No. 23-477

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

JONATHAN 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 FOR FAMILY LAW AND CONSTITUTIONAL LAW SCHOLARS AS AMICI CURIAE SUPPORTING PETITIONER AND RESPONDENTS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. EQUAL PROTECTION PROHIBITS SELECTIVE INFRINGEMENT OF PARENTS' FUNDAMENTAL RIGHT TO DIRECT THEIR CHILDREN'S UPBRINGING AND CARE 6

A. Parental Rights Are Fundamental Rights Safeguarded By The Equal Protection Clause 6

B. This Court's Due Process Jurisprudence Reinforces The Fundamental Nature And Egalitarian Roots of Parental Rights 9

II. SB1 VIOLATES PARENTS' EQUAL PROTECTION RIGHTS 14

A. SB1 Cannot Survive Heightened Scrutiny 15

Table of Contents

Page

B. This Court Should Reject The Sixth Circuit's Flawed Understanding Of Parents' Fundamental Rights In This Context 21

CONCLUSION 24

TABLE OF CITED AUTHORITIES

Page

CASES

Bellotti v. Baird,
443 U.S. 622 (1979) 11

Bowen v. Am. Hosp. Ass'n,
476 U.S. 610 (1986) 14, 16

Brandt v. Rutledge,
551 F. Supp. 3d 882 (E.D. Ark. 2021) 18

Brandt v. Rutledge,
677 F. Supp. 3d 877 (E.D. Ark. 2023) 21

In re Burns,
519 A.2d 638 (Del. 1986) 17, 20

In re Custody of a Minor,
393 N.E.2d 836 (Mass. 1979) 16, 19

Crandall v. Nevada,
73 U.S. 35 (1867) 7

Dunn v. Blumstein,
405 U.S. 330 (1972) 7

Farrington v. Tokushige,
273 U.S. 284 (1927) 12

In re Hofbauer,
393 N.E.2d 1009 (N.Y. 1979) 16, 19

Cited Authorities

Page

Kanuszewski v. Mich. Dep't of Health & Hum. Servs., 927 F.3d 396 (6th Cir. 2019). 10

Mass. Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). 15

Meyer v. Nebraska, 262 U.S. 390 (1923). 8, 12, 16

Moore v. City of E. Cleveland, 431 U.S. 494 (1977). 11, 13-14

Newmark v. Williams, 588 A.2d 1108 (Del. 1991) 16, 17, 20

Parham v. J. R., 442 U.S. 584 (1979). 9, 10, 20, 22

People v. Bennett, 501 N.W.2d 106 (Mich. 1993). 11

Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014). 19

Pierce v. Soc'y of the Sisters, 268 U.S. 510 (1925). 5, 9, 11, 15, 16

Plyler v. Doe, 457 U.S. 202 (1982). 6, 7

Cited Authorities

Page

Police Dep't of the City of Chicago v. Mosley,
408 U.S. 92 (1972) 7

Reynolds v. Sims,
377 U.S. 533 (1964) 7

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973) 4, 6, 7, 15

Shapiro v. Thompson,
394 U.S. 618 (1969) 6, 7

Skinner v. Oklahoma,
316 U.S. 535 (1942) 8, 15

Stanley v. Illinois,
405 U.S. 645 (1972) 8-9, 15, 16, 17, 20

Troxel v. Granville,
530 U.S. 57 (2000) 4, 7, 10

United States v. Carolene Products Co.,
304 U.S. 114 (1938) 13

United States v. Rutherford,
442 U.S. 544 (1979) 20

Wisconsin v. Yoder,
406 U.S. 205 (1972) 7, 13, 15, 16, 23

Zablocki v. Redhail,
434 U.S. 374 (1978) 8, 9, 15

Page

REGULATIONS

50 Fed. Reg. 14878 (1985) 14

OTHER AUTHORITIES

Am. Acad. Pediatrics Comm. on Drugs, Policy Statement, Off-Label Use of Drugs in Children, 133 Pediatrics 563 (2014) 21

Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy*, 81 Mich. L. Rev. 463 (1983) 11

Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 Fordham L. Rev. 2529 (2022) 11, 21

Ira C. Lupu, *The Centennial of Meyer and Pierce: Parents' Rights, Gender-Affirming Care, and Issues in Education*, J. Contemp. Legal Issues (forthcoming 2024) 6

Joseph Goldstein, *Medical Care of the Child at Risk: On State Supervision of Parental Autonomy*, 86 Yale L.J. 645 (1976-1977). 19

Lewis Grossman, *Criminalizing Transgender Care*, 110 Iowa L. Rev. (forthcoming 2024) 14

Cited Authorities

Page

Report, President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (1983). 14

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are legal scholars whose scholarship and teaching focus on family law and constitutional law, including the Equal Protection Clause of the Fourteenth Amendment. These scholars have an interest in ensuring that the Fourteenth Amendment is interpreted and applied to vigorously protect the interests of parents in directing their children's medical care. *Amici* include:

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INTRODUCTION AND SUMMARY OF ARGUMENT

Amici agree with Petitioner and Respondents in Support of Petitioner that Tennessee Senate Bill 1 (SB1) violates the Equal Protection Clause of the Fourteenth Amendment because it discriminates against transgender adolescents based on their sex and transgender status. But SB1 violates the Equal Protection Clause for an additional, independent reason: it selectively infringes on certain parents' fundamental right to direct their adolescent children's medical care.

It is well-settled that legislative action is subject to heightened scrutiny under the Equal Protection Clause when it unevenly "impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). One of those fundamental rights is the "interest of parents in the care, custody, and control of their children"—"perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.). Accordingly, this Court has repeatedly struck down laws that unevenly burden certain individuals' parental rights absent sufficient government justification for that classification.

A parent's fundamental right to determine their child's care and upbringing includes a broad right to make decisions about a child's healthcare. The reasons why are obvious: parents, not the state, are in the best position and most motivated to act in their children's best interests, in consultation with responsible medical authorities. SB1 selectively impinges on that right by prohibiting parents of

transgender adolescents from accessing for their children the identical medications—including puberty blockers and hormone therapy—that parents of non-transgender adolescents can freely access for their children.

That discriminatory ban cannot withstand the heightened scrutiny this Court's decisions demand. Tennessee has articulated no sufficient interest in preventing parents of transgender adolescents from accessing treatment that all credible medical authorities have deemed necessary in appropriate cases. In fact, SB1 flies in the face of Tennessee's purported interest in protecting minors' health. The medical consensus is that denying medical care for transgender adolescents frequently poses grave and irreversible harms. And the record does not support Tennessee's position that the purported risks of the treatments targeted by SB1 are present when administered to transgender adolescents but not when administered to other adolescents. That fact exposes Tennessee's true goal, which is not to protect minors from any health risks, but to prevent transgender youth from living consistently with their gender identity. Tennessee would have its children be "mere creature[s] of the state," the very danger that the fundamental right of parental autonomy is designed to protect against. *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 535 (1925).

For these reasons, as well as those stated by Petitioner and Respondents in Support of Petitioner, the Court should either remand this case for the Sixth Circuit to apply heightened scrutiny, or it should apply that heightened scrutiny and hold that SB1 violates the Equal Protection Clause.

ARGUMENT

I. EQUAL PROTECTION PROHIBITS SELECTIVE INFRINGEMENT OF PARENTS' FUNDAMENTAL RIGHT TO DIRECT THEIR CHILDREN'S UPBRINGING AND CARE

A. Parental Rights Are Fundamental Rights Safeguarded By The Equal Protection Clause

1. This Court has made clear that the Equal Protection Clause may be violated not only when laws "disadvantage a suspect class," but also when laws selectively "impinge[] upon a fundamental right explicitly or implicitly protected by the Constitution." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973); *accord Plyler v. Doe*, 457 U.S. 202, 216-17 (1982). "A long line of decisions" illustrates how "equal protection review is heightened when fundamental rights are distributed in a discriminatory way." Ira C. Lupu, *The Centennial of Meyer and Pierce: Parents' Rights, Gender-Affirming Care, and Issues in Education*, J. Contemp. Legal Issues, at 36 (forthcoming 2024).[2] For instance, in *Shapiro v. Thompson*, the Court held that a law imposing a one-year durational residency requirement as a precondition to receiving welfare benefits triggered strict scrutiny under the Equal Protection Clause because it burdened certain indigent residents' fundamental right to interstate travel. 394 U.S. 618, 630 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). The Court explained that "[t]he constitutional right to travel from

2. Available at https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2970&context=faculty_publications.

one State to another," while "find[ing] no explicit mention in the Constitution," "occupies a position fundamental to the concept of our Federal Union." *Ibid.*; *see id.* at 630 n.8 (tracing the right's history and citing *Crandall v. Nevada*, 73 U.S. 35 (1867)). Similarly, the Court has applied strict scrutiny to invalidate discriminatory restrictions on the right to vote under the Equal Protection Clause. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). In doing so, it has observed that this "fundamental political right," *Dunn*, 405 U.S. at 336, although not expressly conferred in the Constitution, "is of the essence of a democratic society," *Reynolds*, 377 U.S. at 555.[3] To determine whether a law impacts a fundamental right, this Court "look[s] to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein." *Plyler*, 457 U.S. at 217 n.15; *see also Rodriguez*, 411 U.S. at 33.

2. Parental rights are one such fundamental right. "[T]he interest of parents in the care, custody, and control of their children *** is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.). And the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972).

Because parental rights (and closely related family rights) have long been deemed fundamental, they have

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3. *See also, e.g.*, *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 94, 99 (1972) (law that selectively infringed First Amendment rights "carefully scrutinized" to determine whether it was "tailored to serve a substantial governmental interest").

long been safeguarded by the Equal Protection Clause. In *Skinner v. Oklahoma*, for instance, a state law permitted the forced sterilization of those convicted of certain felony offenses, but not others. That law triggered, and failed, strict scrutiny under the Equal Protection Clause because it selectively burdened certain people's "right which is basic to the perpetuation of a race—the right to have offspring." 316 U.S. 535, 536 (1942).

So too in *Zablocki v. Redhail*, where strict scrutiny applied to a law prohibiting the issuance of marriage licenses to those in arrears on child-support obligations. In striking down the law under the Equal Protection Clause, the Court focused on the fundamental nature of the right to marry: "the foundation of the family and of society, without which there would be neither civilization nor progress." 434 U.S. 374, 384 (1978). That right could not be restricted to the "rich" and denied to the "poor." *Id.* at 404 (Stevens, J., concurring in the judgment). Similar concerns were present in *Stanley v. Illinois*, where a state law permitted unmarried fathers—but not married fathers or unmarried mothers—to be deprived of child custody absent any determination that they were unfit. 405 U.S. 645, 646-47 (1972). In holding this scheme denied unmarried fathers "the equal protection of the laws," this Court explained that the right "to raise one's children" has long "been deemed essential" and that the "integrity of the family unit has found protection in" both "the Due Process Clause of the Fourteenth Amendment" and "the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 649, 651 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and citing *Skinner*, 316 U.S. at 541). And while the state's professed interest in children's welfare was "legitimate," the "means used to achieve

th[o]se ends"—"separating children from fathers without a hearing designed to determine whether the father is unfit"—"spite[d]" those "articulated goals." *Id.* at 652-53.

As these decisions clearly demonstrate, legislative classifications that infringe on the fundamental parental rights of some, but not all, individuals must satisfy heightened scrutiny.

B. This Court's Due Process Jurisprudence Reinforces The Fundamental Nature And Egalitarian Roots of Parental Rights

1. The nature and scope of parents' fundamental right to raise their children as they see fit—including by making decisions about their medical care—has been further explored in this Court's substantive due process cases. The reasoning in those decisions offers valuable guidance as to how parents' rights should be assessed in the equal protection context.[4]

Nearly a century ago, the Court first acknowledged that "[t]he child is not the mere creature of the state" and that parents "have the right, coupled with the high duty, to recognize and prepare" their children "for additional obligations." *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 535 (1925). That right includes the "plenary authority to seek" medical "care for their children, subject to a physician's independent examination and medical judgment." *Parham v. J. R.*, 442 U.S. 584, 604 (1979); *see*

4. *See also Zablocki*, 434 U.S. at 396-403 (Powell, J., concurring in the judgment) (assessing discriminatory state law under both equal protection and due process principles).

also, e.g., *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 418 (6th Cir. 2019) ("Parents possess a fundamental right to make decisions concerning the medical care of their children."). This protection stems not just from respect for parental autonomy, but from parents' corresponding "duty to recognize symptoms of illness and to seek and follow medical advice." *Parham*, 442 U.S. at 602.

The deeply rooted deference to parents' right to direct the upbringing of their children reflects two normative judgments. The first judgment is that protecting this right is generally necessary to promote children's best interests. As this Court recognized in *Troxel v. Granville*:

> [T]here is a presumption that fit parents act in the best interests of their children *** so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

530 U.S. at 68-69 (plurality op.) (striking down a nonparental-visitation statute that infringed on mother's right to control which third parties could visit her child).

Simply put, "natural bonds of affection lead parents to act in the best interests of their children." *Parham*, 442 U.S. at 602 (citing 1 William Blackstone, Commentaries *447). A contrary approach, in which the child is the mere "creature of the state," would undermine the interests of the child by delegating child-rearing rights to those

least familiar with the child's needs. *Pierce*, 268 U.S. at 535. Scholars have similarly recognized that "deference to parental decision-making promotes child wellbeing because, as compared with state actors or third parties granted decision-making authority by the state, parents are generally better positioned to understand a child's needs and make decisions that will further that child's interests." Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 Fordham L. Rev. 2529, 2532-33 (2022).

The second normative judgment, also backed by centuries of tradition, is that strong parental rights combined with firm limits on government power serve society as a whole. "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977) (plurality op.). "It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.* at 503-04. "Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter." *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality op.). Indeed, courts have recognized that "massive state involvement with childrearing would invest the government 'with the capacity to influence powerfully, through socialization, the future outcomes of democratic political processes.'" *People v. Bennett*, 501 N.W.2d 106, 122 n.3 (Mich. 1993) (Riley, J., concurring and dissenting) (quoting Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy*, 81 Mich. L. Rev. 463, 480-81 (1983)).

2. Several of this Court's parental-rights decisions, while formally grounded in the Due Process Clause, have held that laws discriminating against certain classes of parents or families cannot withstand constitutional scrutiny. The deep-seated equality concerns reflected in those decisions confirm that the selective deprivation of parental autonomy implicates equal protection rights as well.

One of the Court's earliest such cases, *Meyer v. Nebraska*, struck down a law aimed at German immigrants that prohibited schools from teaching in any language other than English. 262 U.S. 390, 398 (1923). Recognizing that the law affected few citizens beyond those with foreign lineage, the Court concluded that "[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue." *Id.* at 401. Two years later in *Pierce*, the Court invalidated a law that infringed the right of Catholics and other religious minorities to send their children to religious schools, explaining that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." 268 U.S. at 535. And in *Farrington v. Tokushige*, the Court struck down a law that infringed the right of Japanese and other Asian immigrants to send their children to private foreign-language schools. 273 U.S. 284, 298 (1927). In doing so, it reiterated that a minority parent has "the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue." *Ibid.*

The egalitarian underpinnings of these early decisions are made clear in the well-known footnote four of *United States v. Carolene Products Co.* There, the Court cited *Meyer*, *Pierce*, and *Farrington* as paradigmatic examples of the "prejudice against discrete and insular minorities" that "tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." 304 U.S. 144, 152 n.4 (1938).

Later decisions about parental autonomy (or familial autonomy more broadly) continued to advance these egalitarian themes. In *Yoder*, the Court invalidated Wisconsin's compulsory school-attendance law that would have exposed Amish children, at a "crucial adolescent stage of development," to influences their parents and community considered to be detrimental. 406 U.S. at 217-18. By forcing parents to send their children to public or private school past the eighth grade, the law undermined the "diversity [society] profess[es] to admire and encourage," and left parents with an impossible choice: "abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region." *Id.* at 218. Similarly, in *Moore*, the Court invalidated an ordinance that prohibited members of extended families from living together—a law that particularly harmed "the poor and deprived minorities of our society," who frequently faced "compelled sharing of a household." 431 U.S. at 508, 510 (Brennan, J., concurring). *Moore* also rejected the notion that the "deeply rooted" concept of the family is limited to the traditional "nuclear family." *Id.* at 503-04 (plurality op.). Rather, "the tradition of" extended-family households "has roots equally venerable and equally deserving of constitutional

recognition." *Id.* at 504. Accordingly, "the Constitution prevents" a city "from standardizing its children and its adults by forcing all to live in certain narrowly defined family patterns." *Id.* at 506.

II. SB1 VIOLATES PARENTS' EQUAL PROTECTION RIGHTS

Prior to SB1 and its contemporaries, prohibitions on approved medications for some minors but not others were unprecedented. Lewis Grossman, *Criminalizing Transgender Care*, 110 Iowa L. Rev. (forthcoming 2024).[5] Indeed, "[t]he decision to provide or withhold medically indicated treatment is, except in highly unusual circumstances, made by the parents or legal guardian," and "as long as parents choose from professionally accepted treatment options the choice is rarely reviewed in court and even less frequently supervened." *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 627 n.13 (1986) (plurality op.) (quoting Report, President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (1983), and 50 Fed. Reg. 14878, 14880 (1985)).

SB1's extreme departure from that tradition violates parents' equal protection rights. By banning the use of puberty blockers and hormone therapy for the treatment of gender dysphoria while allowing those same therapies' use for the treatment of other conditions, SB1 denies a discrete group of parents—those with transgender adolescents—the fundamental right to determine their

5. Available at https://digitalcommons.wcl.american.edu/facsch_lawrev/2248.

children's care, including by using medically accepted treatments. Meanwhile, parents of non-transgender adolescents can freely follow medically accepted standards in accessing the same medications for their children. Yet the Constitution firmly "excludes any general power of the state to standardize its children by forcing them" to live according to the state's political and social preferences. *Pierce*, 268 U.S. at 535; *see Yoder*, 406 U.S. at 233.

A. SB1 Cannot Survive Heightened Scrutiny

Like other legislative classifications this Court has reviewed (*see, e.g.*, *Skinner*, 316 U.S. at 536; *Zablocki*, 434 U.S. at 384; *Stanley*, 405 U.S. at 646-47), SB1 imposes an unequal burden on fundamental parental rights. Parents of transgender adolescents are precluded from accessing the same medications that parents of non-transgender adolescents can freely access for their children. SB1 must, therefore, survive this Court's "'critical examination' of the state interests advanced in support of th[at] classification." *Zablocki*, 434 U.S. at 383 (quoting *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) and citing *Rodriguez*, 411 U.S. at 17). For all the reasons explained by Petitioner and Respondents in Support of Petitioner, SB1 cannot satisfy that standard—as every other court to have considered similar categorical bans on transgender healthcare under heightened scrutiny has concluded. Pet. App. 181a-205a; Pet. 28 & n.7 (collecting cases).

In conducting this inquiry, state-court medical-neglect decisions—which assess whether a state may override parents' preferred treatment plan for their child—provide useful guidance. Grounded in part

in this Court's parental-rights jurisprudence, these decisions have imposed standards of review similar to the heightened scrutiny this Court has applied. *See, e.g.*, *Newmark v. Williams*, 588 A.2d 1108, 1117 (Del. 1991) (state intervention in parents' care decisions "is only justifiable under compelling conditions"); *id.* at 1115 (citing *Stanley*, *Yoder*, and *Pierce*); *In re Hofbauer*, 393 N.E.2d 1009, 1013 (N.Y. 1979) ("[G]reat deference must be accorded a parent's choice as to the mode of medical treatment to be undertaken.") (citing *Yoder*).

In medical-neglect cases, courts have authorized intervention into a child's medical care only when two exceptional circumstances are both present. First, the state's interest in its preferred course of treatment must be compelling in the sense that all responsible medical authority agree it is the only appropriate course of treatment. For instance, in *Hofbauer*, the New York Court of Appeals explained that the government may not "assume the role of a surrogate parent and establish as the objective criteria with which to evaluate a parent's decision its own judgment as to the exact method or degree of medical treatment which should be provided." 393 N.E.2d at 1014. Instead, the relevant question is whether the parents "have provided for their child a treatment which is recommended by their physician and which has not been totally rejected by all responsible medical authority." *Ibid.*; *accord In re Custody of a Minor*, 393 N.E.2d 836, 846 (Mass. 1979) (citing *Yoder*, *Pierce*, and *Meyer*); *see also Bowen*, 476 U.S. at 628 n.13 (observing that, under state law, "as long as parents choose from professionally accepted treatment options the choice is rarely reviewed in court and even less frequently supervened").

Second, even when all responsible medical authorities agree on the appropriateness of the state's preferred course of treatment, it must be both likely to result in benefit to the child and pose few countervailing risks. Thus, in *Newmark*, the Supreme Court of Delaware refused to order that a child receive chemotherapy over his parents' objections where that treatment would be "highly invasive, painful, involve[] terrible temporary and potentially permanent side effects," and "pose[] an unacceptably low [40 percent] chance of success, and a high risk that the treatment itself would cause his death." 588 A.D.2d at 1117-18. Under those circumstances, "[t]he State's authority to intervene in this case *** cannot outweigh the Newmarks' parental prerogative." *Id.* at 1118; *accord In re Burns*, 519 A.2d 638, 645 (Del. 1986) (citing *Stanley*).

Those decisions confirm that Tennessee cannot justify its selective prohibition on certain parents' obtaining medically approved—and critically necessary—treatment for their adolescent children. Contrary to the first requirement these decisions impose, all responsible medical authorities agree that transgender healthcare is medically necessary in appropriate cases. The private Respondents' medical experts, who have collectively "diagnosed and treated hundreds of individuals with gender dysphoria," detailed the significant mental-health benefits of transgender healthcare, which they have observed clinically. Pet. App. 176a. For instance, "Dr. Adkins has testified that '[a]ll of [her] patients who have received medical treatment for gender dysphoria have benefitted from clinically appropriate treatment,'" and that "[f]or some individuals, this treatment can eliminate or reduce the need for surgical treatment." Pet

App. 195a (alterations in original) (citation omitted). Dr. Antommaria likewise testified that "the available evidence indicates that gender-affirming care improves, rather than worsens, psychological outcomes," Pet. App. 195a, and that "[t]reatment with pubertal suppression among those who wanted it was associated with lower odds of lifetime suicidal ideation when compared with those who wanted pubertal suppression but did not receive it," Pet. App. 196a (quoting Pet. App. 264a).

Transgender healthcare is backed not just by the credible medical experts who testified in this case, but by the research and expertise of specialists in the field and every leading medical and mental-health organization in the country. Pet. App. 60a, 86a, 178a-181a (documenting the widespread endorsement of the WPATH and Endocrine Society's guidelines for treating gender dysphoria). Other courts have similarly acknowledged that "[e]very major expert medical association recognizes that gender-affirming care for transgender minors may be medically appropriate and necessary to improve the physical and mental-health of transgender people." *Brandt v. Rutledge*, 551 F. Supp. 3d 882, 891 (E.D. Ark. 2021), *aff'd*, 47 F.4th 661, 670 (8th Cir. 2022) (embracing district court's factual findings).

On the other side of this broad consensus is the state's outlier view "that gender-affirming treatment does not improve mental health outcomes." Pet. App. 196a. But as the district court found, that assertion is not credible, because it "relies solely on the testimony of" a physician "who seems never to have treated an individual for gender dysphoria." Pet. App. 196a. Accordingly, the experts in this case and the medical profession as a whole support rather

than disapprove of allowing parents to choose transgender healthcare for their adolescent children. When a parent's preferred course of treatment does not run counter to the overwhelming weight of responsible medical authorities, the state may not override that choice. *Cf. In re Hofbauer*, 393 N.E.2d at 1012-13 (state could not supplant parents' chosen treatment when physicians testified that it was "a beneficial and effective mode of treatment") (citing *Yoder*); *compare Pickup v. Brown*, 740 F.3d 1208, 1223, 1236 (9th Cir. 2014), *abrogated on other grounds by Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018) (parents do not have fundamental right to access treatment that state has "reasonably deemed harmful" based on the "well-documented, prevailing opinion of the medical and psychological community"); *In re Custody of a Minor*, 393 N.E.2d at 846 (overriding parents' care decision on basis of "uncontested" evidence that their preferred therapy was "useless and dangerous").[6]

Failing to satisfy the second requirement that these medical-neglect decisions have imposed, Tennessee's total ban on transgender healthcare for adolescents also poses enormous risks to minors experiencing gender dysphoria. Indeed, the "means" that Tennessee is using to achieve its purported interest in minors' health "spites" those

6. Even were the state's competing view of the appropriate medical treatment credible, that would simply pose a conflict among medical authorities, which is also insufficient to override parental authority in this context. *See, e.g.*, Joseph Goldstein, *Medical Care of the Child at Risk: On State Supervision of Parental Autonomy*, 86 Yale L.J. 645, 653 (1976-1977) (where "parents are confronted with conflicting medical advice about which, if any, treatment procedure to follow," there is "no justification *** for coercive intrusion by the state").

"articulated goals." *Stanley*, 405 U.S. at 652-53. As the district court found, "leaving gender dysphoria untreated can result in severe anxiety, depression, self-harm, and suicidal ideation." Pet. App. 207a-208a. Delaying transgender healthcare until those with gender dysphoria reach adulthood, as Tennessee would require, "will lead to physical changes that are consistent with the patients' sex at birth (i.e. inconsistent with their current gender identity), which will have the follow-on effect of worsening the patients' dysphoria." Pet. App. 209a. A preferred care plan (or, more accurately, deprivation of any care) that poses such profound risks to a minor cannot be justified under the heightened standard of review appropriate in this case. *Cf. Newmark*, 588 A.2d at 1117-18; *In re Burns*, 519 A.2d at 645.

That transgender healthcare may pose "low" risks that "can be mitigated" (Pet. App. 192a-193a) does not justify a total ban on that care. To start, the district court properly found that any health risks the state identified here are equally "prevalent" among those who are "not receiving the[] procedures" banned by SB1. Pet App. 197a. Regardless, "few" forms of treatment are entirely "without risk." *United States v. Rutherford*, 442 U.S. 544, 555-56 (1979). The inevitable "risks" involved in any "medical procedure" or treatment only reinforces the conclusion that "[p]arents can and must make those judgments." *Parham*, 442 U.S. at 603. It is parents, in consultation with their chosen physicians, who are best positioned to weigh the considerable risks of not obtaining transgender healthcare against the risks of that care in individual cases. Unlike government actors, the parents in this case will have spent virtually every day of their lives with their children and are far better positioned to

assess whether the toll of untreated gender dysphoria on their child's health justifies any risks of treatment. Huntington & Scott, *supra*, at 2532-33.[7]

B. This Court Should Reject The Sixth Circuit's Flawed Understanding Of Parents' Fundamental Rights In This Context

Although the Sixth Circuit did not consider the question of parental rights in the equal protection context, it did so in the due process context—and badly misunderstood the nature of those rights. Whether the Court remands with instructions for the Sixth Circuit to apply the correct analysis, or assesses SB1's constitutionality in the first instance, it should reject the Sixth Circuit's misinterpretations.

The Sixth Circuit concluded that SB1 implicated no fundamental parental right because there is no "'deeply rooted' tradition of preventing governments from regulating the medical profession in general or certain treatments in particular, whether for adults or their children." Pet. App. 17a. Accordingly, it concluded that "[a]s long as it acts reasonably, a state may ban

7. That the Food and Drug Administration (FDA) has not specifically approved the use of puberty blockers and hormone therapy to treat adolescents with gender dysphoria does not alter this conclusion. Many established medical treatments, particularly those for minors, involve off-label uses of FDA-approved medications. *See* Am. Acad. Pediatrics Comm. on Drugs, *Policy Statement, Off-Label Use of Drugs in Children*, 133 Pediatrics 563, 563 (2014) (off-label use of FDA-approved medications "does not imply an improper, illegal, contraindicated, or investigational use"); *accord Brandt v. Rutledge*, 677 F. Supp. 3d 877, 902 (E.D. Ark. 2023).

*** treatments for children." Pet. App. 25a. But that misstates the record and the law. Tennessee is not regulating certain treatments as a whole, but is instead regulating the extent to which certain parents, but not others, can access legally available treatments for their children. *Supra* p. 15 (describing how non-transgender minors may receive exact same medications). And a parent's choice as to what available care to provide her child is precisely the type of decision this Court's parental-rights jurisprudence protects. *Supra* pp. 9-11.

The majority also opined that "parents do not have a constitutional right to obtain reasonably banned treatments for their children." Pet. App. 21a (alteration omitted). That, of course, begs the question. The medications at issue are not banned in Tennessee. Rather, parents of non-transgender children can freely use those same medications to treat their adolescent children, but parents of transgender children cannot. That selective ban, which goes against the overwhelming weight of medical expertise, cannot be sincerely characterized as reasonable. *Supra* pp. 15-21. For at least these reasons, the Court should disregard the Sixth Circuit's analysis of the fundamental right at issue.[8]

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8. The Sixth Circuit also dismissed the relevance of *Parham* on the logic that the decision rested on "procedural" due process. Pet. App. 24a. But as Judge White rightly recognized, *Parham* "was expounding the substantive due-process right of parents to direct their children's medical care, although the discussion was in the context of addressing the minor plaintiffs' procedural due-process claims." Pet. App. 96a (White, J., dissenting).

To hold that parents lose their fundamental right to direct their children's medical care whenever the state "deem[s] a treatment harmful to children without support in reality," as the Sixth Circuit held here, would reduce the right to a nullity. Pet. App. 97a (White, J., dissenting). Upholding the decision below would deny transgender adolescents the time-honored protections that parental autonomy provides, reducing them to "mere creature[s] of the state" whose health and development is dictated by the State's political values. And it would compel parents to either remain in their home state and risk their children's health and life, or (assuming they have the resources to do so) "migrate to some other and more tolerant region." *Yoder*, 406 U.S. at 218. Forcing parents to make that choice is antithetical to a free society, longstanding American conceptions of the family, and "the diversity we profess to admire and encourage." *Id.* at 226. To do this to any family is a constitutional scourge. To single out vulnerable parents and children is even worse.

CONCLUSION

For these reasons, as well as those explained by Petitioner and Respondents in Support of Petitioner, the Court should either remand for the Sixth Circuit to apply heightened scrutiny, or it should hold that SB1 violates the Equal Protection Clause.

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