No. 23-466

In The Supreme Court of the United States

L.W., BY AND THROUGH HER PARENTS AND NEXT FRIENDS, SAMANTHA WILLIAMS AND BRIAN WILLIAMS, ET AL.,

Petitioners,

v.

JONATHAN SKRMETTI, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

The Fourth Circuit's en banc decision in *Kadel v. Folwell*, Nos. 22-1721, 22-1927, 2024 WL 1846802 (4th Cir. Apr. 29, 2024) (en banc), highlights the intractable conflict among the courts of appeals on the critical constitutional question cutting across all pending cases involving discrimination against transgender people: level of scrutiny. The Court should grant certiorari to resolve this cleanly presented question now.

1. The Sixth Circuit's sweeping declaration that this Court's reasoning in *Bostock v. Clayton County*, 590 U.S. 644 (2020) "applies only to Title VII," Pet. App. 43a, creates an intractable split that only this Court can resolve. Reaffirming its prior holdings, the Fourth Circuit's en banc decision in *Kadel* held that categorical exclusions of coverage for gender-affirming care in a state health plan and a Medicaid program triggered heightened equal protection scrutiny under *Bostock*. 2024 WL 1846802, at *16-17.

Even the lead *dissenting* opinion in *Kadel* agreed with the majority that discrimination based on transgender status is sex discrimination under the Equal Protection Clause. On behalf of himself and two other dissenting judges, Judge Richardson acknowledged that "several of our colleagues on other Circuits argue that *Bostock* does not apply outside of Title VII." *Kadel*, 2024 WL 1846802, at *35–36 (citing, *inter alia*, *L.W. v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023)). But, he continued, "[w]ith respect for their thoughtful opinions, I believe they are wrong," and "*Bostock*'s principles reverberate in other areas of the

law. One such area is Equal Protection." *Id.* at *36. Because both the Equal Protection Clause and Title VII "are triggered if a person's membership in the protected class was one reason—not necessarily the *only* or the *primary* reason—for their dissimilar treatment," they "share a common inquiry into but-for causation." *Id.* at *37-38. Thus, according to Judge Richardson, "discrimination on the basis of homosexual or transgender status triggers heightened scrutiny under the Equal Protection Clause . . . because *Bostock* tells us that to discriminate on the basis of these traits is necessarily to discriminate 'because of' sex.'" *Id.* at *38.

2. The Fourth Circuit's decision in *Kadel* also ensures that a circuit split will continue to persist on the more specific question of whether restrictions on gender-affirming medical care constitute sex discrimination, regardless of how the en banc Eighth Circuit rules in *Brandt v. Rutledge*, No. 4:21-cv-00450-JM, 2023 WL 4073727 (E.D. Ark. June 20, 2023), *hearing en banc granted*, *Brandt v. Griffin*, No. 23-2681 (8th Cir. Oct. 6, 2023). In opposing certiorari, Tennessee speculated that the "circuit split may soon be resolved" in the forthcoming en banc proceedings in *Brandt*. Opp. 17. But the Fourth Circuit's decision in *Kadel* means that the split presented by the Sixth Circuit's decision will not be "resolved" regardless of how the Eighth Circuit rules.

Like the original panel in *Brandt*—and unlike the Sixth Circuit here—the Fourth Circuit held that restrictions on gender-affirming care are "textbook sex discrimination", *Kadel*, 2024 WL 1846802 at *17, and not facially neutral, *contra* Pet. App. 33a. As the

Fourth Circuit explained, "[t]hose assigned female at birth can receive vaginoplasty and breast reconstruction for gender-affirming purposes, but those assigned male at birth cannot. And those assigned male at birth can receive a mastectomy for gender-affirming purposes, but those assigned female at birth cannot." *Kadel*, 2024 WL 1846802, at *16 (footnote omitted).

The Fourth Circuit also explained why *Geduldig v. Aiello*, 417 U.S. 484 (1974)—on which the Sixth Circuit relied heavily (Pet. App. 36a, 42a, 46a)—did not alter that conclusion. Although "pregnancy is often a reliable indicator of a person's sex," determining whether someone "requires pregnancy-related treatment—the issue in *Geduldig*—does not turn on or require inquiry into a protected characteristic." *Kadel*, 2024 WL 1846802, at *12. "In contrast, determining whether a treatment like reduction mammoplasty constitutes 'transsexual surgery' or whether a testosterone supplement is prescribed in connection with a 'sex change[] or modification[]' is impossible—literally cannot be done—without inquiring into a patient's sex assigned at birth and comparing it to their gender identity." *Id.* (alterations in original); *accord* Pet. App. 78a (White, J., dissenting) ("The statutes here, by contrast [to *Geduldig*], expressly reference a minor's sex and gender conformity—and use these factors to determine the legality of procedures.").

* * * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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