No. 23-5110

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 United States District Court
for the Northern District of Oklahoma
The Hon. John F. Heil, III
No. 4:23-cv-00177

RESPONSE BRIEF FOR DEFENDANTS-APPELLEES 15-53

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Emily Bazelon, *The Battle Over Gender Therapy*, NEW YORK TIMES MAGAZINE (June 15, 2022) 5

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Lauren Moss & Josh Parry, *Puberty blockers to be given only in clinical research*, BBC News (June 10, 2023) 41

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GLOSSARY

DSM-5 TR	–	Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision
FDA	–	United States Food and Drug Administration
GnRH	–	Gonadotropin hormone-releasing hormone
NHS	–	National Health Service in England
WPATH	–	World Professional Association for Transgender Health

PRIOR OR RELATED APPEALS

There are no prior or related appeals.

ISSUES PRESENTED

1. Whether the Equal Protection Clause prohibits Oklahoma from requiring children to wait until they are 18 to obtain, as part of a gender transition, puberty blockers, cross-sex hormones, and surgeries—unproven procedures that carry substantial risks of permanent harm.

2. Whether the Due Process Clause prohibits Oklahoma from requiring children to wait until they are 18 to obtain, as part of a gender transition, those same unproven procedures.

INTRODUCTION

Plaintiffs urge this Court to enjoin Oklahoma from preventing doctors from injecting physically healthy children with powerful cross-sex hormones and from surgically removing their breasts or genitals. Plaintiffs claim there is a "right" to take these radical actions on minors, but no such right exists in our Constitution.

Relying on Sixth and Eleventh Circuit decisions on similar state laws, *see L.W. v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023); *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023), the district court correctly determined that Oklahoma's requirement that children wait until they are 18 to obtain these surgeries and drugs is not likely to violate the Equal Protection Clause or the Due Process Clause. This comports with *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242–44 (2022), where the Supreme Court abandoned as "egregiously wrong" the heightened scrutiny it had long applied to another purportedly essential medical procedure. In short, the Constitution does not speak on this subject, ergo States are free to regulate.

STATEMENT OF THE CASE

A. Sex and gender identity are different concepts.

Sex is objective and binary: Whether a person is male or female "can be ascertained regardless of any declaration by a person, such as by chromosomal analysis or visual inspection." J.A.(Vol.4).594.[1] This fact (among many others) is supported by four expert witnesses for the State: (1) James Cantor, PhD, a sexual behavior scientist, *id.*; (2) Michael Laidlaw, MD, an endocrinologist, J.A.(Vol.4).733–36; (3) Angela Thompson, MD, MPH, an OBGYN, J.A.(Vol.5).855; and (4) Curtis Harris, MS, MD, JD, a longtime Oklahoma endocrinologist and former president of the Oklahoma Medical Board, J.A.(Vol.5).891.[2]

The Diagnostic and Statistical Manual of Mental Disorders ("DSM-5 TR") states that "sex and sexual refer to the biological indicators of male and female (understood in the context of reproductive capacity), such as in sex chromosomes, gonads, sex hormones, and non-ambiguous internal and external genitalia." J.A.(Vol.4).734. Sex is not "assigned" or "designated" at birth. To the contrary, as millions of parents understand through the ultrasound process, "the objective sex of a newborn was the same on the day before as the day after the birth." *Id.* 594–95.

Gender dysphoria is a "mental health condition … characterized by a strong and

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[1] The State adopts Plaintiffs' format for appendix citations: J.A.(Vol.-).----.

[2] In addition to their affidavits, each expert submitted a rebuttal after Plaintiffs included new evidence in their reply. J.A.(Vol.6).1140–50, 1170–77, 1223–26, 1228–29.

lasting desire to be the opposite sex, and 'clinically significant' distress of sufficient severity to impair the individuals' ability to function in their daily life setting." J.A.(Vol.4).596 (citing the DSM-5 TR). Importantly, "gender dysphoric children are not simply younger versions of gender dysphoric adults. They differ in virtually every objective variable measured, including in their responses to treatments." *Id.* 597. Thus, to understand gender dysphoria in minors, one cannot automatically extrapolate from research into adult gender dysphoria. *Id.* 597–98.

B. Using cross-sex hormones, puberty blockers, and surgeries to treat gender dysphoria in minors is a recent and surging phenomenon.

The use of drugs and surgeries to conform a person to their perceived gender only emerged as "the option of choice" for adults in the 1960s and 1970s. *Skrmetti*, 83 F.4th at 466. "[N]ormally timed puberty" is a "crucial period of development" for children. Megan Twohey & Christina Jewett, *They Paused Puberty, but Is There a Cost?*, N. Y. TIMES (Nov. 14, 2022) (hereinafter "NYT");[3] *see also* J.A.(Vol.4).576, 645, 647, 736, 742–43. Unsurprisingly, then, these procedures were "not available for minors until just before the millennium." *Skrmetti*, 83 F.4th at 467. Plaintiffs' own expert admits that the "first reference to the use of puberty blockers for the treatment of gender dysphoria in

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[3] *Available at* https://www.nytimes.com/2022/11/14/health/puberty-blockers-transgender.html. Plaintiffs criticize citing to the New York Times. Aplts. Br. 45. But typical evidentiary rules do not apply at the injunction stage. *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003). Regardless, are we not supposed to notice when mainstream outlets talk with experts and report on these issues in ways that contradict Plaintiffs' assertions?

the medical literature was in 1998[,]" J.A.(Vol.2).366, 130 years after the Fourteenth Amendment was ratified.

Providers have decreased the ages at which they provide these drugs and surgeries to minors. J.A.(Vol.4).652-53, 765–66; *see also Skrmetti*, 83 F.4th at 467-68. Indeed, without an evidentiary basis, the World Professional Association for Transgender Health ("WPATH") recently removed guidelines for a minimum age for hormones and surgery for minors. J.A.(Vol.4).765–66; *see also* J.A.(Vol.4).593, 652–53. And "[m]any physicians in the United States and elsewhere are prescribing blockers … as early as age 8" and "sex hormones as soon as 12 or 13." NYT.

The WPATH guidelines "cannot be called evidence-based guidelines …." J.A.(Vol.4).592–93. But even taken at face value, the WPATH and Endocrine Society instructions are mere *recommendations*, as practitioners have discretion over whether to follow them. *See id.* 643, 652–53, 765, 768, 773. Doctors can, for example, ignore a patient's mental health. *See id.* 614. Although Plaintiffs imply that all doctors follow these instructions, Aplts. Br. 6–7, that is not accurate. Many practitioners in this area believe these increasingly lax guidelines are still too strict. *See* Emily Bazelon, *The Battle Over Gender Therapy*, N. Y. TIMES MAG. (June 15, 2022) (hereinafter "NYT Mag.").[4] When WPATH updated its guidelines in 2022, the authors "faced fury from providers and activists within the transgender world." *Id.* These providers do not agree that

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[4] *Available at* https://www.nytimes.com/2022/06/15/magazine/gender-therapy.html.

children should demonstrate years of cross-gender identification before receiving blockers and hormones, nor do they believe children should undergo a "comprehensive diagnostic assessment" for mental health. *Id.* These "guard rails [are] *anathema*" to some providers, who have labeled the WPATH authors "*traitors*." *Id.* (emphases added); *see also* J.A.(Vol.4).764.

Illustrating these concerns, three women who received cross-sex hormone treatment in Oklahoma testify here that they received minimal psychiatric evaluation prior to being diagnosed with gender dysphoria. J.A.(Vol.5).895–96, 905, 911–12. One was diagnosed, as an adolescent, without any discussion about her childhood sexual abuse. *Id.* 911–12. That therapist even asked the woman's mother, in front of her, if she wanted "a dead daughter or living son?" when the mother expressed concerns over testosterone. *Id.* 912. Following their diagnoses, these "detransitioners" were quickly able to obtain testosterone with minimal information about the risks. *Id.* 896, 905, 912.

The number of adolescents being diagnosed with gender dysphoria has skyrocketed in recent years, "numerically overwhelm[ing] the previously known and better characterized types" of gender dysphoria. J.A.(Vol.4).607; *see also Skrmetti*, 83 F.4th at 468 ("The percentage of youth identifying as transgender has doubled … while the percentage of adults … has remained constant."). These adolescents are predominantly biologically female, and "[c]ases commonly appear to occur within clusters of peers in association with increased social media use … and among people with autism or other mental health issues." J.A.(Vol.4).607.

C. Plaintiffs have declined to detail the significant risks of these procedures.

Providing gender dysphoric children puberty blockers and cross-sex hormones—to say nothing of surgeries—has stoked controversy because it saddles physically healthy kids with serious risks of permanent physical harm. J.A.(Vol.4).645; J.A.(Vol.5).807–08, 888–89; J.A.(Vol.6).1171–72. As such, "concerns are growing among some medical professionals about the consequences of the drugs," and "prominent specialists" have begun "to reconsider at what age to prescribe them and for how long." NYT. A New York Times investigation found "emerging evidence of potential harm from using blockers, according to reviews of scientific papers and interviews with more than 50 doctors and academic experts around the world." *Id.* Defendants' experts have described these harms in detail. J.A.(Vol.4).638–49, 746–61; J.A.(Vol.5).808, 832–40, 887–88; J.A.(Vol.6).1171–72, 1223–24. Although Plaintiffs admit there are risks, *e.g.*, J.A.(Vol.2).376–77, they largely decline to detail those risks.

D. Puberty blockers can weaken bone density, damage brain development, and lead to the permanent sterilization of children.

Drugs like Lupron are approved by the FDA to treat prostate cancer and precocious puberty. J.A.(Vol.4).743–44. They are not FDA-approved for "gender-affirming" procedures. *Id.* 744; J.A.(Vol.2).372. Puberty blockers "stop normal menstrual function for the female and halt further pubertal development" for both sexes. J.A.(Vol.4).743. These drugs affect the reproductive system, among other body parts. *Id.* 743–51; J.A.(Vol.5).887; NYT.

Locking in. In this context, puberty blockers potentially lock children into lifelong medical dependence, J.A.(Vol.4).555, 638–39, 644; J.A.(Vol.5).818, even though their dysphoria may otherwise "desist" on its own, J.A.(Vol.4).740; J.A.(Vol.6).1145; *see also* NYT (blockers "could force life-altering choices ... before patients know who they really are"). Indeed, "most patients who take puberty blockers move on to hormones to transition, as many as 98 percent in British and Dutch studies." NYT; *see also* J.A.(Vol.4).598–601, 777. As a result, some doctors "worry that some young people are being swept into medical interventions too soon." NYT; *see also* J.A.(Vol.4).747, 752. Plaintiffs' expert admits that studies of "gender diverse *prepubertal* children ... have, in the past, shown that many of these children will not grow up to be transgender." J.A.(Vol.2).264. He claims this data doesn't apply after puberty, *id.*, but Dr. Laidlaw points out that several studies in question included post-pubertal children. J.A.(Vol.4).777–78; *see also id.* 601.

Sterilization. "There is an egregious history in the United States of sterilizations being performed on disadvantaged and vulnerable women ...." J.A.(Vol.5).815. Yet, puberty blockers have proliferated even though the recent wave of gender dysphoria is overwhelmingly female and "[i]nfertility is among other lasting effects for patients who start blockers at the first stage of puberty and proceed to hormones and surgery." NYT. Plaintiffs claim fertility will simply resume if a patient stops taking blockers, but the answer isn't that simple. *See, e.g.*, J.A.(Vol.4).746 (noting a lack of studies on this point). Defendants' OBGYN focuses on the "severe risk[]" of sterilizing women with "gender-

affirming" care, J.A.(Vol.5). 807–08, 811–12; *see also id.* 812 (opining that Plaintiffs' drug regimen "will almost certainly result in sterilization" and that fertility preservation options are "inaccessible, experimental, and speculative"). Even "[t]he Endocrine Society's guidelines recognize that puberty blockers can cause … 'compromised fertility'" and WPATH "cautions that hormone therapy can impair fertility." *Skrmetti*, 83 F.4th at 489; J.A.(Vol.5).858.

Brain damage. "Some doctors and researchers are concerned that puberty blockers may somehow disrupt a formative period of mental growth," NYT, including the State's experts, J.A.(Vol.4).639–41, 648 (Cantor: "there are reasons to fear that use of puberty blockers may have permanent negative effects on brain development"); *id.* 751; J.A.(Vol.5).807–08, 888. A number of experts believe more study of the effects of puberty blockers on the brain is needed. Diane Chen et al., *Consensus Parameter: Research Methodologies to Evaluate Neurodevelopmental Effects of Pubertal Suppression in Transgender Youth*, 5 TRANSGENDER HEALTH 246 (2020).[5]

Bone density. Bone mass increases rapidly during puberty. J.A.(Vol.4).748. This increase is "critical" in reaching "peak bone mass," which is "a strong predictor of osteoporosis in later life." *Id.* (citation omitted). But the use of blockers "will inhibit the normal accrual of bone density." J.A.(Vol.4).749–51; NYT. Many transgender adolescents do "not fully rebound from this" loss and "lag behind their peers," which

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[5] *Available at* https://www.liebertpub.com/doi/10.1089/trgh.2020.0006.

"could lead to heightened risk of debilitating fractures earlier than would be expected from normal aging." NYT; *see also Skrmetti*, 83 F.4th at 489 ("Administering puberty blockers to prevent pubertal development can cause diminished bone density …."). It is "increasingly clear that the [puberty-blocking] drugs are associated with deficits in bone developments." NYT; *see also* J.A.(Vol.4).641–43.

E. By taking testosterone and estrogen, minors risk infertility, mental issues, heart failure, weight gain, and more.

"Testosterone is an anabolic steroid of high potency" that the FDA has not approved for transitioning. J.A.(Vol.4).752–53. Excess testosterone in females presents "a serious risk to the healthy functioning of physiologic processes within the cardiovascular, endocrine, neurologic, pulmonary, and reproductive organ systems." J.A.(Vol.5).834, 840. Testosterone given to minor females—*i.e.*, deliberately inducing hyperandrogenism, J.A.(Vol.4).756—risks damage to ovaries and infertility. J.A.(Vol.5).814, 832–34, 837–381; *see also* J.A.(Vol.2).377 (admission by Plaintiffs' expert that "treatment for gender dysphoria with gender-affirming hormones may impair fertility" and may not be reversible). The testosterone dose given in this context is "***extremely*** elevated" for females, "the likes of which are not usually seen naturally." J.A.(Vol.5).834; J.A.(Vol.4).755. Evidence indicates that testosterone increases the risk of heart attacks "in females who identify as transgender men …." J.A.(Vol.5).835, 888; *see also* J.A.(Vol.4).754–58. There are also risks of depression and mood instability, and associations "with hypomanic, manic, or psychotic symptoms." J.A.(Vol.5).836–37;

J.A.(Vol.4).753, 757. Breast and other cancers are a concern. J.A.(Vol.4).756–57; J.A.(Vol.5).838–39. Testosterone may also "cause irritation, dryness, and atrophy of the vaginal tissue, which can cause significant discomfort and even bleeding." J.A.(Vol.5).839.

The three Oklahoma women who transitioned—two as adolescents—testify that testosterone caused or coincided with excruciating joint pain, chronic dizziness and fainting, light-headedness, heart problems, cognitive problems (including memory loss), anxiety, weight gain, vein enlargement, vaginal atrophy, hair loss, poor mental health, hospitalization, and even a suicide attempt. J.A.(Vol.5).898, 906, 913–14. Many of these persisted after the treatment stopped, including hair loss, hair growth, a lower voice, and vaginal atrophy. *Id.* 907, 914; *see also* J.A.(Vol.4).756–57 (criticizing Plaintiffs' expert for failing to specify what is reversible); J.A.(Vol.5).888, 902.

Males with gender dysphoria taking estrogen—*i.e.*, those deliberately inducing the medical condition of hyperestrogenemia, J.A.(Vol.4).759–60—risk serious cardiac events. *Id.* 760; J.A.(Vol.5).835–36. They also risk irreversible infertility, and testicular "cryopreservation may not be possible in males" undergoing this therapy. J.A.(Vol.5).850, 860–62, 888. Breast cancer is also a concern, J.A.(Vol.4).760, as is weight gain, thin skin, and bruising, J.A.(Vol.5).888.

F. Surgeries to cut off breasts and genitals carry drastic, irreversible harms.

Plaintiffs ignore the surgical aspect of SB 613. Nevertheless, "transition surgeries, in particular mastectomies, are being performed on minors throughout the country."

J.A.(Vol.4).761; J.A.(Vol.5).814. And Plaintiffs seek to enjoin SB 613 in its entirety. Aplts. Br. 59. Thus, surgeries merit mention. Mastectomies "result[] in a permanent loss of the ability to breastfeed and significant scarring of 7 to 10 inches." J.A.(Vol.4).762. Other relevant surgeries on minor boys include removing testicles—"by nature a sterilizing procedure"—and a "vaginoplasty," where the "penis is surgically opened" in order "to create a pseudo-vagina." *Id.* Complications may include infection and a "complete loss of erotic sensation." *Id.* (citation omitted). For females, surgeries may remove "the ovaries, uterus, fallopian tubes, cervix, and the vagina." *Id.* In addition, a "phalloplasty" imitates a penis by transplanting tissue from another area of the body to the pelvis and inserting rods or inflatable devices. *Id.* 763; J.A.(Vol.5).814. Complications may include problems with blood supply, scarring, infections, and "possible injury to the sensory nerve of the clitoris." J.A.(Vol.4).763 (citation omitted). Complication rates for these procedures are high. *Id.*

G. The safety and efficacy of hormones and surgeries for minors is hotly disputed, and Plaintiffs' evidence is undeniably of low quality.

There is fierce disagreement in the medical community over whether benefits from puberty blockers, hormones, and surgeries on minors exist and outweigh the risks. J.A.(Vol.4).627–44, 763–71; J.A.(Vol.5).829–40, 890; J.A.(Vol.6).1140–41, 1150, 1175–76, 1223–24, 1229. There is no medical consensus. J.A.(Vol.4).763; *see also id.* 554–563; *Skrmetti*, 83 F.4th at 489 ("no one disputes that these treatments carry risks or that the evidence supporting their use is far from conclusive").

There is very little evidence about the long-term effects of these treatments. J.A.(Vol.4).580–93, 763–69, 780–82; *see also* NYT ("A Reuters examination of a range of transgender treatments also found scant research into the long-term effects."). The short-term evidence Plaintiffs and their experts cite is considered low quality evidence. J.A.(Vol.4).571–72, 767–69; *see also* NYT (reporting that, in 2017, the Endocrine Society "described the limited research on the effects of the drugs on trans youth as 'low-quality'"). Plaintiffs tout "cross-sectional and longitudinal studies[,]" Aplts. Br. 8, but Plaintiffs' expert admits that "observational studies"—which "include cross-sectional and longitudinal studies"—"generally constitute 'low' quality evidence." J.A.(Vol.2).363. Going further, he admits the Endocrine Society's clinical practice guidelines are based overwhelmingly on low quality evidence. *Id.* 368–69; *see also* Aplts. Br. 41 (indicating Plaintiffs' evidence is "not based on randomized controlled trials").

Moreover, adolescent-onset gender dysphoria, the predominant clinical population today, is largely unstudied, J.A.(Vol.4).607–08, and the cohort studies of puberty blockers and cross-sex hormones for minors have not provided reliable evidence for improving mental health compared to alternative treatments, *id.* 627–36. Plaintiffs' claim that the State "offer[s] no alternative treatment supported by any evidence[,]" Aplts. Br. 42, is wrong: the State's expert has argued that "[p]sychotherapy has support equal to that of medicalized transition while lacking the harms and risks of medicalized transition." J.A.(Vol.4).665; *see also id.* 666 (explaining that none of the

cohort studies of puberty blockers and cross-sex hormones were "able to demonstrate medicalization to be superior to psychotherapy").[6]

Unlike Plaintiffs' experts, the State's experts rely on systematic reviews, which are the most reliable and conclusive form of evidence for determining the safety and effectiveness of a treatment. *See* J.A.(Vol.4).565; J.A.(Vol.6).1141–50. Those reviews indicate there is insufficient evidence to conclude that hormonal interventions for gender dysphoria are effective or safe. J.A.(Vol.4).575, 578–87; J.A.(Vol.6).1145–47.

And while Plaintiffs insist that their preferred treatments are "life-saving medical care," Aplts. Br. 58, "[n]o studies have documented any reduction in suicide rates in minors (or any population) as a result of medical transition." J.A.(Vol.4).612. Nor have studies provided meaningful evidence that medical transition decreases suicidality in minors. *Id.* 612, 774–76. Because of the lack of evidence supporting the effectiveness and safety of puberty blockers, cross-sex hormones, and sex-reassignment surgeries for minors, the State's experts oppose these treatments. *Id.* 578–638, 666–69; 786; J.A.(Vol.5).809–10, 837, 865; 888–91; J.A.(Vol.6).1140–41, 1229.

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[6] Similarly, Plaintiffs claim that "Defendants do not dispute that … the banned care is the only evidence-based treatment available." Aplts. Br. 42–43. This is false. The State directly disputed Plaintiffs' claim below, explaining that "psychotherapy has support equal to that of medicalized transition." J.A.(Vol.3).520. Plaintiffs' attempt to smuggle in disputed claims as undisputed facts should be rejected.

H. Europeans have been moving to restrict these procedures for children.

Further research on these issues has led "European health care ministries to step back and discourage or even cease providing medicalized transition of minors, other than in exceptional and carefully limited circumstances." J.A.(Vol.4).554; *see also Skrmetti*, 83 F.4th at 477 ("[S]ome of the same European countries that pioneered these treatments now express caution about them …."). A thorough recounting of these developments is found in Cantor's report. *See* J.A.(Vol.4).554–62, 621–23; J.A.(Vol.6).1149–50. In short, the "[i]nternational consensus explicitly regards gender transition to be experimental." *Id.* 621; *see also Skrmetti*, 83 F.4th at 488 (treatments are "unsettled, developing, [and] in truth still experimental").

England. In 2020, England's National Health Service ("NHS") commissioned an independent review of puberty blockers and hormones on minors. J.A.(Vol.4).555. An interim report found "very limited research on the sexual, cognitive, or broader developmental outcomes" from using blockers to treat gender dysphoria. *Id.* 555–56; 780. This summer, the NHS announced that "there is not enough evidence to support their safety or clinical effectiveness as a routinely available treatment," thus they will only be used in clinical trials. *Id.* 556, 780; J.A.(Vol.6).1175.

Sweden. Sweden's National Board of Health has concluded that the "risks of puberty suppressing treatment with GnRH-analogues and gender-affirming hormonal treatment currently outweigh the possible benefits." J.A.(Vol.4).560. Sweden has "placed limits on the treatment, concerned not just with the risk of blockers, but the

steep rise in young patients, the psychiatric issues that many exhibit, and the extent to which their mental health should be assessed before treatment." NYT; *see also* J.A.(Vol.4).781.

Finland. In 2020, Finnish researchers found that "[m]edical gender reassignment is not enough to improve functioning and relieve psychiatric comorbidities among adolescents with gender dysphoria." J.A.(Vol.4).557. As such, Finland has "ended the surgical transition of minors." *Id.*; *see also id.* 781. "[D]octors there remain concerned about the physical effects of blockers, including on brain development …." NYT. Puberty blockers and cross-sex hormones can only be prescribed in Finland if "other psychiatric symptoms have ceased." J.A.(Vol.4).557–58.

Norway. Earlier this year, the Norwegian Healthcare Investigation Board "deemed medicalized transition to be experimental" and "concluded that the evidence for the use of puberty blockers and cross-sex hormone treatments in youth was insufficient." J.A.(Vol.4).561; *see also id.* 782.

I. Oklahoma enacted Senate Bill 613 to protect children from harm.

Signed into law on May 1, 2023, SB 613 states that "[a] health care provider shall not knowingly provide gender transition procedures to any child." OKLA. STAT. tit. 63, § 2607.1(B). It 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). This includes surgical procedures, puberty-blocking drugs,

and cross-sex hormones. *Id.* SB 613 expressly exempts "behavioral health care services or mental health counseling" as well as medications prescribed "for the purpose of treating precocious puberty or delayed puberty." *Id.* § 2607.1(A)(2)(b).

Around 20 States have enacted similar laws. *See* Leor Sapir & Colin Wright, *Medical Journal's False Consensus on 'Gender-Affirming Care'*, WALL STREET JOURNAL (June 9, 2023).[7] Most have faced a legal challenge. Thus far, the Sixth and Eleventh Circuits have reversed preliminary injunction grants, and the Eighth Circuit has affirmed an injunction grant. *Compare Skrmetti*, 83 F.4th 460 (6th Cir. 2023), *and Eknes-Tucker*, 80 F.4th 1205 (11th Cir. 2023), *with Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022). The Eighth Circuit, however, just took the State's summary judgment appeal *en banc* from the start. *Brandt v. Griffin*, No. 23-2681 (8th Cir. Oct. 6, 2023).

J. Plaintiffs sought a broad injunction but made a limited case.

Represented by the ACLU, Lambda Legal, and Jenner & Block attorneys from Washington, D.C., Chicago, Los Angeles, and New York City, Plaintiffs challenged SB 613. *See* J.A.(Vol.1).34, 97. Plaintiffs demanded facial relief and a preliminary injunction of the entire law. *Id.* 61–63, 149. But Plaintiffs mostly ignored the law's surgical aspect, and no individual Plaintiff mentions a desire for adolescent surgery. Moreover, Plaintiffs essentially conceded SB 613 is appropriate for pre-pubescent children. *See* Aplts. Br. 7;

[7] *Available at* https://www.wsj.com/articles/medical-journals-false-consensus-on-gender-affirming-care-sex-change-procedure-transgender-f10cd52b.

J.A.(Vol.2).222, 265, 346. Indeed, the only Oklahoma practitioner Plaintiff, who then withdrew from the suit, J.A.(Vol.5).940 n.3, admitted she would only begin to "explore gender-affirming hormone therapy … around the age of 14." J.A.(Vol.2).346.

Despite having the burden to make their case for an injunction, Plaintiffs did not ask the district court for an evidentiary hearing, strategically choosing to attack the State's witnesses from a distance rather than in cross-examination. On October 5, 2023, the court issued a 36-page opinion denying a preliminary injunction. *See* J.A.(Vol.6).1266-1301.

SUMMARY OF THE ARGUMENT

Plaintiffs cannot establish a likelihood of success on the merits. Senate Bill 613 does not violate the Equal Protection Clause or the Due Process Clause because it is a neutral medical regulation of procedures with medical uncertainty. The district court correctly analyzed SB 613 for a rational basis. The Act only prohibits these transition procedures based on age. It does not discriminate on the basis of sex because all children are prohibited from a medicalized transition. Similarly, the Act does not discriminate on transgender status because the Supreme Court has consistently held that regulating treatments received by only one sex is not discriminatory. And Plaintiffs have failed to show any historical basis for their substantive due process claim.

Properly analyzed, the Act must be upheld, as the State has rational bases to conclude the Act protects children. Even if intermediate scrutiny applied, the evidence demonstrates that puberty blockers, cross-sex hormones, and sex-reassignment surgeries have long-lasting effects on bone density, fertility, and development, among other things. Plaintiffs misleadingly paint a one-sided picture of the procedures, evidence, and medical community on these issues. Most tellingly, Plaintiffs never explain the substantial risks of the practices. Plaintiffs also largely ignore recent seismic developments in Europe. The State's experts below testified to the other side of the story, as did three women who underwent similar procedures in Oklahoma and deeply regret it. The Constitution does not require Oklahoma to ignore these developments or these witnesses. The district court was correct to deny an injunction.

STANDARD OF REVIEW

"A preliminary injunction is an 'extraordinary and drastic remedy'" that "is never awarded as of right." *Munaf v. Geren*, 553 U.S. 674, 689–690 (2008) (citations omitted). A plaintiff "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). "[T]he right to relief must be clear and unequivocal." *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) (citation omitted).

When plaintiffs seek facial relief, "it is necessary to proceed with caution and restraint." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975). This is "[b]ecause facial challenges push the judiciary towards the edge of its traditional purview and expertise." *Ward v. Utah*, 398 F.3d 1239, 1247 (10th Cir. 2005). As such, litigants bringing a facial challenge "normally 'must establish that no set of circumstances exists under which the [statute] would be valid.'" *United States v. Hansen*, 599 U.S. 762, 769 (2023) (citation omitted). Therefore, "courts must be vigilant in applying a most exacting analysis to such claims." *Ward*, 398 F.3d at 1247.

The denial of a preliminary injunction is reviewed for an abuse of discretion, *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003), which "occurs only when the trial court bases its decision on an erroneous conclusion of law or where there is no rational basis in the evidence for the ruling." *Wilderness Workshop v. U.S. Bureau of Land Mgmt.*, 531 F.3d 1220, 1223–24 (10th Cir. 2008) (quotations omitted).

ARGUMENT

I. Issue No. 1: The Equal Protection Clause does not prohibit Oklahoma from requiring children to wait until adulthood to obtain puberty blockers, cross-sex hormones, and surgeries for a gender transition.

No State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. This means "that all persons subjected to … legislation shall be treated alike, under like circumstances and conditions …." *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602 (2008) (citation omitted). This does *not* "guarantee equal results for all, or suggest that the law may never draw distinctions between persons in meaningfully dissimilar situations …." *SECSYS v. Vigil*, 666 F.3d 678, 684 (10th Cir. 2012). Such guarantees "might themselves generate rather than prevent injustice." *Id.* Equal protection merely "keeps governmental decision-makers from treating differently persons who are *in all relevant respects* alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (emphasis added); *see also Ashaheed v. Currington*, 7 F.4th 1236, 1249 (10th Cir. 2021).

To determine whether a law violates equal protection, courts "apply different levels of scrutiny to different types of classifications." *Clark v. Jeter*, 486 U.S. 456, 461 (1988). At minimum, classifications must survive rational basis review. *Id.* "Laws premised on classifications based on age or medical condition[,]" for example, "receive deferential review." *Skrmetti*, 83 F.4th at 479. Only when the law targets a fundamental right or a suspect class does a heightened standard of review apply. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *see also Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 532 (10th Cir. 1998).

Finally, "health and welfare laws" are "entitled to a 'strong presumption of validity.'" *Dobbs*, 142 S. Ct. at 2284 (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)). That deference "applies even when the laws at issue concern matters of great social significance and moral substance." *Id.* The Supreme Court has applied this presumption to the treatment of the disabled, *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 365–368 (2001), laws banning assisted suicide, *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997), and laws banning abortion, *Dobbs*, 142 S. Ct. at 2284. Laws such as these "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Id.*

Here, SB 613 protects all minors equally against interventions designed to permanently transform their healthy bodies based on their gender dysphoria, and it does not discriminate based on sex or transgender status. The law's distinctions are based on age and medical procedure, and nothing more. So rational basis review applies.

A. SB 613 does not discriminate based on sex.

Under SB 613, no minor may be given the specified gender transition procedures, male or female. Plaintiffs' efforts to counter this reality fail because they cannot point to *similarly situated* people treated differently under the law. SB 613 affects both sexes equally, and it does so based on biological realities, not stereotypes. It does not allow doctors, for the sole purpose of gender transition, to push a physically healthy child's hormone levels beyond that which is normal, nor does it allow for surgical alterations. As the district court found, the Act only bans procedures designed to change one's

existing healthy body or to disrupt natural growth processes that are ongoing, acknowledging that the two sexes experience those processes differently. See J.A.(Vol.6).1298–99.

When it comes to biology and physiological development, boys and girls are not similarly situated. *See Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974) ("While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification …. Normal pregnancy is an objectively identifiable physical condition with unique characteristics."). Girls have periods, boys do not. Boys produce more testosterone, girls produce more estrogen. *See* J.A.(Vol.5).856. Medical regulations that recognize these differences are not suspect. *See, e.g.*, *Dobbs*, 597 U.S. at 236 (Absent pretext, "[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny.").

The Sixth and Eleventh Circuits relied on *Dobbs, Geduldig*, and other precedents to explain why laws like SB 613 do not discriminate based on sex. *See Skrmetti*, 83 F.4th at 480–86; *Eknes-Tucker*, 80 F.4th at 1227–31. Such laws, they explained, merely acknowledge that "by the nature of their biological sex, children seeking to transition use distinct hormones for distinct changes." *Skrmetti*, 83 F.4th at 481; *see also Eknes-Tucker*, 80 F.4th at 1228. And basing legislation on "a lasting feature of the human condition" does not make "all lawmaking in the area [] presumptively invalid." *Skrmetti*, 83 F.4th at 481. In other words, "the statute refers to sex only because the medical procedures that it regulates … are themselves sex-based." *Eknes-Tucker*, 80 F.4th at

1229. Indeed, "it is difficult to imagine how a state might regulate the use of puberty blockers and cross-sex hormones for the relevant purposes in specific terms *without* referencing sex in some way." *Id.* Overall, these laws lack "any of the hallmarks of sex discrimination." *Skrmetti*, 83 F.4th at 480. They "do[] not prefer one sex over the other[,] … include one sex and exclude the other[,]… bestow benefits or burdens based on sex[,]" or "apply one rule for males and another for females." *Id.*; *see also Eknes-Tucker*, 80 F.4th at 1228. Thus, heightened scrutiny does not apply.

Plaintiffs argue that "[a]ll sex classifications warrant heightened scrutiny." Aplts. Br. 16. But "[c]lassification is not discrimination." *Caskey Baking Co. v. Virginia*, 313 U.S. 117, 121 (1941); *see also F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are *in all relevant respects alike*.'" *Nordlinger*, 505 U.S. at 10 (emphasis added); *see also Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 54 (10th Cir. 2013). To trigger a plausible claim, a law must do more than mention sex; it must "use[] sex classifications to bestow unequal treatment on men and women." *Skrmetti*, 83 F.4th at 483; *Powers v. Harris*, 379 F.3d 1208, 1215 (10th Cir. 2004) ("[E]qual protection only applies when the state treats two groups, or individuals, differently."); *Buckley Constr. v. Shawnee Civic & Cultural Develop. Auth.*, 933 F.2d 853, 859 (10th Cir. 1991) (similar). Plaintiffs barely attempt to reconcile their theory with this case law, nor do they wrestle with the wild implications of their position applied to the medical field, where differing treatments for males and females abound.

To be sure, some cases casually refer to unlawful discrimination as a "classification." *See, e.g., Virginia*, 518 U.S. at 546 (exclusion of women from military school is "gender-defined classification"); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 729–30 (1982) (exclusion of men from nursing school is "gender-based classification"); *Free the Nipple-Fort Collins v. City of Fort Collins,* 916 F.3d 792, 799 (10th Cir. 2019) (female-only topless ban is "gender-based classification"). None of these cases involved medical procedures, however, and in each case benefits or exclusions were tied to those classifications. Thus, it was not the classification *per se* that deserved heightened scrutiny, it was the differential treatment. *See Skrmetti*, 83 F.4th at 483 ("The laws in those cases used sex classifications to bestow unequal treatment on men and women."). "[T]he necessity of heightened review," in other words, "will not be present every time that sex factors into a government decision." *Id.* 484.

Governments routinely classify individuals by sex, or use "explicitly gendered" terms, Aplts. Br. 18, especially when it comes to medicine. *Dobbs* applied rational basis review to an abortion prohibition even though only women can obtain abortions and the law referred to the female sex nearly a dozen times. *Compare* MISS. CODE § 41-41-191 (utilizing "mother," "maternal," and "woman"), *with* Aplts. Br. 31 n.11 (claiming *Dobbs* involved "facially neutral regulations"). Over 40 states—including states opposing Oklahoma here, such as California and New York—ban "female" genital mutilation, as does the federal government. *See, e.g.*, OKLA. STAT. tit. 21, § 760; 18 U.S.C. § 116; CAL. PENAL CODE § 273.4; N.Y. PENAL LAW § 130.85. Further examples are

plentiful. *See Skrmetti*, 83 F.4th at 482 (citing statutes on testicular, prostate, and cervical cancer, as well as breastfeeding, pap smears, and in vitro fertilization). Does heightened scrutiny apply to these laws? Of course not. But that is precisely where Plaintiffs' theory leads. *See* Aplts. Br. 18–20.

Plaintiffs cite a racial discrimination case to assert that "facial classifications 'do not become legitimate on the assumption that all persons suffer them in equal degree.'" Aplts. Br. 20 (quoting *Powers v. Ohio*, 499 U.S. 400, 410 (1991)). But the Supreme Court has "never 'equat[ed] gender classifications, for all purposes, to classifications based on race.'" *Skrmetti*, 83 F.4th at 483 (quoting *Virginia*, 518 U.S. at 532). Unlike with race, "[a] sign that says 'men only' looks very different on a bathroom door than a courthouse door." *Cleburne*, 473 U.S. at 468–69 (1985) (Marshall, J., concurring and dissenting in part). "When laws on their face treat both sexes equally, as these laws do, a challenger must show that the State passed the law because of, not in spite of, any alleged unequal treatment." *Skrmetti*, 83 F.4th at 483 (citing *Pers. Adm'r v. Feeney*, 442 U.S. 256, 274 (1979)). The district court found nothing of the sort, and rightly so.

Plaintiffs also argue that "[w]hether a specific treatment is prohibited depends exclusively on whether the treatment is deemed consistent or inconsistent with the minor's" biological sex. Aplts. Br. 18. They complain, for example, that a boy with delayed puberty may be prescribed testosterone, while a biological girl may not be prescribed testosterone. *Id.* But this just wrongly "assumes that any administration of these hormones is one treatment." *Skrmetti*, 83 F.4th at 481. As the Sixth Circuit held:

> Using testosterone or estrogen to treat gender dysphoria (to transition from one sex to another) is a different procedure from using testosterone or estrogen to treat, say, Kleinfelter Syndrome or Turner Syndrome (to address a genetic or congenital condition that occurs exclusively in one sex). These distinct uses of testosterone and estrogen stem from different diagnoses and seek different results. Because the underlying condition and overarching goals differ, it follows that the cost-benefit analysis does too, permitting States to legislate in the area without the assumption that they have presumptively violated the Constitution.

Id. This is not a difficult concept. *See, e.g.*, J.A.(Vol.4.).576, 645.

Next, Plaintiffs strip a partial quote from *Bostock* to fashion a novel test for sex discrimination. Aplts. Br. 18–19. They claim that "[i]f the legislature cannot 'writ[e] out instructions' for determining whether treatment is permitted 'without using the words man, woman, or sex (or some synonym),' the law classifies based on sex." *Id.* at 19 (quoting *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1746 (2020)). But *Bostock* never held that sex discrimination occurs *every* time a law writes out "man, woman, or sex." *Bostock* was an employment law case brought under Title VII, and its analysis is inapplicable to medical regulations. Undergirding *Bostock* was the premise that it is unlawful to take a person's sex into account when making employment decisions. Unlike with an employee, knowing a medical patient's sex is *crucial*. *E.g.*, J.A.(Vol.5).891. "Physical differences between men and women," after all, "are enduring," *Virginia*, 518 U.S. at 533, and "the two sexes are not fungible," *Ballard v. United States*, 329 U.S. 187, 193 (1946). It is not stereotyping to recognize differences between boys and girls when regulating medical procedures. *Cf. Nguyen v. INS*, 533 U.S. 53, 68 (2001). A treatment

that is necessary for one sex might be harmful to the other. To hold otherwise would lead to absurd results.

There's more. *Bostock* emphasized that the "only question" before the Supreme Court was "whether an employer who fires someone simply for being homosexual or transgender has … discriminated against that individual 'because of such individual's sex.'" *Bostock*, 140 S. Ct. at 1753. *Bostock* did "not purport to address bathrooms, locker rooms, or *anything else of the kind*." *Id.* (emphasis added). *Bostock*'s analysis was limited to Title VII, which contains very different language and was enacted a century after the Equal Protection Clause. *Bostock* is irrelevant here. Indeed, *Bostock's* author recently wrote that the idea "that such differently worded provisions [of Title VI and the Equal Protection Clause] should mean the same thing is *implausible on its face*." *Students for Fair Admissions v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring) (emphasis added). This dog won't hunt.

SB 613 does not discriminate on the basis of sex.

B. SB 613 does not discriminate based on transgender status.

Plaintiffs cannot establish that SB 613 discriminates against transgender individuals, either. SB 613 rationally regulates based on *age*, not transgender status. The procedures in question are presently permissible for those 18 or over, which is a strange way for Oklahoma to discriminate against transgender individuals. *See Skrmetti*, 83 F.4th at 480 ("Even those who disagree with the policies behind these laws can appreciate that laws distinguishing between adults and children are not unusual.").

Plaintiffs complain that only transgender children seek these transition procedures, Aplts. Br. 22, but even if true, laws restricting medical procedures that members of one class receive do not discriminate against that class. This was entrenched well before *Dobbs*. *See, e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269 (1993) ("Women seeking abortion is not a qualifying class." (quotation omitted)). *Dobbs* merely reiterated what has long been the case: "the regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation" is a pretext. 142 S. Ct. at 2245–46 (quoting *Geduldig*, 417 U.S. at 496 n.20). And a legislative decision to protect human life from a controversial medical procedure is not evidence of discriminatory animus or pretext. *See Bray*, 506 U.S. at 274; *Dobbs*, 142 S. Ct. at 2246.

Nothing about the present context would remove SB 613 from this line of reasoning. The fact that American medical organizations have lined up to oppose such laws, for example, gained no traction in *Dobbs*, so why should it here? In *Dobbs*, twenty-five such organizations declared that "[a]ccess to abortion is an important component of reproductive health care" which "is essential to women's overall health." Br. of *Amici Curiae* ACOG et al., *Dobbs* (No. 19-1392), 2021 WL 4312120 at *7. Rather than defer to this, the Supreme Court *derided Roe* for relying on medical organizations and failing to "explain why these sources shed light on the meaning of the Constitution." *Dobbs*, 142 S. Ct. at 2243, 2267. States may pass laws to "preserv[e] … the integrity of the medical profession," *Id.* at 2284, not the other way around. And Oklahoma has a

difficult time imagining something more harmful to that profession's integrity than its reckless embrace of procedures that damage and potentially sterilize healthy children.

Plaintiffs also protest, sans citation, that "[p]regnancy is not the defining characteristic of a woman, and the line in *Geduldig* was not drawn to limit care for women." Aplts. Br. 32. But the *Geduldig* line was drawn to limit a procedure applicable only to women that is, according to "major" medical organizations just cited, "essential to women's overall health." *See* Br. of *Amici Curiae* ACOG et al., *Dobbs* (No. 19-1392), 2021 WL 4312120 at *7. Moreover, are Plaintiffs really arguing that 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*? That is nearly impossible to square with the relative newness of these procedures, *see supra* SOC.B, and with Plaintiffs' admission that only *some* transgender adolescents will pursue these procedures. J.A.(Vol.1).54.

Plaintiffs also half-heartedly assert that SB 613 prohibits "gender transition." Aplts. Br. 22. This is false. The Act does not alter anyone's ability to use a different name or present as a different sex. And again, Plaintiffs merely alleged below that "[f]or *some older* adolescents, it *may* be medically necessary and appropriate to treat them with gender-affirming hormone therapy ...." J.A.(Vol.1).54 (emphases added). So for at least *some* dysphoric adolescents, and especially younger ones, hormones are *not* prescribed. The law, then, only applies to a subsection of dysphoric children, much like how laws prohibiting abortion only apply to a subsection of pregnant women. This is yet another indication that Oklahoma is targeting procedures and not persons.

Plaintiffs also return to *Bostock*. But again, "[b]ecause *Bostock* … concerned a different law (with materially different language) and a different factual context, it bears minimal relevance to the instant case." *Eknes-Tucker*, 80 F.4th at 1229; *see also Skrmetti*, 83 F.4th at 484–85. Plaintiffs' claim that the *reasoning* of *Bostock* controls, Aplts. Br. 22–24, is unavailing. For example, Plaintiffs assert that "[n]either the district court nor Defendants can provide an answer for how a classification based on a failure to identify with one's sex designated at birth simultaneously can be a facially sex-based classification under Title VII and a facially sex-neutral classification under the Equal Protection Clause." Aplts. Br. 23. But this misunderstands both *Bostock* and this case. *Bostock* did not turn on whether a facial classification occurred; the majority didn't even use the words "classification" or "facial" once. Instead, the Supreme Court held that Title VII's "because of sex" language meant that an employer could not "discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741. Nothing of the sort is occurring here. In *Bostock*, the employers fired long-time employees "for no reason other than the employee's homosexuality or transgender status," *id.* at 1737, whereas "[i]n this case, the law[] merely den[ies] … medical treatments to all children facing gender dysphoria if they are 17 or under, then permit[s] all of these treatments after they reach the age of majority." *Skrmetti*, 83 F.4th at 485. It's apples versus oranges, even if one looks only at the reasoning and ignores the other distinctions.

What makes these interventions on minors controversial—driving legislative concern—is the fact that they delay normal puberty, increase a child's hormones to unnatural levels, and permanently remove body parts that are healthy. It does not discriminate or classify based on transgender status to require children to wait until adulthood to make such major and often irreversible changes. *See id.*; *Eknes-Tucker*, 80 F.4th at 1229–30. Illustrating this point, Plaintiffs cannot identify a single drug, treatment, or surgery that is not available to a transgender minor but is available to a *similarly situated* non-transgender minor.

Plaintiffs argue that "an adolescent could seek hormonal treatment or surgery" for non-transition cosmetic purposes without running afoul of SB 613, Aplts. Br. 52, but they do not claim that this hypothetical adolescent is similarly situated to Plaintiffs.[8] And surely the State can rationally regulate a particular procedure—here, procedures that are not even FDA-approved—without having to address all other hypothetical uses of the procedure. In any event, Plaintiffs point to nothing that indicates that a significant number of non-dysphoric healthy minors are injecting hormones and having their body parts cut off, such that the State should address it. Whereas here, there is little doubt that blockers, hormones, and surgeries are being used for transitions on minors.

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[8] Plaintiffs offer a slight twist on Page 18, arguing that a "late bloomer" male might be able to obtain testosterone whereas a transgender individual would not. But a diagnosis that a boy's body is physically defective and lacking testosterone is *not* similar in all relevant respects to a physically healthy child diagnosed with gender dysphoria.

Rather than argue that some person or group is similarly situated, Plaintiffs contend that transgender individuals are a quasi-suspect class. But this is irrelevant, given that SB 613 doesn't discriminate against transgender individuals in the first place. Thus, Plaintiffs' complaint that the district court failed to analyze their quasi-suspect class argument, Aplts. Br. 26, is baseless. The district court *did* observe that precedent points towards the conclusion that transgender status is not a quasi-suspect class. J.A.(Vol.6).1279–80. It then explained that "even if heightened scrutiny were to apply to classifications based on transgender status, the Court would not find that SB 613 makes such a classification." J.A.(Vol.6).1280. As SB 613 does not classify based on transgender status, there was no need for the court to engage in a lengthy academic exercise on this point. *See Eknes-Tucker*, 80 F.4th at 1230.

Regardless, the argument fails. To start, the Supreme Court has never recognized gender identity or transgender status as a quasi-suspect class. *Bostock* did not do so. Nor has this Court made such a ruling. As recently as 2015, this Court confirmed it "has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims." *Druley v. Patton*, 601 F.App'x 632, 635 (10th Cir. 2015) (unpublished). Moreover, "[t]he Supreme Court 'has not recognized any new constitutionally protected classes in over four decades ….'" J.A.(Vol.6).1279 n.8 (quoting *Skrmetti*, 83 F.4th at 486). It has *declined* to recognize a quasi-suspect class for mental disabilities, *Cleburne*, 473 U.S. at 445–46, age, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976), poverty, *San Antonio Independent School District v.*

Rodriguez, 411 U.S. 1, 28–29 (1973), and sexual orientation, *Romer v. Evans*, 517 U.S. 620, 632–34 (1996). The bar here is very high, to say the least. *See Skrmetti*, 83 F.4th at 486.

This is for good reason. "Regulation of treatments for gender dysphoria poses fraught line-drawing dilemmas," and Plaintiffs' position would "[r]emov[e] these trying policy choices from fifty state legislatures to one Supreme Court" which "is not how a constitutional democracy is supposed to work … when confronting evolving social norms." *Id.* at 486–87. The admonition in *Dobbs*, 142 S. Ct. at 2247, is sensibly applied here: Courts should guard against "wielding nothing but 'raw judicial power,' ... [to] usurp[] the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people." *Id.* at 2265.

Diving deeper, transgender status does not qualify as a suspect classification. *See, e.g., Skrmetti*, 83 F.4th at 486–88; *Eknes-Tucker*, 80 F.4th at 1230. To start, gender identity is not immutable. Although Plaintiffs summarily allege that "gender identity is innate" and that "[t]ransgender people are a distinguishable and distinct group," Aplts. Br. 27, they cannot dispute that "[u]nlike existing suspect classes, transgender identity is not 'definitively ascertainable at the moment of birth.'" *Skrmetti*, 83 F.4th at 487 (citation omitted)). Plaintiffs also blithely insist that transgender status "cannot be voluntarily changed[,]" Aplts. Br. 27, while they ignore the three Oklahoma witnesses who previously identified as transgender and now do not. J.A.(Vol.5).894–916. In addition, Oklahoma's experts point to substantial evidence that gender-dysphoric children will often desist if given the opportunity. J.A.(Vol.4).598–601, 740.

Perhaps most obviously, transgender individuals are not a politically powerless group. Rather, they are robustly supported by the President, federal agencies, medical associations, the media and entertainment industries, and countless major law firms like Jenner & Block. Courts should not permanently place a finger on the scrutiny scale because transgender individuals unfairly lack power. "These are not," in other words, "the hallmarks of a skewed or unfair political process …." *Skrmetti*, 83 F.4th at 487. Plaintiffs' solitary argument otherwise is that, allegedly, in 2023 "state legislatures entertained 500+ anti-LGBTQ laws, over eighty-four of which became law …." Aplts. Br. 27. Putting aside that judicial notice cannot possibly cover this assertion, and that several cited laws—such as bathroom and speech-related laws—have sound defenses, Plaintiffs' math doesn't even add up. If only 84 of over 500 proposals became law, that means that transgender advocates were apparently able to stop more than 416 bills in a single year. That is very nearly the *opposite* of political powerlessness.

SB 613 does not discriminate based on transgender status.

C. SB 613 does not purposely discriminate or enforce sex stereotypes.

SB 613 does not impose sex stereotypes or "enforce gender conformity." Aplts. Br. 17. "A concern about potentially irreversible medical procedures for a child is not a form of stereotyping." *Skrmetti*, 83 F.4th at 485. The Act contemplates biology, not stereotypical behavior. Females and males have distinct body parts. *See Virginia*, 518 U.S. at 533. Prohibiting surgeries that cut off healthy body parts because the patient

does not identify with the sex that possesses those body parts is not promoting a stereotype. And if SB 613 was intended to stereotype, it does a remarkably poor job. Again, it does not prohibit individuals from dressing or acting in ways associated with the opposite sex. SB 613 merely requires dysphoric children to wait until 18 to make risky, life-altering changes to their healthy bodies.

If anyone traffics in stereotypes, it is Plaintiffs, who testify that a child "acted like a boy" because "[h]e would play in creeks and ponds, and always come home muddy." J.A.(Vol.2).314; *see also id.* 295 (indicating that "My Little Pony" is for girls and "Cub scouts and soccer" are for boys); 301 ("she started to realize that boys were not supposed to play with dolls"); 327 ("she liked 'girly' things" such as "The Little Mermaid"). This traces to the DSM-5-TR, which labels things like a "strong preference for the toys, games, or activities stereotypically used or engaged by the other gender" as a manifestation that can contribute to a diagnosis of gender dysphoria. J.A.(Vol.2).182.

Put differently, if SB 613 deals with stereotypes—*i.e.*, if biology were a stereotype—then the regulated procedures *themselves* cater to stereotypes. Plaintiffs seek these procedures because they do not believe their natural body looks the way that someone of their gender identity *should* look. These procedures are therefore designed to transform a child's features into those more typical of the opposite sex. The State's decision to regulate increasingly utilized procedures that are grounded on apparent sex stereotypes cannot require heightened scrutiny.

Next, Plaintiffs assert that SB 613 was passed with animus, citing other legislation

and quotes from random legislators, sans context. Aplts. Br. 30–31. Courts have long refused to ascribe intent to a law based on stray legislator statements. This is in part because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *United States v. O'Brien*, 391 U.S. 367, 384 (1968). As such, this Court recently held that "the statements of a few legislators concerning their motives for voting for legislation is a reed too thin to support invalidation of a statute." *Citizens for Const. Integrity v. United States*, 57 F.4th 750, 768 (10th Cir. 2023). That alone should put this claim to rest.

In any event, the cited statements do not indicate that discriminating against transgender minors motivated the Legislature as a whole. For one thing, neither Plaintiffs nor the United States makes any effort to comprehensively analyze quotes from legislators, contextualize the fragments they provide, or quantify how many quotes might invalidate an entire statute. Rather, they cherry pick a few soundbites and present them, context-free, as definitive. They ignore other quotes, such as the law's author stating that "gender dysphoria is very real," that children need "mental health treatment," and that they should wait until they are 18 so "at least they will have reached some level of maturity to make a more informed decision." *Senate approves bill prohibiting gender transition procedures for minors*, OKLA. SENATE (Feb. 15, 2023).[9]

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[9] *Available at* https://oksenate.gov/press-releases/senate-approves-bill-prohibiting-gender-transition-procedures-minors.

Moreover, even out of context, the statements point to the conclusion that the legislators in question believed that the children will be *better off* under SB 613, not that any harm is desired. The United States points out that one representative lamented that children are being pushed toward "desolation, destruction, degeneracy, and delusion, ending in delusional play acting." Br. of U.S. 3. But the representative followed this by repeatedly emphasizing that he was seeking to help the children involved deal with underlying mental health issues rather than saddle them with irreversible side effects for the rest of their lives. "Would it not be kinder," he asked, while listing the risks of the procedures, "to give them actual mental health [treatment]?" J.A.(Vol.5).1076. Moreover, sharp as it is, his rhetoric resembles the sentiments expressed by the three Oklahoma detransitioners. *See, e.g.*, J.A.(Vol.5).899, 902 ("After nine years of transitioning and taking testosterone and going through many surgeries, I was left *empty* and *broken*. I was *devastated* .... [T]he physical transition was *never real*, it never resolved the gender dysphoria, and what [I] truly needed was psychological counseling …." (emphases added)); *Id.* 906 ("My mental health was *terrible* while I was on testosterone. I was *hospitalized* six times .... In 2018, I tried to commit *suicide* ...." (emphases added)). Are legislators not allowed to empathize with and echo people who suffer like this?[10]

Plaintiffs also allege that fifteen other bills were introduced in Oklahoma that

[10] A more thorough rebuttal of the United States' brief on these points can be found in the State's response to the federal government below. *See* J.A.(Vol.5).1067–82.

sought to limit aspects of gender transitioning. Aplts. Br. 30. But redundant bills are filed all the time. If a bill's mere introduction can affect a different law's constitutionality, that would improperly chill legislative action. Furthermore, Plaintiffs cite Oklahoma laws that require minors in public schools to use the bathroom and play on sports teams consistent with biological sex, as well as a law ensuring that birth certificates accurately record biological sex. *Id.* Each of those laws are supported by non-discriminatory state interests and do not support a plausible inference of discriminatory intent. *See, e.g.*, *Adams v. Sch. Bd. of St. Johns Cnty.,* 57 F.4th 791 (11th Cir. 2022) (en banc) ("[S]eparating school bathrooms based on biological sex passes constitutional muster and comports with Title IX."). Plaintiffs apparently believed that any disagreement with them during the "thoughtful debates[,]" *Skrmetti*, 83 F.4th at 471, surrounding these issues are examples of animus. This is untenable.

D. SB 613 is rationally related to compelling governmental interests and would also survive intermediate scrutiny.

SB 613 "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Dobbs*, 142 S. Ct. at 2284. Plaintiffs' claim must fail, that is, "if there is 'any reasonably conceivable state of facts that could provide a rational basis for the classification.'" *Copelin-Brown v. N.M. State Pers. Off.*, 399 F.3d 1248, 1255 (10th Cir. 2005) (citation omitted). And the State has "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007).

Here, "[p]lenty of rational bases exist" for this law. *Skrmetti*, 83 F.4th at 489 Plaintiffs concede that "[s]afeguarding minors' health and wellbeing is a *compelling* interest," Aplts. Br. 57 (emphasis added), not just a legitimate one. And it is eminently rational for Oklahoma to see the explosion in gender dysphoria cases, observe the increase in risk-filled procedures with lifelong effects, and listen to detransitioners, as well as those in the medical community, who oppose such procedures. *See supra* SOC.B, G. When confronted with these circumstances, the Eleventh Circuit described a similar law as "exceedingly likely to satisfy" this level of review. *Eknes-Tucker*, 80 F.4th at 1230.

The *most* rigorous form of review SB 613 could face here is intermediate scrutiny. *See, e.g.*, Br. of U.S. 10. "To withstand intermediate scrutiny, a statutory classification must be substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Fort Collins*, 916 F.3d at 799. SB 613 is likely to meet this standard of review, further demonstrating that an injunction should be denied. *See Eknes-Tucker*, 80 F.4th at 1231–36 (Brasher, J., concurring) (Alabama's law "is likely to satisfy intermediate scrutiny").

To begin, the Act fulfills the State's "strong interest in public health." *Clark v. City of Draper*, 168 F.3d 1185, 1189 (10th Cir. 1999). This interest is especially powerful when the State is protecting children's health and interests. *Aid for Women v. Foulston*, 441 F.3d 1101, 1119 (10th Cir. 2006); *see also Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("The State, of course, has a duty of the highest order to protect the interests of minor

children ….”). Again, Plaintiffs *concede* that “[s]afeguarding minors’ health and wellbeing is a compelling interest.” Aplts. Br. 57.

The State has provided expert reports and declarations from Oklahoma women that demonstrate the life-altering risks of these procedures. Those risks include sterilization, decreased bone density, osteoporosis, anxiety, loss of genitalia, cardiovascular disease and cancer, loss of sexual function, as well as a lifetime of dependence on expensive drugs. *See supra* SOC.C–G. These witnesses are qualified; one is a former Medical Board President. And European developments support their analysis. *See supra* SOC.H; *see also* Joshua Cohen, *Increasing Number Of European Nations Adopt A More Cautious Approach To Gender-Affirming Care Among Minors*, FORBES (June 6, 2023);[11] Lauren Moss & Josh Parry, *Puberty blockers to be given only in clinical research*, BBC NEWS (June 9, 2023).[12]

Plaintiffs protest that these procedures are not experimental. Aplts. Br. 41. “Even if that were true, that alone does not give parents a fundamental right to acquire them. As long as it acts reasonably, a state may ban even longstanding and nonexperimental treatments for children.” *Skrmetti*, 83 F.4th at 477. In any event, entities like the Norwegian Healthcare Investigation Board have independently examined the evidence

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[11] *Available at* https://www.forbes.com/sites/joshuacohen/2023/06/06/increasing-number-of-european-nations-adopt-a-more-cautious-approach-to-gender-affirming-care-among-minors/?sh=494f42b47efb.
[12] *Available at* https://www.bbc.com/news/uk-65860272.

surrounding these procedures and declared that they are experimental. *See supra* SOC.H. Others have agreed. J.A.(Vol.4).621–23, 665–66; *see also Skrmetti*, 83 F.4th at 488 ("The unsettled, developing, in truth still experimental, nature of treatments in this area surely permits more than one policy approach"). Oklahoma may take the same view, especially when Plaintiffs' evidence is of low quality and their procedures are not FDA-approved.

The limited research here shows significant risks and little support for prescribing these procedures to minors. J.A.(Vol.4).579–87, 763–69. Plaintiffs argue that many other treatments have risks, or are supported by similar levels of research, Aplts. Br. 43–44, but they make virtually no effort to show their work. And most (if not all) of those other treatments can be objectively diagnosed, J.A.(Vol.4).664, and regardless the State is not required to treat every problem in the world in one piece of legislation. *See Skrmetti*, 83 F.4th at 481 ("States may permit varying treatments of distinct diagnoses").

Again, the Act serves the compelling objectives of protecting minors and ensuring that they are mature before making life-altering decisions. And even "[a]ssuming this statute involves a sex-based classification, it does so because there is no other way to regulate treatments for a 'discordance between [an individual's] sex and their internal sense of identity' without drawing such a distinction." *Eknes-Tucker*, 80 F.4th at 1235 (Brasher, J., concurring). That is, the State's interests are "sufficiently related to the sex classification in the law to the extent there is one." *Id.* And

intermediate scrutiny, unlike strict scrutiny, does not analyze whether a "state could achieve its objective with some lesser restriction." *Id.* at 1236.

Elsewhere, the State has consistently required minors to wait to make certain decisions. Persons under 18 participate in a different justice system because of a "recognition of the comparative immaturity and irresponsibility of juveniles." *Roper v. Simmons*, 543 U.S. 551, 569 (2005). And no person under 18 may receive a tattoo. OKLA. STAT. tit. 21, § 842.1. Minors cannot vote, OKLA. CONST. art. III, § 1, smoke tobacco, OKLA. STAT. tit. 10A, § 2-8-224, use a tanning facility, OKLA. STAT. tit. 63, § 7302, drink alcohol, OKLA. STAT. tit. 37A, § 6-120, or buy lottery tickets, OKLA. STAT. tit. 3A, § 726. These laws are based on the common sense understanding that minors are not mature enough to make certain consequential decisions.[13] Plaintiffs ask the Court to ignore this and rule that the Constitution *requires* allowing a 13-year-old boy to have his healthy genitals cut off when he is not even allowed to get his mother's initials tattooed on his shoulder or drink a beer.

After ignoring Europe in their opening brief, Plaintiffs will likely emphasize that European countries have not banned the procedures for minors, but rather allow for their use in research trials. But that is not meaningful under intermediate scrutiny, and

[13] The parents of one Plaintiff initially wanted the Plaintiff to "take some time to think about it" and "wait until [the Plaintiff] was 18 to start" medical treatments. J.A.(Vol.2).309, 314. This is a sound sentiment, even if the parents later changed their minds. It is not irrational for the State to reach the same conclusion.

it certainly does not matter under a rational basis review. Again, the Act does not need to employ the least restrictive means. At most, it needs to be substantially related to important objectives. The European restrictions demonstrate that the evidence supporting the efficacy of the procedures is low quality and that the risks of the procedure are profound. And nothing in the Constitution forbids Oklahoma from protecting its minors *here* and allowing research to proceed over *there*. The Constitution does not require States to operate as research hubs, that is. Moreover, Plaintiffs have not even alleged that they would like to participate in research.

Further, the district court's findings were not dicta. Although the court accurately noted that the Act *could* be upheld under rational basis review "based on nothing more than its own rational speculation," J.A.(Vol.6).1293, it found that such speculation was "not necessary, as there is ample record evidence to establish that SB 613 is rationally related to a legitimate state interest for at least four distinct reasons." *Id.* 1294. That finding—that, based on the evidence, the Act rationally related to a legitimate purpose—was "necessarily involved [or] essential to determination of the case at hand." *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995) (citation omitted).

Plaintiffs' claim that the district court overlooked their evidence, *see* Aplts. Br. 36–39, is mere sour grapes that the court did not accept their disputed view of the efficacy and safety of these procedures. And, as even Plaintiffs are forced to admit, the court *did* cite their affidavits multiple times. *Id.* 38 n.13. And, again, Plaintiffs *declined* to ask for an evidentiary hearing. In any event, Plaintiffs' criticism is ironic given their

approach to the State's affidavits. Instead of interacting with State experts, Plaintiffs handwave them away by claiming they "have no experience treating or diagnosing gender dysphoria in adolescents or adults." *Id.* 38. But the State's experts do not provide these procedures because they do not believe they are justified based on the evidence. *See* J.A.(Vol.5).888–89.[14] Plaintiffs cannot just assume the truth of what they advocate for and then disqualify those who disagree from opining. The Legislature (and the district court) are not barred from relying on experts who do not participate in a procedure because they believe it unproven and harmful.

Moreover, the State's experts are not from irrelevant fields; rather, they would otherwise be considered strong candidates to provide the procedures—if they considered them legitimate.[15] And courts have for decades held that an "expert physician need not be a specialist in a particular medical discipline to render expert testimony relating to that discipline." *Pagés-Ramírez v. Ramírez-González*, 605 F.3d 109, 114 (1st Cir. 2010) (citation omitted); *see also Gayton v. McCoy*, 593 F.3d 610, 617 (7th Cir. 2010); *McDowell v. Brown*, 392 F.3d 1283, 1297 (11th Cir. 2004); *Baerman v. Reisinger*, 363 F.2d 309, 310 (D.C. Cir. 1966). Finally, the State's experts have also explained why

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[14] Plaintiffs' claim that the State's experts have not "even stud[ied] gender-affirming medical care for transgender minors," Aplts. Br. 37, is false. *See, e.g.*, J.A.(Vol.4).548–50, 731–32; J.A.(Vol.5).812–17; J.A.(Vol.6).1171.

[15] Plaintiffs note that a couple district courts have not credited two of the State's witnesses. But several of those decisions were reversed and repudiated by their governing appellate courts. *See, e.g.*, *Adams v. Sch. Bd. of St. Johns Cnty.*, 318 F. Supp. 3d 1293 (M.D. Fla. 2018); *L.W. v. Skrmetti*, 2023 WL 4232308 (M.D. Tenn. June 28, 2023).

clinicians like Plaintiffs' experts can be biased *because of* their involvement with a debated treatment, and why disinterested evaluation is important for scientific understanding. *See, e.g.*, J.A.(Vol.4).571 ("[I]n evidence-based medicine, opinion based on clinical experience is identified as the least reliable source of medical knowledge."); *see also id.* 551–53, 671, 674.

Criticisms of the district court's factual findings fare little better. For example, Plaintiffs claim that the "court invented a new definition of 'experimental' that the record does not support." Aplts. Br. 42. This would be news to the Sixth Circuit, which found that these procedures were "unsettled, developing, in truth still experimental," *Skrmetti*, 83 F.4th at 488, and to the State's experts. J.A.(Vol.4).621–23, 665–66. Moreover, Plaintiffs' protestations that gender dysphoria is objective, Aplts. Br. 48, ignore the district court's point that the diagnosis is based on the subjective beliefs of minors. J.A.(Vol.6).1294; J.A.(Vol.4).734. Similarly, Plaintiffs' claims of "clear error" based on desistance and fertility, Aplts. Br. 48, miss that the district court was noting that puberty blockers usually serve as the first step to a full medicalized transition that includes cross-sex hormones and surgeries, J.A.(Vol.4).644; J.A.(Vol.5).818, 829–32, a fact that Plaintiffs do not seriously dispute. *See* Aplts. Br. 47 (acknowledging that minors may go onto cross-sex hormones after starting with puberty blockers). And while Plaintiffs dispute the significance of puberty blockers suppressing the rapid growth of bone density at the onset of puberty, Aplts. Br. 45, they do not dispute that it occurs.

Plaintiffs also criticize the district court's reference to "immediate[] infertility[,]" Aplts. Br. 47, even though that statement is well supported in the record. J.A.(Vol.4).746–47; J.A.(Vol.5).814, 832–34, 837–38. In a similar manner, Plaintiffs make the incredible claim that there is no record citation to support the district court's finding that minors using these drugs for gender transitions face different challenges and consequences than minors using them for other diagnoses. Aplts. Br. 44. Not only does the paragraph Plaintiffs cite include a supporting citation, J.A.(Vol.6).1296, but the next paragraph includes *eight* different record cites supporting the district court's conclusion. *Id.* 1296–97 (citing J.A.(Vol.4).646–47; *id.* 755; J.A.(Vol.5).811; J.A.(Vol.4).648; *id.* 755; *id.* 583; *id.* 748, 752; J.A.(Vol.5).891–92).

In sum, the Act survives rational basis or intermediate scrutiny.

II. Issue No. 2: Plaintiffs are not likely to succeed on their substantive due process claims without making any effort at proving a historical case.

Plaintiffs relegate their substantive due process arguments to a couple pages near the end of their brief, and *amici* United States and California ignore the clause entirely. This is telling. Plaintiffs' due process claim is meritless.

All substantive due process claims are now subject to the same two-part analysis. *Dobbs*, 142 S. Ct. at 2246. Courts examine whether the alleged right is one that is "objectively, deeply rooted in this Nation's history and tradition, ... and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it] were sacrificed." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (cleaned up). This analysis

requires a "'careful description' of the asserted fundamental liberty interest[,]" *id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)), and "a careful analysis of the history of the right at issue." *Dobbs*, 142 S. Ct. at 2246. This means that "[i]dentifying a new fundamental right subject to the protections of substantive due process is often an uphill battle, as the list of fundamental rights is short." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 770 (10th Cir. 2008) (citation omitted).

Glucksberg acknowledged "that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment[,]" and yet it still held that "the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause." 521 U.S. at 720, 728. Similar to Plaintiffs here, the respondents in *Glucksberg* sought to analyze their substantive due process claim from a higher level of abstraction. Drawing on precedent that granted a right to reject life-saving medical care or to obtain an abortion, they argued that the Due Process Clause protects "basic and intimate exercises of personal autonomy" which "protects the 'liberty of competent, terminally ill adults to make end-of-life decisions free of undue government interference.'" *Id.* at 724 (citation omitted). The Court rejected this broad reading of precedent and the abstract description of the alleged right. *See id.* ("The question presented in this case … is whether the protections of the Due Process Clause include a right to commit suicide with another's assistance.").

Applying this precedent, the question in this case is whether the Due Process Clause includes a fundamental right for parents to choose for their children to use

puberty blockers, cross-sex hormones, and surgeries for a gender transition. *See, e.g.*, *Eknes-Tucker*, 80 F.4th at 1221. Simply put, Plaintiffs have not conducted the historical inquiry necessary to recognize such a right as "a new component of the 'liberty' protected by the Due Process Clause." *Dobbs*, 142 S. Ct. at 2247.[16] The Complaint and Plaintiffs' brief are empty of historical evidence or reasoning. "The mere novelty of such a claim is reason enough to doubt that 'substantive due process' sustains it." *Flores*, 507 U.S. at 303. Plaintiffs' failure to provide historical evidence that this "right" existed when the Fourteenth Amendment was ratified is dispositive.

Plaintiffs rely on *Parham v. J.R.*, 442 U.S. 584 (1979), to argue that the Supreme Court has framed "the parental right as one to make medical decisions on behalf of their children." Aplts. Br. 55. But "*Parham v. J.R.* does not help [Plaintiffs]." *Skrmetti*, 83 F.4th at 476. *Parham* involved a far different scenario: a child *protesting* parental authority. In *Parham*, a state allowed parents to commit their children to mental institutions. *Parham*, 442 U.S. at 588–91. In the dicta quoted by Plaintiffs, the Court simply observed that children "are not able to make sound judgments concerning many decisions, including their need for medical care or treatment" and that a child's disagreement with a decision "does not automatically transfer the power to make that decision from the

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[16] This is similarly detrimental to their equal protection claim. Plaintiffs argue that "original fixed meaning … has no place in equal protection analysis," Aplts. Br. 25, but it would be passing strange for history to be critical for one clause of the Fourteenth Amendment but have "no place" in regard to the other.

parents to ... the state." *Id.* at 603. Instead, "States must provide 'some kind of inquiry' … to guard against 'the risk of error inherent in the parental decision to have a child institutionalized for mental health care.'" *Skrmetti*, 83 F.4th at 476 (quoting *Parham*, 442 U.S. at 603, 606). Therefore, "[n]othing in *Parham* supports an affirmative right to receive medical care, whether for a child or an adult, that a state reasonably bans." *Id.* at 477; *see also Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 286 (1990) (noting that *Parham* "allowed" a state to credit parental health decisions but did not create "a constitutional requirement" that a state "recognize such decisionmaking").

Plaintiffs have not pointed to a single precedent finding a right to receive a specific treatment. Parents possess rights to raise their children, but this Circuit has "never specifically recognized or defined the scope of a parent's right to direct her child's medical care[.]" *P.J. v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010). And while *Wagner* indicated there was likely "*some* level of protection for parents' decisions regarding their children's medical care[,]" the Court there even held that parents' ability to refuse recommended cancer treatment was "not clearly established." *Id.* at 1197–98 (emphasis added). This comports with the Supreme Court's explicit rejection of the view that "the right to refuse unwanted medical treatment could be some-how transmuted into a right to" receive a specific treatment. *Glucksberg*, 521 U.S. at 725–26; *see also Rutherford v. United States*, 616 F.2d 455, 456 (10th Cir. 1980) (holding that a right to privacy does not allow patients "to take whatever treatment they wished regardless of" federal law); *Abigail All. for Better Access to Dev. Drugs v. von Eschenbach*, 495 F.3d 695,

697 (D.C. Cir. 2007) ("there is no fundamental right 'deeply rooted in this Nation's history and tradition' of access to experimental drugs for the terminally ill" (citation omitted)).

There is no fundamental right for parents to have their children provided specific procedures. As such, SB 613 is analyzed under rational basis review, which it easily survives for the reasons laid out above.

III. Plaintiffs effectively concede that numerous applications of SB 613 are valid, which severely undermines their facial challenge.

An injunction stopping enforcement of the entire law would be inappropriate. This is because, despite bringing a facial challenge, Plaintiffs have ignored the surgical aspect of SB 613—one can imagine why—and no individual Plaintiff has testified to a desire or plan for surgery. As such, Plaintiffs lack standing to challenge half of the statute. Moreover, Plaintiffs essentially concede SB 613 is appropriate for pre-pubescent children. *See* Aplts. Br. 7 ("pubertal suppression may be medically indicated *after the onset of puberty*"). That is another large category of minors for whom an injunction would be mistaken. Plaintiffs, in short, have barely *tried* to show that broad or facial injunctive relief is merited here. *See United States v. Hansen*, 599 U.S. 762, 769 (2023) ("[L]itigants mounting a facial challenge to a statute normally 'must establish that *no set of circumstances* exists under which the [statute] would be valid.'" (citation omitted)).

IV. The other injunctive factors weigh in favor of the State.

For constitutional claims, the Tenth Circuit tends to "collapse[] the first and second preliminary-injunction factors, equating likelihood of success on the merits with a demonstration of irreparable injury." *Fort Collins*, 916 F.3d at 806. As Plaintiffs are unlikely to succeed on the merits, they necessarily fail to establish irreparable harm.

The balance of the harms and the public interest similarly favors the State. These factors merge when the State is party. *Aposhian v. Barr*, 958 F.3d 969, 978 (10th Cir. 2020). "Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (citation omitted). The Act also protects Oklahoman children from experimental procedures with substantial lifetime risks. If the law were enjoined, minors in this State will continue to have their normal puberty stopped, they will be given dangerous doses of hormones, and they will have permanent surgeries removing healthy body parts. They will be subject to all the numerous risks listed above.

CONCLUSION

This Court should affirm the denial of a preliminary injunction, as the district court did not "exceed[] the bounds of permissible choice," *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (citation omitted).

STATEMENT REGARDING ORAL ARGUMENT

The already-scheduled oral argument should assist the Court in reaching a decision in this case. Not only does the case come with a voluminous record, but it also covers significant constitutional issues relating to controversial medical practices.

s/ Zach West

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CERTIFICATE OF COMPLIANCE

This response complies with the typeface requirements of Fed. R. App. P. 32 because it was prepared in a proportionally spaced font (Garamond, 14-point) using Microsoft Word 2016. The document complies with the type-volume limitation of Fed. R. App. P. 27, because it contains 12,998 words, excluding the parts exempted.

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CERTIFICATE OF DIGITAL SUBMISSION

All required privacy redactions have been made as required by 10th Cir. R. 25.5 and the ECF Manual. Additionally, this filing was scanned with Crowdstrike antivirus updated on November 15, 2023.

s/ *Zach West*
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CERTIFICATE OF SERVICE

I certify that on December 11, 2023, I caused the foregoing to be filed with this Court and served on all parties via the Court's CM/ECF filing system. No paper copies are required pursuant to 10th Cir. R. 27.2.

s/ *Zach West*
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