UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

AUTUMN CORDELLIONÉ, also known as JONATHAN RICHARDSON, Plaintiff,	)	
v.	)	Case No. 3:23-cv-135-RLY-CSW
COMMISSIONER, INDIANA DEPARTMENT OF CORRECTION, in her official capacity. Defendant.	)	

STATEMENT OF INTEREST OF THE UNITED STATES

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INTRODUCTION

Indiana recently enacted a law banning certain surgeries at Indiana Department of Corrections (DOC) facilities, *only* when those surgeries are sought by transgender people for gender-affirming purposes. House Enacted Act 1569 (HEA 1569), codified at Indiana Code § 11-10-3-1 *et seq.*, categorically eliminates the ability of transgender people in DOC custody with a diagnosis of gender dysphoria to obtain certain medically necessary care, with no consideration given to individualized medical needs. The United States respectfully submits this Statement of Interest under 28 U.S.C. § 517[1] to advise the Court of the United States' view that, by imposing a blanket ban on certain medical procedures that forecloses any individualized assessment of the medical needs of transgender people—and only transgender people—in custody, HEA 1569 violates both the Equal Protection Clause of the Fourteenth Amendment and the Eighth Amendment to the Constitution.[2]

The question of HEA 1569's constitutionality is not a close one. The Seventh Circuit has already held that laws discriminating against transgender people are subject to heightened scrutiny under the Fourteenth Amendment. *A.C. v. Metropolitan Sch. Dist. of Martinsville*, 75 F.4th 760, 772 (7th Cir. 2023), *cert. denied*, No. 23-392 (Jan. 16, 2024); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1037, 1051 (7th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1260 (2018). The Seventh Circuit has also held that blanket bans on gender-affirming surgeries in the correctional context violate the Eighth Amendment. *Fields v. Smith*, 653 F.3d 550, 553-54, 559 (7th Cir. 2011). This precedent clearly establishes that laws like HEA 1569, which categorically ban gender-affirming surgery in the carceral setting, cannot pass constitutional muster.

[1] Under 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."
[2] The United States expresses no view on any issues in this case other than those set forth herein.

INTEREST OF THE UNITED STATES

The United States has a strong interest in protecting individual and civil rights, including the rights of transgender people, and in ensuring consistent application of constitutional standards to the rights of transgender people across the country. Executive Order 13,988 recognizes the right of all people to be "treated with respect and dignity," "to access healthcare . . . without being subjected to sex discrimination," and to "receive equal treatment under the law, no matter their gender identity or sexual orientation." 86 Fed. Reg. 7,023 (Jan. 25, 2021). The United States is authorized under 42 U.S.C. § 2000h-2 to intervene in cases alleging sex-based discrimination in violation of the Fourteenth Amendment. The United States is also authorized under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 *et seq.*, to investigate conditions of confinement in correctional facilities and to bring a civil action against a state or local government engaged in a pattern or practice of unconstitutional conduct or conditions.

Consistent with these interests, the United States has intervened in litigation challenging state laws restricting gender-affirming medical care. *See, e.g.*, U.S. Compl. in Intervention, Dkt. 38-1, *L.W. v. Skrmetti*, No. 3:23-cv-00376 (M.D. Tenn. Apr. 26, 2023); U.S. Pet. for Writ of Cert., *United States v. Skrmetti*, No. 23-477 (Nov. 6, 2023). The United States has also filed numerous briefs challenging state laws banning gender-affirming medical care. *See, e.g.*, Br. for the U.S. as Amicus Curiae in Supp. Pls.-Appellees, *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, No. 23-2366 (7th Cir. Sept. 27, 2023). The United States has investigated prisons for failure to provide constitutionally sufficient medical care. *See, e.g.*, Letter from Kristen Clarke, Assistant Att'y Gen. of the United States, U.S. Dep't of Justice, and Tracy L. Wilkison, Acting United States Att'y, to Wade Horton, County Administrative Officer, and Sheriff Ian Parkinson, San Luis Obispo Co. Sheriff's Office (Aug. 31, 2021). The United States has also filed briefs objecting to prisons'

failure to provide adequate medical care to transgender people in custody. *See, e.g.*, U.S. Statement of Interest, Dkt. 69, *Doe v. Ga. Dep't of Corr.*, Case No. 1:23-cv-05578-MLB (N.D. Ga. Jan. 8, 2024).

BACKGROUND

I. Transgender People and Gender-Affirming Care

Transgender people are individuals whose gender identity does not conform with their sex assigned at birth.[3] A transgender man is an individual assigned a female sex at birth but whose gender identity is male; a transgender woman is an individual assigned a male sex at birth but whose gender identity is female. A non-transgender, or cisgender, individual has a gender identity that corresponds with the sex the individual was assigned at birth. Gender identity is innate.[4]

According to the American Psychiatric Association's Diagnostic & Statistical Manual of Mental Disorders,[5] "gender dysphoria" is the diagnostic term for "clinically significant distress" experienced by *some* transgender people resulting from the incongruence between their gender identity and the sex assigned at birth.[6] To be diagnosed with gender dysphoria, the incongruence between one's sex assigned at birth and one's gender identity must persist for at least six months and be accompanied by clinically significant distress or impairment in occupational, social, or other important areas of functioning.[7] The inability of people diagnosed with gender dysphoria to live consistent with their gender identity can significantly undermine their overall health and wellbeing.[8] Delay or denial of medically necessary treatment for gender dysphoria is likely to

[3] Expert Rep. of Randi Ettner, Ph.D., Dkt. 37-1 [hereinafter Ettner Rep.], at 3; Expert Rep. of Loren S. Schechter, M.D., Dkt. 37-2 [hereinafter Schechter Rep.], at ¶ 20; *see also Karnoski v. Trump*, 926 F.3d 1180, 1187 n.1 (9th Cir. 2019).
[4] *See* Ettner Rep. at 3-6.
[5] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed., Text Revision 2022) [hereinafter DSM-5-TR].
[6] DSM-5-TR at 511-15; Ettner Rep. at 4; Schechter Rep. at ¶ 21.
[7] DSM-5-TR at 511-15; Ettner Rep. at 4, 5.
[8] Ettner Rep. at 15.

create or exacerbate other medical issues, such as anxiety, depression, and suicidality.[9] Transgender people who do not receive medically necessary gender-affirming care face increased rates of victimization, substance abuse, depression, anxiety, and suicidality.[10] According to the American Medical Association, "[e]very major medical association in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people."[11]

As with all medical care, treatment for gender dysphoria varies based on the specific medical needs of each patient. Appropriate treatment may include supportive therapy and social transition (e.g., dressing and presenting consistent with a person's gender identity).[12] For individuals with persistent gender dysphoria, appropriate treatment may include hormone therapy (e.g., administration of testosterone to a transgender man).[13] For some individuals with severe and persistent gender dysphoria, hormone therapy may not be sufficient.[14] For these individuals,

[9] DSM-5-TR at 511-15 ("[A]dults with gender dysphoria before gender-affirming treatment . . . are at increased risk for mental health problems including suicidal ideation, suicide attempts, and suicides."); Ettner Rep. at 15, 16; Schechter Rep. at ¶ 56; *see also* Substance Abuse and Mental Health Services Administration (SAMHSA), *Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGTBQI+ Youth*, SAMHSA Publication No. PEP22-03-12-001 (2023) at 14, https://perma.cc/2SJU-8K66 ("Withholding timely gender-affirming medical care when indicated . . . can be harmful because these actions may exacerbate and prolong gender dysphoria." (footnotes omitted)).

[10] Ettner Rep. at 15, 16; *see also* Jack L. Turban, et al., *Access to Gender-Affirming Hormones During Adolescence and Mental Health Outcomes Among Transgender Adults*, 17(1) PLoS ONE 1, 1-15 (2022); Jack L. Turban, et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145(2) Pediatrics 1, 1-8 (2020); Nat'l Academies Scis., Eng'g, and Med., *Understanding the Well-Being of LGBTQI+ Populations* 363-364 (2020).

[11] James L. Madara, *AMA to States: Stop Interfering in Health Care of Transgender Children*, AMA (Apr. 26, 2021), https://perma.cc/7JYQ-FW2P (letter from CEO) [hereinafter *AMA Statement*]; *see also* American Academy of Family Physicians et al., *Frontline Physicians Call on Politicians to End Political Interference in the Delivery of Evidence Based Medicine*, (May 15, 2019), https://perma.cc/ZP4T-DN7T (statement issued on behalf of American Academy of Family Physicians, American Academy of Pediatrics, American College of Obstetricians and Gynecologists, American College of Physicians, American Osteopathic Association, and American Psychiatric Association).

[12] Ettner Rep. at 7, 8.

[13] Ettner Rep. at 8, 9.

[14] Ettner Rep. at 9.

surgical intervention may be medically necessary.[15] And, as with all medical care, a patient must meet certain criteria to be eligible to receive gender-affirming care, including surgery.[16]

Gender-affirming care is grounded in empirical evidence,[17] including both clinical and research evidence that evaluates the risks and benefits of providing care (including surgery), as well as the risks of not providing care.[18] The evidence is comparable in quantity and quality to evidence relied on to support many other medical interventions.[19] Research supports the efficacy and safety of this care, and the medical techniques used in gender-affirming surgery are well-established.[20]

Prior to HEA 1569's passage, DOC adhered to guidelines published by well-established medical organizations providing a framework for treating gender dysphoria,[21] as well as guidance promulgated by the National Commission on Correctional Health Care (NCCHC) concerning the provision of gender-affirming care in corrections facilities.[22] As of November 29, 2023, DOC policy identified the medical guidelines as reflecting a "professional consensus" about the treatment of gender dysphoria, including the medical necessity of gender-affirming surgery in some circumstances.[23] Prior to the passage of HEA 1569, the DOC approved gender-affirming

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[15] *Id.*; *see also, e.g.*, *AMA Statement* ("[M]edically necessary services that affirm gender or treat gender dysphoria may include . . . gender-affirming surgeries.").
[16] *See, e.g.*, Ettner Rep. at 23-26 & n.5.
[17] Ettner Rep. at 6, 11-13.
[18] Ettner Rep. at 9-13; Schechter Rep. at ¶¶ 40, 41, 44-46.
[19] Schechter Rep. at ¶¶ 48, 49.
[20] *Id.* (explaining that "urethroplasties, orchiectomies, skin grafts, and mastectomies are all accepted techniques for congenital, oncological, and traumatic conditions").
[21] *See, e.g.*, Dep. Tr. of Adrienne Bedford, Chief Medical Officer of Indiana Department of Corrections, Dkt. 37-3 [hereinafter Bedford Tr.], at 43:9-13, 49:24-50:3 (referring to standards of care promulgated by the World Professional Association for Transgender Health (WPATH)); *see also* Wylie Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. of Clinical Endocrinology & Metabolism 3869 (2017), https://perma.cc/8R3P-6NQY.
[22] *See, e.g.*, Bedford Tr. at 18:21-19:6 (referring to NCCHC guidance); *see also* NCCHC, *Position Statement: Transgender and Gender Diverse Health Care in Correctional Settings* (Nov. 2020), https://perma.cc/P8ZJ-B6AM ("Evaluations to determine the medical necessity of gender-affirming surgical procedures will be performed on a case-by-case basis, applying a careful risk, benefit, and alternatives analysis. Gender-affirming procedures will be provided when determined to be medically necessary for a patient according to accepted medical standards.").
[23] Bedford Tr. at 32:22-33:2 (concerning policy in effect on date of deposition, Nov. 29, 2023); *id.* at 53:10-19 (same).

surgery for two transgender people in DOC custody as medically necessary treatment for their gender dysphoria.[24]

II. House Enacted Act 1569

On April 20, 2023, Governor Eric J. Holcomb signed HEA 1569 into law, with an effective date of July 1, 2023. HEA 1569 added Section 11-10-3-3.5(a) to the Indiana code and amended portions of Section 11-10-3-1.

A. The Statute's Text

HEA 1569 provides that the DOC "may not authorize the payment of any money, the use of any state resources, or the payment of any federal money administered by the state to provide or facilitate sexual reassignment surgery to an offender patient." Ind. Code § 11-10-3-3.5(a).[25]

HEA 1569 defines "sexual reassignment surgery" as:

> performing any of the following surgical procedures for the purpose of attempting to alter the appearance of, or affirm the offender patient's perception of, his or her gender or sex, if that appearance or perception is inconsistent with the offender patient's sex:
>
> (A) Surgeries that sterilize, including castration, vasectomy, hysterectomy, oophorectomy, orchiectomy, and penectomy[;]
>
> (B) Surgeries that artificially construct tissue with the appearance of genitalia that differs from the offender patient's sex, including metoidioplasty, phalloplasty, and vaginoplasty[; or]
>
> (C) Removing any healthy or non-diseased body part or tissue.

Ind. Code § 11-10-3-1(6). The statute does not define "gender" or "sex." In context, the statute appears to be using the term "sex" to refer to an individual's sex assigned at birth.

Put simply, HEA 1569 categorically prohibits certain medical treatments *only* when offered as gender-affirming care for transgender persons, without regard for their individual medical

[24] *Id.* at 45:23-46:6.

[25] The statute contains an exception for "offender patients approved by the department for sexual reassignment surgery prior to July 1, 2023." Ind. Code § 11-10-3-3.5(b).

needs. For example, a non-transgender woman (i.e., assigned female at birth) may receive a hysterectomy as a medically necessary treatment for endometriosis, but a transgender man (i.e., assigned female at birth) may *not* receive a hysterectomy as a medically necessary treatment for gender dysphoria.

B. Circumstances Leading up to the Passage of HEA 1569

HEA 1569 was one of at least four Indiana bills targeting transgender people passed during the 2022 and 2023 legislative sessions. These include Senate Enrolled Act 480, prohibiting gender-affirming care for minors;[26] House Enrolled Act 1041, prohibiting transgender girls from participating on girls' sports teams; and House Enrolled Act 1608, requiring schools to notify a student's parents of any change to a student's name or pronouns.

HEA 1569's author Peggy Mayfield claimed, contrary to DOC's position prior to the law's passage, that "[t]here are no generally accepted professional medical standards for using [gender-affirming] surgery as a treatment."[27] Another sponsor claimed that HEA 1569 "is focused solely on unproven, irreversible, and life-altering surgeries."[28]

DISCUSSION

Under existing Seventh Circuit precedent, blanket bans on gender-affirming surgeries for transgender people in custody, without any individualized consideration of medical need, violate the Equal Protection Clause of the Fourteenth Amendment, *see A.C.*, 75 F. 4th at 772; *Whitaker*,

[26] Most of Senate Enrolled Act 480's prohibitions were enjoined by another court in this district. *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, No. 1:23-CV-00595-JPH-KMB, 2023 WL 4054086 (S.D. Ind. June 16, 2023), *appeal filed*, No. 23-2366 (7th Cir. July 12, 2023).

[27] *Corrections and Criminal Law Senate Committee Meeting*, 2023 Leg., 123rd Gen. Assemb. at 1:36:25 (Ind. Mar. 21, 2023), https://iga.in.gov/session/2023/video/committee_corrections_and_criminal_law_3000/ (statement of Rep. Peggy Mayfield, bill author).

[28] Senate Session, 2023 Leg., 123rd Gen. Assemb. at 36:59 (Ind. Mar. 30, 2023), https://iga.in.gov/session/2023/video/senate (statement of Sen. Stacey Donato, one of bill's three sponsors). In addition, at least one legislator warned the Senate that HEA 1569 "is a direct violation of the Eighth Amendment." *Senate Session*, 2023 Leg., 123rd Gen. Assemb. at 48:00 (Ind. Mar. 30, 2023), https://iga.in.gov/session/2023/video/senate (statement of Sen. Greg Taylor).

858 F.3d at 1051, and the Eighth Amendment, *see Fields*, 653 F.3d at 553-54, 559. Such bans violate the Equal Protection Clause because they discriminate based on sex and on membership in a class that is at least quasi-suspect and are not substantially related to an important governmental interest.[29] They also constitute cruel and unusual punishment under the Eighth Amendment because the failure to provide adequate treatment for gender dysphoria with no regard to individualized circumstances constitutes deliberate indifference to a serious medical condition.

By prohibiting only those well-established treatments aimed at treating gender dysphoria, while allowing the same surgeries to treat other serious medical needs, HEA 1569 violates equal-protection principles. Moreover, the statute forecloses DOC officials from providing gender-affirming surgery where it is medically necessary based on an individualized assessment of medical needs and, as such, amounts to deliberate indifference to a substantial risk of harm from inadequately treated gender dysphoria. While the United States takes no position on whether Ms. Cordellioné requires such treatment, a blanket ban on this category of care violates the Constitution.

I. HEA 1569's Blanket Ban on Certain Gender-Affirming Care for Transgender People in Custody, Without Any Individualized Assessment of Medical Need, Violates the Equal Protection Clause of the Fourteenth Amendment.

A. HEA 1569's Blanket Ban on Gender-Affirming Medical Care Warrants Heightened Scrutiny Under the Equal Protection Clause.

Heightened scrutiny applies to HEA 1569 because the statute discriminates based on sex and discriminates against transgender people, who constitute at least a quasi-suspect class.

1. Laws that Discriminate Based on Sex Are Subject to Heightened Scrutiny.

"[*A*]*ll* gender-based classifications today warrant heightened scrutiny." *United States v. Virginia*, 518 U.S. 515, 555 (1996) (emphasis added) (citation and internal quotation marks

[29] Indeed, such bans fail even rational-basis review. *See infra* note 39.

omitted). The Seventh Circuit has applied heightened scrutiny to laws discriminating against transgender people because the discrimination is based on sex. *Whitaker*, 858 F.3d at 1051 (finding that school district's bathroom policy prohibiting transgender boy from using boys' restroom failed heightened scrutiny); *accord A.C.*, 75 F.4th at 772 (applying *Whitaker*).

As explained in further detail below, the Seventh Circuit's reasoning in *Whitaker* and *A.C.* applies to blanket bans on gender-affirming care. This Court should therefore follow other federal courts, including one in this district, subjecting bans on gender-affirming care to heightened scrutiny because they discriminate based on sex. *See K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, No. 1:23-CV-00595-JPH-KMB, 2023 WL 4054086, at *8 (S.D. Ind. June 16, 2023) (applying heightened scrutiny to Indiana's ban on gender-affirming care for minors), *appeal filed*, No. 23-2366 (7th Cir. July 12, 2023); *see also Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022) (same for Arkansas's ban);[30] *Poe v. Labrador*, No. 1:23-CV-00269-BLW, 2023 WL 8935065, at *14 (D. Idaho Dec. 26, 2023) (same for Idaho's ban), *appeal docketed*, No. 24-142 (9th Cir. Jan 9, 2024); *but see L.W. v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023) (applying rational-basis review to Kentucky's and Tennessee's bans on gender-affirming care for minors), *pets. for cert. filed*, Nos. 23-466 (Nov. 1, 2023), 23-477 (Nov. 6, 2023); *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023) (same for Alabama's ban), *pet. for reh'g filed*, No. 22-11707 (Sept. 11, 2023).

2. HEA 1569 Discriminates Based on Sex.

HEA 1569 discriminates based on sex in two ways. First, it discriminates based on sex assigned at birth. Second, it discriminates based on transgender status, which inherently involves

[30] After a bench trial on remand resulted a permanent injunction, *Brandt v. Rutledge*, No. 4:21-cv-00450 JM, 2023 WL 4073727 (E.D. Ark. June 20, 2023), the Eighth Circuit recently granted the defendants' petition for initial hearing en banc, *see* Order, *Brandt v. Griffin*, No. 23-2681 (8th Cir. Oct. 6, 2023).

sex discrimination. It is therefore subject to heightened scrutiny.

a. HEA 1569 Discriminates Based on Sex Assigned at Birth.

HEA 1569 facially discriminates based on sex because an individual's "sex at birth determines whether or not the [individual] can receive certain types of medical care." *See Brandt*, 47 F.4th at 669. As with Indiana's statute banning gender affirming care for adolescents, which a court in this district enjoined, "sex-based classifications are not just present in [the statute's] prohibitions; they're determinative." *See K.C.*, 2023 WL 4054086, at *8 (applying intermediate scrutiny to Indiana ban on gender-affirming care for transgender youth and enjoining most of Senate Enrolled Act 480).

HEA 1569 provides that the DOC "may not authorize the payment of any money . . . to provide or facilitate sexual reassignment surgery" for an individual in its custody. Ind. Code § 11-10-3-3.5(a). The statute defines "sexual reassignment surgery" as certain enumerated surgical procedures performed "for the purpose of attempting to alter the appearance of, or affirm the offender patient's perception of, his or her gender or sex, *if that appearance or perception is inconsistent with the offender patient's sex* . . . ." Ind. Code § 11-10-3-1(6) (emphasis added). HEA 1569 thus explicitly makes the availability of medical procedures dependent on the person's sex.

Because the prohibition in HEA 1569 "cannot be stated without referencing sex," it is "inherently based upon a sex" classification. *See Whitaker*, 858 F.3d at 1051; *accord A.C*, 75 F.4th at 772.[31] In crafting the statute, the legislature could not "writ[e] out instructions" to identify the banned medical procedures "without using the words man, woman, or sex (or some synonym)." *See Bostock v. Clayton County*, 141 S. Ct. 1731, 1746 (2020); *see also A.C.*, 75 F.4th at 769 ("*Bostock* thus provides useful guidance [in the context of a bill limiting transgender students' to

[31] Indeed, in its mere two pages of legislative text, HEA 1569 uses the term "sex" or "sexual" six times.

bathrooms], even though the particular application of sex discrimination it addressed was different."). HEA 1569 defines "sexual reassignment surgery" in sex-based terms, and "then phrases its prohibition in terms that repeatedly rely on those definitions." *See K.C.*, 2023 WL 4054086, at *8; *see also Hecox v. Little*, 79 F.4th 1009, 1021 (9th Cir. 2023) (concluding that Idaho's ban on transgender girls and women in women student athletics "certainly classifies on the basis of sex"). *But see Skrmetti*, 83 F.4th at 481; *Eknes-Tucker*, 80 F.4th at 1227-28.

b. HEA 1569 Discriminates Based on Transgender Status, Which Inherently Involves Sex Discrimination.

HEA 1569 also facially discriminates based on transgender status, which the Seventh Circuit has recognized "is a form of sex discrimination." *See A.C.*, 75 F.4th at 769. The very purpose of gender-affirming care is to enable a transgender person to "affirm the . . . patient's perception of [] his or her" gender identity when that identity "is inconsistent with the . . . patient's sex" assigned at birth. *See* Ind. Code § 11-10-3-1(6). By categorically targeting medical care that only a transgender person would seek, HEA 1569 discriminates based on transgender status. *Cf. Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("[a] tax on wearing yarmulkes is a tax on Jews" because such skullcaps are worn "exclusively or predominately" by Jewish people); *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (a defendant "cannot be permitted to use a technically neutral classification as a proxy to evade [a] prohibition of intentional discrimination.").

As the Supreme Court has recognized, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Bostock*, 140 S. Ct. at 1741. HEA 1569 thus "unavoidably discriminates against persons with one sex identified at birth" but who identify with a different sex "today." *See id.* at 1746. That inescapable feature of transgender discrimination inheres in HEA 1569 because pursuant to the law, as in *K.C.*, "a

medical provider can't know whether a gender *transition* is involved without knowing the patient's sex and the gender associated with the goal of the treatment." 2023 WL 4054086, at *8 (emphasis in original).

Sex classification also is inherent in HEA 1569's differential treatment of transgender individuals based on their gender nonconformity. The Supreme Court has recognized that differential treatment based on gender stereotypes is a sex classification subject to heightened scrutiny. *J.E.B. v. Alabama*, 511 U.S. 127, 136-38 (1994); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). The Seventh Circuit has, in turn, held that discrimination based on transgender status inherently entails such classification because, "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Whitaker*, 858 F.3d at 1048. Discrimination based on gender nonconformity appears in HEA 1569's plain text. The statute prohibits treatments based on whether they are performed "for the purpose of attempting to alter the appearance of, or affirm the offender patient's perception of, his or her gender or sex, if that appearance or perception is *inconsistent with* the offender patient's sex" assigned at birth. Ind. Code § 11-10-3-1(6) (emphasis added).

Said differently, HEA 1569 "treats transgender [people,] . . . who fail to conform to sex-based stereotypes associated with their assigned sex at birth, differently" than non-transgender people, who do. *See Whitaker*, 858 F.3d at 1051.

3. Because HEA 1569 Discriminates against Transgender People, who Independently Constitute at Least a Quasi-Suspect Class, It is Subject to Heightened Scrutiny.

Transgender people constitute a class that is at least quasi-suspect. The Supreme Court has analyzed four factors to determine whether a group constitutes a "suspect" or "quasi-suspect" class: (1) whether the class historically has faced discrimination, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986); (2) whether the class has a defining characteristic that "frequently bears no relation to

[the] ability to perform or contribute to society," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985) (citation omitted); (3) whether the class has "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Lyng*, 477 U.S. at 638; and (4) whether the class lacks political power, *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987).

Several federal courts have concluded that transgender people "constitute at least a quasi-suspect class." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610 (4th Cir. 2020) (collecting district court cases reaching same conclusion), *cert. denied*, 141 S. Ct. 2878 (2021); *see also, e.g.*, *Hecox*, 79 F.4th at 1026 ("[H]eightened scrutiny applies to laws that discriminate on the basis of transgender status [because] gender identity is at least a quasi-suspect class." (citation and internal quotations marks omitted)); *Brandt*, 47 F.4th at 670 n.4 (finding no "clear error in the district court's factual findings underlying" the legal conclusion that transgender people constitute a quasi-suspect class though not relying on that theory to affirm); *but see Skrmetti*, 83 F.4th at 486-88 (finding that transgender people do not constitute a quasi-suspect class).

First, "[t]here is no doubt" that transgender people, as a class, "historically have been subjected to discrimination based on their gender identity, including high rates of violence and discrimination in education, employment, housing, and healthcare access." *Grimm*, 972 F.3d at 611 (citation omitted); *see also Whitaker*, 858 F.3d at 1051 ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.").

Second, whether a person is transgender bears no relation to that person's ability to contribute to society. As the Fourth Circuit in *Grimm* explained, "[s]eventeen of our foremost medical, mental health, and public health organizations agree that being transgender implies no impairment in judgment, stability, reliability, or general social or vocational capabilities." 972 F.3d at 612 (citation and internal quotation marks omitted).

Third, transgender people share "obvious, immutable, *or* distinguishing characteristics that define them as a discrete group . . . ." *See Bowen*, 483 U.S. at 602 (emphasis added) (quoting *Lyng*, 477 U.S. at 638). Transgender people are distinguishable as a group because their gender identities do not align with their sex assigned at birth. Courts have also held that transgender status is immutable because it "is not a choice" but is "as natural and immutable as being cisgender." *Grimm*, 972 F.3d at 612-13; *see also, e.g.*, *M.A.B. v. Board of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 720-21 (D. Md. 2018) (collecting district court cases).[32]

Finally, transgender people have not "yet been able to meaningfully vindicate their rights through the political process." *Grimm*, 972 F.3d at 613. "Even considering the low percentage of the population that is transgender," they are "underrepresented in every branch of government." *Id.* (citing relevant data). The proliferation of laws and governmental policies targeting transgender people for discrimination attests that transgender people lack the power necessary to protect themselves in the political process.[33] That the position of *some* transgender people in society "has improved markedly in recent decades," *see Frontiero v. Richardson*, 411 U.S. 677, 685-86 (1973), does not undermine finding that transgender people as a class lack political power. The same was true about women when the Supreme Court began treating sex as a quasi-suspect classification. *See id.* Nor does the filing of a brief by United States in this case and elsewhere prove that transgender people now have political clout sufficient to defend themselves against discriminatory laws; instead, it underscores how dire the situation has become.

All four factors confirm that transgender persons constitute at least a quasi-suspect class. HEA 1569 is therefore subject to heightened scrutiny because it discriminates against this class.

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[32] *See also* Ettner Rep. at 3 ("A transgender man cannot simply turn off his gender identity like a switch, any more than anyone else could.").

[33] *E.g.*, *Anti-Trans Bills Tracker*, TransLegislation.com (last visited Feb. 20, 2024), https://perma.cc/L2ZP-XEGL (listing 85 anti-transgender laws enacted in 2023).

4. HEA 1569 is Not Exempt from Heightened Scrutiny for Any Other Reason.

In the *K.C.* litigation before the Seventh Circuit, Indiana raised arguments to exclude the state's ban on gender-affirming care for adolescents from heightened scrutiny under the Equal Protection Clause. *See* Br. for Defs.-Appellants, *K.C.*, No. 23-2366 (Aug. 21, 2023), at 30-39. Those arguments mirrored the reasoning employed by two other circuits which applied rational-basis review to similar adolescent bans. *Skrmetti*, 83 F.4th at 480-82; *Eknes-Tucker*, 80 F.4th at 1228-30. To the extent that Indiana may rely on similar arguments in this litigation, they have no merit. *Skrmetti* and *Eknes-Tucker* cannot be reconciled with the Seventh Circuit's decisions in *Whitaker* and *A.C.*, and as discussed below, were wrongly decided. *See also* U.S. Pet. for Writ of Cert., *United States v. Skrmetti*, No. 23-477.

First, Indiana argued that when that a statute applies equally to men and women, the law is exempt from heightened scrutiny. Br. for Defs.-Appellants, *K.C.*, at 32; *see also Skrmetti*, 83 F.4th at 480 (adopting this argument); *Eknes-Tucker*, 80 F.4th at 1228 (adopting this argument). But a law such as HEA 1569 that discriminates against *both* transgender men and women "*doubles* rather than eliminates" liability for sex discrimination. *Bostock*, 141 S. Ct. at 1742 (emphasis added). As with Title VII, which "protect[s] individuals of both sexes from discrimination" even if an employer "treat[s] men and women as groups more or less equally," *id.* at 1741, the right to equal protection is a "personal right" that considers the treatment of *individuals* as individuals and not only as part of a (favored or disfavored) group, *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 230 (1995) (the Fourteenth Amendment "protect[s] *persons*, not *groups*" (emphasis in original)); *Miller v. Johnson*, 515 U.S. 900, 911 (1994) (similar).[34] The Seventh Circuit reached

[34] The Sixth and Eleventh Circuits mistakenly concluded that *Bostock* (a Title VII case) has no bearing on the proper interpretation of the Equal Protection Clause. *See Skrmetti*, 83 F.4th at 484; *Eknes-Tucker*, 80 F.4th at 1229. *Skrmetti* and *Eknes-Tucker* failed to explain why or how any difference in language between Title VII and the Equal Protection

the same conclusion when analyzing bills restricting bathroom use to a person's sex assigned at birth, *A.C.*, 75 F. 4th at 764; *Whitaker*, 858 F.3d at 1039, as did the district court in *K.C.* when analyzing Indiana's ban on gender-affirming care for minors. 2023 WL 4054086 at *9 ("While [the statute at issue] prohibits both male and female minors from using puberty blockers and cross-sex hormone therapy for gender transition, it nonetheless draws sex-based classifications . . . .").

Second, Indiana argued that facial classifications purportedly based on physiological differences between sexes may exempt a statute from intermediate scrutiny.[35] Br. for Defs.-Appellants, *K.C.*, at 34; *see also Skrmetti*, 83 F.4th at 481 (adopting this argument); *Eknes-Tucker*, 80 F.4th at 1228 (adopting this argument). But intermediate (and not strict) scrutiny exists precisely *because* "[p]hysical differences between men and women . . . are enduring . . . ." *Virginia*, 518 U.S. at 533. Said differently, equal-protection analysis already accounts for physiological differences between sexes at the second step of the intermediate-scrutiny inquiry, which considers whether a defendant's justification is "exceedingly persuasive." *Id.* (citation omitted). Applying *Virginia*, the *K.C.* district court reached the same conclusion when analyzing Indiana's ban on gender-affirming care for transgender adolescents. 2023 WL 4054086, at *9 (rejecting Indiana's argument that when "medical procedures take account of basic, immutable biological differences," then heightened scrutiny does not apply); *see also id*. ("While [the ban] prohibits both male and female minors from using puberty blockers and cross-sex hormone therapy for gender transition, it nonetheless draws sex-based classifications under current Seventh Circuit precedent."). The

Clause would render a classification sex-based under the former but sex-neutral under the latter. *Bostock*'s core insight—that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex," rings just as true in the equal-protection context. 140 S. Ct. at 1741. *See also A.C.*, 75 F.4th at 769 ("*Bostock* strengthens *Whitaker*'s conclusion that discrimination based on transgender status is a form of sex discrimination . . . .").

[35] As noted above, HEA 1569 does not define "sex," but appears to be referring to sex assigned at birth. *See* Ind. Code § 11-10-3-1(6). HEA 1569 prohibits certain medical treatment only the treatment's purpose is to affirm an "appearance or perception [of gender identity that] is inconsistent with the . . . patient's sex." *Id.*

suggestion that heightened scrutiny is inapplicable to sex-based classifications in the medical context because of "biological" differences between sexes "conflates the classifications drawn by the law with the state's justification for it." *Brandt*, 47 F. 4th at 670.

Third, the Court should reject any argument from Indiana that *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), and *Geduldig v. Aiello*, 417 U.S. 484 (1974), exempt a ban or restriction on gender-affirming care from heightened scrutiny. *See* Br. for Defs.-Appellants, *K.C.*, at 32; *see also Skrmetti*, 83 F.4th at 481-82 (adopting this argument); *Eknes-Tucker*, 80 F.4th at 1228 (adopting this argument). Relying on *Geduldig*, the Supreme Court in *Dobbs* reasoned that the challenged law there did not trigger heightened scrutiny on the ground that "a State's regulation of abortion is not a sex-based classification" under the Fourteenth Amendment's Equal Protection Clause, and that "regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny" unless the regulation is pretext for discrimination. 597 U.S. at 235-36. But "*Geduldig* was about pregnancy, which doesn't always trigger heightened scrutiny" because pregnancy is an "objectively identifiable physical condition and not necessarily a proxy for sex." *K.C.*, 2023 WL 4054086, at *8 (rejecting Indiana's reliance on *Geduldig* and its application to Indiana's ban on gender-affirming for youth). In contrast, Indiana's ban on gender-affirming care for individuals in custody prohibits certain medical procedures "only when used for gender transition, which in turn requires sex-based classifications." *See id.* (relying on *Whitaker*, 858 F.38 at 1051, to find that the ban "cannot be stated without referencing sex"). Unlike laws regulating abortion, HEA 1569 regulates medical procedures that *all* individuals can undergo, but restricts them only for transgender people in custody.

And as the Ninth Circuit recently explained in affirming a preliminary injunction against Idaho's ban on transgender women and girls in women's student athletics, *Geduldig* itself invokes heightened scrutiny for distinctions that are "'mere pretexts designed to effect an invidious discrimination.'" *Hecox*, 79 F.4th at 1025 (quoting *Geduldig*, 417 U.S. at 496 n.20). The court in *Hecox* reasoned that Idaho's definition of "biological sex" was specifically designed to exclude transgender women—"a classification that *Geduldig* prohibits." *Id.* The prohibition in HEA 1569 on certain gender-affirming care for individuals in custody similarly prohibits a treatment that only transgender people would seek; thus, *Geduldig* hurts rather than helps the State's argument.

B. HEA 1569's Blanket Ban on Certain Gender-Affirming Care Cannot Survive Intermediate Scrutiny.

To withstand intermediate scrutiny, a defendant must show that the challenged action "serves important governmental objectives" and that the "discriminatory means employed are substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 524 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (requiring an "exceedingly persuasive justification" for a sex-based classification)); *see also Craig v. Boren*, 429 U.S. 190, 197 (1976). "The burden of justification is demanding and it rests entirely on the State." *Virginia*, 518 U.S. at 533. Heightened scrutiny provides enhanced protection where there is a greater danger that a legal classification results from impermissible prejudice or stereotypes. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

Moreover, the "justification must be genuine, not hypothesized or invented *post hoc* in response to litigation," and it "must not rely on overbroad generalizations . . . ." *Virginia*, 518 U.S. at 533; *see also Hecox*, 79 F.4th at 1030 (finding the sweeping prohibition on transgender female athletes too broad to satisfy heightened scrutiny). A classification does not withstand heightened scrutiny when "the alleged objective" of the classification differs from the "actual purpose." *Miss.*

Univ. for Women, 458 U.S. at 730.

Indiana's asserted justification for HEA 1569's prohibition—that gender-affirming surgery constitutes "unproven" medical care—cannot withstand heightened scrutiny for three reasons. First, Indiana cannot substantiate that this care is unproven. Second, Indiana's claimed interests appear pretextual. Third, Indiana cannot show that this ban is substantially related to its claimed interests.

1. Indiana Cannot Substantiate Its Claimed Interest.

The United States does not dispute that regulating "unproven" medical treatments is an important government interest. But Indiana cannot support its assertion that gender-affirming care is experimental and unsafe. While in some circumstances courts defer to a government party's definition of its own interests, such deference cannot overcome Indiana's complete lack of substantiation for its claimed interest here. *See Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (acknowledging a "tradition of giving a degree of deference to a university's academic decisions," while making clear that such deference must be applied "within constitutionally prescribed limits"); *Miller-El v. Cockrell*, 537 U.S. 322, 324 (2003) ("[D]eference does not imply abandonment or abdication of judicial review.").

As explained *supra*, substantial research supports gender-affirming care's efficacy and safety. The American Medical Association, for example, acknowledges that "standards of care and accepted medically necessary services that affirm gender or treat gender dysphoria may include mental health counseling, non-medical social transition, gender-affirming hormone therapy, and/or gender-affirming surgeries."[36] *See also Fields*, 653 F.3d at 553-54, 559 (recognizing, in challenge to ban on certain gender-affirming care in the Wisconsin Department of Corrections, that the

[36] *AMA Statement*.

"accepted standards of care" for treating gender dysphoria may require gender-affirming surgery in some circumstances); Bedford Tr. at 43:9-13 (agreeing that DOC followed established standards in determining whether gender-affirming surgery is appropriate for a particular patient); *cf. Kadel v. Folwell*, 620 F. Supp. 3d 339, 373 (M.D.N.C. 2022) (citing concession by North Carolina's witness defending categorical exclusion of insurance coverage for certain gender-affirming treatments, that "denying endocrine treatment or surgical treatment" to all transgender people would be a "draconian" position), *appeal filed*, No. 22-1721 (4th Cir. July 8, 2022). Clinicians have used these guidelines, which are peer-reviewed and based on reviews of scientific literature, for decades.[37] *Cf. Fain v. Crouch*, 618 F. Supp. 3d 313, 329 (S.D.W. Va. 2022) (finding that assertion by West Virginia's proffered expert that there is a lack of evidence regarding gender-affirming surgery was "inconsistent with the body of literature on this topic"), *appeal filed*, No. 22-1927 (4th Cir. Sept. 6, 2022). That HEA 1569 permits health care providers to administer the enumerated procedures (such as vasectomies and hysterectomies) as long as the purpose is not to affirm the person's gender identity implicitly acknowledges the procedures' longstanding safety.

As explained above, DOC's own policy, at least prior to HEA 1569's passage, contradicts the premise that the gender-affirming care is "unproven." And a categorical ban on gender-affirming surgery regardless of medical necessity and appropriateness based on an individual

[37] *See* Meredithe McNamara, M.D., M.S., et al., "A Critical Review of the June 2022 Florida Medicaid Report on the Medical Treatment of Gender Dysphoria," at 5 (July 8, 2022), https://perma.cc/2LLH-EDYU. Some of the research supporting gender-affirming care comes from observational studies recording patients in real-world settings, such as a cohort of clinic patients. *Id*. at 13. Though such studies are coded as "low quality," the classification is a technical term that does not connote a lack of evidence. The term contrasts with randomized controlled trials, which are coded as "high quality." *Id.* at 13, 14. To subject patients to randomized trials in certain circumstances, however, would violate medical ethics. *Id.* at 14, 15 (explaining that it would be unethical to conduct such a trial on the treatment of juvenile diabetes by denying some participants insulin). Observational studies provide the framework for other medical guidelines, including the prevention and treatment of cardiovascular disease. *Id.* at 15, 16 (explaining that the American College of Cardiology and the American Heart Association's guidelines on the treatment of cholesterol to prevent heart disease are based in part on "a great deal of observational evidence, including studies technically ranked as 'low quality'").

assessment is not consistent with any established standard of care. The refusal to consider medical needs, no matter how severe, underscores HEA 1569's exclusive focus on transgender status and disregard for distinctions that address individual medical circumstances.

2. Indiana's Claimed Interest May be Pretextual.

Indiana's failure to substantiate its claimed interest, in conjunction with HEA 1569's text and the circumstances of HEA 1569's passage, suggest that Indiana's claimed interest is not "genuine," *Virginia*, 518 U.S. at 533, but rather is a pretext for discrimination. Under any level of scrutiny, a challenged statute cannot "impos[e] a broad and undifferentiated disability on a single named group." *Romer v. Evans*, 517 U.S. 620, 632 (1996). The motivation for a challenged statute or government action may be evidenced by lawmakers' contemporaneous statements and the historical context of the action. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977); *see also Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1915 (2020) (applying *Arlington Heights* factors to assess equal-protection animus claim).

The text of HEA 1569 expressly applies only to people in custody whose gender identity differs from their sex assigned at birth. By barring specified forms of health care only for people in custody whose gender identity differs from their sex assigned at birth, HEA 1569 imposes "a broad and undifferentiated disability on a single named group." *See Romer*, 517 U.S. at 632; *see also Labrador*, 2023 WL 8935065, at *14 (finding that Idaho's claimed interest of protecting vulnerable youth from harm in banning gender-affirming care for adolescents was pretextual, as the statute "allows the same treatments for cisgender minors that are deemed unsafe and thus banned for transgender minors"). Despite the absence of the word "transgender" in the statute, HEA 1569 indeed "seems inexplicable by anything but animus toward" transgender people. *See Romer*, 517 U.S. at 632; *see also Hecox*, 79 F.4th at 1025 ("Here, it appears that the definition of 'biological sex' was designed precisely as a pretext to exclude transgender women from women's

athletics . . . ."). HEA 1569's categorical nature is further evidence of pretext, as the blanket ban on gender-affirming surgery treats all transgender people the same, regardless of individual circumstance or medical need.

As to the circumstances surrounding its passage, HEA 1569 was one of at least four bills passed during the 2022 and 2023 Indiana legislative session that targeted transgender people. *See Arlington Heights*, 429 U.S. at 267 ("The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes."). The legislature passed HEA 1569 despite the Seventh Circuit holding unconstitutional another state's blanket ban on gender-affirming hormones and surgery in prison. *See Fields*, 653 F.3d 550. And HEA 1569's author's claim that "[t]here are no generally accepted professional medical standards" for gender-affirming surgery, *see supra* note 27, ignores DOC's own policies recognizing the guidelines as reflecting a "professional consensus."

Together, the text of HEA 1569, its categorical nature, and the circumstances surrounding its passage suggest that legislators' purpose was to target for differential treatment a specific class of individuals in custody. *See Hecox*, 79 F.4th at 1032 ("The record indicates that Idaho may have wished to convey a message of disfavor toward transgender women and girls, who are a minority in this country. And this is a message that Idaho simply may not send through unjustifiable discrimination." (citation and internal quotation marks omitted)).

3. HEA 1569's Blanket Ban on Certain Gender-Affirming Care is Not Substantially Related to Legislators' Asserted Interests.

Even if Indiana could substantiate its asserted concern that gender-affirming surgery is "unproven" (and it cannot), and even if those concerns were not pretextual, HEA 1569 would still fall because it is not "'substantially related'" to those concerns, for at least three reasons. *See Virginia*, 518 U.S. at 533.

First, as explained above, the blanket ban lacks an accurate scientific or medical basis and ultimately harms—not helps—those it purports to shield from "unproven" medical care. *See Hecox*, 79 F.4th at 1028 (holding that "the Act's means . . . are not substantially related to, and in fact undermine," the purported legislative objectives). Banning this gender-affirming care will have devastating effects on transgender people in custody while providing no countervailing benefit to them or anyone else. *See Kirchberg v. Feenstra*, 609 F.2d 727, 734 (5th Cir. 1979) (requiring courts to "weigh[] the state interest sought to be furthered against the character of the discrimination caused by the statutory classification").

Second, HEA 1569's prohibitions are overinclusive. Just as with Indiana's ban on gender-affirming care for transgender adolescents, HEA 1569 lacks a "close means-end fit" because it categorically bans certain gender-affirming care to treat gender dysphoria despite evidence that preventing the subset of transgender individuals for whom such care is deemed medically necessary from accessing such treatments will "prolong[] . . . their dysphoria, and caus[e] additional distress and health risks, such as depression, posttraumatic stress disorder, and suicidality." *See K.C.*, 2023 WL 4054086, at *11 (identifying risks of denying gender-affirming care). HEA 1569 is therefore overinclusive in prohibiting the use of certain gender-affirming care in all instances. *See Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001). An alternative approach—one that might come closer to the "substantial relationship" standard—might place reasonable limits on certain gender-affirming surgery as opposed to an across-the-board ban. *Cf. K.C.*, 2023 WL 4054086, at *11 (noting that Finland has adopted certain safeguards for "puberty blockers and cross-sex hormone therapies," including a requirement that gender dysphoria be "severe" and "other psychiatric symptoms have ceased"); *Doe v. Ladapo*, No. 4:23-CV-114-RH-MAF, 2023 WL 3833848, at *14 (N.D. Fla. June 6, 2023) (rejecting Florida's

assertion that the state's ban on gender-affirming care for minors would align the state with European countries, given that "the treatments are available in appropriate circumstances in all the countries cited by the defendants, including Finland, Sweden, Norway, Great Britain, France, Australia, and New Zealand," often with "appropriate preconditions" and "only in approved facilities").

Third, HEA 1569 is underinclusive in addressing Indiana's asserted interests. The statute permits the banned procedures for any medical condition *except* gender dysphoria. *See* Ind. Code § 11-10-3-1(6) (prohibiting enumerated procedures only when performed with "the purpose of attempting to alter the appearance of, or affirm the . . . patient's perception of, his or her gender or sex, if that appearance or perception is inconsistent with the . . . patient's sex [assigned at birth]"). Some of the enumerated procedures can treat other conditions, including hysterectomies for certain types of cancer and genital surgery for injuries to genitalia.[38] Accordingly, if HEA 1569's true objective were to curb risks associated with these procedures, a prohibition applying only when these procedures are performed to affirm a person's gender identity would be dramatically underinclusive. This underscores the mismatch between the "alleged objective" and "actual purpose" of HEA 1569. *See Miss. Univ. for Women*, 458 U.S. at 730.[39]

[38] Schechter Rep. at ¶ 43.

[39] Although subject to heightened scrutiny, HEA 1569 fails even rational-basis review. A state "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Cleburne*, 473 U.S at 446; *see also U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("[A] bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."). For the reasons described above, HEA 1569 violates the command of *Cleburne* and *Moreno*. The law additionally fails because the scope of Indiana's ban—applying to all transgender individuals in custody diagnosed with gender dysphoria—goes beyond states' bans on gender-affirming care for minors that have survived rational-basis review. *Cf. Eknes-Tucker*, 80 F.4th at 1227, 1230 (finding that Alabama's ban likely survived rational-basis review in part because it was targeted at minors); *Skrmetti*, 83 F.4th at 480 ("It is the rare drug, for example, that does not have separate rules for children and adults, whether by lowering the dosage for children or banning it altogether for children."). Said differently, HEA 1569's broad-based application renders it unconstitutional under even rational-basis review because "[d]issuading a person from conforming to the person's gender identity rather than to the person's natal sex is not a legitimate state interest." *Dekker v. Weida*, No. 4:22-CV-325-RH-MAF, 2023 WL 4102243, at *14 (N.D. Fla. June 21, 2023), *appeal filed*, No. 23-12155 (11th Cir. June 27, 2023).

II. HEA 1569's Blanket Ban on Certain Gender-Affirming Care for Transgender People in Custody Violates the Eighth Amendment Because It Does Not Account for an Individual's Particular Circumstances.

As the Seventh Circuit has held, blanket bans on certain gender-affirming care in the correctional context violate the Eighth Amendment. In *Fields*, the court upheld a district court's injunction against a Wisconsin statute imposing a blanket ban on hormone therapy and gender-affirming surgery for incarcerated people because it constituted deliberate indifference to a serious medical need. 653 F.3d at 555-56, 559 (agreeing with the district court that "the constitutional violation stemmed from removing even the consideration of hormones or surgery" (citation and internal quotation marks omitted)).

Under this binding precedent, HEA 1569 violates the Eighth Amendment's guarantee that incarcerated people receive adequate medical care for serious medical conditions. *Estelle v. Gamble*, 429 U.S. 97, 102-05 (1976) (the failure to provide incarcerated people with adequate medical care runs afoul of the Eighth Amendment's prohibition on cruel and unusual punishment); *Greeno v. Daley*, 414 F.3d 645, 652-53 (7th Cir. 2005). To establish that prison officials have violated the constitutional guarantee of adequate medical treatment, an incarcerated person must first demonstrate an objectively serious medical need. *Estelle*, 429 U.S. at 104; *Greeno*, 414 F.3d at 653. They must then show that prison officials exhibited "deliberate indifference" to that need, meaning the officials knew of and disregarded a substantial risk to the incarcerated person's health. *See Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Greeno*, 414 F.3d at 653.[40] HEA 1569 bans an entire category of gender-affirming care, without regard to individual circumstances such as

[40] Whether prison officials had subjective knowledge of a risk of serious harm is a "'question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.'" *Zaya v. Sood*, 836 F.3d 800, 805 (7th Cir. 2016) (quoting *Farmer*, 511 U.S. at 842).

medical necessity, and is thus facially unconstitutional.

The Seventh Circuit has long recognized that gender dysphoria is a "serious medical need" implicating the Eighth Amendment. *Mitchell v. Kallas*, 895 F.3d 492, 499 (7th Cir. 2018) ("Prison officials have been on notice for years that leaving serious medical conditions, including gender dysphoria, untreated can amount to unconstitutional deliberate indifference."). *See also Meriwether v. Faulkner*, 821 F.2d 408, 412-13 (7th Cir. 1987).[41] Consistent with this precedent, in *Fields*, the court upheld an injunction against a Wisconsin statute that prohibited prisons from providing any hormone therapy or gender-affirming surgery. 653 F.3d at 554-58. Though plaintiffs had sought only hormone therapy, the district court concluded, and the appellate court affirmed, that the categorical nature of the ban dictated an injunction against the entire statute. In the court's words, "the constitutional violation stemmed from removing even the consideration of hormones or surgery." *Id.* at 559 (citation and internal quotation marks omitted); *see also id.* ("'The reach of this statute is sweeping inasmuch as it is applicable to any inmate who is now in the custody of the DOC or may at any time be in the custody of the DOC, as well as any medical professional who may consider hormone therapy or [gender-affirming surgery] as necessary treatment for an inmate.'" (quoting the trial opinion in *Fields v. Smith*, 712 F.Supp.2d 830, 865–67 (E.D. Wis. 2010))). Two other circuit courts have reached similar conclusions. *See Kosilek v. Spencer*, 774 F.3d 63, 91 (1st Cir. 2014) (noting that a blanket ban on gender-affirming surgery would conflict with the Eighth Amendment); *Rosati v. Igbinoso*, 791 F.3d 1037, 1040 (9th Cir. 2015) (a transgender individual stated an Eighth Amendment claim based on allegation that prison had a

[41] *See supra* note 9. *See also De'lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003) (holding that a transgender person's "need for protection against continued self-mutilation constitutes a serious medical need to which prison officials may not be deliberately indifferent") (citing *Lee v. Downs*, 641 F.2d 1117, 1121 (4th Cir. 1981)); *Belcher v. City of Foley, Ala.*, 30 F.3d 1390, 1396 (11th Cir. 1994) ("Under the Eighth Amendment, prisoners have a right to receive medical treatment for illness and injuries . . . and a right to be protected from self-inflicted injuries . . . ." (citations omitted)).

blanket policy against gender-affirming surgery).[42]

These decisions reflect the longstanding principle that prison bans on entire categories of medical treatment constitute deliberate indifference because they disregard the substantial risk of harm to incarcerated individuals with serious medical conditions. *See, e.g.*, *Smith v. Linthicum*, Case No. 21-20232, 2022 WL 7284285 at *6 (5th Cir. Oct. 12, 2022) (prison's refusal to repair or remove an individual's spinal cord stimulator pursuant to a categorical and non-medical policy to that effect violated the Fifth Circuit's clearly established Eighth Amendment law), *cert. denied*, 144 S. Ct. 70 (2023); *Colwell v. Bannister*, 763 F.3d 1060, 1063 (9th Cir. 2014) ("[T]he blanket, categorical denial of medically indicated surgery solely on the basis of an administrative policy that one eye is good enough for prison inmates is the paradigm of deliberate indifference." (internal quotation marks omitted)).

These absolute bans on certain types of medical care in prison violate the Eighth Amendment because medical care must be "adequate in light of the severity of the condition and professional norms." *Perez v. Fenoglio*, 792 F.3d 768, 777 (7th Cir. 2015) (citations omitted). Although the Eighth Amendment does not entitle incarcerated people to the medical treatment of their choice, when prison officials know of a significant risk to an incarcerated person's health, they cannot provide treatment that is "blatantly inappropriate" for the individual's serious medical need. *Id*. at 777-78 (citations and internal quotation marks omitted). *See also Mitchell*, 895 F.3d at 498; *Roe v. Elyea*, 631 F.3d 843, 859 (7th Cir. 2011) ("inmate medical care decisions must be fact-

[42] The Fifth Circuit has held that a prison's policy barring gender-affirming surgery or assessments for such surgery did not constitute "unusual" punishment under the Eighth Amendment, in large part because it considered that the First Circuit in *Kosilek* "effectively allowed a blanket ban on sex reassignment surgery." *Gibson v. Collier*, 920 F.3d 212, 216 (5th Cir. 2019). This misreads *Kosilek*, which said explicitly that a blanket ban on such surgeries would have violated the Eighth Amendment. *Kosilek*, 774 F.3d at 91 (citing *Roe v. Elyea*, 631 F.3d 843, 862–63 (7th Cir. 2011)). Other federal courts have declined to follow *Gibson* because it rests on a "sparse summary judgment record that the *pro se* plaintiff developed," "misconstrues" *Kosilek*, and "conflicts" with other circuits' law, including *Fields*. *Edmo v. Corizon, Inc*., 935 F.3d 757, 795-97 (9th Cir. 2019). *See also Flack v. Wisconsin Dep't of Health Servs*., 395 F. Supp. 3d 1001, 1017-18 (W.D. Wis. 2019).

based with respect to the particular inmate, the severity and stage of his condition, the likelihood and imminence of further harm and the efficacy of available treatments"); *Ralston v. McGovern*, 167 F.3d 1160, 1162 (7th Cir. 1999) (determining whether prison medical care is constitutionally adequate "is a question of judgment that does not lend itself to mechanical resolution. It is a matter of determining the civilized minimum of public concern for the health of prisoners, which depends on the particular circumstances of the individual prisoner.").

When assessing the adequacy of medical treatment that prison officials provide incarcerated people, courts look to medical judgments and accepted professional medical standards, which generally require individualized assessment of medical needs. *See Estelle*, 429 U.S. at 102 (courts should consider "'the evolving standards of decency that mark the progress of a maturing society'" when assessing a prison's medical care under the Eighth Amendment (citations omitted)); *Kosilek*, 774 F.3d at 82 (Eighth Amendment requires medical care at "a level reasonably commensurate with modern medical science and of a quality acceptable within prudent professional standards" (citations and internal quotation marks omitted)). The Seventh Circuit has recognized that "[t]he failure to consider an individual inmate's condition in making treatment decisions is . . . precisely the kind of conduct that constitutes a 'substantial departure from accepted professional judgment practice, or standards, [such] as to demonstrate that the person responsible actually did not base the decision on such a judgment.'" *Elyea*, 631 F.3d at 862-63 (quoting *Sain v. Wood*, 512 F.3d 886, 895 (7th Cir. 2008)). Prior to the passage of HEA 1569, DOC adhered to a standard of care that recommends individualized assessments to determine when gender-affirming surgery is medically necessary for particular individuals.[43] By categorically barring medically necessary treatment without any individualized assessment and arbitrarily selecting

[43] *See supra* note 23.

which treatment to provide (i.e., non-surgical) even if that treatment is ineffective, the statute thus violates the Eighth Amendment. *See Konitzer v. Frank*, 711 F. Supp. 2d 874, 908-12 (E.D. Wis. 2010) ("[c]learly, what the defendants were doing to treat [Plaintiff] was not working" when they continued to self-mutilate and attempt suicide without access to gender expression allowances); *De'lonta v. Johnson*, 708 F.3d 520, 526 (4th Cir. 2013) (*De'lonta II*) ("just because [prison officials] have provided [Plaintiff] with *some* treatment consistent with the [standards of care], it does not follow that they have necessarily provided her with *constitutionally adequate* treatment" (emphasis in original)); *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1266-67 (11th Cir. 2020) ("It seems to us that responding to an inmate's acknowledged medical need with what amounts to a shoulder-shrugging refusal even to consider whether a particular course of treatment is appropriate is the very definition of 'deliberate indifference'—anti-medicine, if you will.").

To be sure, the Seventh Circuit has held there was no clearly established Eighth Amendment violation in refusing to provide a *particular* incarcerated person with gender-affirming surgery where an individualized assessment has determined that surgery was not medically necessary based on the individual's circumstances. In *Campbell v. Kallas*, 936 F.3d 536, 541-42 (7th Cir. 2019), the Seventh Circuit recognized prison officials' qualified immunity for plaintiff's Eighth Amendment claim after two medical evaluations concluded that gender-affirming surgery was not medically necessary or possible under the plaintiff's particular circumstances.[44]

Critically, the Seventh Circuit *distinguished* its ruling in *Campbell* from situations

[44] Other courts have concluded similarly. *See Kosilek*, 774 F.3d at 91 (no deliberate indifference where prison officials solicited the opinions of multiple medical professionals who presented two treatment plans and prison pursued the non-surgical option for incarcerated person whose request also posed reasonable, individualized security concerns); *Lamb v. Norwood*, 899 F.3d 1159, 1163 (10th Cir. 2018) (no deliberate indifference when prison officials provided effective levels of counseling and hormone treatment to person with gender dysphoria and prison doctor determined that gender-affirming surgery was not medically necessary for her).

involving categorical bans on surgery like the one Indiana has enacted or outright refusals to conduct surgical assessments. *Id.* at 547 n.2 (distinguishing both *De'lonta II* and *Rosati* because those cases involved either a failure to evaluate for, or a categorical ban on, gender-affirming surgery); *see also Kosilek*, 774 F.3d at 91 (citing *Elyea*, 631 F.3d at 862-63) ("[A] blanket policy regarding" gender affirming surgery "would conflict with the requirement that medical care be individualized based on a particular prisoner's serious medical needs.").

As an unconditional ban on all gender-affirming surgery in prison, HEA 1569 forecloses any individualized assessment of the medical necessity of such surgery for all incarcerated individuals with gender dysphoria. By banning all gender-affirming surgery, without exception, HEA 1569 forbids Indiana's state-contracted prison medical professionals—who prior to July 1, 2023, had evaluated on a case-by-case-basis whether gender-affirming surgery was medically necessary—from conducting the individualized assessments that numerous courts, including the Seventh Circuit, have long held are required by the Eighth Amendment.[45] In so doing, the statute results in—indeed requires—deliberate indifference to a substantial risk of serious harm to incarcerated people whose gender dysphoria is not adequately addressed by non-surgical treatments. For this reason, HEA 1569 is facially unconstitutional.

[45] Several prison systems explicitly assess for and provide gender-affirming surgery. For example, the U.S. Bureau of Prisons has a procedure in place to allow for the provision of gender-affirming surgery. U.S. Dep't of Justice, Fed. Bureau of Prisons, Program Statement 5200.08 ("Transgender Offender Manual") § 9 (Jan 13, 2022), https://perma.cc/H5DP-2LHL (outlining the individualized assessment procedure applied to requests for gender-affirming surgery by transgender people in BOP custody). *See also* Mass. Dep't of Correction, 103 Doc 653, Identification, Treatment and Correctional Management of Inmates Diagnosed with Gender Dysphoria § 653.03 (Oct. 26, 2022), https://perma.cc/J8RK-ZB22 (outlining assessment procedures for gender-affirming surgery); Wis. Division of Adult Institutions, Policy #500.70.27: Transgender Inmates § VIII(D)(9) (Apr. 4, 2022), https://perma.cc/N9MR-C55P (same); Wash. Dep't of Corrections, Guidelines for Healthcare of Transgender Individuals § III(E) (Oct. 2, 2023), *see* Settlement Agreement, Dkt. 3-1, *Disability Rights Washington v. Dep't of Corrections*, No. 23-cv-01553-JCC (W.D. Wash. Oct. 11, 2023) (same); Ill. Dep't of Corrections, Admin. Directive No. 04.03.104: Evaluations, Treatment and Correctional Management of Transgender Offenders § II(H)(2) (Apr. 1, 2021), https://perma.cc/H6FA-VCJ4 (same); Minn. Dep't of Corrections, Policy No. 202.045 §H(4) (Jan. 31, 2023), https://policy.doc.mn.gov/DOCPolicy/PolicyDoc.aspx?name=202.045.pdf (specifying process to manage requests for "gender-affirming surgical treatment, if considered medically necessary for treatment of the incarcerated individual's gender dysphoria . . .").

CONCLUSION

For the foregoing reasons, Indiana's blanket ban on gender-affirming surgery for transgender people in DOC custody violates both the Equal Protection Clause of the Fourteenth Amendment and the Eighth Amendment.

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2024, the foregoing document was electronically transmitted to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to counsel of record.

/s/ John R. Fowler
JOHN R. FOWLER