ADVANCE SHEET HEADNOTE
May 18, 2026

**2026 CO 32**

**No. 26SA66, *Boe v. Child.'s Hosp. Colo.*—Preliminary Injunction—Colorado Anti-Discrimination Act—Public Interest—Balance of the Equities—Gender Identity.**

In this original proceeding under C.A.R. 21, the supreme court concludes that petitioners satisfied all the required factors for granting a preliminary injunction under *Rathke v. MacFarlane*, 648 P.2d 648, 653–54 (Colo. 1982), and the trial court therefore abused its discretion by denying petitioners' motion for a preliminary injunction.

Under the public-interest factor, the court holds that, when anti-discrimination laws and protected classes are involved, it is inappropriate for a trial court to conduct a purely numerical comparison of the number of people who will or might be harmed if a preliminary injunction is or isn't issued. It also holds that the balance-of-the-equities factor tends to support granting an injunction when the alleged harm to the nonmoving party is speculative and the moving party has demonstrated actual harm.

The supreme court makes the order to show cause absolute, reverses the trial court's order, and remands the case to the trial court to grant petitioners' motion and issue the requested injunction.

**The Supreme Court of the State of Colorado**
2 East 14th Avenue • Denver, Colorado 80203

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**2026 CO 32**

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**Supreme Court Case No. 26SA66**
*Original Proceeding Pursuant to C.A.R. 21*
District Court, City and County of Denver, Case No. 26CV30232
Honorable Ericka F. H. Englert, Judge

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**In Re**
**Plaintiffs:**

Bella Boe, Chloe Coe, Danielle Doe, and Gabriella Goe,

v.

**Defendant:**

Children's Hospital Colorado.

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**Order Made Absolute**
*en banc*
May 18, 2026

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**JUSTICE HOOD** delivered the Opinion of the Court, in which **CHIEF JUSTICE MÁRQUEZ**, **JUSTICE GABRIEL**, **JUSTICE BERKENKOTTER**, and **JUSTICE BLANCO** joined.
**JUSTICE BOATRIGHT**, joined by **JUSTICE SAMOUR**, dissented.

JUSTICE HOOD delivered the Opinion of the Court.

¶1 In this unusually fraught case—which directly and indirectly implicates efforts to limit the risk of harm to a wide variety of medically vulnerable children—we are asked essentially the following question: Did the trial court err by refusing to enter a preliminary injunction that would have required respondent, Children's Hospital Colorado ("CHC"), to repeal its recent suspension of medical gender-affirming care, when that repeal might invite the wrath of the federal government?[1]

¶2 With sympathy for the petitioners, respondent's employees and representatives, and the trial court that had to blaze an uncertain trail, we conclude that the trial court erred in its application of the test we adopted in *Rathke v. MacFarlane*, 648 P.2d 648, 653–54 (Colo. 1982), for determining whether to grant a preliminary injunction. Therefore, we reverse the trial court's decision, and we order the court to issue a preliminary injunction directing CHC to restore its

[1] Gender-affirming care ranges from choice of pronouns to hormonal treatment and surgery. Petitioners and CHC agree that medical gender-affirming care is a subset of gender-affirming care that refers to medical procedures such as puberty blockers and hormone therapy used to treat gender dysphoria. Gender dysphoria "refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender." Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5-TR* 511 (5th ed. 2022).

offering of medically necessary medical gender-affirming care, pending a decision on the merits.

## I. Facts and Procedural History

¶3 Petitioners are minor patients representing a class of similarly situated individuals who had been receiving gender-affirming care from CHC's TRUE Center for Gender Diversity ("TRUE Center"), a department created for the purpose of supporting gender-diverse and transgender patients.[2]

¶4 CHC is the leading pediatric hospital in the Rocky Mountain Region, providing sometimes lifesaving medical care to a broad variety of ailing children from Colorado, Wyoming, New Mexico, Kansas, Montana, and other states.

¶5 On December 18, 2025, the United States Secretary of Health and Human Services, Robert F. Kennedy, Jr., issued a declaration proclaiming that medical gender-affirming care is neither safe nor effective and "fail[s] to meet professional recognized standards of health care." U.S. Dep't of Health & Hum. Servs., *Declaration of the Secretary of the Department of Health & Human Services RE: Safety, Effectiveness, and Professional Standards of Care for Sex-Rejecting Procedures on Children and Adolescents*, at 9 (Dec. 18, 2025) ("Kennedy Declaration"). The

[2] "[G]ender diverse" is a nondiagnostic term that refers to "[physical] features or behaviors that are not typical (in a statistical sense) of individuals with the same assigned gender in a given society and historical era." Am. Psychiatric Ass'n, *supra*, at 511. "Transgender" refers to the broad spectrum of individuals whose gender identity is different from the gender they were assigned at birth. *Id.*

Kennedy Declaration further warned that the federal Department of Health and Human Services ("HHS") may seek to exclude entities or individuals from federal health care payment programs if they provide medical gender-affirming care to minors. *Id.*

¶6 CHC participates in federal health care payment programs and receives significant funding from the federal government. In 2024, CHC received $182.6 million in funding, mostly from the federal government. Almost half of CHC's patients are Medicaid enrollees, and all commercial insurance companies require hospitals to participate in federal health care payment programs to qualify for contracts and to bill for services.[3] If CHC were excluded from federal health care payment programs, it wouldn't be able to treat any patients enrolled in Medicaid or serve patients who have commercial insurance.

¶7 In response to the Kennedy Declaration, the Colorado Attorney General joined other state attorneys general in filing a lawsuit in federal court in Oregon, *Oregon v. Kennedy*, No. 6:25-cv-02409-MTK, at *2 (D. Or. Apr. 18, 2026) (unpublished order) ("Oregon Order"), challenging the legality of the Declaration.

¶8 Despite the pending lawsuit, HHS's general counsel announced on the social media platform X that he was referring CHC to the HHS Office of the

[3] Medicaid is a joint federal-state program that provides health care coverage for low-income individuals and individuals with disabilities. *See* 42 U.S.C. § 1396d.

Inspector General ("OIG") for investigation for providing medical gender-affirming care in violation of the Kennedy Declaration. A few days later, OIG agreed not to exclude any entities until the *Oregon* court ruled on the then-pending motion for summary judgment or thirty days after the hearing on the motion for summary judgment, whichever was earlier.

¶9 At the beginning of January 2026, CHC notified petitioners that it could no longer provide medical gender-affirming care—including hormone therapy and puberty blockers—to transgender patients under the age of eighteen. However, CHC continues to offer hormone therapy and puberty blockers to cisgender youth for various reasons.[4]

¶10 Petitioners and other transgender youth who sought such care from CHC were suddenly abandoned during a precarious time. Without access to puberty blockers and hormone therapy, these children will go through puberty and develop characteristics of a sex with which they do not identify. Petitioners have experienced depression, and in at least two instances, suicidal ideation, because they can no longer access medical gender-affirming care.

¶11 Petitioners filed a class action seeking an injunction to prevent CHC from refusing to provide medically necessary care to its transgender youth patients.

[4] "Cisgender" describes individuals whose gender expression is consistent with the gender they were assigned at birth. Am. Psychiatric Ass'n, *supra*, at 511.

They argued that CHC's decision to stop providing gender-affirming care was discriminatory on the basis of gender identity, sex, and disability and thus violated the Colorado Anti-Discrimination Act ("CADA"); specifically, section 24-34-601, C.R.S. (2025).[5] Regarding gender identity, petitioners assert they are being discriminated against because CHC is denying transgender youth access to puberty blockers and hormone therapy while continuing to provide the same medication to cisgender youth.

¶12 The trial court denied petitioners' request for a preliminary injunction, concluding that they hadn't satisfied the six-factor test we adopted in *Rathke* for granting a preliminary injunction. *Boe v. Child.'s Hosp. Colo.*, No. 26CV30232, at 22 (Dist. Ct., City & Cnty. of Denver, Feb. 13, 2026) (unpublished order). The trial court concluded that petitioners (1) were likely to succeed on the merits of their CADA claim; (2) had shown there was danger of real, immediate, and irreparable injury; and (3) had shown there was no plain, speedy, and adequate remedy at law. *Id.* at 18–20. Nevertheless, it denied petitioners' request for injunctive relief

[5] The parties did not explicitly address discrimination on the basis of sex at the preliminary injunction hearing, and the trial court order only briefly mentions disability discrimination in its analysis. *Boe v. Child.'s Hosp. Colo.*, No. 26CV30232, at 18–19 (Dist. Ct., City & Cnty. of Denver, Feb. 13, 2026) (unpublished order). Petitioners need only show a reasonable probability of success on the merits as to one of its CADA claims for a preliminary injunction to issue. Accordingly, we focus our analysis on their claim of discrimination on the basis of gender identity.

because it found that (1) the injunction was contrary to the public interest; (2) the balance of the equities favored CHC; and (3) the injunction was not sufficiently specific to preserve the status quo pending a trial on the merits. *Id.* at 18–22.

¶13 We granted petitioners' request for review under C.A.R. 21.[6]

## II. Analysis

¶14 We start by explaining our decision to exercise our original jurisdiction in this case and then discuss the applicable standard of review. Next, we provide an overview of the *Rathke* factors, which a moving party must satisfy for a trial court to grant a preliminary injunction. Finally, we address the disputed factors and review the trial court's application of those factors to the facts of this case.

### A. Original Jurisdiction

¶15 Relief under C.A.R. 21 is an extraordinary remedy, and the decision to exercise original jurisdiction is a matter solely within our discretion. C.A.R. 21(a)(2); *In re Marriage of Green*, 2024 CO 24, ¶ 8, 547 P.3d 1095, 1097. Such relief may be granted only when no other adequate remedy is available. *Edwards v. New Century Hospice, Inc.*, 2023 CO 49, ¶ 12, 535 P.3d 969, 972. We have exercised our

[6] The issue set forth in the petition is as follows:

> 1. When the lives of children are at stake, did the district court err by allowing the continued violation of the law and refusing to order Respondent to provide medically necessary gender-affirming care to prevent "certain" irreparable injury to Plaintiffs.

original jurisdiction when a petition also raises issues of first impression that are of significant public importance. *Id.*

¶16 We exercise our jurisdiction here because an appellate remedy is inadequate: Petitioners will suffer irreparable harm without our intervention. The petition also raises important questions about how to apply certain preliminary-injunction factors to anti-discrimination cases.

## B. Standard of Review

¶17 We review a trial court's denial of a motion for a preliminary injunction for an abuse of discretion. *Rathke*, 648 P.2d at 653. Under this standard, we examine whether the court's ruling is based on a misapplication or misinterpretation of the law, or is otherwise manifestly arbitrary, unreasonable, or unfair. *People v. West*, 2025 CO 61, ¶ 13, 578 P.3d 832, 835; *People v. Chavez*, 2020 COA 80M, ¶ 8, 486 P.3d 377, 378. We review a trial court's findings of fact for clear error; meaning, we reverse only if there is no support for those findings in the record. *Trinidad Area Health Ass'n v. Trinidad Ambulance Dist.*, 2024 COA 113, ¶ 22, 562 P.3d 928, 933. We review a trial court's legal conclusions de novo. *Evans v. Romer*, 854 P.2d 1270, 1275 (Colo. 1993).

## C. Preliminary Injunction

¶18 To grant a party's motion for a preliminary injunction, the trial court must find that the moving party has demonstrated all six *Rathke* factors:

> (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) that the injunction will preserve the status quo pending a trial on the merits.

648 P.2d at 653–54 (citations omitted).

¶19 The parties don't dispute that petitioners have satisfied the second and third factors. Therefore, we focus our analysis on the remaining four factors, starting with those the court found lacking; namely, the fourth, fifth, and sixth because they form the basis for the petition.

¶20 Then, we address CHC's challenge to the trial court's finding that petitioners satisfied the first factor: a reasonable probability of success on the merits. Although CHC has not petitioned this court for relief, and therefore the procedural posture of its challenge is unusual, we choose to address it now because it is so intertwined with the issues presented by petitioners.[7]

### 1. Public Interest

¶21 A court must ensure that, if issued, an injunction "will not disserve" the public interest. *Id.* at 654. Whether the trial court applied the appropriate test for

[7] We granted the petition under C.A.R. 21, which provides no mechanism for a cross-petition. Ordinarily, we confine ourselves to the issues presented in the petition. In this instance, we make a rare exception to our practice because of the unusual circumstances presented by this case.

discerning the public interest in an anti-discrimination case is a question of law that we review de novo. *See Evans*, 854 P.2d at 1275.

¶22 In evaluating the public interest, courts may look to pronouncements by our state's elected representatives. *See Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs*, 199 P.3d 718, 731 (Colo. 2009). We presume that their policy choices are made in the public's interest. *See Kourlis v. Dist. Ct.*, 930 P.2d 1329, 1336 (Colo. 1997).

¶23 The Colorado General Assembly enacted CADA to "prohibit[] discrimination based on [identified] protected classes and [to] ensure[] that every Coloradan is able to enjoy freedom from discrimination." § 24-34-300.7(1), C.R.S. (2025); *see also Elder v. Williams*, 2020 CO 88, ¶ 27, 477 P.3d 694, 699 ("CADA claims derive from statutory duties designed to implement the broad policy of eliminating intentional discriminatory or unfair employment practices, rather than to compensate an individual for personal injuries.").

¶24 CADA states that

> [i]t is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, . . . sex, . . . [or] gender identity. . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .

§ 24-34-601(2)(a).

¶25 The General Assembly has also specifically identified a public interest in protecting Colorado citizens who seek medical gender-affirming care by

declaring, "It is the public policy of Colorado to ensure [that decisions related to gender-affirming health care services] can be made without unnecessary governmental interference." § 24-34-300.7(2).

¶26 Beyond CADA, the General Assembly has repeatedly declared that gender identity is a protected class. *See* § 1-47-107, C.R.S. (2025) (voting rights); § 5-3-210, C.R.S. (2025) (extension of consumer credit); § 6-23-104, C.R.S. (2025) (primary health care providers); § 6-24-110, C.R.S. (2025) (cemeteries); § 8-5-101, C.R.S. (2025) (wage equality); § 10-3-1104.9, C.R.S. (2025) (deceptive insurance practices); § 12-245-202, C.R.S. (2025) (regulation of mental health care); § 13-93-102, C.R.S. (2025) (attorney licensing); § 18-1-714, C.R.S. (2025) (victims' rights); § 19-1-130, C.R.S. (2025) (foster care); § 19-2.5-1502.5, C.R.S. (2025) (juvenile justice system); § 22-1-142.5, C.R.S. (2025) (public school graduation ceremonies); § 23-1-137.7, C.R.S. (2025) (higher education graduation ceremonies); § 24-18-307, C.R.S. (2025) (law enforcement facial recognition service); § 24-34-502, C.R.S. (2025) (housing); § 24-34-701, C.R.S. (2025) (advertising); § 24-90-122, C.R.S. (2025) (public libraries); § 25-2-110, C.R.S. (2025) (death certificates); § 25-2-113.8, C.R.S. (2025) (birth certificates); § 25.5-5-329, C.R.S. (2025) (family planning services); § 26.5-1-116, C.R.S. (2025) (preschool graduation ceremonies); § 28-5-103, C.R.S. (2025) (veteran affairs).

¶27 Thus, it's hardly surprising that the trial court recognized that granting the requested injunctive relief would serve the public interest by protecting petitioners and other vulnerable transgender and gender-diverse youth. *Boe*, at 20. Colorado law makes it unmistakably so.

¶28 But the trial court still found itself in a bind. It worried that ordering CHC to "violat[e] . . . federal law," as it put it, could have catastrophic consequences for a larger segment of the public. *Id.* at 21 & n.2. It reasoned that issuing an injunction would disserve the public interest because it could prompt HHS to exclude CHC from federal health care payment programs, which could force CHC to shut down. *Id.* at 20. And if CHC were to shut down, it would lose the ability to provide *any* pediatric care to *thousands* of patients throughout the Rocky Mountain Region. *Id.* Thus, the court found that "the requested injunction could create a greater risk to a greater number of individuals, which would adversely affect the public interest." *Id.* at 21.

¶29 In reaching this conclusion, the trial court relied on *Trinidad*, an opinion from a division of our court of appeals. *Id.* at 17. In *Trinidad*, a different trial court denied a motion for an injunction that would have compelled an ambulance district to perform inter-facility transfers even when that would leave no crew available to immediately respond to incoming 911 calls. ¶¶ 43–44, 562 P.3d at 936. The division affirmed the trial court's decision because granting the preliminary

injunction "could 'create a greater risk to a greater number of individuals.'" *Id.* *Trinidad*, however, did not involve a protected class. The case before us does.

¶30 We conclude that a *Trinidad*-style strict numerical comparison of affected individuals isn't appropriate when the individuals seeking injunctive relief are part of a protected class and seeking an injunction because of discrimination based on that protected class. Were it otherwise, minority groups would always lose. But that is not the law. On the contrary, that's precisely why we have protected classes. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (suggesting more protection is required when there is prejudice against discrete and insular minorities).[8]

¶31 The trial court's concern about opposing the public interest by ordering CHC to "violat[e] . . . federal law" is also misplaced. Why? Because the Kennedy Declaration isn't federal law. *See Regular Route Common Carrier Conf. of Colo. Motor Carriers Ass'n v. Pub. Utils. Comm'n*, 761 P.2d 737, 748–49 (Colo. 1988) (distinguishing general statements of policy that don't carry the force of law from

[8] Transgender youth comprise approximately 3.3% of the youth population in the United States. Jody L. Herman & Andrew R. Flores, *How Many Adults and Youth Identify as Transgender in the United States?* (Aug. 2025), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/ [https://perma.cc/U5KP-X5WS]. So, transgender youth will always represent fewer individuals when compared to the population at large, and a purely numerical comparison will always leave them without protection when they are discriminated against based on gender identity.

substantive rules, which must go through formal rulemaking and therefore do carry the force of law); *see also Burroughs Wellcome Co. v. Schweiker*, 649 F.2d 221, 224 (4th Cir. 1981). A declaration from the HHS secretary can be a basis for exclusion from federal health care payment programs, but the Declaration itself isn't a federal law banning gender-affirming care. *See* 42 U.S.C. § 1320a-7(b)(6)(B) (authorizing HHS to exclude an entity from federal health care payment programs if the secretary determines that the quality of care the entity is providing fails to meet professionally recognized standards of health care); Kennedy Declaration, *supra*, at 9 ("This declaration does not constitute a determination that any individual or entity should be excluded from participation in any Federal health care program. Any such determination could only be made after a separate determination under 42 C.F.R. § 1001.701 . . . .").

¶32 Furthermore, since the trial court issued its order here, the federal district court in *Oregon* has issued its opinion, concluding that the Kennedy Declaration is unlawful and enjoining HHS from initiating enforcement actions based, in whole or in part, on the Kennedy Declaration. Oregon Order, *supra*, at *2.

¶33 Because any potential harm to the public's interest in access to health care is speculative, and because the General Assembly has stated that it is in the public's interest to prohibit discrimination against individuals based on gender identity

and to protect those individuals' access to medical care, we conclude that the trial court erred by finding that petitioners failed to satisfy the public-interest factor.

### 2. Balance of the Equities

¶34 The balance-of-the-equities factor allows a trial court to consider "whether the threatened injury to the plaintiff outweighs the threatened harm the preliminary injunction may inflict on the defendant." *Rathke*, 648 P.2d at 654. Unlike the public-interest factor, which looks at the impact on the broader public, this factor focuses on balancing the harms (or lack thereof) to the parties in the case. This factor militates in favor of granting an injunction if the alleged harm to the nonmoving party is too speculative and the moving party has demonstrated actual harm. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (requiring more than "speculation" to show that potential harm to the defendant outweighed actual injury to the plaintiff); *see also, e.g.*, *Am. Invs. Life Ins. Co. v. Green Shield Plan, Inc.*, 358 P.2d 473, 475–76 (Colo. 1960) (explaining that a court shouldn't issue an injunction if the harm to the moving party is too speculative).

¶35 Petitioners, the moving party, have demonstrated that they face actual and continuing physical and psychological harm if the preliminary injunction isn't issued. Without access to medical gender-affirming care, petitioners are likely to experience irreversible physical changes to their bodies that are inconsistent with their gender identity. Puberty blockers are a type of medical gender-affirming care

that use hormones to delay the natural onset of puberty. *Boe*, at 4. Doctors may prescribe puberty blockers to allow minor patients more time to consider their gender identity. *Id.* Going through puberty causes physical changes that are difficult, if not impossible, to reverse without surgery. *Id.* When puberty blockers are stopped, puberty proceeds in accordance with biology. *Id.*

¶36 This harm to petitioners is real and actively occurring. Petitioner Gabriella Goe[9], a nine-year-old who started living as a girl by her fourth birthday and has been a patient at the TRUE Center since the age of six, was expecting to start using puberty blockers in March or April 2026 to allow her more time to decide whether to go through testosterone-led puberty. Gabriella's mother testified at the injunction hearing that if Gabriella can't get puberty blockers before puberty begins, she will be devastated.

¶37 The denial of care has already caused at least one of the petitioners to suffer grave psychological harm. Petitioner Danielle Doe was diagnosed with gender dysphoria at a young age, and her family decided to move from Texas to Colorado so they could live in a state with more protections for transgender people. Danielle started puberty blockers when she was twelve years old, and she has been

[9] With the trial court's permission, petitioners filed under pseudonyms. We use the same pseudonyms here. Consequently, we forgo our protocol of using initials for minors.

receiving other medical gender-affirming care from the TRUE Center. After learning that CHC could no longer provide her care, Danielle was hospitalized at CHC for a depressive episode. She wrote her mother a letter that expressed suicidal ideation, stating, "If I don't see you again, I love you."

¶38 The nonmoving party, CHC, has also demonstrated significant potential harm if the court issues the preliminary injunction and HHS follows through on its threat to exclude CHC from federal health care payment programs. However, the threat of harm to CHC remains speculative, and CHC has other avenues to address it. Issuing the preliminary injunction petitioners seek won't cause CHC's immediate exclusion from federal health care payment programs or cause it to shut down. *See generally* 42 C.F.R. § 402.212.

¶39 Before HHS may lawfully exclude CHC from federal health care payment programs, it must follow administrative procedures, which include providing proper notice to CHC and giving CHC an opportunity to respond. *Id.* If HHS determines that exclusion is warranted, CHC may request a hearing before an administrative law judge to determine whether "[t]he basis for the imposition of the sanction exists." 42 C.F.R. § 1001.2007(a)(1)(i). The Oregon Order declared the Kennedy Declaration unlawful, Oregon Order, *supra*, at *2; therefore, presently, the Kennedy Declaration may not be used as a basis to exclude entities from federal health care payment programs. True, HHS may appeal the Oregon Order

or devise a new way to exclude entities that provide medical gender-affirming care, but even if this were to occur, opportunities for further judicial review exist.

¶40 Critically, if HHS seeks exclusion, CHC may be able to obtain judicial review of the agency's action without first exhausting administrative remedies. *See* 42 U.S.C. § 1320a-7(f)(1) (incorporating 42 U.S.C. § 405(g) to authorize judicial review of actions of the secretary of HHS). The United States Supreme Court has recently reaffirmed federal courts' ability to waive exhaustion requirements for equitable and practical reasons, particularly when exhaustion would be inefficient, or in the words of the Court, "pointless, wasteful, or too slow." *Santos-Zacaria v. Garland*, 598 U.S. 411, 418 (2023); *see also Smith v. Berryhill*, 587 U.S. 471, 478 (2019) (clarifying that the "element of administrative exhaustion" in 42 U.S.C. § 405(g)—the exhaustion requirement that applies to HHS exclusion procedures—may be "excused by the courts"). And the Tenth Circuit has recognized an exception to the exhaustion requirement in 42 U.S.C. § 405(g) if exhaustion would be futile, irreparable harm would result, and a colorable constitutional claim that is collateral to the substantive claim of entitlement is raised. *Koerpel v. Heckler*, 797 F.2d 858, 862 (10th Cir. 1986) (citing *Mathews v. Eldridge*, 424 U.S. 319, 328 (1976)).

¶41 Here, CHC can assert that the exception should apply because administrative law judges don't have the authority to enjoin an act of the secretary,

42 C.F.R. § 1005.4(c)(4), and there is no process to stay CHC's exclusion during the appeals process. Thus, the administrative appeals process in this scenario would be futile.

¶42 Moreover, CHC could argue that because the exclusion would begin twenty days after the notice of exclusion and because exclusion would cut CHC off from a major funding source and force it to close, it would suffer irreparable harm if it were forced to exhaust administrative remedies. Given the grave consequences of exclusion, CHC can raise a colorable due process claim based on the inadequacy of HHS's exclusion procedures. Therefore, if HHS seeks exclusion, CHC may seek immediate judicial review. Once in federal court, CHC can request a preliminary injunction to stop the exclusion while the court reviews the merits of the case. 5 U.S.C. § 705.

¶43 To further demonstrate the threat of harm it faces, CHC also highlights the Department of Justice's ("DOJ") efforts to subpoena medical records of patients who have received gender-affirming care and personnel records of the medical professionals who provided such care as an example of the unrelenting nature of this administration's efforts to attack providers of gender-affirming care. The DOJ is investigating providers of medical gender-affirming care to youth and the United States District Court for the Northern District of Texas recently granted the DOJ's petition to enforce a subpoena for such medical and personnel records

against Rhode Island Hospital. *In re Admin. Subpoena 25-1431-032*, No. 4:26-mc-00006-O (N.D. Tex. Apr. 30, 2026) (unpublished order). CHC is in ongoing litigation in the United States District Court for the District of Colorado to quash a similar subpoena the DOJ issued to it. *In re Dep't of Just. Admin. Subpoena No. 25-1431-030*, No. 25-mc-00063-SKC-CYC (D. Colo. filed Aug. 8, 2025). But CHC is in a different procedural posture than Rhode Island Hospital, so the order from the United States District Court for the Northern District of Texas doesn't guarantee a specific outcome in CHC's case. While we understand the seriousness and likelihood that HHS will follow through on the threatened action, at this point and before this court, those threats remain speculative.

¶44 Therefore, given all of the contingencies in play and the various opportunities CHC has to avoid exclusion, we conclude that the actual immediate and irreparable harm to petitioners outweighs the speculative harm CHC may face if the federal government further acts against it. The trial court erred in concluding that the balance of the equities didn't favor petitioners.[10]

[10] This is not to say that speculative harm can never outweigh actual harm to a plaintiff, but under the facts of this case, the balance tilts in favor of petitioners' actual harm.

### 3. Preserving the Status Quo

¶45 The purpose of an injunction is to preserve the status quo and to protect the rights of the parties pending a final decision on the merits. *Anderson v. Pursell*, 244 P.3d 1188, 1196 (Colo. 2010). The status quo is the last uncontested status between the parties before the dispute developed. *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001). When the implementation of a new rule is involved, the appropriate status quo is "the status quo before the rule was enacted." *Sanger v. Dennis*, 148 P.3d 404, 419 (Colo. App. 2006). To maintain the status quo, "injunction[s] prohibiting conduct must be sufficiently precise to enable the party subject to the [injunction] to conform its conduct to the requirements." *Colo. Springs Bd. of Realtors, Inc. v. State*, 780 P.2d 494, 499 (Colo. 1989).

¶46 Here, before the dispute arose—that is, before CHC suspended providing medical gender-affirming care to transgender youth—doctors and other medical personnel at CHC provided medical gender-affirming care to youth patients when they deemed it medically necessary to do so. Thus, the status quo that the injunction would preserve is CHC's pre-January 2026 policy of providing medically necessary medical gender-affirming care to transgender patients under the age of eighteen.

¶47 Petitioners are simply asking CHC to revert to the level of care it offered before CHC's suspension of care in response to the Kennedy Declaration, not to provide new services. They are asking CHC to allow providers to give medical gender-affirming care to transgender youth if the provider deems such care necessary; they are not asking CHC to force providers to provide such care. CHC can't force providers to prescribe gender-affirming care to individual patients, but it can define the scope of services it offers. Because CHC offered medical gender-affirming care until January 2026, the requested injunction simply preserves that status pending resolution of the merits of this dispute.

¶48 The trial court also found that the terms of the proposed injunction weren't sufficiently specific. It reasoned that CHC wouldn't be able to conform its conduct to the injunction because the injunction doesn't define the term "medically necessary care" or explain what care must be provided and when CHC must provide it. We disagree.

¶49 The term "medically necessary" is a term of art grounded in established standards used by medical experts, and it has been used by courts to grant injunctions in the past. *E.g.*, *Edmo v. Corizon, Inc.*, 935 F.3d 757, 803 (9th Cir. 2019). So, "Medically necessary care" isn't a vague term to CHC in this context because the trial court found that the TRUE Center prescribed medical gender-affirming care only when it was medically necessary for the treatment of gender dysphoria.

*Boe*, at 3. We therefore conclude that the proposed preliminary injunction is specific enough to notify CHC of what is expected of it and would preserve the status quo. *See People ex rel. Rein v. Meagher*, 2020 CO 56, ¶ 44, 465 P.3d 554, 563 (concluding that an injunction was sufficiently specific when the defendant was required to cease violating an agency rule). Accordingly, the trial court erred by concluding that petitioners failed to satisfy this factor.

### 4. Success on the Merits

¶50 Having addressed the factors placed at issue in the petition, we pivot back to CHC's challenge to the trial court's finding as to the first factor: the reasonable probability of success on the merits. To determine whether this factor is satisfied, a trial court is "obliged to assess the proper legal standard and applicable burden of proof which would be required at a subsequent trial on the merits." *Rathke*, 648 P.2d at 655. This requires a court to "substantively evaluate the issues as it would during trial." *Dallman v. Ritter*, 225 P.3d 610, 621 (Colo. 2010). As opposed to a permanent injunction, to obtain a preliminary injunction, petitioners need only show a "likelihood of success on the merits rather than actual success." *Id.*

¶51 CHC challenges the trial court's conclusion that petitioners demonstrated a reasonable probability of success on the merits of their CADA claim. The trial court determined that petitioners "have demonstrated a probability that they will succeed on the merits of their claims under CADA because the testimony and

evidence at the preliminary injunction hearing tended to demonstrate that CHC has ceased offering medical gender affirming care at least in part due to [petitioners'] gender identity and/or disability." *Boe*, at 19. We afford the trial court deference and conclude that the record supports the trial court's finding. *See Trinidad*, ¶ 22, 562 P.3d at 933.

¶52 To succeed on their CADA claim, petitioners must prove that CHC is a place of public accommodation and that it denied petitioners full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations because of their sex, gender identity, or disability. *See* § 24-34-601(2)(a). Hospitals are a place of public accommodation. § 24-34-600.3(1)(a)(VII).

¶53 Petitioners must prove causation—"that, 'but for' their membership in an enumerated class, they would not have been denied the full privileges of a place of public accommodation." *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 28, 370 P.3d 272, 280, *rev'd on other grounds sub nom.*, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617 (2018). Petitioners, however, don't have to prove "that their membership in the enumerated class was the 'sole' cause of the denial of services," just that "the discriminatory action was based in whole or in part on their membership in the protected class." *Id.* Nor do petitioners have to prove animus. *Id.* at ¶ 37, 370 P.3d at 282.

¶54 The trial court considered the testimony and evidence presented at the preliminary injunction hearing to determine that CHC differentiated between transgender and cisgender patients. *Boe*, at 18. There is no dispute that CHC ceased offering puberty blockers and hormone therapy to transgender patients under the age of eighteen while continuing to offer puberty blockers and hormone therapy to cisgender patients under the age of eighteen.[11] Puberty blockers and hormone therapy for both transgender and cisgender patients serve the purpose of timing and aligning puberty with gender identity. For cisgender patients, the medication helps time and align puberty with that of the gender they identify with, which is consistent with their gender assigned at birth. And for transgender patients, the medication helps time and align puberty with that of the gender they identify with, which differs from their gender assigned at birth. Denying access to puberty blockers and hormone therapy for the purpose of gender-affirming care but not for purposes unrelated to gender-affirming care differentiates care based on gender identity.

[11] CHC, for the first time on appeal, asserts that its policy is based on age, which isn't a protected class under CADA, and not on gender identity because it continues to provide medical gender-affirming care to transgender patients over the age of eighteen. Because this argument wasn't raised at the trial level, and because petitioners have demonstrated that a court could reasonably conclude the policy is based on gender identity, we will not address it.

¶55 Even without analyzing the disparate treatment between transgender and cisgender youth, CHC's policy to suspend providing medical gender-affirming care explicitly discriminates against patients because of their gender identity. Gender-affirming care is inextricably intertwined with gender identity. In *Craig*, the division held that action related to same-sex marriage implicates sexual orientation. ¶ 39, 370 P.3d at 282. Similarly, here, action related to gender-affirming care implicates gender identity.

¶56 Furthermore, CHC has directly tied its decision to suspend medical gender-affirming care to the identity of transgender patients. In its letter notifying patients' families that it was suspending care, CHC stated, "We continue to believe that all families, including the families of transgender children, should have the ability to seek and receive the expert medical care their child needs to thrive." And in a previous letter to patients' families, in response to a federal executive order that attempted to ban gender-affirming care for patients under nineteen years of age, CHC stated that the ban "denies the families of gender diverse children the same rights as other families." CHC's decision to suspend medical gender-affirming care to youth denies petitioners the full and equal enjoyment of services based on gender identity.

¶57 The trial court also found that petitioners demonstrated causation under CADA because "but for" petitioners' membership in a protected class—gender

identity—they wouldn't have been denied access to care. *Boe*, at 13, 18. CHC argues that "the contributing factor producing the harm of which [petitioners] complain is that the federal government has used 'every means possible to stop gender affirming care and has interfered with care in a way that is unprecedented.'" And, CHC asserts, "[t]hat factor breaks any other causal chain." *See Rocky Mountain Planned Parenthood, Inc. v. Wagner*, 2020 CO 51, ¶ 28, 467 P.3d 287, 292 (stating that, in a negligence claim, an intervening cause can break the chain of causation and dilute an actor's negligence). CHC argued to the trial court that it had a legitimate, nondiscriminatory reason for its decision to suspend medical gender-affirming care: the existential threat posed by the Kennedy Declaration.

¶58 Petitioners argue CHC can't avoid responsibility by claiming it's merely implementing a third-party's discriminatory agenda. *See Williams v. Dep't of Pub. Safety*, 2015 COA 180, ¶ 47, 369 P.3d 760, 771 (identifying a theory that holds a party liable for discriminatory conduct when another "who lacked decision-making power used the formal decisionmaker as a dupe in a deliberate scheme to bring about" discriminatory conduct). Although CHC acted reluctantly and expressed no animus toward transgender patients, the action it chose to take in response to the Kennedy Declaration specifically targeted transgender youth

patients. The Kennedy Declaration may have influenced CHC's decision, but it doesn't absolve CHC of responsibility.

¶59 The trial court concluded the testimony and evidence presented at the preliminary injunction tended to demonstrate that CHC's denial of medical gender-affirming care to petitioners was, at least in part, because of petitioners' status, which is enough to satisfy causation for a claim under CADA. *Boe*, at 19; *see Craig*, ¶ 28, 370 P.3d at 280; *see also Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020) (explaining that under Title VII—a federal anti-discrimination statute similar to CADA—a defendant can't avoid liability by citing another factor that contributed to the discriminatory decision). We agree with the trial court. CHC's decision to suspend offering medical gender-affirming care to transgender patients under the age of eighteen, in response to the Kennedy Declaration, denied petitioners care because of their gender identity.

¶60 For these reasons, we conclude that the trial court didn't err by finding that petitioners had demonstrated that there is a reasonable probability of success on the merits of their CADA claim.

## III. Conclusion

¶61 Because petitioners satisfied all six *Rathke* factors, the trial court abused its discretion by denying petitioners' motion for a preliminary injunction. We make the order to show cause absolute, reverse the trial court's order, and remand the

case to the trial court to grant petitioners' motion and issue the requested injunction.

**JUSTICE BOATRIGHT**, joined by **JUSTICE SAMOUR**, dissented.

JUSTICE BOATRIGHT, joined by JUSTICE SAMOUR, dissenting.

¶62 Faced with the risk of losing hundreds of millions of dollars in federal funding, which would threaten the viability of its entire hospital system, Children's Hospital Colorado ("CHC") made a considered decision to suspend medical gender-affirming care that it had previously provided to minors.[1] As the majority acknowledges, this is a difficult and fraught situation. I cannot begin to imagine the complicated conversations CHC's administration had because of the impact that its decision would have. While I have no doubt that the results of CHC's decision have been painful, it is my view that CHC's actions did not constitute discrimination under the Colorado Anti-Discrimination Act ("CADA"). Hence, I respectfully dissent. Under the first factor enumerated in *Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982), petitioners' claims are unlikely to succeed on the merits, and the requested injunction should therefore be denied.[2]

[1] As used here and by the parties, "medical gender-affirming care" refers to a subset of gender-affirming care that involves medical intervention, such as hormone replacement therapy or puberty blockers.

[2] Given this conclusion, I would not reach any of the other issues addressed by the majority and therefore express no opinion on those issues.

## I. Facts and Procedural History[3]

¶63 CHC has been providing medical gender-affirming care to transgender youth through its TRUE Center for Gender Diversity, established in 2007. On December 18, 2025, the U.S. Department of Health and Human Services issued what is known as the "Kennedy Declaration," concluding that "[s]ex-rejecting procedures for children and adolescents are neither safe nor effective as a treatment modality for gender dysphoria" and thus authorizing the Office of the Inspector General ("OIG") to exclude providers who offer medical gender-affirming care to minors from participating in federal health care programs. U.S. Dep't of Health & Hum. Servs., *Declaration of the Secretary of the Department of Health & Human Services RE: Safety, Effectiveness, and Professional Standards of Care for Sex-Rejecting Procedures on Children and Adolescents*, at 9 (Dec. 18, 2025). Less than two weeks later, on December 30, 2025, CHC was referred to OIG for violating the Kennedy Declaration by continuing to provide this care to minors.

¶64 In direct response to its referral to OIG, on January 5, 2026, CHC advised patients that it was immediately suspending its provision of medical gender-affirming care to minors, fearing exclusion from federal health care programs—which CHC reports would halt federal reimbursements and threaten

[3] The following facts are based on the trial court's findings of fact, following the preliminary injunction hearing.

the hospital's license, accreditation, and participation in commercial health insurance plans.

¶65 Four transgender minor patients at CHC, who had been receiving medical gender-affirming care for gender dysphoria, brought claims against CHC under CADA, section 24-34-601(2)(a), C.R.S. (2025), alleging discrimination in a place of public accommodation on the basis of gender identity, sex, and disability. Petitioners sought a preliminary injunction ordering CHC to continue providing "medically necessary care."

¶66 A preliminary injunction is "an extraordinary remedy." *Rathke*, 648 P.2d at 651. To be entitled to preliminary injunctive relief, a moving party must demonstrate *each* of the following six factors: (1) "a reasonable probability of success on the merits"; (2) "a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief"; (3) the absence of a "plain, speedy, and adequate remedy at law"; (4) that "a preliminary injunction will not disserve the public interest"; (5) that "the balance of equities favors the injunction"; and (6) that "the injunction will preserve the status quo pending a trial on the merits." *Id.* at 653–54. If even one factor is unsatisfied, then the request for a preliminary injunction should be denied. *Id.* at 654.

¶67 After a hearing, the trial court denied the preliminary injunction, in part based on the fourth and fifth *Rathke* factors: The court determined that obligating

CHC to provide this care "could place CHC at a greater risk of exclusion" and thus "would pose a grave danger to the public interest"—greater than that to petitioners.

¶68 The trial court did, however, find that petitioners demonstrated a reasonable probability of success on the merits of their CADA claims, satisfying the first *Rathke* factor. It explained that because CHC "continues to offer hormone therapy and puberty blockers to cisgender youth for purposes not related to gender affirming care[,] [r]efusing to offer these treatments to transgender patients for the purpose of gender affirming care facially differentiates between transgender and cisgender patients." Accordingly, the court found that the record "tended to demonstrate that CHC has ceased offering medical gender affirming care at least in part due to [petitioners'] gender identity." Along the same lines, the court found that petitioners demonstrated a sufficient likelihood of success on their CADA claims that CHC discriminated on the basis of disability given its finding that gender dysphoria can cause disability.

¶69 Petitioners then petitioned for a rule to show cause under C.A.R. 21, challenging the trial court's denial of the preliminary injunction.

## II. Analysis

¶70 In my view, petitioners' CADA claims do not make it past the first *Rathke* factor—likelihood of success on the merits—because petitioners failed to

demonstrate with reasonable probability that CHC's decision to discontinue gender-affirming care to minors constituted discrimination under CADA. *See* 648 P.2d at 653.

¶71 Section 24-34-601(2)(a) of CADA requires discrimination to be *because of* a petitioner's protected status. Specifically, CADA provides:

> It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, *because of* disability . . . sex . . . [or] gender identity . . . the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .

*Id.* (emphasis added).[4]

¶72 The majority seems to accept without question that CHC's decision to suspend medical gender-affirming care to minors constituted discrimination, largely adopting the trial court's findings that the evidence "tended to demonstrate that CHC's denial of medical gender-affirming care to petitioners was, at least in part, because of petitioners' status" and understanding this as "enough to satisfy causation for a claim under CADA." Maj. op. ¶ 59.

¶73 But, from my perspective, CHC's decision to terminate gender-affirming care for minors was plainly not "because of" petitioners' gender identity, sex, or

[4] Hospitals are expressly a place of public accommodation. § 24-34-600.3(1)(a)(VII), C.R.S. (2025).

disability. This decision was made only after CHC was threatened with exclusion from federal health care programs, which again, would halt all federal reimbursements and threaten the hospital's license, accreditation, and participation in commercial insurance plans. It was a decision driven by the direct threat to the viability of the entire hospital. The majority barely acknowledges the true cause of the decision by tepidly saying that the Kennedy Declaration "may have influenced CHC's decision." *Id.* at ¶ 58. That completely minimizes the reality of the situation. Furthermore, it brushes off these drastic consequences as speculative. *Id.* at ¶ 33. But based on the record before us, I cannot fathom that CHC would have made this call if the consequences of the Kennedy Declaration were not so severe. The Kennedy Declaration, not any individual's or group's gender identity, sex, or disability, was the reason CHC decided to stop providing medical gender-affirming care. Petitioners' protected status played no role in its decision.

### A. The Majority's Definition of "Service" Did Not Consider How Gender-Affirming Care Is Fundamentally Different

¶74 Respectfully, the core of my disagreement is the manner in which the majority chooses to treat two entirely different medical services as the same thing in their abbreviated analysis of *Rathke*'s first factor, regarding petitioners' probability of success on their CADA claim. Maj. op. ¶¶ 50–60.

¶75 This dispute by and large focuses on the continued administration of puberty blockers to treat precocious puberty, but not to treat gender dysphoria. The majority concludes that because certain puberty blockers are still provided to youth diagnosed with conditions like precocious puberty, a hormonal condition that causes the early onset of puberty, denying these medications for youth diagnosed with gender dysphoria is discriminatory because both treatments "serve the purpose of timing and aligning puberty with gender identity." Maj. op. ¶ 54. The only difference the majority notes is that for cisgender patients, this gender identity is consistent with the gender assigned at birth, and for transgender patients, this gender identity differs from the gender assigned at birth. *Id.* The majority's argument depends on defining the "service" at issue here in broad terms, grouping any and all hormone therapy into one bucket. *Id.*

¶76 In contrast, CHC frames medical gender-affirming care as a different kind of medical service than treating precocious puberty. Thus, it points out that, by declining to provide medical gender-affirming care (such as hormone replacement therapy or puberty blockers for gender dysphoria), it is simply declining to include this service in its "scope of care." CHC argues that "nothing within CADA requires a hospital to treat every medical condition or offer every treatment program."

¶77 While treatment for gender dysphoria and hormonal conditions like precocious puberty can both consist of puberty blockers, this does not make these treatments one and the same, such that providing one service but not the other constitutes discrimination under CADA. A medical service should not be defined based on the *medication* prescribed; rather, a medical service is defined by "the underlying medical concern the treatment is intended to address." *United States v. Skrmetti*, 605 U.S. 495, 513 (2025) (addressing whether Tennessee's ban on medical gender-affirming care for minors violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution). In my view, the majority conflates the *medication* provided with the *condition* treated, regardless of the reason why it is needed or prescribed. This is problematic. For example, using prednisone, a corticosteroid, to treat eczema is not the same as using it to treat back pain—it is the same medication but two different treatments. So, it is troubling that the majority concludes that CHC's decision to offer one treatment but not the other is, in and of itself, discrimination. It isn't that simple.

¶78 As acknowledged by the parties themselves, and as demonstrated by the record, precocious puberty and gender dysphoria are completely different conditions, leading to distinct considerations for care. Precocious puberty is a physical condition causing the early onset of puberty, before the age of eight or nine, that can result in complications like stunted growth. *Precocious puberty*, Mayo

Clinic (July 25, 2025), https://www.mayoclinic.org/diseases-conditions/precocious-puberty/symptoms-causes/syc-20351811 [https://perma.cc/5CSF-4TBU]. In such cases, puberty blockers are used to temporarily prevent the onset of puberty to avoid such complications. *Id.*

¶79 On the other hand, gender dysphoria, as defined by the trial court, is a condition that causes a person "extreme distress due to the difference between gender identity and the gender or sex assigned at birth." It has a far wider array of treatment options, including certain pharmaceutical and surgical interventions.[5] As the trial court found, depending on the unique needs of a child, treatment *may include* puberty blockers, meant to "temporarily pause sexual development" and allow patients "time to explore their identity."

¶80 Precocious puberty and gender dysphoria are different conditions. Thus, the use of puberty blockers to treat precocious puberty and their use to treat gender dysphoria are different medical services. To lump them into a singular bucket is illogical and ultimately untenable. Therefore, it is inaccurate to characterize CHC's decision to stop providing puberty blockers as a treatment for

[5] As the trial court found, "Gender affirming care has an expansive definition. It ranges from the choice of pronouns and preferred name to hormonal treatment and surgery."

gender dysphoria while continuing to provide this medication for precocious puberty as discrimination.

¶81 Using this correct framing of medical "service," petitioners' gender identity, sex, or disability was not a "but-for" cause of CHC's decision to cease medical gender-affirming care for minors. "But-for" causation instructs courts to change one thing at a time to see if the outcome changes. *Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020). If it does, we have found a but-for cause. *Id.* So here, the causal question becomes: Do the services CHC provides to its patients change depending on their protected status? The answer is a resounding no. Medical gender-affirming care for minors, as a treatment for gender dysphoria, *is not offered*, while other hormonal treatments, like puberty blockers for precocious puberty, *are offered* to *all* patients who need it. Therefore, CHC raises a valid point when it argues that petitioners may have "allege[d] a valid CADA claim if [CHC] denied transgender patients puberty blockers *for precocious puberty*." (Emphasis added.) They didn't.[6]

¶82 The majority cites CHC's statement that it "believe[s] that all families, including the families of transgender children, should have the ability to seek and

[6] Importantly, "events [can] have multiple but-for causes, . . . [s]o long as the plaintiff's [protected class] was one but-for cause of [a] decision," this can suffice for purposes of showing discrimination. *Bostock*, 590 U.S. at 656 (citation omitted).

receive the expert medical care their child needs to thrive" as indicating that CHC "has directly tied its decision to suspend medical gender-affirming care to the identity of transgender patients." Maj. op. ¶ 56. But, in my view, that attribution is ill-considered; instead, that comment merely emphasizes that CHC had compassion for the petitioners and that it *wanted* to provide that care.

### B. Petitioners Failed to Establish any Evidence of Discriminatory Intent

¶83 Even accepting the majority's construction of the medical service at issue here, petitioners' CADA claims fail on intent, which the majority leaves largely unaddressed.

¶84 Petitioners argued at the preliminary injunction hearing that the phrase "because of" *only* requires a court to review "but-for" causation and that it is "irrelevant whether or not the hospital's decision is based on animus," citing *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶ 37, 370 P.3d 272, 282 ("CADA requires no such showing of 'animus.'" (citing *Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 253 (Colo. App. 2006))), *rev'd on other grounds sub nom.*, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617 (2018). However, I view this as an incomplete characterization of CADA.

¶85 First and foremost, petitioners' (and the trial court's) reliance on *Craig* is misplaced. In *Craig*, the division's statement that "CADA requires no such showing of 'animus'" was made to distinguish that case from *Bray v. Alexandria*

*Women's Health Clinic*, 506 U.S. 263 (1993), which concerned an action under 42 U.S.C. § 1985(3). *Craig*, ¶¶ 36–37, 370 P.3d at 281–82. Neither does section 1985(3) expressly require intent, but in *Bray*, the Supreme Court applied precedent interpreting section 1985(3) as requiring plaintiffs to prove that defendant's actions were motivated by "some . . . class-based, invidiously discriminatory animus." 506 U.S. at 268 (quoting *Griffin v. Breckenridge,* 403 U.S. 88, 102 (1971)). Thus, in assessing whether CADA requires a similar showing of intent, *Craig* took the absence of similar precedent interpreting CADA's language to conclude that it does not.[7]

¶86 The majority glosses over CHC's intent in ceasing this particular kind of medical treatment. This is concerning. If, for instance, CHC had decided to cease medical gender-affirming care because it lacked the expertise to safely continue offering this service, the majority's rationale would still deem that action discriminatory. Maj. op. ¶ 59 (agreeing with the trial court that "CHC's denial of medical gender-affirming care to petitioners was, at least in part, because of

[7] The court in *Craig* concluded that Masterpiece Cakeshop violated CADA "*even if* [it] assume[d] that CADA requires plaintiffs to establish an intent to discriminate, as in [a] section 1985(3) action," because the "ALJ reasonably could have inferred" discriminatory intent from Masterpiece's conduct. ¶ 38, 370 P.3d at 282 (emphasis added).

petitioners' status, which is enough to satisfy causation for a claim under CADA"). That would be an absurd result.

¶87 Common sense dictates that one cannot discriminate against another without a motive or purpose to do so, at least in this context. The petitioners, however, failed to present *any* evidence of discriminatory intent. That's not surprising—there was no discriminatory intent. CHC has made it very clear that its decision to stop the provision of medical gender-affirming care to minors does not come from a place of animus, disdain, or disapproval of transgender individuals seeking these kinds of services. In fact, the very opposite is true. First, CHC continues to provide medical gender-affirming care to transgender *adults*, unmistakenly signaling that it is not declining to provide this care because of petitioners' gender identity. Second, CHC had been providing medical gender-affirming care to transgender youth for years, stopping this care only *after* they were referred to OIG for failure to comply with the Kennedy Declaration. Instead, the record demonstrates that CHC made this decision for its own survival, as well as the thousands of patients who would be deprived of *all* medical care if the hospital were to meet its demise.[8]

[8] Petitioners go even further to argue that *Craig* establishes that intent is not even relevant. Yet, even if one disagrees that CADA *requires* proof of intent, intent certainly is still *relevant* to a but-for analysis. For instance, if petitioners had demonstrated that CHC intended to discriminate against transgender individuals here, they likely would have established that petitioners' gender identity was a

¶88 Nor am I persuaded by petitioners' warning that CHC is "merely implementing a third-party's discriminatory agenda" and that not considering this as discrimination would "create a heckler's veto where bigots could threaten places of public accommodation" and entities like CHC "could use those threats to justify denying services to minorities." These situations are not one and the same. Exclusion from federal programs is not mere financial pressure. If the federal authorities proceed as they have repeatedly promised with a regulatory sanction under 42 C.F.R. § 1001, CHC will not only "be excluded from participation in Medicare, Medicaid and all other Federal health care programs," 42 C.F.R. § 1001.1(a), but, as found by the trial court, it consequently may lose accreditation by the Colorado Department of Public Health and Environment, eligibility to participate in commercial health insurance, and the ability to staff faculty from the University of Colorado School of Medicine. The bottom line is that the Kennedy Declaration is a government directive that threatens CHC with catastrophic consequences if it fails to comply.

¶89 The decision to offer a specific form of medical care is specialized and technical. It involves complexities and medical considerations that this court

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but-for cause for CHC's decision to stop providing medical gender-affirming care to minors. This would have established that it actually *was* petitioners' protected status that caused the decision.

neither has expertise in nor been provided with enough information to meaningfully assess: whether a hospital has the resources or expertise to provide adequate care; whether there are sufficient patients who need the treatment to make it financially or logistically viable; and, most importantly, whether a hospital *will* have resources if it decides to continue providing this care. These are decisions that a hospital is best equipped to make in the absence of a showing that such decisions were "because of" petitioners' gender identity, sex, or disability under CADA.

### C. This Case Is Distinguishable from Those Discussing "Inextricable Intertwinement" of Conduct and Status

¶90 Admittedly, this issue is complicated by the fact that the medical condition at issue is experienced only by those in the protected class. Because only the transgender population seeks out medical gender-affirming care for gender dysphoria, declining to provide this service exclusively impacts this population.

¶91 Petitioners thus suggest that CHC's termination of medical gender-affirming care for transgender minors constitutes discrimination because "[d]rawing distinctions based on characteristics 'inextricably intertwined' with transgender status or a gender dysphoria diagnosis is discrimination on the basis of transgender status or disability." They again quote *Craig* to argue that "[j]ust like a 'tax on wearing yarmulkes is a tax on Jews,'" ¶ 39, 370 P.3d at 282 (quoting

*Bray*, 506 U.S. at 270), "so too is a ban on gender affirming care for 'transgender youth' discrimination on the basis of gender identity." That analogy is misplaced.

¶92 In *Craig*, Masterpiece Cakeshop argued that it refused to bake a cake for the plaintiffs not "because of" their sexual orientation, but because it disagreed with plaintiffs' plans to enter into a same-sex marriage. ¶ 30, 370 P.3d at 280. The division found this distinction inappropriate, given that the U.S. Supreme Court has rejected distinctions between "discrimination based on a person's status and discrimination based on conduct closely correlated with that status." *Id.* at ¶ 32, 370 P.3d at 280 (citing *Christian Legal Soc'y Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 689 (2010), in which the Supreme Court noted its "decisions have declined to distinguish between status and conduct" in response to Christian Legal Society's argument that it did not exclude individuals because of sexual orientation, but because of their engagement in "unrepentant homosexual conduct," *id.* at 672, 689).

¶93 This case is distinguishable, however. This case would be comparable to *Craig* only if it was demonstrated that CHC is refusing to offer medical gender-affirming care because it does not *agree* with the decisions by petitioners—all transgender individuals (status)—to seek medical gender-affirming care (conduct). As already addressed, CHC is not discriminating *because of* the petitioners' protected status *or conduct*.

¶94 Relatedly, both parties' briefing compared gender dysphoria to sickle-cell anemia, a condition affecting almost exclusively people of African descent. U.S. Ctrs. for Disease Control & Prevention, *Data and Statistics on Sickle Cell Disease*, (May 15, 2024), https://www.cdc.gov/sickle-cell/data/index.html [https://perma.cc/2MET-9JFT]. CHC asserts that it would not be discriminating against Black people if it declined to treat sickle-cell anemia because it did not have the appropriate stem-cell treatment available. I agree.

¶95 Petitioners respond with a different hypothetical. Suppose, they offer, that a hospital refused to treat HIV or AIDS because it refused to treat homosexual men. They suggest that, if we determine CHC did not engage in discrimination here, this hypothetical provider would likewise be immune from CADA liability for refusing to treat HIV or AIDS *even if* it explicitly ties its decision to sexual orientation discrimination.

¶96 These hypotheticals actually highlight the validity of my position on intent. In the sickle-cell anemia hypothetical, declining to offer stem-cell treatment for sickle-cell anemia patients would not be discriminatory because the reason for denying the service was solely related to the unavailability of stem-cell treatment. By contrast, in petitioners' HIV/AIDS example, the hospital's conduct would constitute discrimination because the *reason* for denying care was to avoid treating a protected class of people *based on their protected status*.

¶97 Here, declining to provide medical gender-affirming care for minors would have been discriminatory if the record reflected that the reason for this decision was to discriminate against transgender youth because of their protected status or associated conduct. But, it does not. CHC's decision had nothing to do with petitioners' protected status. Because the majority fails to apprehend this, it misapplies CADA.

## III. Conclusion

¶98 I do not view petitioners as having adequately demonstrated a reasonable probability of success on the merits of their claim that CHC discriminated against them "because of" their gender identity, sex, or disability. They therefore have not met their burden under the first *Rathke* factor. Not only does the record make it clear that CHC did not intend to discriminate on any of the grounds raised, but it also shows that CHC's decision was made solely with the survival of the hospital—and, by extension, the well-being of its present and future patients, including petitioners themselves—in mind.

¶99 Because petitioners were not entitled to a preliminary injunction, I respectfully dissent.