No. 23-5110

In the United States Court of Appeals for the Tenth Circuit

PETER POE, by and through his parents and next 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-Appellees.

On Appeal from the U.S. District Court for the Northern District of Oklahoma, No. 4:23-cv-00177, Honorable John F. Heil, III, District Judge

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INTRODUCTION

Peter Poe, Daphne Doe, Brandon Boe, Lydia Loe, and Ryan Roe all started thriving once they began receiving gender-affirming medical care. They began this treatment only after they, together with their parents, guardians, and doctors, thoughtfully deliberated over the benefits of starting care compared with any potential side effects and the risk to their mental health of not treating their gender dysphoria. This evidence-based medical care was necessary to address the grave distress and suffering they had experienced due to their gender dysphoria.

The State now has banned the very medical treatments that have proven so beneficial for Minor Plaintiffs. The State's ban does not protect Minor Plaintiffs, it endangers them.

Take Minor Plaintiffs' own words:

- "I am terrified of the changes my body would go through if I had to stop taking hormones." J.A.(Vol.2).0309 (Brandon Boe, 17).
- "I am afraid my dysphoria would also get a lot worse, which would make it hard for me to focus on school and my plans for the future, and the other things I like to do." J.A.(Vol.2).0297 (Daphne Doe, 15).
- "I fear what it would mean to be forced to live in body that is not consistent with who I am." J.A.(Vol.2).0340 (Ryan Roe, 14).
- "I am horrified of the changes my body would go through if I cannot keep getting my puberty blockers. I am also afraid of other people not seeing me as a boy… ." J.A.(Vol.2).0285 (Peter Poe, 12).
- "With estrogen, I feel more like myself. Without it, my body would grow out – I would become a man. I would feel like dying every day having to

> look at myself. I don't know if I would survive that." J.A.(Vol.2).0323 (Lydia Loe, 17).

Faced with the real fears and immediate medical needs of actual Oklahoma teenagers and their families, Defendants present a false narrative untethered from the reality of clinical practice in the area of gender-affirming medical care and the supporting body of evidence. They ignore all evidence supporting gender-affirming medical care and exaggerate and distort its risks. They rely on non-scientific, non-peer reviewed publications. They cite to developments under four foreign nations' socialized medical systems, none of which has banned gender-affirming medical care for minors and at least one of which has not made any actual changes to its guidelines. *See generally* Amicus Br. of Stonewall Equality et al.[1]

Eager to avoid scrutiny of their discriminatory acts and false narrative, Defendants misrepresent or misapprehend the law. As to equal protection, Defendants seek to escape heightened scrutiny by conflating whether a classification exists that triggers heightened scrutiny, as SB613 does based on sex and transgender status, with whether the classification *survives* heightened scrutiny. As to due process, Defendants argue there is no fundamental right to access gender-affirming medical care for minors (which Plaintiffs did not argue) to avoid addressing SB613's

[1] *See also* Kaja Klapsa, *The Real Story on Europe's Transgender Debate*, POLITICO (Oct. 8, 2023), https://www.politico.com/news/2023/10/06/us-europe-transgender-care-00119106.

unlawful interference with the well-established fundamental right of parents to direct the medical care of their children.

When properly framed, SB613 facially classifies based on sex and transgender status and infringes the fundamental rights of parents to direct the medical care of their minor children. Defendants bear the demanding burden of demonstrating, at a minimum, how categorically banning this treatment substantially advances an important governmental interest. They fail to meet that standard. The law's differential treatment cannot be justified based on Defendants' proffered critiques of gender-affirming medical treatment for gender dysphoria, all of which are overstated and in any event apply to many forms of medical treatment that Oklahoma does not ban.

ARGUMENT

I. Plaintiffs Are Likely to Succeed on Their Equal Protection Claim.

Properly analyzed, SB613 classifies based on sex and transgender status, thereby triggering heightened scrutiny. Defendants repeat the district court's errors by offering a strained reading of SB613's text and distorting longstanding equal protection precedent. They conflate the application of scrutiny with the threshold legal question of what level of scrutiny a law's classification triggers. None of Defendants' various attempts to evade heightened scrutiny can be squared with Supreme Court doctrine. And under heightened scrutiny, Defendants cannot show

why categorically banning all gender-affirming medical care for adolescents with gender dysphoria substantially advances an important governmental interest. In fact, SB613 is so disconnected from any legitimate interest that it fails any standard of review.

A. Defendants' Articulation of Equal Protection Doctrine Flouts Supreme Court Precedent.

The Supreme Court assesses equal protection claims by identifying the nature of the classification and then imposing "different degrees of judicial scrutiny for different kinds of classifications." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring) ("*SFFA*"). Defendants are correct that the Equal Protection Clause "does not forbid classifications." Appellees' Br. 24. But that does not end the inquiry. Identifying the classification is step one of the equal protection analysis. Step two is whether the particular classification can be justified under the appropriate standard of review, which is "intermediate scrutiny for classifications based on sex." *SFFA*, 600 U.S. at 308-09. "While the validity and importance of the objective may affect the outcome of the analysis, the analysis itself does not change." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 n.9 (1982). Heightened scrutiny requires a court to "smoke out" improper uses of suspect lines, *Johnson v. California*, 543 U.S. 499, 506 (2005), and to ensure that the law does not "classify unnecessarily and overbroadly by gender when more accurate and impartial lines can be drawn." *Sessions v. Morales-Santana*,

582 U.S. 47, 63 n.13 (2017). Heightened scrutiny is the framework the Supreme Court uses to determine whether sex-based differential treatment is justified.

B. SB613 Triggers Heightened Scrutiny Because It Classifies on The Basis of Sex.

The Supreme Court has commanded that all sex classifications trigger heightened scrutiny. *See United States v. Virginia*, 518 U.S. 515, 555 (1996) ("*VMI*"). Defendants' arguments for why this Court should ignore that command are unavailing.

First, Defendants argue that heightened scrutiny does not apply to SB613's sex classification because the law classifies both boys and girls on the basis of their sex. Appellees' Br. 22-23. But the Supreme Court has already rejected this "equal application" argument in the context of sex classifications. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 n.13 (1994) (peremptory challenges based on sex are impermissible even "if each side uses its peremptory challenges in an equally discriminatory fashion" because "the exclusion of even one juror for impermissible reasons harms that juror"); *id.* at 159-60 (Scalia, J., dissenting) (noting "the system as a whole [wa]s evenhanded" and that "for every man struck by the government petitioner's own lawyer struck a woman"). The Supreme Court's analysis controls, notwithstanding two nonbinding decisions from other circuits holding otherwise. *See L.W. v. Skrmetti*, 83 F.4th 460 (6th Cir.), *petition for cert. filed*, No. 23-477 (U.S.

Nov. 1, 2023); *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205 (11th Cir.), *petition for reh'g en banc pending*, No. 22-11707 (11th Cir. filed Nov. 13, 2023).[2]

Second, Defendants argue that heightened scrutiny does not apply because "[w]hen it comes to biology and physiological development, boys and girls are not similarly situated." Appellees' Br. 23. Again, Defendants confuse the presence of a classification with its justification. Laws that classify based on physiological differences still trigger heightened scrutiny. Those differences may in some circumstances justify a sex classification, but they cannot erase one. *Compare Nguyen v. INS*, 533 U.S. 53, 73 (2001) (applying heightened scrutiny to law that differentiated between unwed mothers and unwed fathers because of physiological differences and holding that the law survived heightened scrutiny), *with Sessions*, 582 U.S. at 76 (applying heightened scrutiny to law that differentiated between unwed mothers and unwed fathers and holding that it did not survive heightened scrutiny); *see also Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 799 (10th Cir. 2019) (applying heightened scrutiny to sex-based classifications based on female-only nudity restrictions).

Neither *Dobbs* nor *Geduldig* instruct that heightened scrutiny not be applied to laws that facially classify based on alleged physiological differences between the

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[2] *But see generally Poe v. Labrador*, No. 23-cv-00269, 2023 WL 8935065 (D. Idaho Dec. 26, 2023) (rejecting *L.W.*'s and *Eknes-Tucker*'s reasoning and granting preliminary injunction against statute like SB613).

sexes. Appellees' Br. 23-25. Both cases assessed whether a sex classification was present when the government draws lines based on pregnancy status or abortion. Because the *Dobbs* and *Geduldig* Courts concluded that the laws at issue did *not* facially classify based on sex, they applied the Supreme Court's test for assessing laws that have a disparate impact on a particular group. Defendants' suggestion that the Supreme Court has immunized all facial sex classifications in the medical context from heightened scrutiny, Appellees' Br. 25, is incorrect. To do so would require abrogating *VMI*'s command that all sex classifications trigger heightened scrutiny, and the *Dobbs* Court was clear that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 290 (2022). Further, the Supreme Court has clearly instructed that "[i]f a precedent of [the Supreme Court] has direct application in a case, as [*VMI*] does here, a lower court should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions …. This is true even if the lower court thinks the precedent is in tension with some other line of decisions." *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023) (cleaned up).

Third, Defendants incorrectly contend *Bostock*'s holding that discriminating against a person for having "one sex identified at birth" and identifying with a different sex "today" is discrimination on the basis of sex has no bearing here.

Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1746 (2020). Title VII and the Equal Protection Clause apply different standards to determine whether a sex classification is permissible: Title VII imposes a categorical ban on sex discrimination, while the Equal Protection Clause subjects such laws to heightened scrutiny. *Compare id*. at 1737 (holding that "in Title VII, Congress outlawed discrimination in the workplace on the basis of … sex"), *with J.E.B.*, 511 U.S. at 152 (holding that all "gender-based classifications require an exceedingly persuasive justification in order to survive constitutional scrutiny" (quotations omitted)). But those differences have nothing to do with whether a sex classification exists in the first instance. Again, in attempting to skirt *Bostock*'s clear logic, Defendants conflate a law's classification with its justification by claiming that "treatment that is necessary for one sex might be harmful to the other." Appellees' Br. 27-28. But such claims about the differences in treatment for those designated male at birth and those designated female at birth go to whether the line-drawing is justified, not whether a classification exists in the first instance. By the law's plain terms, an individual's sex governs whether treatment is permitted or prohibited. Heightened scrutiny applies.

Finally, Defendants argue that SB613 does not classify based on sex, but rather based on age. Appellees' Br. 28-29. But including an age classification alongside a sex classification does not insulate SB613 from heightened scrutiny. *See*

Craig v. Boren, 429 U.S. 190, 197 (1976) (applying heightened scrutiny to sex classification even though it only affected men between the ages of 18 and 20).

C. Heightened Scrutiny Applies Because SB613 Classifies Based on Transgender Status.

Defendants' arguments that SB613 does not classify based on transgender status and that even if it did, such classifications do not trigger heightened scrutiny, are likewise incorrect.

1. SB613 classifies based on transgender status.

The plain text of SB613 and its avowed purpose belie Defendants' arguments that SB613 does not classify based on transgender status. Appellees' Br. 28, 33. SB613 facially classifies based on one's "perception of his or her gender or biological sex, if that perception is inconsistent with the minor's biological sex." Okla. Stat. tit. 63 § 2607.1(A)(2)(a). Having a "perception" of one's sex different than one's "biological sex" is the definition of being transgender. J.A.(Vol.2).0179; J.A.(Vol.2).0218. The law keys its prohibition to that definition: treatment that is aimed at aligning one's gender identity in a manner inconsistent with one's birth-designated sex is prohibited, while treatment that is deemed consistent with one's birth-designated sex is permitted. Where the "conduct targeted … is closely correlated" with status, the law is "directed toward" those persons "as a class." *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring). Here, the

conduct of treating incongruence between gender identity and birth sex is closely correlated—indeed, precisely correlated—with the status of being transgender.

Defendants' arguments about why SB613 doesn't classify based on transgender status profoundly misunderstand the equal protection doctrine. Defendants question whether "a 'defining characteristic' of a transgender individual is the ability to have a doctor inject hormones and cut off healthy body parts before turning 18?" Appellees' Br. 30. That incendiary (and inaccurate) description of the law's *prohibition* does not describe the law's *classification*. The relevant classification is having a gender identity—what SB613 calls one's "perception" of one's gender or sex—that is different than one's "biological sex." That is what "closely correlates" with being transgender, just as engaging in same-sex intimacy closely correlates with being gay. Further, that the law "only applies to a subsection" of transgender people does not make it any less of a transgender status classification. Appellees' Br. 30. If a classification is needed to reach all members of a group to be considered a classification on the basis of such characteristic, almost no such classifications would be subject to constitutional scrutiny. *See*, *e.g.*, *Craig*, 429 U.S. at 197 (recognizing sex classification even though the law only affected men between 18 and 20).

In arguing that SB613 does not classify based on transgender status, Defendants again confuse the law's classification with its justification by arguing

that "[w]hat makes these interventions on minors controversial … is the fact that they delay normal puberty, increase a child's hormones to unnatural levels, and permanently remove body parts that are healthy." Appellees' Br. 32. Claims about *why* gender-affirming medical treatment is banned only for transgender adolescents go to whether the law is justified, but they do not change the fact that the law creates a transgender status classification. Similarly, Defendants try to smuggle the application of heightened scrutiny into the question of whether it is triggered by insisting that non-transgender and transgender minors are not "similarly situated." Appellees' Br. 33. But determining whether two groups of people are similarly situated for a particular purpose is what applying heightened scrutiny does.

Even assuming *arguendo* that the law did not facially classify based on transgender status, its intent and effect are to limit treatment for transgender individuals—*i.e.*, those who have a gender identity different from their birth-designated sex—thus creating a transgender status classification warranting heightened review. The law undeniably disparately impacts transgender individuals, the group who seeks treatment to align their bodies with a gender identity different from their birth-designated sex. And the "contemporary statements by members of the decisionmaking body" reveal that SB613 deliberately does so or that, at a minimum, was enacted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," which is relevant to the law's

unconstitutionality. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

Defendants attempt to dilute the potency of the legislative record by pointing to language from SB613's sponsor that Defendants say demonstrates *care* for transgender adolescents. Appellees' Br. 8. Even if that were so (and the statements cited hardly prove the point), this Court has explained that "[t]he 'intent to discriminate' forbidden under the Equal Protection Clause is merely the intent to treat differently," not malice, bigotry, or animus. *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (citing, *inter alia*, *Feeney*, 442 U.S. at 273-74).

2. Transgender status is a quasi-suspect classification triggering heightened scrutiny.

Defendants fail to address the two critical considerations in arguing that transgender people are not a quasi-suspect class: whether a group has suffered a history of discrimination and possesses a defining characteristic that bears no relation to one's ability to contribute to society. *See Windsor v. United States*, 699 F.3d 169, 181 (2d Cir. 2012), *aff'd*, 570 U.S. 744 (2013). And Defendants are wrong as to the two (non-dispositive) factors they do address.

Transgender people have the "obvious" and "distinguishing" characteristic of a gender identity that does not align with their sex assigned at birth. That is enough. *See Lyng v. Castillo*, 477 U.S. 635, 638 (1986). The "distinguishing" characteristic

need not be immutable in the strict sense. Heightened scrutiny applies to both alienage and legitimacy, for example, even though both classifications are subject to change. *Windsor*, 699 F.3d at 183 n.4. Indeed, "[r]ather than asking whether a person *could* change a particular characteristic, the better question is whether the characteristic is something that the person *should* be required to change [in order to avoid government discrimination] because it is central to a person's identity." *Wolf v. Walker*, 986 F. Supp. 2d 982, 1013 (W.D. Wis.), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014).

Defendants' argument that "transgender individuals are not a politically powerless group" cannot be taken seriously. Expressions of transgender identity were criminalized for much of the nineteenth and twentieth centuries. *See* Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 152-53 (2010). These efforts have recently reemerged, including prohibitions on cross-gender expression in public and criminalization of restroom use by transgender adults. *See, e.g.*, Ark. Code §§ 6-1-107, 16-130-104; Fla. Stat. § 553.865.[3] And in 2019, Oklahoma asked the Supreme Court to reject protections for transgender people under federal law. Amicus Br. of Oklahoma et al.

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[3] Defendants' assertion that this Court may not take judicial notice of bills that state legislatures consider and enact targeting transgender individuals, including by prohibiting gender-affirming medical care, cannot be squared with their request that the Court defer to how the New York Times misrepresents the care itself. *Compare* Appellees' Br. 35 with *id.* at 4 n.3.

at 36, *Bostock*, 140 S. Ct. 1731. Just a few years ago, transgender people were singularly targeted for exclusion from service in our armed forces. *See Karnoski v. Trump*, 926 F.3d 1180, 1186 (9th Cir. 2019). And they have undeniably been the target of an unprecedented wave of discriminatory laws and executive actions across the country, including in Oklahoma, for much of the past two years. *See*, *e.g.*, Movement Advancement Project, *Under Fire: Banning Medical Care and Legal Recognition for Transgender People* (Sept. 2023), https://www.mapresearch.org/file/MAP-2023-Under-Fire-Report-5.pdf.[4]

Defendants similarly argue that transgender people cannot be politically powerless because various organizations and law firms support Plaintiffs in this case. Appellees' Br. 35. Those same contentions could be leveled against any group that has effectively challenged discrimination through the court system. *See*, *e.g.*, Amicus Br. of Am. Fed'n of Tchrs., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (brief from major national organization opposing school segregation). Such a view of political power also would have the deleterious effect of discouraging prominent

[4] Defendants' argument that "only 84 of over 500 proposals became law" in 2023 "means that transgender advocates [are] … the *opposite* of political[ly] powerless[]," Appellees Br. 35, not only is meritless but also is belied by their recognition that "redundant bills are filed all the time," *id.* at 39. If anything, such numbers show that transgender people endure disproportionate fervor and societal vilification.

organizations and attorneys from advocating for civil liberties, lest they undermine their clients' claims by appearing on their behalf.

Even if the Court declines to conclude that transgender status is a quasi-suspect classification, the law still triggers heightened scrutiny based on its transgender status classification because such classifications are inherently sex-based. *See Bostock*, 140 S. Ct. at 1746.[5]

D. SB613 Fails to Pass Constitutional Muster.

1. SB613 Fails Heightened Scrutiny.

Defendants cannot provide an "exceedingly persuasive justification" for SB613's categorical ban of medically necessary gender-affirming medical care to treat gender dysphoria because it is not "substantially related to the achievement" of Defendants' proffered interest in safeguarding the health of minors. *VMI*, 518 U.S. at 531, 533. SB613's sweeping prohibition against safe, effective, and evidence-based care is infirmly overbroad, and its prohibition of treatments solely based on the adolescent's sex assigned at birth is not tethered to the State's purported concerns about irreversibility, safety, or efficacy. *See Sessions*, 582 U.S. at 63 n.13.

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[5] Defendants' arguments about the inapplicability of *Bostock*'s reasoning are unavailing. *See supra* Section I.B. Additionally, that the *Bostock* Court did not answer questions not before it does not mean the Court's reasoning has no applicability outside the employment context.

Heightened scrutiny is more exacting. Defendants' factual errors are too numerous to respond to individually, but they fall into the following broad categories:

Efficacy: Defendants completely ignore the evidence of the banned care's efficacy. The benefits of care, even when balanced against potential risks and side effects, are why it is the standard of care for gender dysphoria and why every major U.S. medical association recommends it. J.A.(Vol.2).0219-20.[6] The safety and efficacy of using pubertal suppression and hormone therapy to treat gender dysphoria is supported by over twenty years of clinical experience and scientific research, including cross-sectional and longitudinal studies. J.A.(Vol.5).1004; J.A.(Vol.2).0189-90; J.A.(Vol.2).0258.

Defendants also ignore that prohibiting access to gender-affirming medical care puts Minor Plaintiffs at risk of severe distress, anxiety, depression, self-harm, suicidal thoughts, and suicide. J.A.(Vol.2).0234-35; J.A.(Vol.2).0263-64; J.A.(Vol.2).0291; J.A.(Vol.2).0303; J.A.(Vol.2).0329; J.A.(Vol.2).0340. There are no evidence-based alternatives for treatment of gender dysphoria. J.A.(Vol.2).0261-62. Defendants' proposed alternative of psychotherapy alone, Appellees' Br. 13,

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[6] To the extent Defendants are concerned that doctors are departing from clinical guidelines, Appellees' Br. 5-6, that concern can be addressed through existing medical malpractice law, codifications of clinical guidelines, or regulations short of complete bans. *See, e.g.*, Okla. Stat. tit. 63, § 2-309 (regulating, not banning, opioids prescriptions, including an allowance for minor patients to receive prescriptions with parental consent).

lacks any evidence of efficacy for treating gender dysphoria and certainly does not meet the overly rigorous standard Defendants impose on the current treatment paradigm. J.A.(Vol.2).0180; J.A.(Vol.2).0379; J.A.(Vol.2).0261.[7] Additionally, puberty blockers are only indicated and effective after the onset of and during the early stages of puberty such that waiting until a patient is 18 to begin pubertal suppression is an impossibility. J.A.(Vol.2).0222. Pubertal suppression alleviates gender dysphoria by pausing endogenous puberty and its many irreversible changes, thus sparing transgender adolescents from developing physiological characteristics inconsistent with their gender identity. J.A.(Vol.2).0234-35.

Evidence: Unlike Defendants' proposed alternatives—for which there is no evidence of efficacy—decades of robust research support gender-affirming care. J.A.(Vol.2).0178; J.A.(Vol.2).0219-21.[8] Defendants' characterization of that evidence as "low quality," Appellees' Br. 13, is misleading because that is a term of art under the GRADE system and does not carry the same meaning in medicine as it

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[7] Defendants point to a statement by their discredited designated expert, James Cantor, to argue that "psychotherapy has support equal to that of medicalized transition." Appellees' Br. 14 n.6. This is false. Neither Defendants nor Cantor cite to any study showing that psychotherapy alone is effective to treat gender dysphoria because no such evidence exists.

[8] "Defendants attempt to create scientific controversy in this uniform agreement through experts who mix their scientific analysis with hypothetical speculation and political hyperbole. … Defendants' belief that gender affirming care is ineffective and unnecessary is simply not supported by the record." *Kadel v. Folwell*, 620 F. Supp. 3d 339, 392 (M.D.N.C. 2022).

does in colloquial parlance. J.A.(Vol.2).0363-64. It means only that there are no randomized controlled trials, which are not necessary to demonstrate efficacy. So-called "low quality" evidence often is "sufficient to justify treatment recommendations." J.A.(Vol.2).0364. In fact, most medical interventions are supported by "low" or "very low" quality evidence as those terms are used in GRADE. J.A.(Vol.5).1051-52. And clinical guidelines in pediatrics are rarely based on "high quality" evidence because of ethical and practical concerns. J.A.(Vol.2).0364-66. Here, randomized controlled trials would not be feasible because participants would know whether they are receiving treatment that causes physical changes to their body. They also would be unethical to conduct because it would require depriving the control group of a treatment that already is known to effectively treat a serious medical condition. J.A.(Vol.2).0364-66; J.A.(Vol.2).0370-72.

Executive Function: Defendants name risks to cognitive development under the incendiary heading "brain damage," followed by citations to *speculative* "effects on brain development" that the New York Times posits. Appellees' Br. 9. They cite to no medical evidence. Indeed, there is no evidence for the claim that gender-affirming medical care negatively affects brain development, and Defendants scaremonger by suggesting it may be possible. Such "unsupported speculation" is not reliable expert opinion. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579,

590 (1993). Defendants' citation to Dr. Chen's work, Appellees' Br. 9, is misplaced, as it demonstrates the opposite: that mental health improved following gender-affirming medical care for gender dysphoria. J.A.(Vol.5).1029.

Desistance: Adolescents who experience gender dysphoria at the onset of puberty rarely come to identify with their sex assigned at birth, J.A.(Vol.2).0264-65, a fact Defendants not only concede but amplify elsewhere. Appellees' Br. 8, 46. Defendants' experts rely on dated research, under obsolete diagnostic criteria, which largely examined pre-pubertal children who were gender non-conforming, not necessarily transgender. J.A.(Vol.2).0265-66. That is a different population than transgender adolescents (pubertal or post-pubertal) with a diagnosis of gender dysphoria, the only population for whom the banned treatment is indicated. *Id.* And any (small) risk of potential desistance must be weighed against the substantial risk of deteriorating mental health for adolescents who are experiencing active gender dysphoria. J.A.(Vol.2).0265. Further, contrary to Defendants' suggestion, Appellees' Br. 8, access to gender-affirming medical care does not increase the likelihood of transgender identity or gender dysphoria. In fact, research shows that the diagnostic criteria for receiving gender-affirming medical care as an adolescent are so rigorous that only those adolescents for whom the care is medically necessary receive it. There is thus a correlation between those that receive medical treatment and those that persist in their transgender identity. J.A.(Vol.5).1033-34.

Fertility: As the district court acknowledged, the effect of puberty blockers on fertility is "transient" and entirely reversible. J.A.(Vol.6).1262. Pubertal suppression pauses puberty only for the duration of treatment; patients will resume endogenous puberty once treatment stops and thereby regain fertility. J.A.(Vol.2).0222. Defendants concede this point but instead argue that a different intervention, hormone therapy, poses unique risks. While hormone therapy may impair fertility, clinical guidelines instruct practitioners to discuss and where requested, mitigate that risk. J.A.(Vol.2).0223. Moreover, that risk is neither categorical nor irreversible. J.A.(Vol.2).0231. Defendants are well aware of this fact, as one of their own witnesses who received gender affirming medical care in the past later became pregnant and had a child as an adult. J.A.(Vol.5).0904-08. Further, whatever risks to fertility are present, they are not unique to this care: testosterone treatments for Klinefelter's syndrome, one of the intersex conditions exempted from SB613's prohibitions, also may impair fertility. J.A.(Vol.2).0232.

Bone Density: Defendants again cite the New York Times' discussion of potential risks to bone density, but their argument goes no further than suggesting that Plaintiffs "do not dispute" there are effects on bone density. Appellees' Br. 46. However, thirty years of experience with gender-affirming medical care have revealed no risk of harm flowing from the temporarily slower rate of bone density accrual that occurs both pre-puberty and while on pubertal suppression.

J.A.(Vol.5).1007. Once puberty resumes, either endogenously or exogenously through hormone therapy, adolescents will undergo a rapid increase in bone density. J.A.(Vol.5).1006-1007.

Defendants cannot show that gender-affirming medical care bears such unique risks and side effects to justify a categorical ban, Appellees' Br. 11-12, especially given that SB613 permits non-transgender minors to access the same care for any purpose, medical or otherwise, so long as they seek to conform to their birth-assigned sex. Indeed, SB613's explicit carveouts, such as allowing irreversible, sterilizing surgery on intersex infants, Okla. Stat. tit. 63 § 2607.1(A)(2)(b)(4), demonstrate that the law is aimed at gender conformity, not mitigating harm. Defendants could have but declined to draw "more accurate and impartial lines." *Sessions*, 582 U.S. at 63 n.13. Instead, Defendants categorically banned the only evidence-based treatment for gender dysphoria, regardless of whether it was hormonal or surgical and without regard to reversibility, evidence of efficacy, or risk of withholding treatment. J.A.(Vol.2).0261.

"One cannot see in this driven-by-gender scheme the close means-end fit required to survive heightened scrutiny." *Sessions*, 582 U.S. at 68. Although it is true that "the State is not required to treat every problem in the world in one piece of legislation," Appellees' Br. 42, neither can it use suspect lines without properly

justifying the differential treatment. Defendants have not and cannot meet their burden here.

2. SB613 Fails Any Level of Review.

SB613 is subject to and fails heightened scrutiny. It also is unconstitutional under any level of review. SB613's categorical ban of treatments only when used for the purpose of gender transition is not rationally related to Defendants' alleged interest in protecting the health of minors. Rational basis involves deference, but "deference is not abdication." *Moore v. Harper*, 600 U.S. 1, 39 (2023) (Kavanaugh, J., concurring). Defendants' rational basis for SB613 must still be grounded in a "factual context." *Romer v. Evans*, 517 U.S. 620, 632-33 (1996). Defendants point to purported opposition in the medical community and the risks associated with the treatments. Appellees' Br. 40. Defendants overstate both, and both are inherent in the practice of medicine. The provision of gender-affirming medical care is informed by widely accepted clinical guidelines and supported by every major U.S. medical association. J.A.(Vol.2).0219-20. Decades of clinical experience and scientific research demonstrate the safety and efficacy of gender affirming care, and the risks associated with the care are not unique. If the presence of risk or some disagreement

among physicians were enough to categorically ban a medication or intervention, almost no area of medicine would be safe from state prohibition.[9]

Defendants' purported interest in children's health "ma[k]e[s] no sense in light of how" Oklahoma treats the prohibited medications and intervention when provided for any purpose other than gender transition. *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001). All the banned treatments are available to treat any condition other than gender dysphoria or to treat no condition at all, despite nearly identical risks. J.A.(Vol.2).0230-31. SB613's prohibition of treatment only when used for gender transition makes clear that Defendants' purpose is not to protect minors from medical care that lacks a certain level of evidence of efficacy or carries a certain level of risk, but to prohibit medical care when used for gender transition. Preventing gender transition and enforcing gender conformity are not "legitimate legislative end[s]." *Romer*, 517 U.S. at 633.

SB613 bears no rational relation to an interest in protecting the health of minors. Banning the only evidence-based treatment for gender dysphoria endangers transgender adolescents like Minor Plaintiffs, putting them at risk of anxiety, depression, self-harm, and suicidality. J.A.(Vol.2).0219. SB613's effect is "so far

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[9] Defendants do not show such disagreement. They only present the opinions of individuals who have no clinical or research experience with this care and who are extreme outliers within the medical profession.

removed from [the asserted] justifications" that they are "impossible to credit" such that the law fails any level of review. *Romer*, 517 U.S. at 635.

II. Plaintiffs Are Likely to Succeed on Their Due Process Claim.

Plaintiffs' claim is a straightforward application of the *existing* right of parents to direct their children's medical care, not an assertion of a *new* substantive due process right. In *Parham v. J.R.*, 442 U.S. 584 (1979), the Supreme Court expressly held that parents "retain plenary authority to seek [medical] care for their children, subject to a physician's independent examination and medical judgment," and "the fact that the decision of a parent … involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Id.* at 603-04.

Defendants' revisionist interpretation of *Parham* conflicts with Supreme Court and Tenth Circuit precedent. As Defendants see it, *Parham* protects parents' medical decision-making authority only against their children's wishes, not state interference. This reading belies what the *Parham* Court actually said: parents have the substantive due process right "to recognize symptoms of illness and to seek and follow medical advice" on behalf of their children, *including* procuring specific treatments such as "a tonsillectomy, appendectomy, or other medical procedure[s]." *Id*. at 602-03. *Parham* does not contain or even suggest the qualification Defendants read into it. This Court has seen through such reasoning before. *See Kitchen v.*

Herbert, 755 F.3d 1193, 1209-13 (10th Cir. 2014) (rejecting an extratextual limitation on the Supreme Court's decisions pronouncing a fundamental right to marry); *see also Obergefell v. Hodges*, 576 U.S. 644, 671 (2015) (dismissing similar arguments).

This Court and other courts of appeals have applied *Parham* where parents' decisional authority regarding medical care for their minor children stands opposed to state regulation. In *P.J. ex rel. Jensen v. Wagner*, 603 F.3d 1182 (10th Cir. 2010), for example, this Court "[did] not doubt" that the Due Process Clause confers "some level of protection" on parents' rights to make medical decisions on behalf of their children. *Id.* at 1197. The Court there determined, however, that the right was not "clearly established" "*in this particular situation*" because the parent plaintiffs *disagreed* with multiple doctors' recommended course of treatment for their child. *Id.* at 1198 (emphasis added). Here, by contrast, Plaintiffs, their parents, and their doctors all *agree* that the banned care is necessary for Plaintiffs to grow and thrive as their authentic selves.[10]

Defendants' argument ultimately rests on *Washington v. Glucksberg*, 521 U.S. 702 (1997), and cases involving "experimental" drugs. But due process protections should not vary by the "specific treatment" at issue. In any event, Defendants'

[10] Defendants fail to engage with the other authority in Plaintiffs' opening brief that applies *Parham*'s due process holding. *See* Appellants' Br. 56 (collecting cases, *e.g.*, *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000)).

argument misses the point. Plaintiffs' due process claim is not premised on *what* treatments SB613 bans, but on for *whom* they are banned: minors and their parents who seek medically accepted treatments pursuant to the advice of their doctors. *See L.W.*, 83 F.4th at 509-12 (White, J., dissenting) (explaining this distinction). No one disputes states may regulate the medical profession to protect the public from legitimately harmful medical practices that lack evidentiary bases. *See, e.g.*, *Tingley v. Ferguson*, 47 F.4th 1055, 1078 (9th Cir. 2022) (upholding ban on conversion therapy), *cert. denied*, 144 S. Ct. 33 (2023). But a state may not ban parents from providing to their child safe, medically necessary treatments that are otherwise available to adults. Such a ban violates parents' "right … [and] high duty, ... to recognize symptoms of illness and to seek and follow medical advice." *Parham*, 442 U.S. at 602.

Because SB613 imposes just such a ban, it is subject to heightened scrutiny and fails for the reasons outlined in Section I.D.1, *supra*.

III. The Other Preliminary Injunction Factors Favor Plaintiffs.

All preliminary injunction factors favor its issuance. Defendants wrongly claim that this Court collapses the first and second preliminary injunction factors. Appellees' Br. 52. Although a finding of likelihood of success on the merits can be *sufficient* to demonstrate irreparable injury, that does not mean the court's likelihood

of success analysis wholly subsumes the irreparable injury factor or that the two factors are analytically collapsed.

SB613 inflicts an irreparable injury on Minor Plaintiffs by violating their constitutional rights and depriving them of time-sensitive, necessary medical care that their doctors and parents agree they need, and without which, as they each personally attested to, they will suffer immensely. Peter Poe is twelve and going through unwanted puberty now: he cannot wait until he turns 18 or the years-long pendency of this case for relief. J.A.(Vol.2).0285. Without a preliminary injunction, Daphne Doe—who is 15 now and already has benefitted immensely from avoiding a puberty that did not match her gender identity as a girl—will lose access to her medication and start undergoing physical changes that will torture her psychologically and socially. J.A.(Vol.2).0296-97.

Unlike the unsubstantiated possibilities of harm Defendants posit, Appellees' Br. 52, a loss of care will tangibly and irreparably burden Minor Plaintiffs with unwanted physical changes and worsening gender dysphoria. J.A.(Vol.5).1016-17. There is no "effective monetary remedy" for Minor Plaintiffs' injury, *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012), or for the injuries their parents have suffered and will continue to suffer. The Parent Plaintiffs seek only to care for their adolescent children in the best way they know how – following the advice of medical

professionals without having to relocate to access care out-of-state or split up their families. J.A.(Vol.2).0283-0349.

A statewide facial injunction should issue. SB613 bans care statewide and "the scope of injunctive relief is dictated by the extent of the violation established." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). SB613 prohibits Minor Plaintiffs from accessing gender-affirming medical care of any kind, whether puberty blockers, hormone therapy, or surgery, from any medical provider in Oklahoma. Only a statewide injunction will protect the status quo of Minor Plaintiffs' ability to obtain individualized care that is appropriate for their age and stage of development in their home state.

Facial relief is appropriate because there is "no set of circumstances … under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Defendants argue that because pre-pubertal children do not need any of the banned treatments, Appellees' Br. 51, the statute is constitutional as applied to them and therefore facial relief is not warranted. Not so. The means-end tailoring of the law fails in all *factual* applications.[11] If certain exemptions had been written into the statute, perhaps Defendants could have demonstrated a closer means-end fit. But the

[11] Defendants' argument that Plaintiffs demonstrate standing for an application of SB613 that is factually impossible—there is no puberty to pause or pubertal changes to address in prepubertal children—has no basis in law.

State enacted a broad, sweeping statute that is not appropriately tailored to advance an important government interest. In any event, who has standing to challenge individual provisions of the Act is different from the appropriate scope of relief for those who do have standing, like Minor Plaintiffs and their parents.

A preliminary injunction is warranted: this Court should preserve the status quo until a final decision on the merits.

CONCLUSION

The Court should reverse the denial of Plaintiffs' motion for preliminary injunction and direct the district court to order a preliminary injunction enjoining enforcement of SB613.

Dated this 29th day of December 2023.

Respectfully submitted,

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This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), this brief contains 6,497 words.

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I hereby certify that on December 29, 2023, I filed a true and correct copy of the foregoing with the Clerk of the United States Court of Appeals for the Tenth Circuit by using the appellate case filing CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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