Transgender Equality and *Geduldig* 2.0

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In 1974, Geduldig v. Aiello *held that pregnancy discrimination is not facially sex discrimination. Only four years later, Congress repudiated* Geduldig *in the statutory context in the Pregnancy Discrimination Act of 1978. For decades,* Geduldig *remained largely moribund, as the vast majority of pregnancy cases were brought pursuant to Title VII—and as the courts increasingly recognized that pregnancy discrimination implicated gender stereotypes (and thus sex discrimination) even in the Equal Protection context.*

But now, close to five decades later, opponents of transgender equality are trying to give the decision new life. Faced with the prospect of defending government laws and policies targeting "sex changes," "gender dysphoria," and more, such opponents have relied on Geduldig *to argue that such policies are not facially discriminatory on the basis of sex or transgender status.*

These new Geduldig *arguments are inconsistent with the Supreme Court's broader Equal Protection doctrine, and with* Geduldig *itself. Most courts have, accordingly, rejected them. Nevertheless, a number of courts have credited them, and they are being made with increasing frequency in transgender rights cases. This Essay takes up the* Geduldig *arguments being made in contemporary transgender rights cases and explains why such arguments must be rejected.*

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INTRODUCTION

In 1974, the Supreme Court (in)famously held in *Geduldig v. Aiello* that pregnancy discrimination is not facially sex discrimination.[1] Only four years later, Congress repudiated *Geduldig* in the statutory context in the Pregnancy Discrimination Act of 1978, specifying that pregnancy discrimination is indeed sex discrimination.[2] For decades, *Geduldig* remained largely moribund, as the vast majority of pregnancy cases were brought pursuant to Title VII—and as the courts increasingly recognized that pregnancy discrimination implicated gender stereotypes (and thus sex discrimination) even in the Equal Protection context.[3]

Now, almost 50 years later, opponents of transgender rights are attempting to give *Geduldig* new life.[4] Across a host of transgender rights contexts—from medical insurance to athletics participation bans to criminal law—such opponents are arguing that *Geduldig* precludes findings of facial discrimination.[5] Thus, Defendants are arguing that discrimination targeting

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1. Geduldig v. Aiello, 417 U.S. 484 (1974).

2. *See, e.g.*, Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 991–98 (2013).

3. *See, e.g.*, Hayley Gorenberg & Amanda White, *Off the Pedestal and into the Arena: Toward Including Women in Experimental Protocols*, 19 N.Y.U. REV. L. & SOC. CHANGE 205, 238 (1991/1992) (addressing Title VII); Reva B. Siegel, *The Pregnant Citizen, from Suffrage to the Present*, 108 GEO. L. J. 167, 204–10 (2020) (addressing gender stereotyping).

4. *See* sources cited *infra* note 5. *Geduldig* has also taken on renewed importance in the context of reproductive rights and justice, given the overruling of *Roe v. Wade*, 410 U.S. 113 (1973) in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *See, e.g.*, Reva B. Siegel et al., *Equal Protection in* Dobbs *and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 COLUM. J. GENDER & L. 67 (2022).

5. *See, e.g.*, Brief of Appellants at 21–37, Kadel v. Folwell , No. 22-1272, 2022 WL 4078954 (4th Cir. 2022) (in the context of health insurance exclusion on gender affirming care, arguing that discrimination against "sex changes or modifications" and "gender dysphoria" should not be considered facially discriminatory on the basis of sex or gender identity under *Geduldig*); Opening Brief of State Defendants at 47–50, Eknes-Tucker v. Gov. of State of Alabama, No. 22-11707, 2022 WL 2399551 (11th Cir. 2022) (in the context of a criminal ban on gender-affirming care for minors, arguing that language limiting application of the act to those whose "appearance or perception . . . of his or her sex or gender . . . is inconsistent with the minor's [sex assigned at birth]" was not facially discriminatory on the basis of sex or gender identity under *Geduldig*); Reply Brief of Defendants-Appellants at 7–9, Brandt v. Rutledge, No. 21-2875, 511 F. Supp. 3d 882 (E.D. Ark. 2019) (arguing that act which prohibited "gender transition procedures" for minors was not discriminatory on the basis of transgender status under *Geduldig*); En Banc Reply Brief of Appellant the School Board of St. Johns County, Fla. at *3–6, Adams v. School Bd. of St. Johns County, Fla., No. 18-13592, 2021 WL 6062644 (11th Cir. 2021) (arguing that policy that required students to use restroom consistent with their "biological sex" and that singled out "transgender students" was not facially discriminatory under *Geduldig*); Reply Brief of the State-Defendants-Appellants at 9, Corbitt v. Taylor, No. 21-10486, 2021 WL

"sex changes or modifications," "gender dysphoria," and even "transgender persons" cannot be deemed facially discriminatory on the basis of sex or transgender status under *Geduldig*.[6]

This Essay, the first to address this development, contends that this argument fundamentally misunderstands *Geduldig*—even to the extent *Geduldig* retains vitality.[7] *Geduldig* did not hold that government actions that explicitly classify based on protected class status can be exempted from the ordinarily applicable standards of review.[8] Nor did *Geduldig* hold that close proxies for protected class status cannot be deemed facially discriminatory.[9] On the contrary, both the Supreme Court and the lower courts have continued to recognize post-*Geduldig* that explicit reliance on protected class status—as well as close proxies for protected class status—must be deemed facially discriminatory.[10]

Much is at stake in how the courts resolve this developing issue. Most obviously, the *Geduldig* argument has profound implications for transgender rights, potentially forcing litigants into more fact intensive—and often less successful—means of proving discrimination, like stereotyping doctrine and

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3912655 (11th Cir. 2021) (arguing that policy specifically directed at "changing sex on a driver license due to gender reassignment" was not facially discriminatory on the basis of sex or transgender status under *Geduldig*); Appellants Opening Brief at *12–15, Hecox v. Little, Nos. 20-35813, 20-35815, 2020 WL 6833365 (9th Cir. 2020) (arguing that requirement that sports teams be "based on biological sex" and ban on those assigned male at birth competing on those teams designated for those designated female at birth, was not facially discriminatory on the basis of transgender status under *Geduldig*); Appellants' Opening Brief, Doe 2 v. Trump, No. 18-5257, 2018 WL 4538327 (D.C. Cir. 2018) (arguing that policy which explicitly disqualified "transgender persons" *inter alia* on the basis of a "gender dysphoria" diagnosis or "gender transition" was not facially discriminatory under *Geduldig*); Appellants' Opening Brief, Karnoski v. Trump, No. 18-35347, 926 F.3d 1180 (9th Cir. 2019) (arguing that policy which explicitly disqualified "transgender persons" on the basis of a "gender dysphoria" diagnosis or "gender transition" was not facially discriminatory under *Geduldig*); *see also* sources cited *infra* note 106 (compiling cases in which courts have ruled on the *Geduldig* argument).

6. *See* sources cited *supra* note 5.

7. As scholars such as Reva Siegel have observed, the Supreme Court has not cited *Geduldig* in an Equal Protection decision since the 1970s and has arguably undermined its foundations in subsequent precedents—though the Court in dicta recently signaled its continued adherence to *Geduldig*'s core holding. *See* Siegel, *supra* note 3, at 172; *cf.* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2245–46 (2022) (in dicta, rejecting the Equal Protection arguments made by amici on the basis of *Geduldig*). In this Article, I contend that even if *Geduldig* remains wholly good law, it is inapplicable to this new context on its own terms.

8. *See infra* Part IV.

9. *Id.*

10. *See, e.g.*, Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993); Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 689 (2010); Williams v. Kincaid, 45 F.4th 759, 773 (4th Cir. 2022). *See generally infra* Part IV.

intent.[11] Moreover, because *Geduldig* was a case about what facial classification *is* these consequences would flow to all of the diverse arenas in which the transgender community is currently under legal attack.[12] Taken to its logical conclusion, the *Geduldig* argument would permit public entities to criminalize transgender adults for undergoing gender-affirming care, to ban those diagnosed with "gender dysphoria" from public employment, or to misapply systems of sex segregation to trans people everywhere—without automatically triggering heightened review.[13]

But this issue also has profound implications for broader Equal Protection doctrine. If the courts rule that they are permitted, or indeed required, to ignore close proxies—or even facial classifications—when assessing where heightened scrutiny is warranted, this would *also* dramatically undermine Equal Protection guarantees for all other protected classes, including race, sex, national origin, and others. As the lessons of the pre-civil rights era teach, such an approach is an invitation to transparent efforts to evade the law through linguistic sophistry.[14] And while most government entities already seek to avoid facial classifications based on race or sex (aware they will be subject to heightened scrutiny), important contemporary questions still turn on the issue of facial classification, even in those more established contexts.[15]

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11. *See generally* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (describing the difficult standards for proving intent under contemporary Equal Protection doctrine). While stereotyping doctrine has been a highly successful way of proving discrimination for transgender litigants, it remains often more factually driven, and thus both more intensive and less certain, than a finding of facial discrimination. *See generally* Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919 (2016) (describing stereotyping doctrine, its role in transgender rights cases, as well as its potential for wider anti-discrimination law).

12. Those arenas are numerous and varied. *See, e.g.*, *Legislative Tracker: Anti-Transgender Legislation*, FREEDOM FOR ALL AMERICANS, https://freedomforallamericans.org/legislative-tracker/anti-transgender-legislation/ [https://perma.cc/VM5M-PRR4]; Matt Lavietes & Elliott Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far, Most of Them Targeting Trans People*, NBCNEWS (Mar. 20, 2022, 3:00 AM MST), https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418 [https://perma.cc/K5U9-KRMF].

13. *Cf. Bray*, 506 U.S. at 271–74 (extending *Geduldig* to preclude a § 1985[3] conspiracy claim); Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2245–46 (2022) (in dicta, extending *Geduldig* to the criminal regulation of pregnancy).

14. *See, e.g.*, Katie R. Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. 1 (2016).

15. *See, e.g.*, Hernandez v. New York, 500 U.S. 352, 360 (1991) (plurality opinion) (declining to find language discrimination to be categorically facially discriminatory in the *Batson* context); *see also infra* Sections IV.C.–D. (describing more far-reaching arguments that Defendants have made based on *Geduldig* for why even explicit facial classifications should be ignored and not treated as triggering heightened scrutiny).

The remainder of this Essay proceeds as follows. Part I introduces *Geduldig* and describes the legal context in which it was decided, as well as its interpretation in subsequent cases. Part II describes the principles surrounding facial classifications under the Equal Protection clause, and discusses how *Geduldig* fits into those principles. Part III takes up the current legal landscape with respect to transgender Equal Protection litigation. Part IV details the *Geduldig* arguments that are being made in recent transgender Equal Protection cases, and describes why such arguments are erroneous. Part V briefly concludes.

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Two final observations are important before proceeding to the substance of the analysis. As observed above, *Geduldig* has long been largely moribund as a precedent—rarely relied on, and arguably substantially undermined by subsequent Equal Protection precedents.[16] As such, there are important scholarly arguments that *Geduldig* has largely been superseded—arguments which have exponentially increased in importance in the wake of *Dobbs v. Jackson Women's Health Organization*.[17] This Essay sidesteps these important debates, contending that *even if Geduldig* remains wholly good law, it is inapplicable on its own terms to the transgender rights contexts to which Defendants have argued it ought to apply.

Second, because the terms "facial discrimination" and "facially discriminatory" are used in a variety of different ways in the case law, it is important to clarify the manner in which they are used herein. As those terms are used in this context they refer simply to what types of classifications or discrimination are sufficient to—categorically and without any further factual inquiry—establish that a particular group is being targeted for discrimination as a matter of Equal Protection law. In the context of classifications that trigger heightened scrutiny, a determination of facial discrimination will be sufficient to establish the need for heightened scrutiny, without any further proof. As elaborated more fully herein, facial classifications can arise where protected class status is directly implicated on the face of the policy or government program, but may also be found where the policy relies on a close proxy for protected class status, or where there is admitted reliance in administration on protected class status or a close proxy.[18]

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16. *See supra* notes 2–3, 7 and accompanying text.

17. *See* Siegel et al., *supra* note 4. *But cf.* Dobbs, 142 S. Ct. at 2245–46 (2022) (in dicta, rejecting the Equal Protection argument for abortion rights).

18. *See, e.g.*, *Bray*, 506 U.S. at 271 (noting that "[s]ome activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews."). *See generally infra* Part II.

I. *GEDULDIG V. AIELLO*, 417 U.S. 484 (1974)

Decided in 1974, *Geduldig v. Aiello* presented the question of whether pregnancy discrimination was facially sex discrimination.[19] Although the women's rights movement had raised this argument in prior cases, in each of those prior cases, the Justices had avoided squarely ruling on it.[20] *Geduldig*, at last, was a case in which the Court could not avoid squarely addressing the issue. Ultimately, the Court would reject the argument of women's rights advocates that pregnancy discrimination—being deeply entwined with sex discrimination—must be deemed categorically and facially sex discrimination.[21]

Several factors made *Geduldig* an arguably non-ideal case for this issue to be decided by the Court for the first time. At the time, the Supreme Court still had not held that sex discrimination was entitled to heightened scrutiny.[22] Thus the plaintiffs faced the dual burden of persuading the Court to find pregnancy discrimination to be sex discrimination, *and* to apply heightened scrutiny to sex. Moreover, the particular type of pregnancy discrimination at issue here—the exclusion of pregnancy from a state disability plan—was arguably less sympathetic than, for example, pregnancy-based terminations by public employers.[23] And as even the Plaintiffs conceded, disabilities arising from normal pregnancy were especially costly, requiring significant increases in program funding to support.[24]

Nevertheless, advocates for the Plaintiffs in *Geduldig* elected to put all of their weight behind the argument that pregnancy discrimination was sex discrimination.[25] Abandoning the rational basis arguments on which the plaintiffs had prevailed below, attorney Wendy Webster Williams argued to the Court that it should find that pregnancy discrimination was per se sex discrimination—and that sex was a suspect classification entitled to heightened scrutiny.[26]

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19. Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).

20. *See, e.g.*, Cleveland Bd. of Ed. v. LaFleur 414 U.S. 632 (1974) (resolving pregnancy discrimination case based on Due Process, rather than Equal Protection grounds); Neil Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010) (describing Equal Protection pregnancy discrimination case which the Supreme Court vacated and remanded for consideration of mootness).

21. *Geduldig*, 417 U.S. at 496 n.20.

22. *See* Siegel et al., *supra* note 4.

23. *See, e.g.*, Katie Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975 (2017) (discussing the Justices' deliberations in *LaFleur*, where they were more sympathetic to the equality stakes of the plaintiffs' claims, and *Geduldig*, where they were less so).

24. Brief for Appellees at 88–89, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640).

25. Eyer, *supra* note 23, at 1031.

26. *Id.*

But a majority of the Court was unpersuaded by either of the Plaintiffs' contentions.[27] Indeed, the majority in *Geduldig* was so unpersuaded by the Plaintiffs' arguments that initial drafts completely failed to address the Plaintiffs' argument that pregnancy discrimination should be deemed sex discrimination—or that sex discrimination was entitled to heightened review.[28] It was only in response to Justice Brennan's dissent—arguing that pregnancy discrimination was sex discrimination, and that sex discrimination must receive heightened scrutiny—that the majority modified its opinion to address the pregnancy issue at all.[29] Ultimately, its full assessment of the issue appeared in a footnote providing:

> The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed* and *Frontiero v. Richardson* involving discrimination based on gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. 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 like those considered in *Reed* and *Frontiero*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
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> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon a most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[30]

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27. *See Geduldig*, 417 U.S. at 496–97, 496 n.20.

28. *See* Justice Potter Stewart, Second Draft Opinion, Geduldig v. Aiello, at 1–12 (May 15, 1974) (on file with Yale Manuscripts & Archives in Potter Stewart Papers, Box 93).

29. *See Geduldig*, 417 U.S. at 496 n.20.

30. *Id.* (citations omitted). Having concluded that pregnancy discrimination itself was not sex discrimination in this instance, the Court also observed that "[t]here is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class . . . There is no risk from which men are protected and women are not." *Id.* at 496–97.

Given the uncertainty surrounding the treatment of sex discrimination under the Equal Protection clause, lower courts were initially unsure as to *Geduldig*'s meaning.[31] But the Supreme Court soon resolved this confusion in favor of the modern understanding of *Geduldig*: that pregnancy discrimination is not facially and categorically sex discrimination.[32] Therefore, as the Supreme Court has understood it, *Geduldig* was a case about the limits of facial classification.[33] The following Section turns to the Supreme Court's jurisprudence on facial classifications and explains how *Geduldig* fits into that jurisprudence.

II. *GEDULDIG* AND THE LAW OF FACIAL CLASSIFICATIONS

As previously specified, a facial classification is one as to which the courts can directly conclude that a particular group has been targeted for discrimination, without any deeper factual inquiry.[34] Despite its apparent importance to Equal Protection doctrine, the law of facial classifications remains dramatically under-theorized, both in the literature and in the courts.[35] In the Equal Protection context, courts rarely explicitly note—much less justify—their treatment of a particular classification as facial discrimination.[36] Even when courts do explicitly refer to discrimination as

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31. *See, e.g.*, Gilbert v. Gen. Elec. Co., 519 F.2d 661, 666–67 (4th Cir. 1975) (reading *Geduldig* as holding that the exclusion was sex-discriminatory but survived rational basis review), *rev'd*, 429 U.S. 125 (1976).

32. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976).

33. *See* source cited *supra* note 32; source cited *infra* note 135.

34. *See supra* text accompanying note 18.

35. *See infra* notes 36–39 and accompanying text; *see also* Jeffery A. Williams, *The Equal Application Defense*, 9 U. PA. J. CONST. L. 1207, 1221–22 (2006) ("The existence of a facial classification is such an elementary issue that no law confines it: facial classifications admittedly involve 'judgment calls.'").

36. Aside from cases also arising in the Dormant Commerce Clause context (where use of the term is more common), the last Equal Protection case to use the term "facial classification," "facial discrimination," or an analogous term at the Supreme Court level was *Hernandez v. New York*, 500 U.S. 352, 360 (1991). Nevertheless, since that time, the Court has treated numerous government statutes and policies as facially discriminatory (i.e., as implicating protected class status and thus heightened scrutiny without the need for a more detailed factual inquiry). *See, e.g.*, Sessions v. Morales-Santana, 137 S. Ct. 1678, 1689–90 (2017); Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 309–10 (2013); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 720 (2007); Johnson v. California, 543 U.S. 499, 505–08 (2005). Explicit reference to "facial classifications" or "facial discrimination" is more common in the lower courts, though, generally, such courts simply proclaim facial discrimination to exist, without analyzing the parameters for so concluding. *See, e.g.*, Dalton v. Reynolds, 2 F.4th 1300, 1309–10 (10th Cir. 2021); Harrison v. Kernan, 971 F.3d 1069, 1077–78 (9th Cir. 2020); Hassan v. City of New York, 804 F.3d 277, 294–95 (3d Cir. 2015).

"facial," they rarely articulate broader principles for how facial classification should be determined.[37] Like Justice Stewart's view of obscenity, the courts simply "know it when [they] see it."[38]

Nevertheless, it is possible to discern a number of general principles governing facial classification. First, classifications will be deemed facially discriminatory—and subject to heightened scrutiny as a result—when they explicitly rely on protected class status to distribute benefits or burdens.[39] Second, sufficiently close proxies for protected class status will—even after *Geduldig*—be deemed facially discriminatory.[40] And finally, when a defendant admits or is documented to have relied directly on protected class status, or a sufficiently close proxy, in the administration of a facially neutral law, this too will be deemed facially discriminatory.[41]

The first of these principles—that explicit reliance on protected class status is facial discrimination triggering heightened scrutiny—is well-established in the Supreme Court's case law.[42] The Court regularly and consistently treats explicit reliance on protected class status as facial discrimination triggering heightened scrutiny.[43] While there were once significant arguments—arising primarily in the context of affirmative action, but also in other contexts such as prison security—that certain uses of protected class status should not be deemed facially discriminatory (and thus should not trigger heightened scrutiny), these arguments have largely been rejected.[44] Thus, under contemporary Supreme Court doctrine, provisions

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37. *See* sources cited *supra* note 36.

38. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (noting the difficulty of establishing rules to distinguish what is constitutionally proscribed "hard-core pornography" but noting that "I know it when I see it"); *cf.* Williams, *supra* note 35, at 1211–22.

39. *See, e.g.*, *Sessions*, 137 S. Ct. at 1689–90; *Fisher*, 570 U.S. at 309–10; *Parents Involved in Cmty. Sch.*, 551 U.S. at 720; *Johnson*, 543 U.S. at 505–08; Grutter v. Bollinger, 539 U.S. 306, 326–28 (2003); United States v. Virginia, 518 U.S. 515, 531–34 (1996); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 212–13 (1995).

40. *See, e.g.*, Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 689 (2010); Rice v. Cayetano, 528 U.S. 495, 514 (2000); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993); Casteneda v. Partida, 430 U.S. 482, 486 (1977).

41. *See, e.g.*, Sylvia Dev. Corp. v. Calvert Cnty., 48 F.3d 810, 819 (4th Cir. 1995); *see also Johnson*, 543 U.S. at 508 (treating an unwritten but admitted policy of initial racial segregation in California prisons as facially discriminatory).

42. *See infra* notes 43–45 and accompanying text.

43. *See, e.g.*, *Sessions*, 137 S. Ct. at 1689–90; *Fisher*, 570 U.S. at 309–10; *Parents Involved in Cmty. Sch.*, 551 U.S. at 720; *Johnson*, 543 U.S. at 505–08; *Grutter*, 539 U.S. at 326–28; *Virginia*, 518 U.S. at 531–34; *Adarand*, 515 U.S. at 235.

44. *See, e.g.*, *Fisher*, 570 U.S. at 309–10; *Parents Involved in Cmty. Sch.*, 551 U.S. at 720; *Johnson*, 543 U.S. 505–08; *Grutter*, 539 U.S. at 326–28; *Adarand*, 515 U.S. at 212–13; *see also* Williams, *supra* note 35, at 1211–22.

that explicitly classify on the basis of protected class status are necessarily facially discriminatory—and are subject to the requisite level of scrutiny.[45]

Both before and after *Geduldig*, close proxies for protected class status have continued to serve as an alternative way to establish facial discrimination.[46] As Justice Scalia observed in *Bray v. Alexandria Women's Health Clinic*: "A tax on wearing yarmulkes is a tax on Jews."[47] Thus, the Supreme Court has, for example, "declined to distinguish between status and conduct"[48] in the context of sexual orientation discrimination, treating conduct closely associated with gays and lesbians as facially discriminatory.[49] The Court has also treated discrimination based on "Spanish Surnames" as discrimination based on Mexican-American status, and discrimination based on ancestry as facially race-discriminatory.[50] Thus, while the Court has made

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45. *See* sources cited *supra* note 44. *But cf.* R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 904–08 (1998) (noting that although the Supreme Court has held that the applicable level of scrutiny does not alter across contexts, it has continued to allow certain uses of race to be evaluated under more deferential forms of scrutiny); Katie Eyer, *Constitutional Colorblindness and the Family*, 162 U. PA. L. REV. 537, 539–40 (2014) (discussing the issue of the Supreme Court's deviation from strict scrutiny of uses of race in the family law context).

46. *See infra* notes 47–50 and accompanying text. In theory, proxy cases could be considered a special case of intent, rather than facial discrimination cases. *Cf.* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993) ("Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews."). However, for all practical purposes, such cases are facial discrimination cases in the sense that the courts can and do find discrimination based on protected class status without any deeper factual inquiry, but simply based on the category, group, or conduct targeted on the face of the law or policy.

47. *Bray*, 506 U.S. at 270.

48. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 689 (2010).

49. *See, e.g.*, Obergefell v. Hodges, 576 U.S. 644, 670 (2015) (holding that state provisions disallowing marriage by same-sex couples "demean[] gays and lesbians" and "teach[] that gays and lesbians are unequal in important respects"); Lawrence v. Texas, 539 U.S. 558, 575 (2003) (observing that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination"); *id.* at 583 (O'Connor, J., concurring) ("While it is true that the law applies only to conduct, the conduct targeted by this law is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.").

50. *See, e.g.*, Rice v. Cayetano, 528 U.S. 495, 514 (2000) (treating ancestry discrimination as facial race discrimination where ancestry was a proxy for race); Casteneda v. Partida, 430 U.S. 482, 486 (1977) (treating Spanish surname as a proxy for Mexican-American ancestry).

clear—in *Geduldig* and in other cases—that not *all* proxies will be deemed facially discriminatory, it has made equally clear that some proxies will be.[51]

Indeed, it is difficult to see how modern Equal Protection law could function without some provision for proxies being deemed facially discriminatory. Practically speaking, were there no law of proxies as facial discrimination, determined discriminators could always seek to avoid heightened scrutiny by the simple expedient of classifying, for example, based on "ancestry of people enslaved in the United States" rather than race.[52] And theoretically, it can be difficult to even draw a line between explicit classification based on a protected status and close proxies. For example, is discrimination based on having a vagina (or not), a proxy or direct discrimination? Discrimination based on dark skin? Answering these (largely unanswerable) questions is not required under current law, because close proxies and explicit classification are equally deemed to be facially discriminatory.

The final category of facial discrimination that the courts have recognized—facial discrimination in administration of a policy—is not truly a separate category, but rather simply accounts for the fact that facial discrimination can also include express discrimination in administration, even where the law itself does not explicitly classify.[53] Thus, for example, if a defendant admitted that race was a decisive criteria in the administration of a statute, the program would be subject to strict scrutiny without any need for further proof—even if the statute itself did not directly reference race.[54] So too, admitted or express use of a close proxy in administration will be deemed facially discriminatory to the same extent it would be so deemed if it appeared on the face of the statute or policy itself.[55]

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51. *See* cases cited *supra* notes 47–50; *cf.* Hernandez v. New York, 500 U.S. 352, 360 (1991) (rejecting a per se proxy claim); Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974) (rejecting a per se proxy claim).

52. *Cf.* Transcript of Oral Argument at 16, Students for Fair Admissions v. President & Fellows of Harvard Coll., (No. 20-1199) (S. Ct. argued Oct. 31, 2022), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/20-1199_6537.pdf [https://perma.cc/DP8D-FQYE] (advocate for SFA arguing that a university adopting preferences for descendants of former slaves would be "drawing that classification as a proxy for race" and thus that that classification should be treated as race-based).

53. *See, e.g.*, Johnson v. California, 543 U.S. 449, 508–09 (2005) (treating an unwritten but admitted policy of initial racial segregation in California prisons as facially discriminatory); Sylvia Dev. Corp. v. Calvert Cnty., 48 F.3d 810, 818–19 (4th Cir. 1995) (articulating rule under which explicit discrimination in administration or enforcement is treated in the same manner discrimination appearing on the face of a statute).

54. *See* cases cited *supra* note 53.

55. *See* cases cited *supra* note 53.

How does *Geduldig* fit into these general rules of facial classification? Taking the ruling at issue in *Geduldig* seriously on its own terms, *Geduldig* is quite easy to situate within these rules—even if many believe it was a misapplication of them. The statute at issue in *Geduldig* did not explicitly classify based on sex per se—but rather exclusively based on pregnancy.[56] Thus, it did not fall within the rule for finding facial classification based on explicit protected class-based discrimination.[57] The statute *did* rely on what many believed to be a close proxy for sex—pregnancy.[58] But the Court did not find the proxy of pregnancy to be sufficiently close to warrant a holding that it must categorically be deemed sex discrimination.[59]

Of course there are substantial reasons to believe this holding was in error, including the deep interconnections between pregnancy discrimination and the set of stereotypes about women's "place" in the world that have long propped up sex-based inequality.[60] As scholars such as Reva Siegel have observed, pregnancy discrimination was at the very heart of what early women's rights litigators sought to address in arguing for constitutional sex equality, precisely for this reason.[61] And while the Court majority summarily rejected these arguments in *Geduldig*, in later decisions such as *Nevada v. Hibbs* the Court *has* recognized that pregnancy's prominent role in underpinning gender stereotypes and in motivating sex-based disparate treatment.[62] Thus, there were at the time of *Geduldig* (and are today) strong arguments that pregnancy should be understood as a proxy for sex, and categorically subjected to intermediate scrutiny.

But the fact that *Geduldig* may have been wrong (in the view of many) does not undermine the fact that it appears to have been an *application* of the Court's approach to facial classifications, rather than an exception from it.[63] According to the logic of that approach, because the statute at issue in *Geduldig* did not directly classify based on sex—and because the Court declined to find that pregnancy is categorically a proxy for sex—there was

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56. *See Geduldig*, 417 U.S. at 489, 496 n.20.

57. *Id.*

58. *Id.*

59. *Id.* The third category, facially discriminatory administration, was not applicable in *Geduldig*, since there was no contention that the statute was administered in a manner differently than appeared on its face.

60. *See, e.g.*, Siegel, *supra* note 3, at 180–85, 204–10.

61. *Id.*; *see also* Siegel & Siegel, *supra* note 20.

62. *See* Nevada v. Hibbs, 538 U.S. 721, 730–31 (2003).

63. As other scholars have observed, this area is no doubt undertheorized, with little clear law. *See, e.g.*, Williams, *supra* note 35, at 1221–22 ("The existence of a facial classification is such an elementary issue that no law confines it: facial classifications admittedly involve 'judgment calls.'").

no facial discrimination. Whether or not one agrees with the Court's rulings in this regard (and many do not), *Geduldig* did not radically change the structure of the Court's approach to facial classifications—it simply held that one particular potential proxy (pregnancy) was not categorically facially sex discrimination.

Of course, the fact that a status like pregnancy is not deemed facially discriminatory on the basis of sex does not mean that it will be exempted entirely from meaningful Equal Protection review, or even from being deemed sex discrimination.[64] *Geduldig* itself observed that pregnancy discrimination would be deemed sex discrimination where the use of pregnancy was simply a pretext for invidious sex discrimination.[65] Moreover, as other scholars have observed, pregnancy regulation or discrimination ought also to be subject to intermediate scrutiny where it is undergirded by stereotypes or biases about men or women.[66] And as such scholars have also observed, discriminatory application of burdensome pregnancy regulations—to women, but not to men, to racial minorities but not to whites—ought to also trigger heightened scrutiny review.[67] Even rational basis review can—and has at times—afforded a weapon for addressing pregnancy discrimination in some contexts.[68]

And indeed, several of these approaches—including most notably stereotyping doctrine—have led to important victories for pregnancy discrimination claimants despite *Geduldig*.[69] It thus is important not to

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64. *See infra* notes 65–68 and accompanying text.

65. *See* Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).

66. *See, e.g.*, Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. REV. DISC. 160, 165, 167–68 (2013). It is important to note that stereotyping claims can come in any number of forms, and may involve circumstances where sex-based disparate treatment appears on the face of the policy (for example, sex-differentiated approaches to what is appropriate attire or conduct in the workplace). In those circumstances, stereotyping doctrine is not needed to identify facial discrimination, it is simply an application of it. In other circumstances, however, understandings that stereotyping is itself differentially applied may aid the adjudicator in finding discrimination, even where a facial classification or discrimination does not exist. In the pregnancy context, for example, our knowledge that the stereotype that women will not return from parental leave is sex-specific (men are presumed to be likely to return from any birth-related leave) can allow us to identify certain factual circumstances as sex-based even when they are framed in terms of pregnancy. *Cf.* Chadwick v. Wellpoint, 561 F.3d 38, 46–47, 48 n.12 (1st Cir. 2009) (recognizing that it requires no special expertise to conclude that sex-based discrimination may have occurred where a woman with small children is stereotyped as lacking commitment to the job).

67. *See, e.g.*, Michelle Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefield*, 102 CAL. L. REV. 781, 857–59, 868–73 (2014).

68. *See, e.g.*, Katie Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975 (2017).

69. *See, e.g.*, Siegel, *supra* note 3, at 210–11.

overstate the impact of a holding like *Geduldig* (finding a lack of facial classification) on the availability of constitutional protections.[70] Facial classifications are not the only type of discrimination subject to meaningful scrutiny under Equal Protection scrutiny, and it is both unhelpful and inaccurate to treat a ruling on whether a form of discrimination is facial as the *sine qua non* of whether it will be afforded meaningful Equal Protection review.

Nevertheless, it is equally important not to understate the significance of a holding that a given classification is not facial. In recent cases, defendants have argued that classifications like "transsexual surgery" and "gender dysphoria" are not facially discriminatory, precisely because they wish to force plaintiffs into the more burdensome (and less certain) task of proving intent.[71] While it is not clear that intent would be the only alternative to a finding of facial discrimination (this may depend, for example, on whether one conceptualizes stereotyping as a separate inquiry), it is clear that *any* approach that requires a more intensive inquiry will necessarily be more costly for litigants to pursue, and less certain to produce meaningful equal protection review.[72]

Moreover, in many transgender cases, the *Geduldig* arguments defendants are making truly would (unlike *Geduldig* itself) represent a departure from contemporary rules of facial classifications, rather than a (perhaps erroneous) application of them.[73] If a classification explicitly and directly depends on the sex of the individual (as it does in many of the classifications transgender litigants are challenging), what does it even mean to say it is not facially discriminatory?[74] Moreover, what does this say about what facial discrimination *is* (or is not)? As described more fully in Part IV, Defendants' arguments in the transgender rights cases suggest some truly troubling possibilities, such as a return to "separate but equal" reasoning.[75] But the reality is, it is unknowable where applying *Geduldig* to explicit classifications

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70. *Cf.* Goodwin, *supra* note 67, at 861–62 (making a similar point).

71. *See* sources cited *supra* note 5.

72. *See generally* Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012) (describing the difficult standards for proving intent under contemporary Equal Protection doctrine). It is also the case that the mere fact that a proxy is not itself deemed discriminatory may affect whether judges and the public view it as problematic. *See, e.g.*, Sarah Emily Burke & Roseanna Sommers, *Reducing Prejudice Through Law: Evidence from Experimental Psychology*, 89 U. CHI. L. REV. 1369, 1378 (2022).

73. *See infra* Section IV.A.

74. *Id.*

75. *See infra* Section IV.D.

might lead us, only that it would surely lead to retrenchments in the availability of equality protections.

Thus, while it is important not to over-state the extent to which the extension of *Geduldig* to contemporary transgender rights would cut off opportunities for meaningful Equal Protection review, it is also important not to minimize its likely impact. The following Part turns to the emerging constitutional jurisprudence of transgender Equal Protection law and explains how issues of facial discrimination have been treated to date in that context.

III. FACIAL DISCRIMINATION AND TRANSGENDER EQUALITY

Unlike sexual orientation discrimination, the Supreme Court has yet to decide an Equal Protection case in the context of transgender equality.[76] But recent years have seen an explosion of cases addressing transgender Equal Protection rights in the lower federal courts, and to a lesser extent in the state courts.[77] Such litigation has overwhelmingly led to successes for transgender litigants in challenging government discrimination against the transgender community.[78] Importantly here, in recent transgender Equal Protection cases courts have often found facial discrimination triggering heightened scrutiny to exist, on one (or both) of two grounds: sex discrimination and/or discrimination based on transgender status.[79]

With respect to transgender status, many courts have easily concluded that the polices challenged in recent transgender Equal Protection cases facially discriminate based on transgender status.[80] Thus, policies discriminating

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76. *See* Katie Eyer, *Transgender Constitutional Law*, 171 U. PA. L. REV. (forthcoming 2023), https://ssrn.com/abstract=4173202 [https://perma.cc/YEM5-XS8B].

77. *Id.*

78. *Id.*

79. *See infra* text accompany notes 80–88.

80. *See, e.g.*, Williams v. Kincaid, 45 F.4th 759, 772 (4th Cir. 2022); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 610–13 (4th Cir. 2020), *as amended* (Aug. 28, 2020); Karnoski v. Trump, 926 F.3d 1180, 1200–01 (9th Cir. 2019); Eknes-Tucker v. Marshall, 603 F. Supp. 3d. 1131, 1147 (M.D. Ala. 2022); Kadel v. Folwell, No. 1:19CV272, 2022 WL 3226731, at *18–19 (M.D.N.C. Aug. 10, 2022); Fain v. Crouch, 618 F. Supp. 3d 313, 327 (S.D.W. Va. 2022); Brandt v. Rutledge, 551 F. Supp. 3d 882, 889 (E.D. Ark. 2021), *aff'd sub nom.* Brandt *ex rel.* Brandt v. Rutledge, 47 F.4th 661 (8th Cir. 2022); Hecox v. Little, 479 F. Supp. 3d 930, 975–76 (D. Idaho 2020), *aff'd*, No. 20-35813, 2023 WL 1097255 (9th Cir. Jan. 30, 2023); Morris v. Pompeo, No. 219CV00569GMNDJA, 2020 WL 6875208, at *7 (D. Nev. Nov. 23, 2020); Stone v. Trump, 400 F. Supp. 3d 317, 352–53 (D. Md. 2019); Stockman v. Trump, 331 F. Supp. 3d 990, 999–1000 (C.D. Cal. 2018), *vacated and remanded on other grounds*, No. 18-56539, 2019 WL 6125075 (9th Cir. Aug. 26, 2019); F.V. v. Barron, 286 F. Supp. 3d 1131, 1140–41 (D. Idaho 2018), *decision clarified sub nom.* F.V. v. Jeppesen, 466 F. Supp. 3d 1110 (D. Idaho 2020), and *decision clarified sub nom.* F.V. v. Jeppesen, 477 F. Supp. 3d 1144 (D. Idaho 2020); M.A.B. v. Bd. of Educ. of

against "sex changes or modifications," "gender dysphoria," and more have all been found to discriminate on the basis of transgender status, without any further factual inquiry.[81] While most of these government policies have not used the word "transgender," courts have nevertheless easily concluded that they facially discriminate.[82] As in most other facial discrimination cases, this conclusion has generally occasioned little detailed analysis—but rather has been treated as obvious given the very close association between the criteria relied on and the characteristics that define transgender people as a class.[83]

Of course, such a finding does not guarantee heightened scrutiny unless a court *also* is willing to conclude anti-transgender discrimination should receive heightened scrutiny. But an increasing number of courts have so held, either on the grounds that anti-transgender discrimination is itself categorically sex discrimination (a form of discrimination that already receives intermediate scrutiny), or on the grounds that transgender people independently ought to be deemed as suspect or quasi-suspect class.[84] Thus,

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Talbot Cnty., 286 F. Supp. 3d 704, 719–20 (D. Md. 2018); Flack v. Wisc. Dep't of Health Servs., 328 F. Supp. 3d 931, 952–53 (W.D. Wisc. 2018); Doe 1 v. Trump, 275 F. Supp. 3d 167, 208 (D.D.C. 2017), *vacated on other grounds sub nom.* Doe 2 v. Shanahan, 755 F. App'x 19 (D.C. Cir. 2019).

81. *See* cases cited *supra* note 80.

82. *Id.*

83. *Id.* Indeed, the courts often have not even used the term "facial discrimination" in their discussion, though some do. *Id.*

84. *Grimm*, 972 F.3d at 610–13; *Karnoski*, 926 F.3d at 1200–01; *Brandt*, 551 F. Supp. 3d at 889; Michelle v. California Dep't of Corr. & Rehab., No. 118CV01743NONEJLTPC, 2021 WL 1516401 (E.D. Cal. Apr. 16, 2021), *report and recommendation adopted sub nom.* Concepcion v. California Dep't of Corr. & Rehab., No. 118CV01743NONEJLTPC, 2021 WL 3488120 (E.D. Cal. Aug. 9, 2021); Vasquez v. Iowa Dep't. of Hum. Servs., No. CVCV061729, slip op. at 59 (Iowa Dist. Ct. Polk Cnty. Nov. 19, 2021), https://www.courthousenews.com/wp-content/uploads/2021/11/iowa-medicaid-transgender-ruling.pdf [https://perma.cc/CD4P-FQPD]; Bos. All. of Gay, Lesbian, Bisexual & Transgender Youth v. United States Dep't of Health & Hum. Servs., 557 F. Supp. 3d 224, 244–45 (D. Mass. 2021); *Hecox*, 479 F. Supp. 3d at 975–76; *Morris*, 2020 WL 6875208, at *7; Ray v. McCloud, 507 F. Supp. 3d 925, 936–38 (S.D. Ohio 2020); Monegain v. Dep't of Motor Vehicles, 491 F. Supp. 3d 117, 140 (E.D. Va. 2020); Toomey v. Arizona, No. CV1900035TUCRMLAB, 2019 WL 7172144, at *8 (D. Ariz. Dec. 23, 2019); *Stone*, 400 F. Supp. 3d at 355; Garcia v. Nevada, No. 2:17-CV-359-APG-CWH, 2019 WL 11731008, at *5–6 (D. Nev. Mar. 22, 2019); A.H. v. Minersville Area Sch. Dist., 408 F. Supp. 3d 536, 575 (M.D. Pa. 2019); *Stockman*, 2017 WL 9732572, at *15; *F.V.*, 286 F. Supp. 3d at 1144–45; Good v. Iowa Dept. of Hum. Servs. No. 18-1158, 2018 WL 7888510 (Iowa Sept. 26, 2018); Beal v. Iowa Dept. of Hum. Servs., CVCV054956; CVCV055470 (consolidated) (5th Jud. Dist.) (slip opinion), https://www.aclu.org/sites/default/files/field_document/good_v._iowa_department_of_human_services_-_ruling_on_petitions_for_judicial_review_2018-06-06.pdf [https://perma.cc/9JMB-MVFN]; *M.A.B.*, 286 F. Supp. 3d at 719–22; *Flack*, 328 F. Supp. 3d at 952–53; *Doe 1*, 275 F. Supp. at 209; Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *see also* cases cited *infra* note 87.

a growing number of circuit and district courts have held that—where a provision facially discriminates against the transgender community—it will be subject to heightened scrutiny.[85]

In addition to finding many of the policies challenged in transgender Equal Protection cases to be facially discriminatory on the basis of transgender status, many courts have also found them to be facially discriminatory on the basis of sex.[86] In some cases, this has followed inexorably from the courts' determination that facial discrimination based on transgender status exists—since many circuits have, like the Supreme Court in *Bostock v. Clayton County*, concluded that anti-transgender discrimination is necessarily also sex discrimination.[87] But courts have also found facial sex discrimination on a number of other grounds, including that the government is facially classifying individuals based on sex-assigned-at-birth (in, for example, school restrooms, or prisons), or that a program is facially distributing benefits or burdens on the basis of conformity to gender stereotypes.[88]

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85. *See* cases cited *supra* note 84.

86. *See* cases cited *infra* notes 87–88.

87. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738–43 (2020); *see also Stone*, 400 F. Supp. 3d at 352–53, 355; *Flack*, 328 F. Supp. 3d at 952–53. For circuits concluding that anti-transgender discrimination is sex discrimination, see EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 575–76 (6th Cir. 2018), *aff'd sub nom.* Bostock v. Clayton Cnty., 207 L. Ed. 2d 218, 140 S. Ct. 1731 (2020); Whitaker *ex rel.* Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1047–51 (7th Cir. 2017); Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016); Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011); Barnes v. City of Cincinnati, 401 F.3d 729, 737–38 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004); Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213, 215–16 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000). While not all of these decisions were from the Equal Protection context, many were. Moreover, the reasoning relied on even in the statutory cases likely also extends to the Equal Protection context. Note, however, that the continued vitality of one of these cases—*Glenn v. Brumby*, 663 F.3d at 1316—may be subject to question in light of the Eleventh Circuit's recent decision in *Kasper* ex rel. *Adams v. Sch. Bd.*, 57 F.4th 791 (11th Cir. 2022) (en banc). While *Adams* does not explicitly overrule *Glenn*—and indeed treats the policy at issue in *Adams* (sex-separated restrooms) as sex discrimination subject to intermediate scrutiny—*Adams* was notably unreceptive to transgender rights arguments as a general matter, and suggests that *Glenn* may rest on shaky ground given the current composition of the Eleventh Circuit.

88. *See, e.g.*, *Brandt*, 47 F.4th at 669–70; *Grimm*, 972 F.3d at 610–13; *Whitaker* ex rel. *Whitaker*, 858 F.3d at 1050–54; Corbitt v. Taylor, 513 F. Supp. 3d 1309, 1314–23 (M.D. Ala. 2021); Iglesias v. Fed. Bureau of Prisons, No. 19-CV-415-NJR, 2021 WL 6112790, at *24–25 (S.D. Ill. Dec. 27, 2021), *modified*, 598 F. Supp. 3d 689 (S.D. Ill. 2022); Kadel v. Folwell, 446 F. Supp. 3d 1, 17–19 (M.D.N.C. 2020), *aff'd sub nom.* Kadel v. N.C. State Health Plan for Tchrs. & State Emps., 12 F.4th 422 (4th Cir. 2021), *as amended* (Dec. 2, 2021); *Monegain*, 491 F. Supp. 3d at 140 (E.D. Va. 2020); J.A.W. v. Evansville Vanderburgh Sch. Corp., 396 F. Supp. 3d 833, 842–43 (S.D. Ind. 2019); *M.A.B.*, 286 F. Supp. 3d at 719–20; Doe v. Mass. Dep't of Correction, No. CV 17-12255-RGS, 2018 WL 2994403, at *9–11 (D. Mass. June 14, 2018); Sullivan-Knoff v. City of Chicago, 348 F. Supp. 3d 787, 792–94 (N.D. Ill. 2018); Hampton v. Baldwin, No. 3:18-

Thus, on either or both of these grounds—that challenged policies facially discriminate on the basis of transgender status or that they facially discriminate on the basis of sex—most policies at issue in contemporary transgender Equal Protection cases are being subject to heightened scrutiny.[89] These policies range *inter alia* from discriminatory health insurance exclusions (excluding coverage for gender affirming care), to policies banning transgender women from competing in women's athletics, to bans on gender-identity appropriate restroom access, to gender-identity inappropriate prison assignments.[90] Thus, across virtually all of the diverse contexts in which transgender plaintiffs are bringing Equal Protection claims, findings of facial discrimination are playing an important role in ensuring that heightened scrutiny is applied—and no doubt, in the high success rates that transgender litigants have experienced.[91]

Likely cognizant of this fact, government defendants have increasingly argued across a host of contexts that facial discrimination—on the basis of sex and/or transgender identity—should *not* be found under the Court's 1974 decision in *Geduldig v. Aiello*.[92] The following section turns to a discussion of the recent arguments that have been raised based on *Geduldig* in the context of transgender Equal Protection cases, and explains why those arguments rest on an erroneous reading of *Geduldig*.

CV-550-NJR-RJD, 2018 WL 5830730, at *10–12 (S.D. Ill. Nov. 7, 2018); Boyden v. Conlin, 341 F. Supp. 3d 979, 999–1003 (W.D. Wis. 2018); *Flack*, 328 F. Supp. 3d at 952–53; *cf. Kasper* ex rel. *Adams*, 57 F.4th at 801–05 (acknowledging that policy which required students to use restrooms based on sex assigned at birth "is a sex-based classification" but finding that it survived intermediate scrutiny). In many cases, these two methods of finding facial sex discrimination are arguably the same since the stereotype at issue is specific to the sex assigned at birth, and there is simply a form of sex-based disparate treatment. *See, e.g.*, *Bostock*, 140 S. Ct. at 1741–43, 1748–49 (recognizing that gender stereotyping is a form of sex-based disparate treatment prohibited by Title VII); *see also* Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1665–70 (2021) (arguing that gender stereotyping—and stereotyping doctrine generally—is properly conceptualized as a form of disparate treatment). Nevertheless, because these are formally different ways of reasoning in the lower courts, I list them both here. As described *supra* Part II, gender stereotyping can also sometimes be applied in a more fact-specific sense as a basis for finding discrimination.

89. *See* sources cited *supra* notes 80–83, 86–88. Some cases have also found heightened scrutiny to be applicable based partly on a more fact-intensive inquiry like intent. *See, e.g.*, *Monegain*, 491 F. Supp. 3d at 144; *Evancho*, 237 F. Supp. 3d at 285–86, 285 n.28.

90. *See* sources cited *supra* notes 80–83, 86–89.

91. *Id.*

92. *See* sources cited *supra* note 5; 417 U.S. 484 (1974).

IV. *GEDULDIG* ARGUMENTS FOR IGNORING FACIAL CLASSIFICATIONS IN THE TRANSGENDER EQUAL PROTECTION CONTEXT

The arguments that Defendants in contemporary transgender Equal Protection cases have raised based on *Geduldig* have taken a number of different forms.[93] But all have centered on arguments that facial discrimination (based on transgender status and/or sex) cannot be found under *Geduldig*, and/or that *Geduldig* otherwise precludes the application of heightened scrutiny, despite the existence of facial discrimination.[94] This section addresses each of the major types of *Geduldig* arguments that have been raised by Defendants in transgender rights cases, explaining in turn why each is erroneous.

A. Geduldig *as a Reason To Ignore Explicit Facial Classifications*

As described in Part I, *Geduldig* was *not* a case involving an explicit facial classification (i.e., sex)—but rather a case involving a proxy (pregnancy) claimed to be close enough to a protected status (sex) to be deemed facially discriminatory.[95] Thus, there is nothing in *Geduldig* that would support the conclusion that explicit facial classifications can escape heightened review where they are relied on by the government—and indeed, modern Equal Protection authority is to the contrary.[96] As the Supreme Court has repeatedly held, where the government explicitly relies on protected class status to distribute benefits or burdens to individuals, its program or policy must survive the applicable level of scrutiny.[97]

It is important to note that in most contemporary transgender Equal Protection cases, this rule—that explicit reliance on protected class status is facial discrimination and triggers the applicable level of scrutiny—is implicated, and should preclude the application of *Geduldig*.[98] This is true

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93. *See* sources cited *supra* note 5; 417 U.S. 484 (1974).

94. *See* sources cited *supra* note 5; 417 U.S. 484 (1974).

95. *See Geduldig*, 417 U.S. at 489. Indeed, the core holding of *Geduldig* was precisely that "[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics" that is not inevitably synonymous with sex. *Id.* at 496 n.20. As some courts have observed in distinguishing *Geduldig*, pregnancy can be defined without even referencing sex. *See, e.g.*, Kadel v. Folwell, 620 F. Supp. 3d 339, 379 n.7 (M.D.N.C. 2022); *see also* Kai N. Stolting & Anthony B. Williams, *Male Pregnancy in Seahorses and Pipefish: Beyond the Mamalian Model*, 29 BIOESSAYS 884 (2007). While this may seem an overly formalistic approach to pregnancy, this formalistic approach rests at the core of *Geduldig*'s holding.

96. *See* sources cited *supra* note 84–88.

97. *See supra* Part II.

98. *See infra* text accompanying notes 99–102.

because many such cases involve circumstances where Defendants are explicitly relying on sex and/or transgender status classifications to distribute benefits or burdens.[99] Thus, for example, when a transgender student brings an Equal Protection claim challenging their exclusion from a gender-identity appropriate restroom, the classification to which they have been subject—sorting students into restrooms based on sex assigned at birth—explicitly classifies on the basis of sex.[100] So too, where a government policy targets "transgender" persons or students for discrimination, there should be no question that it is facially discriminatory.[101]

Nevertheless, this has not stopped defendants in transgender Equal Protection cases from endeavoring to argue that *Geduldig* precludes the application of heightened scrutiny to explicit classifications based on sex and/or transgender status.[102] Often relying on superficial similarities between *Geduldig* and the case at issue (such as the fact that both cases take place in the insurance context), defendants have argued that even where they explicitly rely on a protected class status, this ought not be deemed facially discriminatory[103] (or, they have attempted to confuse the issue by suggesting—contra the face of the classification—that they do not in fact rely on sex or transgender status).[104] For example, defendants have contended that policies such as sex-separated restrooms (which explicitly rely on sex) and policies discriminating against "transgender persons" (which explicitly rely on "transgender" status) are not facially discriminatory under *Geduldig*.[105]

To date, the lower courts have largely—though not universally—rejected these arguments, implicitly or explicitly. Recognizing that a policy that makes an individual's access to a benefit turn on their sex assigned at birth necessarily and facially discriminates on the basis of sex—and that policies targeting "transgender" individuals facially discriminate based on transgender status—the courts have treated *Geduldig* as inapplicable.[106] This

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99. *See* sources cited *supra* note 88.

100. *See, e.g.*, Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 608 (4th Cir. 2020), *as amended* (Aug. 28. 2020) ("[W]hen a School District decides what bathroom a student may use based upon the sex listed on the student's birth certificate, the policy necessarily rests on a sex classification." (internal quotation marks and citation omitted)).

101. *See, e.g.*, Karnoski v. Trump, 926 F.3d 1180, 1201 (9th Cir. 2019) (rejecting the Defendants' *Geduldig*-based argument that discrimination against "transgender persons" was not facially discriminatory on the basis of transgender status).

102. *See* sources cited *supra* note 5.

103. *Id.*

104. *Id.*

105. *Id.*

106. Historically, many courts have simply ignored defendants' *Geduldig* arguments in reaching this conclusion. *See* sources cited *supra* note 88. More recently, a greater number of

conclusion is clearly correct—indeed so much so that it is surprising that in a small number of cases courts have reached the opposite conclusion.[107]

Indeed, it would turn *Geduldig* on its head to treat *Geduldig* as a bar on courts finding facial discrimination, where explicit protected-class-based criteria are relied on by government entities. For decades, the Supreme Court has treated express reliance on protected class status as the *sine qua non* of facial classifications—and of triggering heightened scrutiny.[108] It is hard to imagine a more obviously inaccurate application of *Geduldig*—or a more profound divergence from contemporary Equal Protection doctrine—than to read it as a basis for declining to find facial discrimination where the government is explicitly relying on protected class status in its decision-making.[109]

B. Geduldig *as a Reason Why Proxies Cannot Be Deemed Facially Discriminatory*

Geduldig has more obvious relevance—though not the dispositive relevance that defendants seek to give it—where courts have confronted the question of where close proxies for sex or transgender status should be deemed facially discriminatory.[110] As described in Part I, *Geduldig* did involve a claim that a particular proxy (pregnancy) ought to be deemed

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courts have begun to explicitly address defendants' *Geduldig* arguments, typically (but not always) finding such arguments to be meritless. *See, e.g.*, Jane Doe 1 v. Thornbury, No. 3:23-cv-230-DJH, 2023 WL 4230481, at *4 (W.D. Ky. June 28, 2023) (rejecting *Geduldig* argument); Dekker v. Weida, No. 4:22cv325-RH-MAF, 2023 WL 4102243, at *13-14 (N.D. Fla. June 21, 2023) (same); M.H. and T.B. v. Jeppesen, No. 1:22-cv-00409-REP, 2023 WL 4080542, *11-12 (D. Idaho June 20, 2023) (same); K.C. v. Indiv. Members of Med. Licensing Bd. of Indiana, No. 1:23-cv-00595-JPH-KMB, 2023 WL 4054086, at *8 (S.D. Ind. June 16, 2023) (same); Doe v. Ladapo, No. 4:23cv114-RH-MAF, 2023 WL 3833848 (N.D. Fla. June 6, 2023) (same); Kadel v. Folwell, 620 F. Supp. 3d 339 (M.D.N.C. 2022) (same); Fain v. Crouch, 618 F. Supp. 3d 313 (S.D. W. Va. 2022) (same); Boyden v. Conlin, 341 F. Supp. 3d 979 (W.D. Wis. 2018) (same). *But cf.* L.W. by and through Williams v. Skrmetti, 73 F.4th 408, 419 (6th Cir. 2023) (relying on *Geduldig* and *Dobbs* to find that state was likely to be able to show that ban of gender-affirming care for transgender youth did not trigger heightened scrutiny, and thus state was likely to succeed in appeal of preliminary injunction); Lange v. Houston Cnty., 608 F. Supp. 3d 1340 (M.D. Ga. 2022) (relying on *Geduldig* to find no facial discrimination based on sex or transgender status, though ruling for the plaintiffs on other grounds); Adams by and through Kasper v. Sch. Bd. of St. Johns County, 57 F.4th 791, 809 (11th Cir. 2022) (en banc) (relying on *Geduldig* to conclude that a policy that specifically singled out transgender students for differential treatment was nonetheless not facially discriminatory on the basis of transgender status).

107. *See* sources cited *supra* note 106.

108. *See supra* Part II.

109. *See supra* Part II.

110. *See supra* Parts I, II.

categorically facially discriminatory based on protected class status (sex)—and the Court rejected that particular claim.[111] Thus, *Geduldig* does make clear that not all alleged proxies for protected class status must be deemed categorically facially discriminatory.[112]

But *Geduldig* also stands for far less in the proxy context than defendants have sought to contend in recent transgender rights cases. In such cases, defendants have often suggested that *Geduldig* represents a categorical rejection of the idea that close proxies can be treated as facially discriminatory.[113] But as described in Part II, the Supreme Court has continued to treat close proxies for protected class status as facially discriminatory—both before and after *Geduldig*.[114] Thus, *Geduldig* does not represent a categorical bar on finding facial discrimination based on reliance on a close proxy—but rather merely stands for the unexceptional proposition that not all potential proxies for protected class status must be deemed categorically facially discriminatory.[115]

If *Geduldig* does not answer the question of whether proxies for transgender status—such as "sex change[s]" or "gender dysphoria"—ought to be deemed facially discriminatory, then what does? Here, the treatment by the Supreme Court of close proxies for sexual orientation as a status are instructive.[116] Just as in the transgender rights context, defendants long argued in the sexual orientation context that close proxies for gay and lesbian status—such as same-sex sodomy bans—were facially neutral as to sexual orientation.[117] But the Supreme Court persistently rejected such arguments, recognizing that where conduct is "closely correlated with being [gay or lesbian]" it is "directed toward gay persons as a class."[118] Or, as the Court put it in *Christian Legal Society v. Martinez*, "[o]ur decisions have declined to distinguish between status and conduct" in the sexual orientation context.[119]

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111. *See supra* Part I.

112. *See supra* Part II.

113. *See* sources cited *supra* note 5.

114. *See supra* Part II.

115. *Id.*

116. *See supra* Part II; *infra* note 118 and accompanying text.

117. *See generally* Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083 (2017).

118. *See* Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring).

119. Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez, 561 U.S. 661, 689 (2010). Although the Court in Obergefell v. Hodges, 576 U.S. 644, 670 (2015), suggested that bans on same-sex marriage might be such a proxy as well (though its reasoning did not rely on this conclusion), it is not clear that the current Court will conceptualize discrimination against same-sex marriage in this way. *See* Transcript of Oral Argument at 124, 303 Creative LLC v. Elenis, No. 21-476 (S. Ct. argued Dec. 5, 2022) (questioning whether

Applying these principles to the context of transgender Equal Protection cases makes clear that the types of proxies on which government entities have sought to rely—such as "gender dysphoria" or "gender identity issues"—should also be deemed facially discriminatory.[120] Such proxies are of course very "closely correlated with being"[121] transgender—indeed at times they are literally definitional of transgender status.[122] They often arise in contexts that like a "tax on yarmulkes" are difficult to explain other than a desire to target the burdened group.[123] Thus, like other circumstances in which the Supreme Court has found close proxies to be facially discriminatory, so too the types of close proxies at issue in transgender Equal Protection cases should be deemed facially discriminatory.

Indeed, many of the proxies at issue in recent transgender Equal Protection cases are so deeply entwined with transgender status as to raise precisely the boundary quandaries alluded to in Part II (about the fuzziness of the boundary between proxy and explicit classification).[124] Obviously a government need not use the magic word "transgender" to facially discriminate based on transgender status. There thus are quite plausible arguments that classification based on, for example, "gender reassignment"[125] or having an "appearance or perception" of his or her sex that is "inconsistent with" sex assigned at birth,[126] is not a proxy—but simply another way of explicitly saying transgender status. But whether considered as a close proxy or as an explicit use of transgender status, the outcome ought to be the same—a finding of facial classification.

Finally, it is worth observing that—to the extent that policy concerns inform the courts' decision as to whether a particular proxy should be deemed facially discriminatory—the proxy at issue in *Geduldig* (i.e., pregnancy), had

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discrimination on the basis of same-sex marriage is the same as discrimination on the basis of sexual orientation). *But cf.* Obergefell v. Hodges, 576 U.S. 644, 670 (2015) (suggesting that state provisions disallowing marriage by same-sex couples "demean[] gays and lesbians" and "teach[] that gays and lesbians are unequal in important respects"). However, this does not undermine the existing case law, which clearly treats at least the proxy of sodomy discrimination as the equivalent of sexual orientation discrimination.

120. *See supra* Part II; *infra* note 123 and accompanying text.

121. *See Lawrence*, 539 U.S. at 583 (O'Connor, J., concurring).

122. *See supra* Part II; *infra* notes 125–126 and accompanying text.

123. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 270 (1993) ("Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews.").

124. *See supra* Part II.

125. Corbitt v. Taylor, 513 F. Supp. 3d 1309, 1314–23 (M.D. Ala. 2021).

126. Eknes-Tucker v. Marshall, 603 F. Supp. 3d 1131, 1139, 1147 (M.D. Ala. 2022); *Corbitt*, 513 F. Supp. 3d at 1314–23.

unusually far-reaching implications of a kind not raised in the recent transgender rights cases. Thus, for example, treating pregnancy as per se sex discrimination would have had substantial implications for taxpayers by partially externalizing the social costs of reproduction—and would also have made all regulation of pregnancy, including abortion, quasi-suspect.[127] While this far-reaching impact might also be seen as an argument in *favor* of treating pregnancy as facially discriminatory, the Supreme Court has often been chary of Equal Protection rulings that would have such sweeping societal effects.[128]

In contrast, in the transgender context, no such sweeping impact would result from deeming discrimination against close proxies like "sex changes" or "gender dysphoria" to be facial discrimination on the basis of transgender status. The costs at issue in most transgender-discriminatory provisions are miniscule, and the only individuals meaningfully affected by the vast majority of contemporary anti-transgender government policies are the small minority community of transgender persons themselves.[129] Thus, unlike pregnancy—which would require substantial costs to treat equitably, and which the Court has treated as *sui generis* because of the potential interest in fetal life—no such comparable consequences would flow from a determination that close proxies for transgender status are in fact facially discriminatory.[130]

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127. As other scholars have observed, the consequences of deeming pregnancy discrimination to be facially sex discrimination are far broader than what is at stake in most proxy discrimination cases. For example, the issue of whether the costs of reproduction should generally be externalized (to society) or privatized (to the family) is one that was implicated by the exclusion at issue in *Geduldig* and other common exclusions for pregnancy disability coverage at the time. *See, e.g.*, Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 467–69 (2011). So too, as recent arguments in *Dobbs* suggest, abortion regulation must be deemed sex discrimination if pregnancy regulation is facially discriminatory. *See* Siegel et al., *supra* note 4. Even on its own terms, *Geduldig* itself made clear the potentially high stakes, as including pregnancy in the program would have, under even the Plaintiffs' estimates, raised the overall cost of the insurance program by more than 10%. *See* Brief for Appellees at 88–89, Geduldig v. Aiello, 417 U.S. 484 (1974) (No. 73-640). While again, these far-reaching consequences may be seen as reasons *for* finding pregnancy discrimination to be sex discrimination, this has often not been the Supreme Court's approach.

128. *See, e.g.*, McClesky v. Kemp, 481 U.S. 279 (1987) (infamously rejecting racial justice arguments in the criminal justice context in part because of the sweeping effects that they would have).

129. *See, e.g.*, Kadel v. Folwell, 620 F. Supp. 3d 339, 355–357 (M.D.N.C. 2022) (the total cost of removing the exclusion, during the one year it was removed, was $404,609.26, a miniscule amount in proportion to total plan funds/costs).

130. *See* sources cited *supra* note 127.

C. Geduldig *as a Rule that the Insurance or Benefits Cannot be Facially Discriminatory*

As it has been understood by subsequent decisions, *Geduldig* was a case about facial classifications (or the lack thereof), not a case about the insurance context. Nevertheless, some defendants have attempted to rely on *Geduldig* to argue that insurance and/or benefits are somehow immune from ordinary Equal Protection scrutiny.[131] As set out below this "benefits exceptionalism" is unsupportable, both legally and theoretically. And there is nothing in *Geduldig* that supports such a proposition.

As an initial matter, numerous post-*Geduldig* cases make clear that *Geduldig* was a case about what will be deemed a facial classification—not a case specifically about insurance.[132] Indeed, this reading of *Geduldig* has been central to the ability of the Supreme Court to (as it has done) extend *Geduldig* beyond its original insurance context.[133] Thus, the Court has extended *Geduldig* to, for example, preclude a § 1985[3] conspiracy claim predicated on opposition to abortion,[134] and most recently, in dicta, to preclude the argument that the criminal regulation of pregnancy (via abortion) automatically triggers heightened Equal Protection review.[135] Such rulings have rested centrally on a reading of *Geduldig* as a decision that was about the fact that pregnancy discrimination is not facially and categorically sex discrimination—regardless of the context in which it arose.

Conversely, the Court has also made clear that the "insurance is special" reading of *Geduldig* is erroneous, insofar as it has regularly and repeatedly subjected discrimination in the benefits and insurance context to heightened scrutiny, both before and after *Geduldig*.[136] Indeed, several of the seminal Equal Protection cases in which the Court invalidated facial sex discrimination arose in the benefits and/or insurance context.[137] Thus, the Court has made clear that facial discrimination in the insurance context is subject to the same anti-discrimination rules as facial discrimination in any other context, despite *Geduldig*.[138]

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131. *See* sources cited *supra* note 5.

132. *See* sources cited *infra* note 135.

133. *Id.*

134. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 271–74 (1993).

135. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245–46 (2022).

136. *See* sources cited *infra* note 137.

137. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973); Califano v. Goldfarb, 430 U.S. 199 (1977); Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); *see also* City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 714–15 (1978) (finding that a municipal agency pension plan violated Title VII's protections against sex discrimination).

138. *See* sources cited *supra* note 137.

The above rulings alone are reason enough to reject defendants' recent attempts to read *Geduldig* in the transgender Equal Protection context as creating a special rule for insurance and/or benefits. But it is worth digging a little deeper into the argument, which relies on a superficial appeal to certain language in *Geduldig* which states that "[t]here is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class . . . . There is no risk from which men are protected and women are not."[139] From this language, defendants have attempted to divine a general rule that where the *content* of the benefits package afforded differing classes is the same, that there can be no facial discrimination.[140]

As the context of *Geduldig* makes clear, this reading of *Geduldig* is simply erroneous. This passage addressed an *additional* way that plaintiffs could have, but had failed to, establish sex discrimination—separate and apart from the pregnancy benefits argument. Obviously, if men and women had been afforded different benefits packages in *Geduldig* this independently would have been a basis for finding sex discrimination, irrespective of the pregnancy exclusion. And yet the Court also addressed the pregnancy exclusion separately.[141] This passage thus cannot be read to suggest that providing the same benefits package—even where that package includes facially discriminatory provisions—categorically immunizes benefits or insurance from Equal Protection review.

Indeed, to the contrary, the Court in *Geduldig* specifically recognized that even pregnancy *benefits* discrimination—the subject of its central ruling—could be subject to sex discrimination scrutiny where it was a "pretext[] designed to effect an invidious discrimination against the members of one sex or the other."[142] Thus, the Court itself recognized circumstances in which discriminatory benefits provisions must receive heightened scrutiny, even where all received the same package of benefits.[143] But of course intent and facial classification are simply alternative ways of establishing *the same thing*—i.e., discrimination.[144] Thus, it is nonsensical to suggest that benefits discrimination is actionable where it is covert but intentional, but not where it is explicit and facial.

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139. *See* Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974).
140. *See* sources cited *supra* note 5.
141. *Geduldig*, 417 U.S. at 496 n.20.
142. *Id.*
143. *Id.*
144. *See, e.g.*, Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 819 (4th Cir. 1995).

Finally, some defendants have seemed to imply, relying on *Geduldig*, that the content of benefits provisions are somehow incapable, inherently, of being facially discriminatory. But this is obviously factually incorrect. Many of the benefits exclusions at issue in recent cases—such as bans on coverage for "sex changes or modifications"—are plainly facially discriminatory, under any reasonable definition of that term.[145] Moreover, it is not difficult to conceive of other facially discriminatory benefit provisions—such as an exclusion on coverage of cross-racial fertility services, or of maternity costs for interracial pregnancies. In such instances, there would be "no risk from which [whites] are protected and [racial minorities] are not."[146] Nevertheless, the underlying exclusions would be plainly facially discriminatory, and would be subject to heightened scrutiny review on those grounds—even if all members received the same package of benefits.

D. Geduldig *as a Requirement that All Members of a Group Be Adversely Affected or as an "Equal Application" Principle*

The final way in which defendants have sought to rely on *Geduldig* in recent transgender Equal Protection cases is as a statement of sweeping—but obviously incorrect—Equal Protection principles. Thus, defendants have suggested that *Geduldig* stands for the proposition that government discrimination must precisely and completely divide groups (men and women, transgender and non-transgender people) into the favored and disfavored categories for a facial classification to exist.[147] If some members of the disfavored group are not affected by the classification—for any reason—there is no facial discrimination.[148] So too, defendants have relied on *Geduldig* to argue that Equal Protection doctrine incorporates an "equal application" rule, whereby if both transgender and non-transgender people—or both men and women—are equally subjected to class-based discrimination, then there is no constitutional discrimination.[149]

Both of these arguments are clearly wrong under modern Equal Protection law, though in both instances there is language in *Geduldig* that superficially appears to support the argument that defendants are making. With respect to the first argument, defendants have relied on the following passage from *Geduldig*'s footnote:

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145. *See, e.g.*, Kadel v. Folwell, 620 F. Supp. 3d 339 (M.D.N.C. 2022).
146. *Geduldig*, 417 U.S. at 496–97.
147. *See* sources cited *supra* note 5.
148. *Id.*
149. *Id.*

> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.[150]

Observing in recent transgender Equal Protection cases that there are often both men and women who are affected by the discriminatory provisions—and that often not *all* transgender people are affected (though transgender people may be the only ones affected)—defendants have attempted to rely on this language in *Geduldig* to argue that there is no facial discrimination unless *all* members of the protected class are harmed—and *all* members outside the class are not.[151]

But taking this to state a general rule of facial classifications—that all members of a protected class must be affected by the discrimination, and none outside it can be, in order for a classification to be facially discriminatory—would be patently inconsistent with numerous contemporary Supreme Court cases. Thus, for example, the Supreme Court has found the explicit use of race in the affirmative action context to be subject to strict scrutiny—despite the fact that many whites still gain admission to all universities that have seen their affirmative action programs challenged, and despite the fact that many minorities do not.[152] So too, the Court has consistently recognized that facial discrimination can exist even when only a defined sub-group (like mothers) is affected.[153] As the Court has stressed, the right not to be treated differently based on one's race (or sex, or other protected class status) is a "personal" one, not one defined at a group level.[154]

Indeed, the Court has stated that "even a single instance of [protected class] discrimination" must be evaluated under the relevant Equal Protection strictures.[155] Thus, where there is a single instance of a transgender individual being subjected to facial sex or gender identity discrimination, it does not matter how many other transgender individuals remain unaffected.[156] Under

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150. *Geduldig*, 417 U.S. at 496 n.20.

151. *See* sources cited *supra* note 5.

152. *See, e.g.*, Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 309–10 (2013); Grutter v. Bollinge, 539 U.S. 306, 326–28 (2003).

153. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971).

154. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 230 (1995).

155. Flowers v. Mississippi, 139 S. Ct. 2228, 2242 (2019).

156. *See id.*

contemporary Supreme Court doctrine, the facial classification must be subjected to the requisite level of scrutiny.

So too, the "equal application" rule that Defendants have sought to derive from *Geduldig* is equally unsupportable. Here, defendants have sought to rely on the "two groups" language,[157] as well as the "no risk from which men are protected and women are not" language[158] to argue that where men and women alike are subject to sex discrimination (or transgender people and non-transgender people are subject to gender identity discrimination) there is no constitutional discrimination.[159] But this reading of *Geduldig* ignores decades of case law rejecting precisely this proposition—as well as common sense.

Indeed, the "equal application" principle was precisely the principle that once supported segregation and the Jim Crow regime, and which the Supreme Court has repeatedly repudiated since that time.[160] Even in modern contexts where defendants have argued that they are acting for benign ends—such as prison security—the Court has refused to credit "equal application" arguments, and has instead found that differential treatment of *individuals* based on their protected class status triggers the requisite level of scrutiny.[161] Indeed, such a conclusion follows inevitably from the Court's determination that the Equal Protection right is a "personal" one (not to be subject to discrimination based on race, sex, or other protected class status as an individual)—not one that turns on a weighing of the scales of inequality against a group and its counterpart.[162] Thus, as the Court put it in a recent Title VII case, such equal application of discriminatory terms does not eliminate unlawful discrimination, it "doubles it."[163]

V. CONCLUSION

Geduldig v. Aiello may seem to many an archaic (and likely wrongly decided) opinion—perhaps one of little relevance to contemporary Equal Protection doctrine. But today, defendants are attempting to give it new life.[164] In the new context of transgender rights, defendants across the country are attempting to rely on *Geduldig* to deny that heightened scrutiny is

157. *See supra* text accompanying notes 30, 151.
158. *See supra* text accompanying notes 134, 147.
159. *See* sources cited *supra* note 3.
160. *See* Williams, *supra* note 35, at 1209–13.
161. *See, e.g.*, Johnson v. California, 543 U.S. 499, 505–08 (2005).
162. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227, 230 (1995).
163. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020).
164. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245–46 (2022).

required, even in the context of laws that facially classify on the basis of sex and transgender status.[165]

As set out herein, such *Geduldig*-based arguments are not only wrong, but profoundly so. *Geduldig* was emphatically not a free license to ignore the type of explicit protected-class-based discrimination that is at issue in many recent transgender Equal Protection cases.[166] Indeed, such an approach would turn *Geduldig* (which refused to find facial discrimination in the *absence* of explicit references to a protected class) on its head.[167] And even in the more-directly relevant context of assessing proxy discrimination, *Geduldig* stands for nothing like the far-reaching conclusions that defendants would attribute to it.[168] Rather, *Geduldig* stands only for—at most—the modest proposition that one particular proxy (pregnancy) was deemed by the Court insufficiently close to a protected class status (sex) to be deemed categorically facial sex discrimination.[169]

Nor do the other far-reaching arguments that Defendants have raised based on *Geduldig* fare any better. *Geduldig* did not create a special rule exempting insurance or benefits from ordinary Equal Protection review.[170] Nor, as numerous decisions of the Supreme Court make clear, did it require all members of a disfavored group to be affected for a classification to be facially discriminatory.[171] It did not revive the discredited "equal application" rule that once undergirded the legal justifications for Jim Crow.[172] In short, all of the various contentions raised by defendants in recent transgender Equal Protection cases are demonstrably wrong.

But that does not mean they are not potentially dangerous. Across the country, defendants are relying on *Geduldig* to attempt to argue that provisions that facially discriminate based on "sex changes"—based on "gender dysphoria"—based on "biological sex"—are not facially discriminatory, either on the basis of sex or on the basis of transgender status.[173] If such arguments are credited by the courts, they could dramatically undercut the efforts of the transgender community to seek constitutional protections, at a time when the community has never been more under

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165. *See* sources cited *supra* note 5.
166. *See supra* Section IV.A.
167. *Id.*
168. *See supra* Section IV.B.
169. *Id.*
170. *See supra* Section IV.C.
171. *See supra* Section IV.D.
172. *Id.*
173. *See* sources cited *supra* note 5.

attack.[174] Given the determined efforts of state legislatures to target the transgender community for discrimination, there can be no doubt that any intimation that evasive tactics will be tolerated will only further encourage continued discriminatory laws.[175]

Finally, not only transgender rights—but much of broader Equal Protection law itself—may be at stake in how the courts resolve the set of *Geduldig* questions currently being raised in the context of transgender Equal Protection cases. For it is not only transgender rights cases—but also many other rights cases (such as race, sex, and national origin)—that raise important questions of when a close proxy can or must be deemed facially discriminatory.[176] And it is not only transgender litigants, but also all other Equal Protection litigants, that would suffer the erasure of the discrimination against them were an "equal application" or an "all group members affected" standard adopted.[177] In short, the *Geduldig* arguments raised in many recent transgender Equal Protection cases—while clearly wrong—are nonetheless important. Crediting them could substantially limit the ability of all Equal Protection claimants to succeed in obtaining meaningful review.

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174. *See, e.g.*, *2023 Anti-Trans Bills Tracker*, TRANS LEGISLATION TRACKER, https://translegislation.com/ [https://perma.cc/U85V-RS76]; Matt Lavietes & Elliott Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far, Most of Them Targeting Trans People*, NBC NEWS (Mar. 20, 2022, 3:00 AM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418 [https://perma.cc/K4N2-WKQK].

175. *Cf.* Eyer, *supra* note 76 (noting the continued enactment of large numbers of likely unconstitutional anti-transgender laws, even in the face of numerous lower court decisions constitutionally invalidating anti-transgender discrimination).

176. *See* Hernandez v. New York, 500 U.S. 352, 360 (1991).

177. *See supra* Section IV.D.