No. 23-477

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER,

v.

JONATHAN THOMAS SKRMETTI, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE, ET AL., RESPONDENTS,

and

L.W., BY AND THROUGH HER PARENTS AND NEXT FRIENDS, SAMANTHA WILLIAMS AND BRIAN WILLIAMS, ET AL., RESPONDENTS IN SUPPORT OF PETITIONER.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER AND RESPONDENTS IN SUPPORT OF PETITIONER

JANAI S. NELSON
Director-Counsel
SAMUEL SPITAL
Counsel of Record
ALEXSIS JOHNSON
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street,
5th Floor
New York, N.Y. 10006
sspital@naacpldf.org
(212) 965-2200

AVATARA A. SMITH-CARRINGTON
MOLLY M. CAIN
KACEY MORDECAI
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street NW, Ste. 600
Washington, DC 20005

ROBERT NILES-WEED
CHLOE FIFE
LEIGH DANNHAUSER
MATT TONGLET
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, N.Y. 10153
(212) 310-8651

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Bills

Miscellaneous

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INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights legal

[1] Pursuant to S. Ct. Rule 37.6, no counsel for a party authored this brief in whole or in part and no person or entity other than *amicus*

organization. Through litigation, advocacy, and public education, LDF strives to enforce the United States Constitution's promise of equal protection and due process for all, and to eliminate barriers that prevent Black people in America from realizing their basic civil and human rights. LDF has participated as counsel of record or *amicus curiae* in significant cases before this Court involving various forms of discrimination, including on the basis of race, *Brown v. Board of Education*, 347 U.S. 483 (1954); ethnicity, *St. Francis v. Al-Khazraji*, 481 U.S. 604 (1987); and age, *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), consistently urging the Court to recognize the destructive effects of prejudice.

Consistent with its opposition to all forms of discrimination, LDF has similarly participated as *amicus curiae* in several cases addressing the rights and dignity of transgender, lesbian, gay, bisexual and queer (TLGBQ) people. *See, e.g.*, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *Bostock v. Clayton Cnty.*, 590 U.S. 644 (2020); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rts. Comm'n*, 584 U.S. 617 (2018); *Obergefell v. Hodges*, 576 U.S. 644 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Romer v. Evans*, 517 U.S. 620 (1996); *Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299 (11th Cir. 2021); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

Amicus is committed to ensuring that the guarantee of equal protection in the Fourteenth Amendment to the United States Constitution is fully and faithfully extended to transgender and nonbinary people in the United States.

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and its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Dissenting from the notorious decision in *Plessy v. Ferguson*, the first Justice Harlan "admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.'" *Romer v. Evans*, 517 U.S. 620, 623 (1996) (citation omitted). Justice Harlan's words went unheeded in *Plessy*, but today they are understood to reflect a "commitment to the law's neutrality where the rights of persons are at stake," which is at the core of the Equal Protection Clause. *Ibid.*

Defying this fundamental principle of neutrality, in the past four years, Tennessee and twenty-three other states have passed laws banning access to medically necessary health care for transgender youth. In so doing, they have specifically singled out transgender youth for disfavored treatment: the laws ban the use of certain medications solely for the purpose of gender-affirming health care, while explicitly allowing these same medications to be used to treat adolescents for other purposes.

As explained by petitioner and respondents in support of petitioner, Tennessee's categorical ban on gender-affirming health care for adolescents, SB1, is subject to heightened scrutiny because it constitutes a straightforward sex-based classification.[2] And, as the district court recognized, the law fails such heightened scrutiny because it does not advance the State's purported interest in protecting adolescent health.

But even putting aside SB1's facial sex-based classification, the law must also be subject to a more searching form of scrutiny. By banning access to medications solely when used for the purpose of providing health

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[2] Pet. Br. 19-23; Resp. in Supp. of Pet. Br. 20-32.

care to transgender youth, the law creates "[d]iscriminations of an unusual character." *United States v. Windsor*, 570 U.S. 744, 768 (2013) (quoting *Romer*, 517 U.S. at 633). As such, it requires "careful consideration to determine whether [it is] obnoxious to the constitutional" requirement of equal protection under the law. *Ibid.* (quoting *Romer*, 517 U.S. at 633).

The highly unusual character of Tennessee's ban on gender-affirming health care for adolescents did not occur by happenstance. In 2023, the same year Tennessee passed SB1, over 500 anti-TLGBQ bills were introduced in state legislatures across the nation. The dramatic increase in such bills has been fueled by a rise in the political and social targeting of TLGBQ persons, and transgender people in particular, as immoral and dangerous. This hostility has resulted in grave harms to the mental health and physical safety of TLGBQ people, especially Black transgender people, who already endure rampant discrimination and violence. It is this national trend of increased targeting of TLGBQ people and especially transgender persons that was clearly reflected in the legislative process that resulted in Tennessee's SB1, with proponents of the legislation equating gender-affirming health care with the mutilation of children and referring to it as "dangerous" and "evil."

The Equal Protection Clause does not allow this Court to ignore these facts in considering the constitutionality of SB1. The Equal Protection Clause was adopted for the specific purpose of securing full citizenship for Black people in America, including by prohibiting states from enacting new laws grounded in animus against Black people. But, while the prohibition on racial discrimination is at the core of the Fourteenth Amendment, this Court has long recognized that the

Amendment's requirement of "equal protection of the laws" applies more broadly. It has therefore subjected laws and policies that target disfavored groups for unequal treatment to heightened scrutiny in a wide range of contexts. Such heightened scrutiny is similarly required here.

To be clear, this is not to say that every legislator who voted to ban gender-affirming health care in Tennessee, and other states, was motivated by animus. But these laws cannot be divorced from the context in which they were created, and the legislative record in Tennessee leaves no doubt that biases and stereotypes played a significant role in SB1's passage. It would demean the dignity of transgender people, and undermine the nation's confidence in the integrity of our judicial system, for the Court to ignore the role of animus in the passage of SB1 or to apply the kind of exceedingly deferential rational basis scrutiny that the Sixth Circuit applied here. That minimal scrutiny is designed for "ordinary case[s]," for example, where "assumed health concerns justified [a] law favoring optometrists over opticians." *Romer*, 517 U.S. at 632. It is not designed for laws that depart from our nation's traditions and limit access to health care for adolescents who belong to disfavored groups.

ARGUMENT

I. Tennessee's Health Care Ban Is Grounded in Discrimination Against Transgender People.

Tennessee's SB1 ("Health Care Ban") expressly singles out transgender youth for unequal treatment. Moreover, the Tennessee legislature passed the Health Care Ban amid a wave of anti-transgender laws and policies enacted by state legislatures across the country. Despite the clear evidence of animus underlying the

Health Care Ban, the Sixth Circuit failed to properly consider such evidence in evaluating the Ban.

A. Tennessee Enacted the Health Care Ban Amid a Nationwide Climate of Growing Hostility Towards Transgender People.

Tennessee passed its Health Care Ban against the backdrop of a sharp rise in anti-transgender legislation across the nation. In 2018, forty-one anti-TLGBQ bills were filed throughout the nation and only two passed into law.[3] By 2023, the year that Tennessee enacted its Health Care Ban, over 500 anti-TLGBQ bills were introduced, a 12-fold increase, and eighty-seven were passed into law, more than forty times the number enacted just five years earlier.[4]

Gender-affirming health care for transgender youth has been a particular target of these new legislative ef-

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[3] *See* Matt Lavietes & Elliott Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far, Most of Them Targeting Trans People*, NBC News (Mar. 20, 2022), https://www.nbcnews.com/nbc-out/out-politics-and-policy/nearly-240-anti-lgbtq-bills-filed-2022-far-targeting-trans-people-rcna20418; Kaleigh Rogers & Mary Radcliffe, *Over 100 Anti-LGBTQ+ Laws Passed in the Last Five Years — Half of Them This Year*, FiveThirtyEight (May 25, 2023), https://fivethirtyeight.com/features/anti-lgbtq-laws-red-states/.

[4] *See* Christy Mallory & Elana Redfield, UCLA Sch. L., Williams Inst., *The Impact of 2023 Legislation on Transgender Youth* 1 (2023), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Legislation-Summary-Oct-2023.pdf; Am. Civil Liberties Union, *The ACLU is Tracking 527 Anti-LGBTQ Bills in the U.S.* (June 28, 2024), https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024.

forts. Over half of the bills introduced in 2023 specifically targeted transgender youth.[5] By contrast, in 2018, not a single state banned gender-affirming health care for transgender youth.[6] Now, however, "113,900 transgender youth—more than a third of transgender youth in the U.S.—live in" one of the twenty-four "states that have enacted bans on access to gender-affirming care."[7]

This rapid increase in bans on gender-affirming health care demonstrates the social and political vulnerability of transgender people in the United States, and the bans bear numerous hallmarks of animus.

Bans on gender-affirming health care are at odds with the recommendations of every leading American medical organization to have addressed the issue, including the American Academy of Pediatrics, the American Academy of Child and Adolescent Psychiatry, the American Psychiatric Association, and the American

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[5] *See* Mallory & Redfield, *supra* note 4, at 1. The "vast majority of [such] legislation passed across the country has impacted gender-affirming care for minors." Kiara Alfonseca, *Record Number of Anti-LGBTQ Legislation Filed in 2023*, ABC News (Dec. 28, 2023), https://abcnews.go.com/US/record-number-anti-lgbtq-legislation-filed-2023/story?id=105556010.

[6] *See* Samantha Schmidt, *Arkansas Legislators Pass Ban on Transgender Medical Treatment for Youths, Overriding Governor's Veto*, Wash. Post (Apr. 6, 2021), https://www.washingtonpost.com/dc-md-va/2021/04/06/arkansas-transgender-ban-override-veto/.

[7] Elana Redfield et al., UCLA Sch. L., Williams Inst., *The Impact of 2024 Anti-Transgender Legislation on Youth* 2 (Apr. 2024), https://williamsinstitute.law.ucla.edu/wp-content/uploads/2024-Anti-Trans-Legislation-Apr-2024.pdf.

Medical Association.[8] Moreover, in enacting these bans, government officials have expressed open disdain for gender-affirming health care and transgender people. Several state government officials have compared gender-affirming health care to forced genital mutilation.[9] In advocating for anti-TLGBQ legislation, some high-ranking officials have accused TLGBQ people of being "groomer[s]" and "pro-pedophile."[10] In South Dakota, the author of that state's health care ban described providing gender-affirming health care as a "crime against humanity" and likened it to the Holocaust.[11]

These examples of open hostility to transgender people by state legislators only scratch the surface of the

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[8] *See id.* at 5.

[9] *See, e.g.*, Zoe Christen Jones, *Bill Banning Gender-Affirming Care for Children Passes Idaho House*, CBS News (Mar. 8, 2022), https://www.cbsnews.com/news/idaho-trangender-lgbtq-bill-ban-health-care-children/ (noting an Idaho bill proposing gender affirming care ban through an amendment to its ban on female genital mutilation); Jonathon Sharp, *Gov. Cox Calls Gender-Affirming Care for Trans Youth 'Genital Mutilation During 'Disagree Better' Discussion*, ABC4 Utah (Feb. 22, 2024); Dan Avery & Jo Yurcaba, *Rand Paul Criticized for Trans 'Gender Mutilation' Remarks in Rachel Levine Hearing*, NBC News (Feb. 26, 2021), https://www.nbcnews.com/feature/nbc-out/rand-paul-criticized-trans-gender-mutilation-remarks-rachel-levine-hearing-n1259004.

[10] Matt Lavietes*, 'Groomer,' 'Pro-Pedophile': Old Tropes Find New Life in Anti-LGBTQ Movement*, NBC News (Apr. 12, 2022), https://www.yahoo.com/news/groomer-pro-pedophile-old-tropes-165443302.html.

[11] Katie Shepherd, *A GOP Lawmaker, the Son of an Auschwitz Survivor, Compared Doctors Treating Transgender Children to Nazis. He Regrets It.*, Wash. Post (Jan. 28, 2020), https://www.washingtonpost.com/nation/2020/01/28/deutsch-transgender-doctors-nazi/.

"abundant *direct* evidence of animus against transgender people surrounding the bans" on gender-affirming health care.[12] As one analysis explains, "[c]ollating and reading these statements can be difficult and overwhelming," but "it is powerful evidence that these laws are motivated by little more than a bare desire to harm."[13] Indeed, animus directed at transgender people was recognized as a motivation for a ban on gender-affirming health care by the district court in *Doe v. Ladapo*, No. 4:23CV114-RH-MAF, 2024 WL 2947123, at *28-29 (N.D. Fla. June 11, 2024) (striking down a Florida ban on gender-affirming care for minors and addressing the animus behind the legislation), *appeal docketed sub nom. Doe v. Surgeon Gen. of Fla.*, No. 24-11996 (11th Cir. filed June 18, 2024).

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[12] *Developments in the Law—Chapter One Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 Harv. L. Rev. 2163, 2182-83 (2021) (collecting examples).

[13] Scott Skinner-Thompson, *Trans Animus*, 65 B.C. L. Rev. 965, 1007 (2024). The examples above are just a few of the examples of anti-trans rhetoric by lawmakers collected by Professor Skinner-Thompson across ten more pages: During the floor debate in Oklahoma regarding a bill banning gender-affirming health care, a co-author of the bill asserted that "being transgender was a path of 'desolation, destruction, degeneracy and delusional play acting.'" *Id.* at 1009. In the Senate Floor session on a gender-affirming health care ban in Mississippi, a senator stated that allowing access to hormone therapy for transgender youth was "unnatural" and should not happen within the borders of the state. *Id.* at 1010. In Arkansas, during committee testimony in support of creating a private cause of action against those who violate the state's ban on gender-affirming health care, the Committee Chair argued that such care was an "act of barbarism." *Id.* at 1011.

These laws, and the animus driving them, are directly harming transgender youth around the country. In a 2023 study, "86% of transgender and nonbinary youth say recent debates around anti-trans bills have negatively impacted their mental health," with "nearly 1 in 3 report[ing] not feeling safe to go to the doctor or hospital when they were sick or injured."[14] The denial of gender-affirming health care resulting from these bans, moreover, "forces incongruence with one's gender identity," while more "than a dozen studies of more than 30,000" transgender youth "consistently show that access to gender-affirming care is associated with better mental health outcomes."[15] Transgender people of color are particularly vulnerable. In a 2023 study, a majority of Black TLGBQ youth reported negative impacts on their mental health resulting from ongoing debates about state restrictions on healthcare and treatment options for transgender people.[16]

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[14] Trevor News, Trevor Project, *New Poll Emphasizes Negative Impacts of Anti-LGBTQ Policies on LGBTQ Youth*, (Jan. 19, 2023), https://www.thetrevorproject.org/blog/new-poll-emphasizes-negative-impacts-of-anti-lgbtq-policies-on-lgbtq-youth/.

[15] Hum. Rts. Watch, *Human Rights Violations Against Transgender Communities in the US* (Sept. 12, 2023), https://www.hrw.org/news/2023/09/12/human-rights-violations-against-transgender-communities-us.

[16] *See* Trevor Project *Issues Impacting LGBTQ Youth: Polling Presentation*, at Slide 6 (Jan. 2023), https://www.thetrevorproject.org/wp-content/uploads/2023/01/Issues-Impacting-LGBTQ-Youth-MC-Poll_Public-2.pdf.

B. Tennessee's Health Care Ban Reflects Bias Against Transgender People.

On March 2, 2023, Tennessee Governor Bill Lee signed the Health Care Ban into law. The legislative process resulting in the Health Care Ban reflected the same bias against transgender persons that has been a hallmark of these bans in other states.

During the Senate Floor Session on the bill, many legislators rebuked the "*ideology* of gender-affirming care," even though such care has long been an accepted medical treatment by all major medical organizations and does not reflect any "ideology."[17]

The animosity toward transgender people was equally apparent in the House Floor Session that followed. Representatives used charged and targeted language to refer to gender-affirming health care, warning against a "lifetime of negative consequences" and "cutting off body parts of a child."[18] Legislators labeled transgender teenagers "gender confused youth" who were "subjected to these dangerous procedures." *Id.* at 1:47:48. In a particularly hostile statement, a representative asserted that gender-affirming care "is dangerous, it is destructive, and [] it is evil." *Id.* at 1:48:13. Members of the public invited to testify in favor of the

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[17] Tenn. Senate, *Senate Floor Session - 9th Legislative Day*, at 36:25, Tenn. S. (Feb. 13, 2023) (emphasis added), https://tnga.granicus.com/player/clip/27513?view_id=703&redirect=true.

[18] Tenn. House, *House Floor Session - 9th Legislative Day*, at 1:47:57-1:48:10, Tenn. H.R. (Feb. 23, 2023), https://tnga.granicus.com/player/clip/27660?view_id=703&redirect=true.

law likened gender-affirming care to abuse, grooming, and "mutilat[ion]."[19]

The bias affecting Tennessee's Health Care Ban is further underscored by Tennessee's recent passage of other anti-TLGBQ laws. Tennessee leads the country in the number of anti-TLGBQ laws passed since 2015. By April 2024, Tennessee had passed nearly double the number of anti-TLGBQ laws relative to other states enacting similar laws in recent years.[20] Transgender Tennesseans are particularly at risk, as the state has recently enacted a number of laws stripping protections from transgender people.[21] Additionally, Tennessee

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[19] Tenn. Senate Health and Welfare Comm., *Health and Welfare Committee Hearing - February 1, 2023*, at 34:40, 44:20, 44:48, 45:24, Tenn. S. (Feb. 1, 2023), https://tnga.granicus.com/player/clip/27361?view_id=703&redirect=true.

[20] *See* Alana Caesar, *Tennessee Lawmakers Pile on 4 More Anti-LGBTQ+ Bills—So Far—On Top of the Twenty They Have Already Passed in Recent Years*, Hum. Rts. Campaign (Apr. 17, 2024), https://www.hrc.org/press-releases/tennessee-lawmakers-pile-on-4-more-anti-lgbtq-bills-so-far-on-top-of-the-twenty-they-have-already-passed-in-recent-years.

[21] *See, e.g.*, Tenn. Code Ann. § 68-33-103(d) (prohibiting the "remov[al]" of a minor from the state for the purpose of "obtaining a medical procedure that" would violate state law if performed in Tennessee—which would include gender-affirming care—passed May 28, 2024); H.B. 2165, 113th Gen. Assemb. (Tenn. 2024) (amending Tenn. Code Ann. § 49-6-300) (requiring requests to "affirm [a] student's gender identity" to be reported to school administration and prohibiting public school employees from accommodating such a request, passed May 1, 2024); Tenn. Code Ann. § 41-1-408 (prohibiting inmates in state prisons and county jails from receiving gender-affirming care, passed April 29, 2024); Tenn. Code Ann. § 49-6-5102 (preventing employees of public schools from "be[ing] compelled" or "required" to use a student's preferred pronouns "if the preferred

narrowly defines "sex" in various state laws for the express purpose of excluding transgender Tennesseans from various state protections. *See* Tenn. Code Ann. § 1-3-105(c) (defining "sex" as "a person's immutable biological sex as determined by anatomy and genetics existing at the time of birth and evidence of a person's biological sex"). In so doing, various laws prohibiting discrimination, including the state's Human Rights Act and the Disability Act, exclude transgender people. *See, e.g.*, Tenn. Code Ann. § 4-21-101(a)(3).

II. The Health Care Ban Violates the Equal Protection Clause Because It Singles Out Transgender People for Unequal Treatment and Reflects Animus Against Them.

A. The Fourteenth Amendment Prohibits Laws Rooted in Bias and Prejudice Against Disfavored Groups.

This Court has long recognized that a fundamental purpose of the Fourteenth Amendment is to prevent states from enacting laws rooted in prejudice. In the words of *Strauder v. West Virginia*, "[t]he framers of the constitutional amendment must have known full well

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pronoun is not consistent with the student's biological sex," passed May 17, 2023); Tenn. Code Ann. § 49-50-805 (allowing private schools to curtail student participation in athletic activities "based upon a student's biological sex," passed April 28, 2023); Tenn. Code Ann. § 68-120-120 (requiring private businesses to display prominent notice of a policy "formal or informal" of gender-neutral restrooms, passed May 17, 2021). The Tennessee legislature continues to introduce bills and focus efforts on anti-transgender laws. *See, e.g.*, H.B. 1215, 113th Gen. Assemb. (Tenn. 2023); S.B. 1339, 113th Gen. Assemb. (Tenn. 2023) (prohibiting any managed care organization that contracts with Tennessee's Medicaid program from covering care which would "enable[] a person to identify with, or live as, a purported identity inconsistent with the person's sex").

the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment." 100 U.S. 303, 309 (1879), *abrogated on other grounds by Taylor v. Louisiana*, 419 U.S. 522 (1975). "Without the apprehended existence of prejudice … it might have been left to the States to extend equality of protection." *Ibid.*

As the quote from *Strauder* demonstrates, the Framers of the Fourteenth Amendment focused on addressing laws grounded in a particular form of prejudice: racism designed to position Black people in America as inferior to white people and exclude them from legal rights, benefits, and privileges available to white people. Anti-Black racism had been used to justify the enslavement of Black people in this country, and it was the basis for laws that continued to deny equal citizenship to Black people in this country after slavery, including the Black Codes, and Jim Crow laws.[22] Laws and policies grounded in racial prejudice persist today, and remedying racially discriminatory laws remains central to equal protection jurisprudence.

While the Fourteenth Amendment offers a (still unfulfilled) promise to end state-sanctioned discrimination against Black people in America, the Amendment also embodies a broader constitutional commitment to rooting out laws grounded in animus or prejudice. As the Court explained in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), laws grounded in considerations that "reflect prejudice and antipathy—a view

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[22] James W. Fox, Jr., *Intimations of Citizenship: Repressions and Expressions of Equal Citizenship in the Era of Jim Crow*, 50 Howard L.J. 113, 122–25, 138–39 (2006) (discussing the history of the Reconstruction Amendments and the Black Codes).

that those in the burdened class are not as worthy or deserving as others," *id.* at 440, are inconsistent with the constitutional guarantee that our laws must provide equal protection to all.

In the century and a half since the enactment of the Fourteenth Amendment, the Court has issued opinions in which several hallmarks of legislation driven by unconstitutional animus can be identified. In each of these contexts, the Court has (ultimately) recognized that such laws are inconsistent with the fundamental principle of the Equal Protection Clause.

Animus as the state's branding of "disfavored people" with a badge of inferiority. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court infamously remarked that Homer Plessy's challenge to state-sponsored segregation could be reduced to an assertion that segregation "stamps the colored race with a badge of inferiority," which, if true, was "solely because the colored race chooses to put that construction upon it." *Id.* at 551. Over half a century later, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court overruled *Plessy*, recognizing that state-sanctioned segregation operated, in part, as a means of branding Black people with a badge of inferiority, which was unconstitutional. In reaching that conclusion, the Court noted that "[t]he impact [of segregation] is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting … inferiority." *Id.* at 494. As a tool of the state, segregation functioned as a means of perpetuating white supremacy through the branding

of Black people with a badge of inferiority within society.[23]

More recently, this Court addressed concerns about the state assigning a badge of inferiority to a disfavored group in *Romer v. Evans*, 517 U.S. 620 (1996). The *Romer* Court invalidated an amendment to Colorado's constitution that prohibited the extension of anti-discrimination protections to lesbian, gay, and bisexual people, in part, because the amendment made "a general announcement that gays and lesbians shall not have any particular protections from the law, inflict[ing] on them immediate, continuing, and real injuries." *Id.* at 635. As the *Romer* Court articulated, "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected [and if] the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare … desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* at 634 (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

Animus as the state's invocation of moral disapproval. In *Levy v. Louisiana*, 391 U.S. 68 (1968), the Court struck down a state law that denied children born out of wedlock the right to recover in a wrongful death

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[23] *See* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 Fordham L. Rev. 887, 916 (2012) ("[T]he harm of state-sponsored segregation was not that it created 'feelings of inferiority,' but that it stood as the government expressing a judgment that one social group is inferior to another—in this case, expressing an ideology of white supremacy. Whether the laws can eliminate privately held ideologies of this nature is one matter, but it is clear that the public laws cannot express and enforce such ideologies.").

action concerning their parents. Addressing an equal protection claim, the *Levy* Court noted that the statute was "based on morals and general welfare" that "discourage[d] bringing children into the world out of wedlock." *Id.* at 70. But the legislature's expression of moral disapproval could not justify the law under equal protection principles. As the Court asked rhetorically, "why, in terms of equal protection, should the tortfeasors go free merely because the child is illegitimate? Why should the illegitimate child be denied rights merely because of his birth out of wedlock?" *Id.* at 71 (internal citations omitted). The *Levy* Court recognized that the moral aspersions cast upon children born out of wedlock hindered their right to equal treatment under the law and found that the denial of their right to recover constituted invidious discrimination in violation of the Fourteenth Amendment. *Id.* at 71-72.

Likewise, in *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court struck down Texas' anti-sodomy statute as unconstitutional. The majority did so on due process grounds, but Justice O'Connor wrote a separate opinion concurring in the judgment applying equal protection principles because the law targeted only people who engage in same-sex intimacy. The state attempted to justify the law on the basis that the "statute satisfies rational basis review because it furthers the legitimate governmental interest of the promotion of morality." *Id.* at 582 (O'Connor J., concurring). But Justice O'Connor explained that the Equal Protection Clause does not support a state proffering "moral disapproval" as "a legitimate state interest to justify by itself a statute that bans homosexual sodomy." *Ibid.* The purpose served by the law was more so "a statement of dislike and disap-

proval against homosexuals than [] a tool to stop criminal behavior." *Id*. at 583. Moreover, the impact of the state's anti-sodomy statute "brand[ed] all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else," which impacted "the areas of employment, family issues, and housing." *Id*. at 581-82. And while moral judgments may be deemed—by some—to be "natural and familiar" they cannot circumscribe the role of the court in "question[ing] whether statutes embodying them conflict with the Constitution of the United States." *Bowers v. Hardwick*, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting), *overruled by Lawrence*, 539 U.S. 558.

Animus as exclusion rooted in fear. In *Korematsu v. United States*, 323 U.S. 214 (1944), the Court upheld a criminal conviction against Fred Korematsu for violating orders which left him no choice but to report to an internment camp for all people of "Japanese-ancestry." In so doing, the Court held that:

> Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities *feared* an invasion of our West Coast and … the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily[.]

Id. at 223 (emphasis added). The Court issued its decision upholding the conviction despite the fact that the record included sufficient evidence of animus for Justice Owen J. Roberts to conclude in his dissent that "[t]he two conflicting orders … were nothing but a cleverly devised trap to accomplish the real purpose of the military

authority, which was to lock [Korematsu] up in a concentration camp." *Id.* at 232 (Roberts, J. dissenting). As the Court explained in *Trump v. Hawaii*, Justice Roberts' dissent correctly interpreted the Constitution while the majority opinion did not, and *Korematsu* was grievously wrong the day it was decided. 585 U.S. 667, 710-11 (2018) ("The dissent's reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'") (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)).

Over four decades later in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Court dismissed the proffering of "fear" as a legitimate state interest. In *Cleburne*, the Court found that a city's requirement that a special use permit be obtained for a proposed group home that would provide housing to people living with intellectual disabilities violated the Equal Protection Clause. *Id.* at 450. When analyzing the claims that were brought by the Cleburne Living Center, the Court noted that the City Council's insistence on requiring the permit included factoring in the negative attitudes of property owners and the fears of certain neighbors. *Id.* at 448 (noting that the Council was concerned "with the fears of elderly residents of the neighborhood. But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for [people with intellectual disabilities] differently ….'"). The *Cleburne* Court, however, explained that "[i]t is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action

violative of the Equal Protection Clause … and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic." *Ibid.* Moreover, laws excluding classes of people singled out for unequal treatment often stoke the fires of hostility by perpetuating ignorance, irrational fears, and stereotyping. *See generally id.* at 460-64 (Marshall, J., concurring in part, dissenting in part). As Justice Marshall acknowledged, "[p]rejudice, once let loose, is not easily cabined." *Id.* at 464.

Animus as the state giving effect to private prejudice. In *Palmore v. Sidoti*, 466 U.S. 429 (1984), the Court reversed the judgment of a lower court, which changed the conditions of a white mother's custody agreement because she was cohabitating with a Black man. The *Palmore* Court noted that while the Constitution cannot control prejudice or curtail private biases, "the law cannot, directly or indirectly, give them effect." *Id.* at 433. As the *Palmore* Court reiterated, "[p]ublic officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private … prejudice that they assume to be both widely and deeply held." *Ibid.* (citing *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971)). *Palmore* therefore stands for the principle that even when a seemingly "protective" justification is proffered—in that case the lower court's concern for the child's wellbeing while being raised in a mixed-race home—animus-based motivations for state action are impermissible. To this end, the *Palmore* Court provided a concise way of analyzing state action that gives effects to private bias: "(1) as a general proposition, the public laws are not to express

and enforce private bias, and (2) when they do, this invalidates the law[.]"[24]

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This Court, in fulfilling the promise of equal treatment under the law, has repeatedly recognized that laws grounded in animus are inconsistent with the Fourteenth Amendment. Whether such laws reflect a desire to brand the disfavored group as inferior, fear, moral disapproval, or an effort to give effect to societal prejudice, they are antithetical to the fundamental principle of state neutrality that is embodied in the concept of equal protection of the laws.

B. The Sixth Circuit Failed to Apply this Precedent in Affirming the Health Care Ban.

The Sixth Circuit disregarded this Court's precedent when it determined that the Health Care Ban was "*Not an animus-driven law*." Pet. App. 46a. The Sixth Circuit asserted that assessing the legislature's motives is a "hazardous matter," and refused to consider any of the evidence demonstrating the role that animus played in the legislative process. Pet. App. 47a (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)).

This Court, however, has not limited its consideration of animus to the face of the law or the stated purpose offered by counsel for the State. Rather, the Court has recognized that legislatures may offer pretextual justifications that seek to obscure animus and insulate legislation from legal challenges. *See, e.g.*, *Moreno*, 413 U.S. at 534 (looking to legislative history as evidence that an amendment to the Food Stamp Act "was intended to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program");

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[24] Pollvogt, *supra* note 23, at 907-08.

Cleburne, 473 U.S. at 448 (identifying "the negative attitude of the majority of property owners" about the location of a facility for people with intellectual disabilities as the reason for the city's insistence on permits for these facilities). But the Sixth Circuit failed to consider *Moreno*, *Cleburne*, or any of the other cases described in the previous section.

In any event, here, the Health Care Ban *does* target transgender youth on its face. Tennessee has not sought to question the accepted understanding of the medical community that puberty blockers and hormones are safe and effective treatments generally, and it has not banned their use in situations when treatment is indicated for purposes like precocious puberty, etc. Instead, the law expressly bans those medications only when administered to treat transgender youth diagnosed with gender dysphoria.[25]

The decision below finds no support in *Trump v. Hawaii*, as the Sixth Circuit reasoned. First, the Court in *Trump*, unlike the Sixth Circuit below, did consider extrinsic evidence of animus in addressing a challenge to a proclamation placing entry restrictions on nationals from certain countries. *See* 585 U.S. at 705. The Court simply held that the plaintiffs' evidence that the proclamation was motivated by hostility against Muslim im-

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[25] Tenn. Code Ann. § 68-33-103(4) ("The exception in subdivision (b)(1)(B) does not allow a healthcare provider to perform or administer a medical procedure that is different from the medical procedure performed prior to the effective date of this act when the sole purpose of the subsequent medical procedure is to: (A) Enable the minor to identify with, or live as, a purported identity inconsistent with the minor's sex; or (B) Treat purported discomfort or distress from a discordance between the minor's sex and asserted identity.").

migrants was insufficient to invalidate the proclamation given the highly deferential review accorded the executive branch concerning the entry of non-citizens. In so holding, the Court emphasized that the proclamation "says nothing about religion," "covers just 8% of the world's Muslim population," and "is limited to countries that were previously designated by Congress or prior administrations as posing national security risks." *Id.* at 706. In sharp contrast, the law at issue here expressly targets transgender youth, categorically bans gender-affirming care for all transgender youth, and lacks any similar neutral justification like the documented national security concerns at issue in *Trump*.[26]

Moreover, the proclamation at issue in *Trump* involved "the President['s] broad discretion" over immigration decisions, an area implicating "'international affairs and national security,'" where the President has traditionally been accorded broad deference. *Id.* at 683, 686 (citation omitted). Here, by contrast, Tennessee seeks to subvert our nation's history and tradition by interfering with medical decisions that have long been made by adolescent children and their families in consultation with their doctors. *See generally Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("[O]ur constitutional system long ago rejected any notion that a child is 'the mere creature of the State'" and parents have a "'high duty' to recognize symptoms of illness and to seek and follow medical advice" (citation omitted)). For this reason, too, *Trump* is inapposite and heightened scrutiny is required. *See Windsor*, 570 U.S. at 764-68 (applying heightened scrutiny in part because the federal law in

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[26] *Amicus* respectfully submits that the Court erred in reaching this conclusion in *Trump v. Hawaii* given the plaintiffs' evidence of animus; but, in any event, the decision is inapposite here.

question departed from history and tradition as to the role of states in defining and regulating marriage).

Failing to apply this Court's case law, the Sixth Circuit attempted to excise the role that animus played in a law that on its face singles out for unequal treatment a discrete and insular minority: transgender youth. *See United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (explaining that heightened scrutiny is appropriate for "prejudice against discrete and insular minorities"); *see also Ladapo*, 2024 WL 2947123, at *14 (citing *Carolene Products* to apply heightened scrutiny to Florida's ban on gender-affirming health care for transgender youth because the statute constitutes "[a]dverse treatment of transgender individuals").[27]

The Sixth Circuit insisted that the "key problem" with this argument is "that a law premised only on animus toward the transgender community would not be limited to those 17 and under." Pet. App. 47a. That remarkable assertion is flatly inconsistent with both common sense and the law. A law need not discriminate against every person in a disfavored group for it to be driven by animus. *See Brown*, 347 U.S. at 487 (involving a challenge brought on behalf of Black children by their parents challenging laws permitting segregation by race in public schools). A law denying medically necessary health care to every single transgender youth does not

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[27] Respondents in support of petitioners similarly argue that the Sixth Circuit erred in failing to apply this Court's case law striking down "laws that (like SB1) appear animated in part by hostility toward a disfavored group, finding that the state failed to articulate a permissible justification for the law's differential treatment." Resp. in Supp. of Pet. Br. 52-53 (citing *Romer*, 517 U.S. at 632; *Cleburne*, 473 U.S. at 448; *Zobel v. Williams*, 457 U.S. 55, 65 (1982)).

lose its discriminatory character because it does not also target transgender adults. It is also not surprising that the law targets medical care for transgender youth specifically given the nature of the animus driving the law discussed above, including that it is being fueled by pernicious and false stereotypes about grooming and mutilating children.[28]

CONCLUSION

Courts "should not be ignorant as judges of what we know to be true as citizens." *United States v. Zubaydah*, 595 U.S. 195, 237 (2022) (Gorsuch, J., joined by Sotomayor, J., dissenting). Tennessee's Health Care Ban was motivated by a desire to target transgender adolescents for disfavored treatment. Indeed, that targeting is clear on the face of the law. The Health Care Ban denies to transgender youth access to care that is available to cisgender youth, thereby "inflict[ing] on them immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it."

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[28] The Sixth Circuit posited, without support, that "[t]he novelty of these treatments also undercuts any claim of animus." Pet. App. 47a. The court, however, strategically ignored the robust factual record, including multiple expert witnesses who testified in favor of the medical treatments' safety and efficacy, and the district court's conclusion that the medical evidence in the record indicates that the medical care is not harmful and "every major medical organization to take a position on the issue … agrees that [the treatments] are appropriate and medically necessary treatments for adolescents when clinically indicated." Pet. App. 198a. And while the Sixth Circuit also pointed to recent changes to medical recommendations for gender-affirming care in in "several European nations," Pet. App. 47a-48a, as the district court recognized, none of those countries has banned puberty blockers and hormones to treat gender dysphoria for young people, Pet. App. 193a-194a.

Romer, 517 U.S. at 635. The Health Care Ban violates the Equal Protection Clause.

Respectfully submitted.

JANAI S. NELSON
Director-Counsel
SAMUEL SPITAL
Counsel of Record
ALEXSIS JOHNSON
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street,
5th Floor
New York, N.Y. 10006
sspital@naacpldf.org
(212) 965-2200

AVATARA A. SMITH-CARRINGTON
MOLLY M. CAIN
KACEY MORDECAI
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street NW, Ste. 600
Washington, DC 20005

ROBERT NILES-WEED
CHLOE FIFE
LEIGH DANNHAUSER
MATT TONGLET
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, N.Y. 10153
(212) 310-8651

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