Case No. 23-5110

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETER POE, by and through his parents and next of friends,
Paula Poe and Patrick Poe, et al.,
Plaintiffs-Appellants,

v.

GENTNER DRUMMOND, in his official capacity as
Attorney General of the State of Oklahoma, et al.,
*Defendants-Appellee*s,

On Appeal from the
United States District Court for the Northern District of Oklahoma
Case No. 4:23-cv-00177
before the Hon. John F. Heil, III

Brief of *Amici Curiae* GLBTQ Legal Advocates & Defenders, Freedom Oklahoma, Prism Project, and National Center for Lesbian Rights in Support of Plaintiffs-Appellants and Reversal

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1(a) and 29(a)(4)(A), and Tenth Circuit Rule 26.1, I certify that *amici curiae* GLBTQ Legal Advocates & Defenders, Freedom Oklahoma, Prism Project, and National Center for Lesbian Rights are nonprofit organizations, none of which has a parent corporation or issues public stock.

Dated: November 16, 2023

/s/ *Jordan D. Hershman*
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INTEREST OF *AMICI CURIAE*[1]

Amici are GLBTQ Legal Advocates & Defenders, Freedom Oklahoma, Prism Project, and National Center of Lesbian Rights. *Amici* have strong interests and deep expertise in issues concerning the civil rights of LGBTQ+ people, and are committed to ensuring that all people, including LGBTQ+ people, can live their lives free from discrimination, including accessing the health care they need.

Amicus **GLBTQ Legal Advocates & Defenders ("GLAD")** works through litigation, public policy advocacy, and education to create a just society free from discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS.

Amicus **Freedom Oklahoma** advocates and organizes across Oklahoma and within the 39 sovereign tribal nations that call this land home to build a future where all Two Spirit, Lesbian, Gay, Bisexual, Transgender, Queer, and fuller spectrum of people whose sexuality or gender or romantic identity exists beyond a heteronormative, binary framework (2SLGBTQ+), have the safety to thrive. The

[1] All parties consent to the filing of this brief. No party's counsel authored this brief in whole or in part, and no money intended to fund preparing or submitting this brief was contributed by a party or party's counsel or anyone other than *amici*, its members, or its counsel. *See* Fed. R. App. P. 29(a)(4).

2SLGBTQ+ community is not a monolith, and therefore we as a single organization cannot claim to do this work on behalf of anyone, but rather we seek to do work with and among our community members, with a growing coalition of allies, and until the community safety we seek is realized.

Amicus **Prism Project** aims to advance inclusivity and foster safe spaces for LGBTQ+ Tulsans through research and education. In addition to investing in research, training, and equitable data collection practices, Prism Project uses data to inform the Tulsa community of the needs of LGBTQ+ Tulsans and provides local education to promote inclusivity with the aspiration of expanding equity across the state of Oklahoma. As a local initiative engaged in the community, Prism Project is acutely aware of the harmful impact of state policies that restrict equitable access to healthcare for transgender Oklahomans.

Amicus **National Center for Lesbian Rights ("NCLR")** is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people through litigation, public policy advocacy, and public education. Through its Transgender Youth Project, NCLR seeks to promote greater understanding and support for transgender children and their families.

Amici seek to eliminate discriminatory barriers to health care for LGBTQ+ people, particularly transgender people, across the United States through impact

litigation, education, and public policy work. *Amici* therefore write to explain why this Court should apply heightened scrutiny to laws, like Oklahoma's, that single out transgender people.

SUMMARY OF ARGUMENT

Oklahoma Senate Bill 613 (the "Act"), codified at Okla. Code Stat. tit. 63, § 2607.1 (eff. May 1, 2023), forbids health care providers from providing medical treatment to transgender minors if—and only if—the purpose of that treatment is to allow those minors to live their lives consistent with their gender identity. The Act prohibits health care providers from "knowingly provid[ing] gender transition procedures" to a minor. Okla. Stat. tit. 63, § 2607.1(B). The Act's prohibitions on health care for minors are broad, encompassing puberty blockers, hormones, and surgery. *Id.* § 2607(A)(2)(a). The Act has placed many transgender adolescents at grave risk of harm while also violating their constitutional rights.

The Northern District of Oklahoma incorrectly held that Appellants are not entitled to preliminary injunctive relief against the Act. The Act facially discriminates on the basis of sex. Each time the Act is applied, the minor's sex is outcome-determinative. The Act targets transgender people, and as both the Supreme Court of the United States and this Court have held, laws and policies that target transgender people inherently discriminate on the basis of sex. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753–54 (2020); *Tudor v. Se. Okla. State Univ.*, 13

F.4th 1019, 1028 (10th Cir. 2021). Therefore, the Act should be subject to heightened scrutiny.

The District Court erred in applying rational basis review. The District Court reasoned that rational basis review is warranted because the Act regulates medical procedures based on an individual's age rather than on the basis of sex or transgender status, and does not evince any pretext for discrimination against transgender individuals. Dist. Ct. Dkt. No. 138 ("Order") at 10–16. That reasoning is incorrect. Regardless of what the Act regulates, it discriminates on the basis of sex, and its enactment was pretextual. To be sure, the State has a legitimate interest in protecting minors from unsafe medical procedures—an interest that may be considered when evaluating whether the law *withstands* heightened scrutiny. But that interest does not transform a sex-based law that targets transgender people into a generally applicable law warranting rational basis review.

The Act cannot withstand heightened scrutiny. The Act categorically bars medical care for transgender minors, even when the minors, their parents, and their doctors all agree that the care is warranted. These extreme restrictions reflect hostility to gender nonconformity, not a legitimate effort to protect children's health or safety. This Court should reverse the denial of the preliminary injunction and preserve Oklahoma youths' access to medically appropriate health care.

ARGUMENT

I. The Act Is Subject To Heightened Scrutiny Because It Discriminates Based On Sex.

Laws singling out transgender people, including the Act, discriminate on the basis of sex. Like all other laws that discriminate on the basis of sex, it is subject to heightened scrutiny.

A. All Sex-Based Classifications Are Subject To Heightened Scrutiny, Regardless Of The Ostensible Purpose Of The Classification.

The Equal Protection Clause bars a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (internal quotation marks and citations omitted).

To implement that constitutional guarantee, the Supreme Court requires "all gender-based classifications" to be subjected to "heightened scrutiny." *United States v. Virginia*, 518 U.S. 515, 555 (1996) (citations omitted). "Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *Id.* at 531 (citations omitted). Heightened scrutiny serves to "smoke out" illegitimate motives by ensuring that the State can prove—not just assert—that the classification has a sufficiently persuasive

justification. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989). "[B]enign justifications" for such classifications "will not be accepted automatically;" a court will closely scrutinize whether the classification in fact advances the "alleged objective." *Virginia*, 518 U.S. at 535–36 (internal quotation marks and citations omitted).

Heightened scrutiny applies even to those classifications ostensibly based on physical differences between men and women. For example, laws distinguishing between mothers and fathers are subject to heightened scrutiny. The typical rationale for such laws—mothers give birth to children, fathers do not—are relevant to whether the laws *pass* heightened scrutiny, not whether they are subject to heightened scrutiny in the first instance. *Compare Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60–61 (2001) (applying heightened scrutiny to statute distinguishing between mothers and fathers, but upholding statute based on physical differences in means of proving parentage), *with Sessions v. Morales-Santana*, 582 U.S. 47, 57–58 (2017) (applying heightened scrutiny and invalidating statute distinguishing between mothers and fathers that relied on outdated gender stereotypes about each's relationship to nonmarital children).

Constitutional limitations on gender classifications apply with full force to laws that single out people who do not conform to sex stereotypes. Many of the Supreme Court's foundational sex-discrimination cases involve such litigants.

Women stereotypically do not attend military school, yet "generalizations about 'the way women are,'" or "estimates of what is appropriate for *most women*," do not justify treating women who do seek to attend military school differently from men. *Virginia*, 518 U.S. at 550. Likewise, even in a world where "nearly 98[%] of all employed registered nurses were female," men and women applying to nursing school must be treated equally, and a legislature may not "perpetuate the stereotyped view of nursing as an exclusively woman's job." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982). As the Supreme Court recently reaffirmed, "[o]verbroad generalizations" concerning gender roles "have a constraining impact, descriptive though they may be of the way many people still order their lives." *Morales-Santana*, 582 U.S. at 63. "Even if stereotypes frozen into legislation have 'statistical support,'" the Supreme Court's decisions "reject measures that classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn." *Id.* at 63 n.13 (citations omitted).

B. Laws That Single Out Transgender People Constitute Sex Discrimination.

When laws target transgender people, they discriminate on the basis of sex. Therefore, these laws must be subject to heightened scrutiny.

The Supreme Court's decision in *Bostock v. Clayton County* explains why policies discriminating against transgender people constitute sex discrimination. 140 S. Ct. 1731 (2020). "[T]ake an employer who fires a transgender person who was

identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." *Id.* at 1741. And if the policy discriminates against both transgender men and transgender women, it "doubles rather than eliminates" the discrimination. *Id.* at 1742–43.

There is no principled distinction between the standard articulated in *Bostock* for Title VII and the Equal Protection Clause. Title VII and the Equal Protection Clause both bar sex discrimination. Why would a law that *is* sex discrimination under Title VII transform into a law that *is not* sex discrimination under the Constitution? Appellate decisions "must comport with the 'reasoning or theory,' not just the holding, of Supreme Court decisions." *Thompson v. Hebdon*, 7 F.4th 811, 827 (9th Cir. 2021) (citation omitted). Indeed, "when the Supreme Court . . . decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts[.]" Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989).

The District Court erred in asserting that *Bostock* does not apply to Appellants' claim under the Equal Protection Clause only because this Court has yet to expressly extend *Bostock* beyond the Title VII context. *See* Order at 13. *Bostock*'s reasoning applies beyond the context of Title VII and makes clear that the Act

impermissibly classifies based on sex. As noted above, the Supreme Court has repeatedly underscored that laws premised on sex stereotyping constitute illicit sex discrimination under the Equal Protection Clause. *Bostock*, meanwhile, explained that it is arbitrary to distinguish discrimination based on sex stereotyping from discrimination against transgender people: If an employer who "fires men who do not behave in a sufficiently masculine way" engages in sex discrimination, why should courts "roll out a new and more rigorous standard" when "that same employer discriminates against . . . persons identified at birth as women who later identify as men[?]" 140 S. Ct. at 1749. That arbitrariness does not disappear when considering discrimination under the Equal Protection Clause as opposed to discrimination under Title VII.

Notably, the Fourth, Eighth, and Ninth Circuits have all found that *Bostock*'s reasoning extends beyond Title VII. *See, e.g.*, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (Title IX); *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 1001 (8th Cir. 2022) (Fair Housing Act), *cert denied*, 143 S. Ct. 2638 (2023); *Doe v. Snyder*, 28 F.4th 103, 113–14 (9th Cir. 2022) (Title IX and Section 1557 of the Affordable Care Act); *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110, 1116 (9th Cir. 2023) (Title IX).

Other Circuit Courts have confirmed that discrimination against transgender people constitutes sex discrimination under the Equal Protection Clause. In *Whitaker*

ex rel. Whitaker v. Kenosha Unified School District Number 1 Board of Education, 858 F.3d 1034 (7th Cir. 2017),[2] the Seventh Circuit explained: "By definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Id.* at 1048. The Court further reasoned policies such as the Act "cannot be stated without referencing sex," which renders them "inherently based upon a sex-classification" and requires heightened scrutiny. *Id*. at 1051. And the Court made clear its heightened scrutiny holding applied to the plaintiff's equal protection claim. *Id.* at 1051–54. In *Brandt by and through Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022), the Eighth Circuit reasoned, while affirming the granting of a preliminary injunction against enforcement of a statute very similar to Oklahoma's: "The biological sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not. The Act is therefore subject to heightened scrutiny." *Id.* at 670. *Whitaker* and *Rutledge*, like the decisions of other Circuit Courts, embrace the principle that laws or policies singling out transgender people are a type of sex discrimination. *See also Hecox v. Little*, 79 F.4th 1009, 1026 (9th Cir. 2023) ("[D]iscrimination on the basis of transgender status is a form of sex-based

[2] *Abrogated on other grounds by Ill. Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020).

discrimination."). That principle endures regardless of whether the law at issue involves medical care, as here, or employment, as in *Bostock*.

C. The Act Discriminates On The Basis Of Sex And Is Therefore Subject To Heightened Scrutiny.

On its face, the Act discriminates on the basis of sex. Under the Act, a health care provider "shall not knowingly provide gender transition procedures to any child." Okla. Stat. tit. 63, § 2607.1(B). The statute defines "gender transition procedures" as "medical or surgical services performed for the purpose of attempting to affirm the minor's perception of his or her gender or biological sex, if that perception is inconsistent with the minor's biological sex[.]" *Id.* § 2607.1(A)(2)(a).

Sex is baked into the statutory text. Not only does the word "sex" appear throughout the statute, but every single time the law will be enforced and applied, a court must ascertain the minor's sex assigned at birth. Suppose a minor receives estrogen. If the minor was assigned male at birth, the Act applies. If the minor was assigned female at birth, the Act does not apply. In each case, the minor's sex is outcome-determinative. The Act on its face classifies based on sex. Its application rests directly on discerning the sex of the minor. Therefore, the Act discriminates based on sex. A law that "distinguishes between those who may receive certain types of medical care and those who may not" on the basis of the "biological sex of the minor patient" constitutes a sex-based classification subject to heightened scrutiny. *Rutledge*, 47 F.4th at 669–70 (addressing Arkansas statute prohibiting transgender

minors from receiving certain medical care); *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, — F. Supp. 3d —, 2023 WL 4054086, at *8–9 (S.D. Ind. June 16, 2023), *appeal docketed*, No. 23-2366 (7th Cir. July 12, 2023) (rejecting defendants' arguments that similar Indiana statute's classifications were "based on age, procedure, and medical condition and encompass both sexes and all gender identities") (internal quotation marks omitted); *see also Bostock*, 140 S. Ct. at 1741 ("[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.").

Moreover, the rationale for applying heightened scrutiny applies with full force here. Heightened scrutiny exists to "smoke out" improper legislative rationales, such as hostility to gender nonconformity. *J.A. Croson Co.*, 488 U.S. at 493. Although the State contends that it is merely trying to protect minors from well-established medical treatments it perceives to be potentially harmful, there are strong reasons to be concerned that this justification is a pretext for a desire to discourage gender nonconformity. Oklahoma's law is another example of a recent wave of laws both in Oklahoma and across the country[3] that discriminate against transgender

[3] *See* Shoshana K. Goldberg, et al., *2023 LGBTQ+ Youth Report*, Human Rights Campaign Found. (Aug. 2023), https://reports.hrc.org/2023-lgbtq-youth-report ("Each year has seen an increase in anti-LGBTQ+ state legislation, with more bills introduced—and passed—in 2022 and 2023 than ever before. The vast majority of these bills directly target LGBTQ+ youth, and transgender, non-binary, gender non-conforming, and other non-cisgender gender-expansive . . . youth in particular, banning or regulating their ability to live openly and freely as their true selves in

people, including legislation that prohibits transgender girls and women from playing on girls' and women's sports teams[4] and prevents transgender children from using school bathrooms that correspond to their gender identity.[5]

Remarks by Oklahoman elected officials about the Act illustrate that it was pretextual in order to target the small minority of transgender youth in Oklahoma. During debate on the Act in the Oklahoma House of Representatives, Representative Jim Olsen, one of the supporters of the Act, said: "It is not possible to change a biological female to a male. It is not possible to change a male to a biological female. This is simply delusional playacting."[6] He went on: "Going down the transgender path is what leads to suicidality. It is a path of desolation, destruction, degeneracy, and delusion, ending in delusional playacting."[7] Governor Kevin Stitt, who signed the Act into law, has made similarly hostile remarks about transgender individuals.[8]

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everywhere from school bathrooms and athletics, to accessing gender-affirming care.").

[4] "Save Women's Sports Act," S.B. 2, codified at Okla. Stat. tit. 70, § 27-106 (2022).

[5] S.B. 615, codified at Okla. Stat. tit. 70, § 1-125.

[6] *Oklahoma House Session: Legislative Day 47 Afternoon Session*, Apr. 26, 2023, 59th Leg., 1st Reg. Sess., 6:01:37–52 p.m. (Okla. 2023) (statement of Rep. Jim Olsen).

[7] *Id.* at 6:03:20–38 p.m. (statement of Rep. Jim Olsen).

[8] Governor Stitt signed an executive order, Executive Order 2023-20 and dubbed "The Women's Bill of Rights," which directs state agencies to narrow the definitions of "male" and "female," which unmistakably was an effort to target transgender Oklahomans. At the signing ceremony for Executive Order 2023-20, Governor Stitt remarked: "Today we're taking a stand against this out-of-control gender ideology

Contrary to the District Court's conclusion that the Act is not part of a "larger legislative strategy to discriminate against transgender people," Order at 15, these discriminatory remarks are *precisely* the types of statements that have warranted courts' examination of legislative intent to "smoke out" illicit motives, such as hostility towards marginalized groups. *J.A. Croson Co.*, 488 U.S. at 493. This provides even further reason to conduct the heightened scrutiny analysis by requiring a "searching analysis" into the justifications for the challenged law. *Virginia*, 518 U.S. at 536 (citation omitted). That analysis allows the Court to determine whether the State's asserted motive—protection of children from dangerous medical treatments—*in fact* justifies the Act. *See id.* at 535–36 ("[A] tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded.").

The District Court's reasoning for applying rational basis review instead of heightened scrutiny is irreconcilable with Supreme Court precedent. First, the District Court reasoned that while the Act "uses terms such as 'sex' and 'gender' . . . the use of those terms is due to the fact the Act itself concerns 'medical or surgical services performed for the purpose of attempting to affirm [a] minor's perception of

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that is eroding the very foundation of our society." Associated Press, *Transgender Rights Targeted in Executive Order Signed by Oklahoma Governor*, NBC NEWS (Nov. 16, 2023 2:42 PM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/transgender-rights-targeted-executive-order-signed-oklahoma-governor-rcna97709.

his or her gender or biological sex . . .'" Order at 11 (quoting Okla. Stat. tit. 63, § 2607.1(A)(2)). But applying a sex-based rule to both sexes does not immunize the classification. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141–42, 142 n.14 (1994); *see also Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 124 (4th Cir. 2022). The "fact of equal application does not immunize the statute from the very heavy burden of justification" required by the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

Bostock repudiated that exact reasoning. It rejected an interpretation of Title VII that "would require [the Court] to consider the employer's treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole," instead explaining that "our focus should be on individuals, not groups." 140 S. Ct. at 1740. The same analysis applies to the Equal Protection Clause. It is hornbook law that the Equal Protection Clause embodies the exact same "basic principle" as Title VII: it "protect[s] *persons*, not *groups*." *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Thus, a law that treats groups equally in the aggregate—but *individually* classifies people based on a suspect characteristic—is subject to heightened scrutiny. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 743 (2007); *accord J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring in judgment) (explaining that the Equal Protection Clause bars gender discrimination in jury selection because "[t]he neutral phrasing

of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups"). If a transgender boy is classified based on sex, that discrimination does not disappear because a transgender girl is also classified based on sex.

The District Court also reasoned that the Act "does not use sex as a means to distinguish between groups—treatments allowed by [the Act] are allowed for *all* minors, regardless of sex." Order at 12. Thus, the District Court found, "[w]here the Act uses gendered terms, it does so to identify the procedures at issue." *Id.* at 11. The District Court is correct that any law targeting health care related to gender transition will necessarily refer to a person's sex. But it drew the wrong inference from that observation. Precisely *because* such laws necessarily refer to a person's sex, heightened scrutiny is warranted. The Act is not a generally applicable law that happens to regulate transgender people. It applies to transgender people *only*, and hence inherently classifies based on sex every time it is applied. The fact that a law "needs" to refer to sex to regulate transgender health care is not a basis to ratchet the level of scrutiny down—it is the very reason the standard of scrutiny must be ratcheted up. *See Grimm*, 972 F.3d at 608 (if a prohibition "cannot be stated without referencing sex," "heightened scrutiny should apply") (citations omitted); *Doe v. Ladapo*, — F. Supp. 3d —, 2023 WL 3833848, at *8 (N.D. Fla. June 6, 2023), *appeal docketed*, No. 23-12159 (11th Cir. June 27, 2023) ("If one must know the sex of a

person to know whether or how a provision applies to the person, the provision draws a line based on sex."); *K.C.*, 2023 WL 4054086, at *8 ("[W]ithout sex-based classifications, it would be impossible for S.E.A. 480 to define whether a puberty-blocking or hormone treatment involved transition from one's sex (prohibited) or was in accordance with one's sex (permitted). . . . At bottom, sex-based classifications are not just present in S.E.A. 480's prohibitions; they're determinative.").

The District Court's reliance on *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), and *Geduldig v. Aiello*, 417 U.S. 484 (1974), is also misplaced. Those cases involved laws that restricted abortion (*Dobbs*) and barred coverage for certain pregnancy-related disabilities (*Geduldig*). The District Court cited those cases for the proposition that "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'" Order at 16 (quoting *Dobbs*, 142 S. Ct. at 2245–46, in turn quoting *Geduldig*, 417 U.S. at 496 n.20). *Amici* respectfully disagree with this proposition: the statement in *Dobbs* was dictum,[9] and

[9] Justice Alito discussed an *amicus* brief arguing that abortion rights are grounded in the Equal Protection Clause, *see Dobbs*, 142 S. Ct. at 2245–46, because there was no equal protection claim active in the case. Rather, the plaintiffs amended their complaint years prior to *Dobbs* to drop their equal protection challenge to

there are strong arguments that *Geduldig*—which predates the Supreme Court's decision to apply heightened scrutiny to sex-based classifications—is inconsistent with subsequent case law, including *United States v. Virginia*.[10]

But even if *Dobbs* and *Geduldig* accurately characterize the law, both cases are inapplicable here. In *Dobbs* and in *Geduldig*, the Court reasoned (incorrectly) that laws regulating abortion and pregnancy did not facially discriminate because they targeted medical treatment or services and not women. But even in that circumstance, the Court explained that heightened scrutiny would apply where the States' justifications were "mere pretext[s] designed to effect an invidious discrimination against members of one sex or the other." *Dobbs*, 142 S. Ct. at 2245–46 (citation omitted).

Here, in contrast, the words of the challenged laws expressly identify the targeted characteristic—sex—and describe the targeted group—a minor whose

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Mississippi's statute. *See Jackson Women's Health Org. v. Currier*, 349 F. Supp. 3d 536, 538 (S.D. Miss. 2018).

[10] *See* Reva B. Siegel et al., *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context,* 43 COLUM. J. GENDER & L. 67, 68–69 (2022),

https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3954&context=faculty_scholarship.

identity is different from their sex, in other words, a transgender minor.[11] The law here is *facially* discriminatory.

Moreover, in *Geduldig* and in *Dobbs*, under the policies at issue, it did not matter *why* an individual received the procedure. In contrast, here, "the minor's sex at birth determines whether or not the minor can receive certain types of medical care under the law." *Rutledge*, 47 F.4th at 669. Thus, the more analogous cases are those holding that laws targeting same-sex relationships are sexual-orientation classifications. *See, e.g.*, *Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez*, 561 U.S. 661, 689 (2010); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in judgment).

The District Court expressed concern that gender transition care involves medical treatments that could be dangerous for children given "ongoing questions of safety and efficacy." Order at 28. There is no doubt that protecting children from dangerous medical treatments is a proper role of government. But that analysis comes into play at Step 2 of the analysis—whether heightened scrutiny is satisfied—not Step 1—whether heightened scrutiny applies. This Court should closely scrutinize Oklahoma's actions and assess whether its blanket ban is justified, not

[11] But even if pretext is considered, it is evident that the Act targets transgender youth on the basis of sex. *See supra*.

rubber-stamp a statute that facially singles out transgender people merely because it is related to health care.

II. The Act Cannot Withstand Heightened Scrutiny.

The Act has banned *all* medical treatment for transgender minors seeking to live according to their gender identity. Even if the minor, the minor's parents, and the minor's doctor are unanimous that the medical treatment would be safe and beneficial, the State has declared such care to be flatly illegal across the board. There is no "exceedingly persuasive justification" for this law. *Whitaker*, 858 F.3d at 1053. The State's asserted interests in safety do not justify the discriminatory Act.

Appellees expressed concern that gender transition treatment prohibited by the Act has not been approved by the FDA. *See* Defendants' Opposition to Plaintiffs' Motion for Preliminary Injunction, Dist. Ct. Dkt. No. 86 at 6, 8–9. The District Court effectively accepted Appellees' argument on this point in its erroneously applied rational basis review. *See generally* Order at 28–34. But concerns about the lack of FDA approval are not a basis to ban medical care for transgender youth, and off-label use of drugs or treatment is a commonplace practice across the medical profession. The puberty-blocking drugs and hormones that are proscribed as gender-affirming care to treat gender dysphoria have been approved for *at least one other* use, indicating that the FDA has determined that they are safe and effective. *See Dekker v. Weida*, — F. Supp. 3d —, 2023 WL 4102243, at *19 (N.D. Fla. June 21,

2023), *appeal docketed*, No. 23-12155 (11th Cir. June 27, 2023) ("That the FDA approved these drugs at all confirms that, at least for one use, they are safe and effective. . . . The FDA approval goes no further—it does not address one way or the other the question whether using these drugs to treat gender dysphoria is as safe and effective as on-label use.").

If Oklahoma had chosen to ban *all* off-label uses of FDA-approved drugs, an equal protection challenge to such a ban would likely be subject to rational basis review, even if it had the incidental effect of restricting medical care for transgender people. Instead, however, the State allows physicians discretion to prescribe drugs for off-label uses *except* when they prescribe drugs to transgender minors. *See* Okla. Stat. tit. 63, § 2607.1(A)(2)(b). That aspect of the Act should raise concern that the State's asserted justification is pretextual. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993) ("[A] law cannot be regarded as protecting an interest . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.") (citations omitted). And that aspect of the State's law is what triggers the application of heightened scrutiny.

For these reasons and the reasons stated by Appellants, the Act cannot survive heightened scrutiny. Laws like the Act, which discriminate on the basis of sex without adequate justification, are unconstitutional.

CONCLUSION

For the foregoing reasons and those articulated by Appellants, *amici* respectfully request that this Court reverse the District Court's denial of a preliminary injunction of the Act on the provision of gender transition medical care for transgender youth.

Dated: November 16, 2023

Respectfully submitted,

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I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on November 16, 2023. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF users.

Dated: November 16, 2023

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Dated: November 16, 2023

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