No. 23-492

In the Supreme Court of the United States

JANE DOE 1, ET AL.,
Petitioners,

v.

COMMONWEALTH OF KENTUCKY, EX REL. RUSSELL COLEMAN, ATTORNEY GENERAL OF KENTUCKY
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Kentucky's 2023 Senate Bill 150, which prohibits health care providers from giving children puberty blockers or hormones to treat gender dysphoria, likely violates the Due Process or Equal Protection Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Respondent agrees with Petitioners' list of the parties to this proceeding except that (i) Respondent is now the Commonwealth of Kentucky, *ex rel.* Russell Coleman, Attorney General of Kentucky, *see* Sup. Ct. R. 35.3, and (ii) John Doe 3, Jane Doe 3, and Jane Minor Doe 3 have now dismissed their petition for a writ of certiorari.

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INTRODUCTION

Kentucky's Senate Bill 150 requires children with gender dysphoria to wait until age 18 before receiving medical interventions or undergoing surgery in an attempt to alter their sex. Nearly two dozen other States have laws like SB 150. Legal challenges to those laws are pending across the country—at present, in seven judicial circuits. Along with the challenge to Tennessee's equivalent law, this case is the first of those many lawsuits to make it to this Court. Others will soon follow.

Because this case is the first in line, the Court should deny review here in favor of perhaps addressing the constitutionality of a law like SB 150 in the future. To be sure, the question presented here is important. It goes to the heart of the States' sovereign authority to decide how best to protect children within their borders. And so if an entrenched split of authority about that question emerges, the Court would have good reason to grant review to resolve it. Yet at this early juncture, there has been little percolation in the courts of appeals. Although there is a 2-1 circuit split about one of Petitioners' claims, the single outlier decision is now being reconsidered by the full Eighth Circuit.

Even if the Court decides that the question presented is worthy of review now, this case is not the right vehicle to address it—not in its current posture. At this stage, the factual record consists of competing declarations. There has been no document discovery, no depositions, no live testimony, and no meaningful fact-finding. For an issue as consequential as that presented, the Court should wait for a case with a fuller

factual record. And given the volume of ongoing litigation about laws like SB 150, the Court need not wait long.

STATEMENT OF THE CASE

1. SB 150 became the law of Kentucky after a lively, and at times raucous, debate in Kentucky's General Assembly. Bruce Schreiner, *GOP lawmakers override veto of transgender bill in Kentucky*, AP (Mar. 29, 2023), https://perma.cc/RK6S-EG4G. In passing the law, Kentucky's legislature carefully considered the available medical and scientific evidence about the use of surgical and medical interventions to treat gender dysphoria in children. As one of the legislative sponsors of what became SB 150, Representative Jennifer Decker, summed up: "[T]here is no quality long-term study to establish that there is [a] long-term benefit [from] gender-transition services, and more importantly, there is long-term evidence that these services result in permanent, lifelong harm to children." *The Do No Harm Act: Hearing on HB 470 Before the House Judiciary Committee*, 2023 Reg. Sess. 44:40–45:00 (Ky. Mar. 2, 2023), https://ket.org/legislature/archives/2023/regular/house-judiciary-committee-198318.

Kentucky's General Assembly responded to this concern not by banning sex-transition interventions outright, but by requiring children to wait until age 18 to undergo them. As relevant here, SB 150 prohibits a Kentucky health care provider from prescribing or administering puberty blockers or hormones to children "for the purpose of attempting to alter the appearance of, or to validate a minor's perception of, the minor's sex, if that appearance or perception is inconsistent with the minor's sex." Ky. Rev. Stat. § 311.372(2).

SB 150 allows a child who was receiving the prohibited treatments before the law took effect to continue doing so as long as they are "systematically reduced" over time. *Id.* § 311.372(6). A health care provider who violates SB 150 risks license revocation as well as civil liability. *Id.* § 311.372(4), (5).

2. Shortly before SB 150 took effect, Petitioners sued. They raised two claims: that SB 150 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Compl. ¶¶ 78–92, ECF No. 2. They sought a preliminary injunction on both theories. Prelim. Inj. Mot., ECF No. 17. Kentucky's Attorney General intervened to defend the constitutionality of SB 150. Order, ECF No. 38. In briefing the preliminary-injunction motion, the parties submitted a host of competing declarations. The district court, however, never held a hearing to resolve the parties' many factual disputes about the relevant medicine and science because the case "presents primarily legal questions."[1] Pet.App.112a. Even still, the district court acknowledged that the dueling declarations raise disputes about the treatments regulated by SB 150. *Id.* at 115a.

The day before SB 150 was to take effect, the district court issued a preliminary injunction. *Id.* at 128a–29a. As to Petitioners' equal-protection claim, the court found that intermediate scrutiny applies because SB 150 discriminates based on sex. *Id.* at 117a–19a. In so holding, the court mostly relied on the Eighth Circuit's decision in *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022). Pet.App.117a,

[1] The Attorney General did not request an evidentiary hearing primarily because of his position that rational-basis review applies. Resp. Ct. Order, ECF No. 44.

119a. Because the district court agreed with *Brandt*, it did not address whether "transgender individuals are a quasi-suspect class." *Id.* at 117a n.5. As to whether SB 150 survives intermediate scrutiny, the court concluded that the law failed such review. In this regard, the court agreed with Petitioners that puberty blockers and hormones are "medically appropriate and necessary for some transgender children." *Id.* at 115a; *see also id.* at 120a–22a. Yet all the court cited for this determination was an amicus brief submitted by "all major medical organizations in the United States." *Id.* at 115a.

The district court also held that those Petitioners who are parents were likely to succeed on their substantive-due-process claim. *Id.* at 123a–26a. It rooted this holding primarily in Sixth Circuit caselaw about a parent's ability to refuse a medical procedure for his or her child. *Id.* at 123a (citing *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396 (6th Cir. 2019)).

3. Upon entry of the preliminary injunction, the Attorney General asked the district court for a stay pending appeal. Mot. Stay, ECF No. 66. While that motion was pending, the Sixth Circuit granted that very relief to Tennessee's Attorney General in the lawsuit challenging the Volunteer State's analogue to SB 150. *L.W. v. Skrmetti*, 73 F.4th 408, 413 (6th Cir. 2023). Based on that intervening decision, the district court stayed its preliminary injunction as to SB 150. Order, ECF No. 79. The Sixth Circuit then declined to lift that stay. *Doe 1 v. Thornbury*, 75 F.4th 655, 657 (6th Cir. 2023) (per curiam).

Two months later, the Sixth Circuit issued a consolidated decision in the Kentucky and Tennessee appeals lifting the preliminary injunctions entered in both cases. Pet.App.61a. Chief Judge Sutton's opinion for the court began by summarizing the relatively brief history of the treatments regulated by SB 150. Those treatments did not become "available for minors until shortly before the millennium." *Id.* at 8a. Initially, the medical profession exercised at least some caution in providing the treatments to children. *Id.* at 8a–9a. But over time, "the standards of care for minors 'have become less restrictive,'" while "the number of doctors prescribing sex-transition treatments and the number of children seeking them have grown." *Id.* at 10a (citation omitted).

In response to these trends, the States entered the field with a "proliferation of legislative activity across the country." *Id.* at 18a. Some 19 States passed laws like Kentucky's and Tennessee's.[2] *Id.* (collecting statutes). Another 14 States came at the issue from the opposite direction. *Id.* As the Sixth Circuit summarized the state of play, the States "are indeed engaged in thoughtful debates over this issue." *Id.*

Against this backdrop, the Sixth Circuit found that Petitioners are unlikely to succeed on the merits of their claims. Starting with due process, the court faulted Petitioners for "never engag[ing] with" the "crucial" historical inquiry that governs substantive-due-process claims. *Id.* at 31a (citation omitted). It determined that our "country does not have a 'deeply

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[2] In the time since the Sixth Circuit's decision, Ohio also passed a law like SB 150. Samantha Hendrickson, *Ohio bans gender-affirming care and restricts transgender athletes despite GOP governor's veto*, AP (Jan. 24, 2024), https://perma.cc/9SUK-MXZ2.

rooted' tradition of preventing governments from regulating the medical profession in general or certain treatments in particular, whether for adults or their children." *Id.* at 21a. As a result, a parent's substantive-due-process right to raise his or her child does not encompass "a right to reject democratically enacted laws." *Id.* at 26a.

As to equal protection, the court found that SB 150 classifies based on age and medical condition—but not on sex. *Id.* at 35a–45a. The through line for the court's analysis was that SB 150 "regulate[s] sex-transition treatments for all minors, regardless of sex." *Id.* at 36a–37a. Indeed, that SB 150 contains the word "sex" does not make the law discriminatory, but is just a function of the law describing "the biology of the procedures." *Id.* at 40a. In this respect, the Sixth Circuit relied on this Court's decisions in *Geduldig v. Aiello*, 417 U.S. 484 (1974), and *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), for the proposition that a law does not discriminate based on sex if it regulates a procedure that only one sex can undergo. Pet.App.38a–39a.

The Sixth Circuit found Petitioners' further arguments no more persuasive. It rejected their reliance on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Pet.App.45a–47a. To the court, *Bostock*'s "text-driven reasoning applies only to Title VII, as *Bostock* itself . . . make[s] clear." *Id.* at 45a. And "there is a marked difference in application of the anti-discrimination principle" in this case as compared to *Bostock*. *Id.* at 46a–47a. In particular, a "concern about potentially irreversible medical procedures for a child is not a form of stereotyping" as in *Bostock*. *Id.* at 47a.

The court also briefly considered Petitioners' back-up argument "that the Act violates the rights of a suspect class: transgender individuals." *Id.* at 49a. In rejecting this argument at the preliminary-injunction stage, the court emphasized that this Court "has not recognized any new constitutionally protected classes in over four decades, and instead has repeatedly declined to do so." *Id.* (citation omitted). The panel also weighed "[o]ther considerations that th[is] Court has highlighted when recognizing a new suspect class." *Id.* at 51a–53a. On the record before it, the court found that those factors "do not improve [Petitioners'] chances of success." *Id.* at 51a.

In light of all these conclusions, the Sixth Circuit applied rational-basis review. *Id.* at 53a–56a. It reasoned that the "unsettled, developing, in truth still experimental, nature of treatments in this area surely permits more than one policy approach, and the Constitution does not favor one over the other." *Id.* at 54a. Because the district court had incorrectly applied intermediate scrutiny, the panel rejected Petitioners' reliance on the district court's "endorsement[] of their position and evidence to question" Kentucky's interests. *Id.* The Sixth Circuit also found that deference to the district court's fact-finding was unnecessary on "a written record like this one and the dueling affidavits that accompany it." *Id.* at 54a–55a.

Judge White dissented. *Id.* at 62a–110a. She disagreed with the majority across the board. She concluded that SB 150 "trigger[s] heightened scrutiny because [it] facially discriminate[s] based on a minor's sex as assigned at birth and on a minor's failure to conform with societal expectations concerning that sex." *Id.* at 76a. And she found that SB 150 could not

survive heightened scrutiny. *Id.* at 91a–95a. As to due process, Judge White concluded that SB 150 "plainly intrude[s] on parental autonomy in violation of [parent Petitioners'] substantive due-process rights." *Id.* at 99a.

ARGUMENT

None of Petitioners' arguments justify the Court granting review of this case—not yet anyway. Petitioners' primary reason for seeking review is that the Sixth Circuit's opinion conflicts with decisions of other courts. But Petitioners overstate that judicial disagreement. And they barely acknowledge that the only circuit-level dispute about a law like SB 150 may soon go away. In addition, Petitioners' assurance that this case is an appropriate vehicle for review overlooks the preliminary nature of this case's factual record. And their final reason for seeking review—that they disagree with the Sixth Circuit's decision—cannot overcome Chief Judge Sutton's persuasive reasoning.

I. Any split of authority does not warrant review now.

Petitioners suggest several different flavors of judicial disagreement in urging the Court to hear this case.

1. First, Petitioners point out that the courts of appeals currently disagree about whether a law like SB 150 is likely constitutional. Pet.16–18. For now, they are right. At present, three circuits have addressed a law like SB 150, all in a preliminary-injunction posture. The Sixth and Eleventh Circuits agree that such laws are likely constitutional. Pet.App.60a–61a; *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205,

1210–11 (11th Cir. 2023). The Eighth Circuit, by contrast, currently disagrees in one respect. *Brandt*, 47 F.4th at 669–71. That said, Petitioners' description of that disagreement leaves out quite a bit.

The Eighth Circuit's views about a law like SB 150 are anything but settled. True, as Petitioners note, a panel of that court held that plaintiffs were likely to succeed on an equal-protection challenge to an equivalent law. *Id.* As the court saw it, the "biological sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not." *Id.* at 670. The panel's holding very nearly prompted en banc rehearing, which the full court denied by a tied vote. *Brandt ex rel. Brandt v. Rutledge*, No. 21-2875, 2022 WL 16957734 (8th Cir. Nov. 16, 2022). Reading between the lines, the full court denied rehearing only because of the case's preliminary posture. *Id.* at *1 (Colloton, J., concurring in denial of rehearing en banc). More to the point, a large majority of the Eighth Circuit suggested that it would reconsider *Brandt*'s holding if the appeal were from a final judgment.

The full Eighth Circuit is about to get that chance. Upon remand from the panel decision in *Brandt*, the district court entered final judgment in plaintiffs' favor. *Brandt v. Rutledge*, --- F. Supp. 3d ---, 2023 WL 4073727, at *1 (E.D. Ark. June 20, 2023). In a second appeal, this time from a final judgment, the Eighth Circuit granted initial hearing en banc. Order, *Brandt v. Griffin*, No. 23-2681 (8th Cir. Oct. 6, 2023). As a result, although the Eighth Circuit's panel decision is still on the books, the full court is set to reconsider its

holding anew shortly. At present, the matter is fully briefed and awaiting oral argument.

This sequence of events, which Petitioners mention only in a footnote, demonstrates that the circuit split about the constitutionality of laws like SB 150 is not entrenched. Indeed, when the Eighth Circuit reconsiders *Brandt*, it will be able to take account of the Sixth and Eleventh Circuits' intervening decisions, something the *Brandt* panel could not do. Perhaps the full Eighth Circuit will stick with *Brandt*. But maybe not. Assuming not, the courts of appeals would then be aligned as to the constitutionality of a law like SB 150. If that occurs, the Court would have far less reason to grant review in a case like this, given that "certiorari jurisdiction exists to clarify the law." *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 610 (2015). It follows that the Court should deny review here to allow the full Eighth Circuit to decide whether it agrees with the Sixth and Eleventh Circuits.

Likely sensing the wisdom of a wait-and-see approach, Petitioners retreat to district court decisions about laws like SB 150. By their telling, a "wall" of district courts agree with them. Pet.16. But of course, this Court's rule guiding its discretion on certiorari focuses on circuit-level disagreement. Sup. Ct. R. 10(a). Petitioners' emphasis on trial rulings is a tell that review by this Court is premature. All of Petitioners' favored district court decisions will make their way through the courts of appeals in the regular course. In fact, that is occurring right now. Such appeals are pending in the Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits. *K.C. v. Individual Members of Med. Licensing Bd.*, No. 23-2366 (7th Cir.) (oral argument scheduled for Feb. 16, 2024); *Brandt v. Griffin*, No. 23-2681 (8th

Cir.) (awaiting oral argument); *Poe v. Labrador*, No. 24-142 (9th Cir.) (opening brief due Feb. 6, 2024); *Poe v. Drummond*, No. 23-5110 (10th Cir.) (oral argument held on Jan. 17, 2024); *Eknes-Tucker v. Governor of Ala.*, No. 22-11707 (11th Cir.) (petition for rehearing pending); *Doe v. Surgeon Gen. of Fla.*, No. 23-12159 (11th Cir.) (appeal fully briefed). And the Fourth Circuit may join in soon. *Voe v. Mansfield*, No. 1:23-cv-00864 (M.D.N.C.) (preliminary-injunction motion fully briefed).

The bottom line is that the litigation concerning laws like SB 150 is just getting started. This and the Tennessee case are the first matters to arrive here. Generally, even for an important issue, this Court does not grant review of the first case to reach its docket. *See Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam); *id.* at 1784 (Thomas, J., concurring). That ordinary rule derives from "the benefit [the Court] receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari." *United States v. Mendoza*, 464 U.S. 154, 160 (1984).

2. Next, Petitioners argue that a subsidiary part of the Sixth Circuit's equal-protection holding is in tension with the views of the Fourth and Ninth Circuits. Pet.19–21. They point to the Sixth Circuit's discussion of whether transgender persons constitute a suspect class. Pet.App.49a–52a. To be clear, the judicial disagreement Petitioners identify is not about laws like SB 150. The Fourth and Ninth Circuit decisions arose in varied contexts like school athletics, school bathrooms, and even military service. *See Hecox v. Little*, 79 F.4th 1009, 1015 (9th Cir. 2023); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020);

Karnoski v. Trump, 926 F.3d 1180, 1186 (9th Cir. 2019) (per curiam).

Even setting this aside, the suspect-class issue has never been a point of emphasis for Petitioners. In district court, they discussed it mostly in passing. Prelim. Inj. Mot. at 16–18, ECF No. 17; Reply at 5–6, ECF No. 52. Their briefs largely summarized what other courts have said. Petitioners did not cite record evidence on this issue. They cited only a newspaper article. And the district court expressly declined to resolve the issue. Pet.App.117a n.5. On appeal, it was more of the same from Petitioners. Their suspect-class argument took a back seat to their lead equal-protection argument. Appellee Br. at 40–42, CA6 ECF No. 68. What little Petitioners said simply summarized what other courts have done. And as below, they did not point to any record evidence, relying again only on a newspaper article.

Petitioners' lack of interest in this part of their claim likely explains why the Sixth Circuit offered only preliminary holdings about it toward the end of its opinion. Notably, Judge White did not even reach the issue in her lengthy dissent. Pet.App.77a n.6 (White, J., dissenting). Although the panel majority provided its initial views on the issue, the court did not resolve it definitively. In fact, the court left open the possibility of recognizing transgender persons as a suspect class in the future. *See id.* at 49a ("But neither the Supreme Court nor this Court has recognized transgender status as a suspect class. Until that changes, rational basis review applies."). And the court made clear that its ruling was tied to the "stage

of the case." *Id.* at 51a. So as of yet, the Sixth Circuit has not conclusively resolved the issue.

The Court should not grant review to consider the Sixth Circuit's preliminary observations. All the more so because this Court has not recognized a new suspect class in "over four decades." *Id.* at 49a (citation omitted). If Petitioners wish to pursue such a significant ask, they should go back to district court and do what they failed to do before: develop a full record on this piece of their equal-protection claim.

Even still, any judicial disagreement on this issue is not as Petitioners describe it. They point to two Ninth Circuit decisions. But the first of those barely engaged with the issue. In a single paragraph, the panel summarily stated that the district court there "reasonably applied the factors ordinarily used to determine whether a classification affects a suspect or quasi-suspect class." *Karnoski*, 926 F.3d at 1200–01. And in a footnote, *Karnoski* clarified that it did not address the argument, which is analogous to the one Petitioners make here, that the policy there discriminated because "gender dysphoria and transition are closely correlated with being transgender." *Id.* at 1201 n.18. Petitioners' other favored Ninth Circuit decision provided even less analysis. It simply followed *Karnoski* as circuit precedent. *Hecox*, 79 F.4th at 1026.

To be sure, Petitioners' favored Fourth Circuit case considered the suspect-class issue in more depth, albeit as an alternative holding. *Grimm*, 972 F.3d at 610–13; *id.* at 635–37 (Niemeyer, J., dissenting). That said, the en banc Fourth Circuit is currently considering two appeals that could implicate *Grimm*. *Kadel v. Folwell*, No. 22-1721 (4th Cir.) (oral argument held Sept. 21, 2023); *Fain v. Crouch*, No. 22-1927 (4th Cir.)

(same). So we may get more insight from the Fourth Circuit about *Grimm* in short order.

Even if tension exists between the Fourth and Ninth Circuits and the decision below, Petitioners neglect to mention that there is an antecedent legal question to resolve before the suspect-class issue could matter. In particular, the suspect-class issue could matter only if SB 150 in fact differentiates based on transgender status. But SB 150 does not discriminate along that line. Petitioners suggest that the Sixth Circuit implicitly held otherwise. Pet.20–21. That is wrong. The Sixth Circuit made clear that SB 150 distinguishes based on medical treatment and age. Pet.App.35a–36a. It never held that the law does the same based on transgender status. For good reason: the law simply says that children with gender dysphoria cannot receive certain interventions until age 18. Ky. Rev. Stat. § 311.372(2). That is not discriminating based on transgender status. It is regulating specific treatments for children for a specific condition.

Petitioners will likely reply that differentiating based on medical treatment in this context is no different than discriminating based on transgender status. But the Sixth Circuit did not resolve that threshold issue, which cuts against the Court doing so first. *See Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 193 (2017) ("[O]urs is a court of final review and not first view." (alteration in original) (citation omitted)). Plus, Petitioners' admission that not all transgender persons seek the treatments regulated by SB 150 weakens any suggestion that it discriminates based on transgender status. Pet.5 ("In *some* cases, resolving gender dysphoria may require medical treatment." (emphasis added)). So too with the fact that SB

150 only applies until children turn 18 years old. *See* Pet.App.52a ("The key problem is that a law premised only on animus toward the transgender community would not be limited to those 17 and under."). And lastly, this Court's precedent is hard to square with Petitioners' contention that regulating specific treatments for a specific condition is no different than status-based discrimination. *See Geduldig*, 417 U.S. at 496 n.20.

3. For their final split of authority, Petitioners pivot to their substantive-due-process claim. In their view, the Sixth Circuit diverged from the Tenth Circuit. Pet.21. That is incorrect. As the United States (Petitioners' ally in this case, *see* Statem. Interest, ECF No. 37) correctly notes in its petition for a writ of certiorari in the Tennessee case, the Sixth Circuit's due-process holding "does not conflict with any decision of another court of appeals." Pet.17 n.6, *United States v. Skrmetti*, No. 23-477.

Petitioners' argument to the contrary simply splits hairs. Their purported circuit split turns on the Sixth Circuit's discussion of *Parham v. J.R.*, 442 U.S. 584 (1979). Pet.App.21a. There, several children challenged their parents' decision to utilize state-provided mental-health treatment. *Parham*, 442 U.S. at 587. *Parham* thus differs from this case in a crucial respect: It concerned parents seeking state-provided treatment for their children, not parents seeking state-prohibited treatment. *Parham* also is distinguishable because the question presented there concerned procedural, not substantive, due process. *Id.*

The Sixth Circuit distinguished *Parham* on both grounds. As to the former, it emphasized that "[n]othing in *Parham* supports an affirmative right to

receive medical care, whether for a child or an adult, that a state reasonably bans." Pet.App.29a. The panel thus rejected Petitioners' contention that *Parham* recognizes a substantive-due-process right for parents to receive state-prohibited medical care for their children. The Sixth Circuit also pointed out that the claim in *Parham* "was resolved on procedural, not substantive, due process grounds." *Id.* at 28a–29a.

This latter holding is the one Petitioners say differs from the Tenth Circuit's view of *Parham*. But even a cursory look at the Tenth Circuit's decision refutes that contention. That case involved parents who wanted to refuse permissible medical treatment for their child, *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1198 (10th Cir. 2010), unlike here where parents are seeking state-prohibited treatment. From a substantive-due-process perspective, this Court has put the refusal of medical treatment on a different plane than insisting on treatment. *See Washington v. Glucksberg*, 521 U.S. 702, 725–26 (1997); *see also* Pet.App.27a.

That difference aside, *PJ*'s discussion of *Parham* is not all that different from the decision below. *PJ* understood *Parham* to "allude[] to, but never specifically define[] the scope of a parent's right to direct her child's medical care." 603 F.3d at 1197. So similar to the court below, the Tenth Circuit did not take *Parham* to be a definitive statement about the scope of a parent's substantive-due-process right with respect to a child's medical care. It viewed *Parham* as "reasonably suggest[ing]" "some level of protection." *Id.* The decision below is not to the contrary. Although it recognized that the question presented in *Parham* concerned procedural due process, it did not stop there. It went on to hold that "[n]othing in *Parham* supports an

affirmative right to receive medical care, whether for a child or an adult, that a state reasonably bans." Pet.App.29a. As a result, there is little daylight between the Sixth and Tenth Circuits' views of *Parham*.

II. This case is a poor vehicle for resolving the question presented.

Petitioners assure the Court that this case is an "appropriate" vehicle for review despite its preliminary posture. Pet.31–32. But they cannot overcome that they rushed this case here on a hastily developed record with no meaningful fact-finding. Nor can they dispute that cases with a fuller factual record will likely arrive at the Court in the near term. Indeed, this case could end up back here again after final judgment, at which time it could be a better vehicle for review.

That this matter is an interlocutory appeal generally cuts against review. Stephen M. Shapiro et al., *Supreme Court Practice* 4.4(h) at 4-19 (11th ed. 2019) ("There may be a tendency to deny certiorari despite a conflict where the case in which review is sought is at an interlocutory rather than final stage."). Of course, that rule is not hard and fast. That is so in part because interlocutory appeals can arise after discovery, live testimony, and meaningful fact-finding by a district judge. Yet this matter involves none of the above. At this early juncture, no fact or expert discovery has occurred. The record mostly contains competing declarations, many of which are lengthy and technical. Decls., ECF Nos. 17-1–17-7, 47-9–47-23, 52-2–52-6, 60-1–60-3. Indeed, the district court opted not to hear live witness testimony before entering its preliminary injunction. Pet.App.112a n.2. All the court did was review a cold paper record, which prompted the Sixth

Circuit to refuse any deference to its findings. *Id.* at 54a–55a.

Besides, the district court did not meaningfully engage with the parties' declarations. Under no circumstances can its fact-finding be described as "detailed." Pet.32. Despite acknowledging factual disputes in the parties' declarations, the district court simply accepted as gospel an amicus brief filed by medical interest groups and summarily declared that the "treatments barred by SB 150 are medically appropriate and necessary for some transgender children." Pet.App.115a; *see also id.* at 122a. To the extent this qualifies as fact-finding, it is the sum total of what the district court did.

Petitioners respond that this appeal largely concerns legal questions. Pet.31–32. Because the Attorney General believes that rational-basis review applies, he agrees with this point as far as it goes. The Sixth Circuit did too. Pet.App.54a. But Petitioners very much dispute the level of scrutiny applicable to SB 150. And if the Court agrees with them on this legal point, they urge the Court to roll up its sleeves, wade through the parties' competing declarations, and determine for itself whether SB 150 likely survives heightened scrutiny. Pet.i. To support this fact-laden request, Petitioners make a host of factual assertions about the relevant medicine and science, many of which the Attorney General disputes. In short, given Petitioners' fact-bound ask of the Court, this case is not a good vehicle to parse the relevant medicine and science.

This seems like an obvious point. Petitioners' refusal to concede it suggests something else is at work. Perhaps that something is that Petitioners want the

Court to consider the still-developing medicine and science surrounding sex-transition interventions for children on an incomplete record. Such a record makes it easier for Petitioners to handwave about the views of the United States' "major professional medical and mental health associations," Pet.6 n.2, given that those views, especially that of WPATH, have not been put through third-party discovery. For comparison, that hard work is being done in another case. *See* Op. & Order, *Boe v. Marshall*, No. 2:22-cv-184 (M.D. Ala. Mar. 27, 2023), ECF No. 263. If the medicine and science favor Petitioners, as they insist, they should want the Court to resolve the question presented on the fullest possible record.

The reality is that, as the Sixth Circuit summarized, the treatments at issue here are "in truth still experimental." Pet.App.54a. Importantly, "the European countries who initiated these treatments are having second thoughts and raising the bar for using them." *Id.* at 32a. And as explained in the court below, the medical interest groups on which Petitioners rely are by no means neutral arbiters of the medicine and science. Appellant Br. at 6–7, CA6 ECF No. 38; *see also* Amicus Br., CA6 ECF No. 32. The serious questions surrounding the safety and efficacy of sex-transition treatments for children underscore why the Court should not consider the medicine and science in a preliminary posture. A question with these stakes for children deserves a robust factual record in which the parties' experts are confronted head-on with contrary views while a district judge watches and then makes detailed factual findings.

One final point. The Court need not wait long for a case with a fuller factual record. As Petitioners

acknowledge, other pending cases have "extensive evidentiary records." Pet.4. For example, in *Eknes-Tucker*, which remains pending in the Eleventh Circuit on a petition for rehearing, the district court held a "three-day hearing on Plaintiffs' motion for preliminary injunction." 80 F.4th at 1215. As noted above, the matter before the Eighth Circuit is an appeal from final judgment. *Brandt*, 2023 WL 4073727, at *2 (noting the court "held an eight-day bench trial on this matter"). The challenge to Florida's analogous law just went to trial. Trs., *Doe v. Ladapo*, No. 4:23-cv-00114 (N.D. Fla. Dec. 14, 2023), ECF Nos. 206, 207, 212. And Alabama's trial is on the books for later this year. Orders, *Boe*, No. 2:22-cv-184, ECF Nos. 386, 399; *see also* Order, *K.C. v. Individual Members of Med. Licensing Bd.*, No. 1:23-cv-00595 (S.D. Ind. Jan. 25, 2024), ECF No. 118 (scheduling trial for Apr. 28, 2025). In short, other cases with a better factual record for considering the question presented are not far behind this one.[3]

[3] Another lurking vehicle problem is Petitioners' standing—in particular, whether they have shown that an injunction would redress their alleged injuries. The Sixth Circuit left this "undeveloped and potentially knotty" question for the district court to consider on remand. Pet.App.59a. The standing issue stems from SB 150 having two separate enforcement mechanisms: license revocation and civil damages. Ky. Rev. Stat. § 311.372(4), (5). Petitioners, however, "do not challenge the constitutionality" of "private civil enforcement." Pet.App.72a (White, J., dissenting). Yet at this juncture, Petitioners have offered no proof that a Kentucky health care provider will administer the treatments prohibited by SB 150 despite the separate risk of civil liability. Thus, on this record, there is no proof of redressability.

III. The Sixth Circuit correctly held that rational-basis review applies.

Petitioners' final reason for seeking certiorari is their view of the merits. Pet.25–31. But Chief Judge Sutton's opinion for the court got it right on both issues.

1. Petitioners' lead merits argument is that the parents among them have a substantive-due-process right to secure for their children the treatments prohibited by SB 150. Of course, the touchstones of substantive due process are history and tradition. More specifically, the question is whether the alleged right is "'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'" *Dobbs*, 597 U.S. at 237–38 (alteration in original) (citations omitted). It follows that "[h]istorical inquiries" are "essential whenever [a court is] asked to recognize a new component of 'liberty' protected by the Due Process Clause." *Id.* at 239.

Throughout this litigation, Petitioners have altogether avoided discussing history and tradition. Their petition is emblematic of that, Pet.25–27, offering nothing even after the Sixth Circuit called them on the issue, Pet.App.31a. Petitioners' continued silence can only mean that our country's history and tradition do not support a constitutional right for parents to secure medical interventions that the government reasonably restricts. And more specifically, there is no history and no tradition about the treatments at issue here, which only began for minors "just before the millennium." *Id.* at 8a.

Rather than discuss history and tradition, Petitioners make two broad points. First, they put great

stock in the views of the "nation's leading medical and mental health organizations." Pet.26; *see also id.* at 5–7. But the Fourteenth Amendment does not outsource the protection of children to medical interest groups. *See Dobbs*, 597 U.S. at 272–73 (criticizing reliance on the views of medical associations to "shed light on the meaning of the Constitution"). With good reason, given that medical interest groups in this country are becoming an outlier on sex-transition treatments for minors compared to the countries that initiated these interventions. *See* Pet.App.32a. Our Constitution entrusts the States with the frontline responsibility of protecting their citizens. The States retain this duty even when—indeed, especially when—there is "medical and scientific uncertainty" about what is best. *See Gonzales v. Carhart*, 550 U.S. 124, 163 (2007).

Second, in pressing their due-process claim, Petitioners more or less rest their case on this Court's *Parham* decision. Pet.26 But as noted above, *Parham* is distinguishable on at least two levels. It was a procedural-due-process case in the main. *Parham*, 442 U.S. at 587. And even if its holding sweeps more broadly, it could apply at most when a parent seeks treatment provided by the State. *See id.* It follows that not even Petitioners' best case supports the broad constitutional right they seek.

2. Petitioners' second merits argument is that SB 150 distinguishes based on sex and thus must survive heightened scrutiny under the Equal Protection Clause. Pet.27–30. Here again, Chief Judge Sutton's opinion carefully explains why this is not so. Pet.App.35a–53a.

According to Petitioners, their equal-protection claim is as simple as noting that SB 150 uses the word

"sex." Pet.27–28; *see* Ky. Rev. Stat. § 311.372(2). But because of the biology of the medical interventions that SB 150 regulates, mentioning "sex" is the "linguistic destiny" of any such law. Pet.App.40a. As Judge Brasher put it in Alabama's analogous case: "I see the word 'sex' in this law. But I don't see a sex *classification*—at least, not as the idea of a sex classification appears in our equal-protection caselaw." *Eknes-Tucker*, 80 F.4th at 1233 (Brasher, J., concurring). So the mere mention of "sex" in SB 150 is not dispositive. Were the rule otherwise, "virtually all abortion laws would require heightened review," Pet.App.40a, in violation of this Court's caselaw, *Dobbs*, 597 U.S. at 236–37.

Petitioners next invoke the Court's *Bostock* decision. Pet.28–29. But they never explain why *Bostock*'s "text-driven reasoning" holds under the differently worded Equal Protection Clause. Pet.App.45a–47a. Nor do they mention that *Bostock*'s author recently criticized mixing and matching statutory and constitutional texts in the anti-discrimination context. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring) ("That such differently worded provisions should mean the same thing is implausible on its face."). In addition, *Bostock* is far removed from this case. *Bostock* concerned stereotypes in the workplace; it did not involve medicine, children, or serious risks to their health. As the Sixth Circuit emphasized, "a case about potentially irreversible medical procedures available to children falls far outside Title VII's

adult-centered employment bailiwick." Pet.App.48a; *see also id.* at 47a.

At bottom, Petitioners' equal-protection arguments cannot overcome this Court's precedent. As the Court just reaffirmed, the "regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or another.'" *Dobbs*, 597 U.S. at 236 (alteration in original) (quoting *Geduldig*, 417 U.S. at 496 n.20). Petitioners do not even try to invoke the mere-pretext part of this holding. It follows that the equal-protection question here turns on whether SB 150 regulates "a medical procedure that only one sex can undergo." *See id.* At absolute most, that is all SB 150 does.

As noted above, Petitioners object to only two aspects of SB 150: its restrictions on puberty blockers and hormones to treat gender dysphoria in children. But neither of those restrictions distinguishes based on sex. As Chief Judge Sutton explained, SB 150 "regulate[s] sex-transition treatments for all minors, regardless of sex. Under [the] law, no minor may receive puberty blockers or hormones or surgery to transition from one sex to another." Pet.App.36a–37a.

Petitioners briefly make two other points. They argue that transgender individuals are a suspect class. Pet.30. As noted above, SB 150 does not differentiate based on transgender status. But even if it does, the Sixth Circuit's preliminary observations about this issue are sound. "The bar for recognizing a new suspect class is a high one." Pet.App.49a. Hesitancy in doing so "makes sense" in light of the "fraught line-drawing dilemmas" that would arise in contexts ranging from

gender-transition surgeries to school sports to bathrooms and to locker rooms. *Id.* at 50a. And on top of that, "it is difficult to maintain that the democratic process remains broken on this issue today." *Id.* at 51a.

As to Petitioners' one paragraph of argument about why SB 150 does not satisfy heightened scrutiny (if it applies), Pet.31, they wrongly view such review as cause to oust the Kentucky General Assembly from protecting children. But even outside rational-basis review, Kentucky's legislature gets to act in areas "where there is medical and scientific uncertainty." *See Gonzales*, 550 U.S. at 163; *see also Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799–800 (2011). Properly understood, heightened scrutiny (even if it applies) is no bar to SB 150. *See Eknes-Tucker*, 80 F.4th at 1234–36 (Brasher, J., concurring) (concluding that Alabama's equivalent law likely survives heightened scrutiny if it applies).

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All in all, Petitioners' objections to the Sixth Circuit's decision ultimately amount to policy disagreements with the Kentucky General Assembly. To be clear, no one in this case disputes the sincerity of Petitioners' beliefs about how best to help children with gender dysphoria. The same should follow for Kentucky's legislature. As the Sixth Circuit saw it, both "citizens and legislatures" have "offer[ed] their perspectives on high-stakes medical policies, in which compassion for the child points *in both directions*." Pet.App.19a (emphasis added). This case, as so many do, simply reduces to a who-decides question. More to the point, this challenge to SB 150 is "precisely the

kind of situation in which life-tenured judges construing a difficult-to-amend Constitution should be humble and careful about announcing new substantive due process or equal protection rights that limit accountable elected officials from sorting out these medical, social, and policy challenges." *Id.* at 61a.

CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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