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

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI


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## INTRODUCTION

The Sixth Circuit held that Kentucky's ban on the use of puberty blockers and hormones to treat transgender minors (the "Treatment Ban") should be subject to rational basis review. That holding was profoundly wrong, conflicts with decisions from other circuits, and warrants Supreme Court review.

Kentucky contends that Supreme Court review would be premature. It urges the Court to wait until other circuits have had the opportunity to weigh in. The Court should not wait. Nearly half the states have enacted similar bans, and most of those bans have led to lawsuits. Given the volume of contentious lower-court litigation, this Court's immediate guidance is needed.

Kentucky also insists this case is a poor vehicle because this case is at the preliminary injunction stage and has an assertedly undeveloped factual record. But the Sixth Circuit—at Kentucky's behest—held that the factual record is irrelevant because rational basis review applies. Having successfully persuaded the Sixth Circuit that facts are not needed, Kentucky cannot now claim that review is unwarranted because additional facts are needed.

In any event, the primary issue in this case—the standard of scrutiny to apply to the Treatment Ban—is a question of law, rather than fact. And if the Court elects to apply the law to the facts rather than leave that task to the lower courts, the extensive factual record provides more than sufficient information for the Court to make an informed decision.

Finally, the Court should grant review because the Sixth Circuit's decision is wrong. Heightened scrutiny is warranted for several reasons. First, the Treatment Ban requires courts to consider a minor's sex every time it is applied, and therefore discriminates based on sex. Second, the Treatment Ban discriminates based on transgender status because it bans transgender minors, and no one else, from obtaining the medicines at issue. Third, the Treatment Ban violates parents' due process rights by interfering with their right to make medical decisions for their children. And as the district court held, Kentucky's flimsy justifications for its law cannot survive heightened scrutiny.

## ARGUMENT

The Sixth Circuit's decision conflicts with decisions of other circuits and is wrong. This case is an ideal vehicle to resolve the circuit split and to restore the civil rights of transgender Kentuckians and their families.

### I. THE COURT SHOULD RESOLVE THE CONFLICT OF AUTHORITY.

The Sixth Circuit's decision creates a 2-1 circuit split on the constitutionality of statutes banning medical treatment for transgender minors—with more decisions forthcoming shortly. Additionally, the court's methodology in assessing Petitioners' claims sharply conflicts with the approaches of other courts of appeals. Only this Court can resolve this disagreement among the lower courts.

1. Kentucky agrees, as it must, that the Sixth Circuit's decision aligns with *Eknes-Tucker v. Governor of*

*Alabama*, 80 F.4th 1205 (11th Cir. 2023), which vacated a preliminary injunction against an Alabama law similar to the Treatment Ban, but conflicts with *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022), which upheld a preliminary injunction against a similar Arkansas law. BIO 8-9.

Kentucky nonetheless urges the Court to deny review because the Eighth Circuit has granted an initial hearing en banc to review the Arkansas district court's permanent injunction against Arkansas's law. BIO 9-10. To be clear, the Eighth Circuit's decision from the preliminary injunction stage has not been vacated and remains binding precedent in the Eighth Circuit. Kentucky contends, however, that because the en banc court may take a different approach from the prior Eighth Circuit panel, Supreme Court review is premature.

Even if that prospect were to materialize, Supreme Court review would still be warranted. A hypothetical en banc decision by the Eighth Circuit aligning itself with the Sixth and Eleventh Circuits would not resolve the widespread disagreement among lower courts. At the time this petition was filed, in addition to the now-reversed decisions from Alabama, Kentucky, and Tennessee, federal district courts in four other states—Arkansas, Florida, Georgia, and Indiana—had granted preliminary injunctions against similar state laws, with the Arkansas court subsequently granting a permanent injunction. Pet. 22-24. The number is now up to five: after the petition was filed, the District of Idaho granted a preliminary injunction against Idaho's similar law,

finding that the plaintiffs showed a likelihood of success on both their Equal Protection claim and their Due Process claim. *Poe ex rel. Poe v. Labrador*, No. 23-cv-00269, __ F. Supp. 3d __, 2023 WL 8935065, at *11 (D. Idaho Dec. 26, 2023), *appeal docketed*, No. 24-142 (9th Cir. Jan. 9, 2024). Kentucky cannot seriously claim that "the litigation concerning laws like SB 150 is just getting started," (BIO 11) in view of this abundance of case law.

As Kentucky correctly points out, appeals on this issue are currently pending in the Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, with a Fourth Circuit appeal likely in the near future. BIO 10-11. Kentucky urges the Court to wait until some or all of those appeals have been decided before granting review. But there is no point in waiting. This issue is important enough that the Court is going to decide it eventually. The Court should grant lower courts the benefit of immediate guidance rather than forcing them to decide these important issues in a doctrinal vacuum.

2. The Sixth Circuit's application of rational basis review also opens up a circuit split. The Sixth Circuit rejected Petitioners' argument that "the Act violates the rights of a suspect class: transgender individuals," concluding that because "neither the Supreme Court nor this Court has recognized transgender status as a suspect class," "rational basis review applies." Pet. App. 49a. That reasoning conflicts with *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023), and *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019), each of which

held that laws singling out transgender people must be subjected to heightened scrutiny.

Kentucky does not dispute the conflict between the decision below and *Grimm*. BIO 13-14. With respect to Ninth Circuit law, Kentucky claims that *Karnoski* addressed this issue in insufficient detail and *Hecox* merely "followed *Karnoski* as circuit precedent." BIO 13. But *Hecox* leaves no doubt that under Ninth Circuit law, laws singling out transgender people are subject to heightened scrutiny, in conflict with the decision below. 79 F.4th at 1026 ("Heightened scrutiny applies because the Act discriminates on the basis of transgender status.").

Kentucky also claims that the Treatment Ban does not discriminate based on transgender status, rendering the Sixth Circuit's discussion of this issue superfluous. BIO 14. Kentucky is wrong. The Treatment Ban is gerrymandered to apply only to transgender people, and hence discriminates against transgender people. The Treatment Ban applies only when a health care provider prescribes puberty blockers or hormones "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). By its terms, the law is inapplicable to minors who seek to use the same medications for any other reason. And the Treatment Ban authorizes the administration of those same drugs for the purposes of aligning minors' bodies with their gender identities, so long as the minors were born with

"external biological sex characteristics that are irresolvably ambiguous," or who do not exhibit various physical features that are "normal for a biological male or biological female." *Id.* § 311.372(3). In short, the law applies to transgender people and no one else. If transgender people constitute a suspect or quasi-suspect class, then the Treatment Ban would be subject to heightened scrutiny.[1]

3. Finally, the Sixth Circuit's Due Process analysis is inconsistent with the Tenth Circuit's reasoning in *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182 (10th Cir. 2010). Relying on *Parham v. J.R.*, 442 U.S. 584 (1979), the Tenth Circuit held that "the Due Process Clause provides some level of protection for parents' decisions regarding their children's medical care." 603 F.3d at 1197. That holding conflicts with the Sixth Circuit's reasoning that *Parham* is a purely "procedural" decision and that

[1] Kentucky does not dispute that Petitioners have preserved the argument that laws discriminating against transgender people should be subject to heightened scrutiny. But it faults Petitioners' lower-court briefing for "summariz[ing] what other courts have done" rather than "cit[ing] record evidence on this issue." BIO 12. To the extent Kentucky contends the standard-of-scrutiny issue is a question of fact, it is mistaken. The Fourth, Sixth, and Ninth Circuits all treated this issue as a question of law, as has this Court in other contexts when considering whether a particular group constituted a suspect class. *See, e.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-47 (1985). Record evidence comes into play when a court decides whether a law *satisfies* heightened scrutiny, not when it decides whether to *apply* heightened scrutiny in the first instance. As such, Petitioners here appropriately supported their arguments with citations to case law rather than to the factual record.

the Due Process rights of Petitioners' parents in this case receive *no* protection. Pet. App. 28a-29a.

Kentucky attempts to distinguish *PJ* on the ground that the parents in that case were seeking to refuse treatment for their children, while the parents here seek to obtain it. BIO 15-16. But neither *Parham* nor *PJ* drew this distinction. In *Parham*, this Court recognized that parents "retain plenary authority to *seek* [medical] care for their children, subject to a physician's independent examination and medical judgment"—not merely to *refuse* care. 442 U.S. at 604 (emphasis added). *PJ* interpreted *Parham* to recognize parents' rights to make "decisions *regarding* their children's medical care," 603 F.3d at 1197 (emphasis added)—which includes the decision to say "yes" in addition to saying "no." Under Tenth Circuit precedent, the Treatment Ban would be subject to heightened scrutiny.

## II. THERE ARE NO VEHICLE PROBLEMS.

This case is an ideal vehicle to decide the questions presented. Applying heightened scrutiny, the district court granted a preliminary injunction against the Treatment Ban based on an extensive factual record. The Sixth Circuit's reversal of that injunction hinged entirely on its decision to apply rational basis review, squarely teeing up the standard-of-scrutiny question for the Court.

Kentucky nonetheless argues that this case is a poor vehicle because it is interlocutory. It contends that "[a]t

this early juncture, no fact or expert discovery has occurred," and that "after final judgment," this case "could be a better vehicle for review." BIO 17.

But in light of the legal standard adopted by the Sixth Circuit, no fact or expert testimony will *ever* occur. The Sixth Circuit held that rational basis review applies to the Treatment Ban. "Rational basis review requires only the possibility of a rational classification for a law" and "does not generally turn on after-the-fact evidentiary debates." Pet. App. 55a. As such, the outcome of this case on remand is likely a foregone conclusion: the district court is likely to hold that regardless of the actual facts, there is a *possibility* of a health-and-safety rationale for Kentucky's law, warranting judgment in its favor. Having successfully argued that the constitutionality of the Treatment Ban can be decided without a factual record, Kentucky cannot turn around and urge the Court to deny certiorari on the ground that the district court has not developed a sufficient factual record.

Kentucky also expresses concern that the evidentiary record is insufficiently detailed. BIO 18-20. That concern should not deter the Court from granting review. As an initial matter, if the Court is concerned with the depth of the evidentiary record, it is free to grant certiorari limited to the first two questions presented, which address the appropriate standard of scrutiny—a pure question of law. If the Court concludes that heightened scrutiny applies, it can remand for the lower courts to consider that standard.

If the Court elects to "roll up its sleeves" (BIO 18) and apply the law to the facts, the record is more than sufficient for such an undertaking. Kentucky itself

acknowledges that the declarations in the record are "lengthy and technical" (BIO 17) and offer abundant evidence concerning the benefits and risks of medical treatment for transgender minors. Kentucky does not identify any additional evidence that it would insert into the record if given the opportunity, or any piece of evidence from any other case that may have affected the result in this one.

Moreover, the district court has already analyzed the facts and ruled in Petitioners' favor. Should the Court analyze the facts for itself, the district court's findings could and should guide this Court's review. Kentucky faults the district court for not "meaningfully engag[ing] with the parties' declarations" and instead "accept[ing] as gospel an amicus brief filed by medical interest groups." BIO 18. These charges are wrong. The district court carefully walked through each of Kentucky's asserted justifications for the law and concluded that Kentucky "fail[ed] to show that the ban imposed by [the Treatment Ban] is 'substantially related to the achievement of those objectives.'" Pet. App. 120a (citations omitted). The court found that Kentucky offered insufficient evidence that the Treatment Ban would protect against "abuse, neglect, [or] mistakes." *Id.* It evaluated Kentucky's evidence supporting its "purported concern for 'the integrity and ethics of the medical profession'" and found that evidence wanting. Pet. App. 121a. As the district court explained, Kentucky's evidence pertained solely to surgical procedures, which are not at issue in this case. Pet. App. 121a-122a. The court also acknowledged the "quoted studies" and "anecdotes" offered in Kentucky's declarations, and concluded that they did not

support "banning the treatments entirely." Pet. App. 122a. In short, the district court did not fail to "meaningfully engage with the parties' declarations." BIO 18. Instead, it engaged fully with those declarations and concluded that under heightened scrutiny, the Treatment Ban is likely unconstitutional. The district court's findings are more than sufficient to facilitate Supreme Court review.

Kentucky speculates that there may be yet-to-be-filed petitions for certiorari arising from cases in which district courts conducted or will conduct evidentiary hearings. BIO 18-20. Perhaps so. But that possibility does not diminish the need for immediate Supreme Court review. Those courts conducting those trials do not know what legal standard to apply. Only this Court can provide that guidance. It should do so in this case.[2]

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[2] Kentucky includes a footnote (BIO 20 n.3) speculating that Petitioners might lack standing because even if the Treatment Ban is overturned, Kentucky doctors might still refuse to offer treatment based on fears of civil liability under Ky. Rev. Stat. § 311.372(5). That argument lacks merit. Section 311.372(5) provides that a "civil action to recover damages for injury suffered as a result of a violation of subsection (2)"---*i.e.*, the Treatment Ban—"may be commenced" at a particular time. *Id.* If the Treatment Ban is unconstitutional, then there will never be an actionable "violation of subsection (2)," and hence no risk of civil liability.

In any event, even if doctors did face a risk of civil liability, it would not undermine Petitioners' standing. There is no reason to believe that the theoretical risk of medical-malpractice lawsuits—which exists in all fifty states—would deter *all* Kentucky physicians from prescribing medications to transgender minors.

## III. THE SIXTH CIRCUIT'S DECISION IS WRONG.

The Sixth Circuit should have subjected the Treatment Ban to heightened scrutiny.

***Infringement on parental rights.*** The Sixth Circuit's decision strips parents of their "plenary authority to seek [medical] care for their children, subject to a physician's independent examination and medical judgment." *Parham*, 442 U.S. at 604.

Kentucky contends that there is no constitutionally protected interest at stake because "there is no history and no tradition about the treatments at issue here." BIO 21. But our traditions *do* provide that it is the prerogative of parents, not the government, to make important medical decisions for their children. *Parham*, 442 U.S. at 604; *see Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion).

***Sex discrimination.*** The Treatment Ban bars the use of the covered therapies "to validate a minor's perception of[] the minor's sex, if that . . . perception is *inconsistent with the minor's sex*." Ky. Rev. Stat. § 311.372(2) (emphasis added). And the exception clause authorizes even otherwise-prohibited conduct if, but only if, a minor's "biological sex characteristics" are not "normal" for a "biological male" or "biological female." *Id.* § 311.372(3)(a)-(b). Thus, whether conduct is prohibited varies with the "sex" of the minor at issue—a paradigmatic case of sex discrimination.

Citing the decision below, Kentucky protests that the Treatment Ban bans "sex-transition treatments for all minors, regardless of sex." BIO 24. But the Equal

Protection Clause "protect[s] *persons*, not *groups*," *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). The Treatment Ban discriminates based on sex because it takes account of an individual's sex every time it is applied, even if it applies to both transgender boys and transgender girls.

***Discrimination against transgender people.*** As the Fourth and Ninth Circuits have correctly held, laws that single out transgender people should be subject to heightened scrutiny because transgender people constitute a suspect or quasi-suspect class. Kentucky's reference to the virtues of "[h]esitancy," BIO 24-25, should not be a license for states to target a vulnerable minority group with only the most minimal judicial scrutiny.

***Application of heightened scrutiny.*** The district court correctly concluded that if heightened scrutiny is applied, the Treatment Ban is likely unconstitutional. The presence of "uncertainty," (BIO 25) (citation omitted) is no substitute for evidence establishing that a ban was justified—which, the district court rightly held, is sorely lacking.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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