No. 23-477

In the Supreme Court of the United States

UNITED STATES OF AMERICA, 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 OF STATE LEGISLATORS, AMERICAN FAMILY ASSOCIATION, INC. AND AFA ACTION, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

TREY DELLINGER
COUNSEL OF RECORD FOR AMICI CURIAE
Senior Legal Fellow
American Family Association, Inc.
AFA Action, Inc.
108 Parkgate Drive
Tupelo, Mississippi 38801
662-821-2024 ext. 523
trdellinger@afa.net

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae (listed in the Appendix hereto) are current and former members of 23 state legislative bodies who sponsored and/or championed legislation protecting their states' children from being harmed by gender transition medical interventions. They have a vital interest in protecting the children of their state from engaging in medically assisted self-harm.

Additional *amici curiae* are the American Family Association and AFA Action (collectively "AFA"). AFA's mission is to inform and mobilize voters and government officials to align public policy with biblical and constitutional principles. AFA's vision is to see a society of citizens successfully preserving life, liberty, and the ability to pursue happiness.

Central to that mission and vision are these principles: God created every human being, male and female, as free and morally responsible bearers of his image. We all want to make our own rules and struggle to follow God's commands to love him and one another, especially when we are children. Yet with the help of the Holy Spirit,[2] we can grow in faith and

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel contributed money intended to fund preparing or submitting this brief.

[2] Such views are consistent with our country's history and tradition. For example, the Founders encouraged Americans to humble themselves and ask God "to incline us by His Holy Spirit to that sincere repentance and reformation which may afford us reason to hope for his inestimable favor and heavenly benediction

maturity and gain the self-control to live with greater obedience to divine law and legitimate governing authority.[3] This biblical understanding, together with contributions from classical civilization,[4] was reflected in our Founders' belief that only a virtuous, self-disciplined people could restrain their individual passions to live by objective standards under the rule of law.[5]

. . . ." John Adams, Proclamation Proclaiming a Fast-Day, (Mar. 23, 1798), *in* FOUNDERS ONLINE, NATIONAL ARCHIVES, https://founders.archives.gov/documents/Adams/99-02-02-2386.

[3] *Genesis* 1:27; *Galatians* 6:7; *Matthew* 22:37-40; *Philippians* 2:3-4; *John* 14:15; *Genesis* 3:5; *Genesis* 4:6-7; *Proverbs* 22:15; *Galatians* 5:19-24; *Romans* 13:1-5.

[4] Leading classical thinkers such as Aristotle and Cicero also emphasized self-control as a virtue. *See* C. Young, *Aristotle on Temperance,* Phil. Rev. 97, 521–542 (1988) *and* Cicero, M., D*e Officiis* 105 (Loeb Classical Lib. ed. 1913), https://penelope.uchicago.edu/Thayer/E/Roman/Texts/Cicero/de_Officiis/1E*.html#:~:text=The%20appetites%2C%20moreover,sort%20of%20passion.

[5] > As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. Republican government presupposes the existence of these qualities in a higher degree than any other form.

THE FEDERALIST NO. 55, https://guides.loc.gov/federalist-papers/text-51-60#s-lg-box-wrapper-25493431. *See also* Russell Kirk, *The Roots of American Order* 29 (4th ed. 2003) ("A conviction of man's sinfulness, and of the need for laws to restrain every man's will and appetite, influenced the legislators of the colonies and of the Republic.")

In support of Tennessee Senate Bill SB1 ("SB1"), which is in keeping with these traditional understandings, and against Petitioners' attempt to read radical identity politics into our constitution, the undersigned submit this *amici curiae* brief.

SUMMARY OF THE ARGUMENT

Petitioners' identity politics is a vision of public policy fundamentally at odds with the original meaning of the Constitution and the biblical and classical tradition that influenced the Founders.[6] Identity politics holds that the highest human good is realized in acting out one's self-concept unhindered by objective legal standards. Such restraints are presumed invalid as a denial of the individual's "right to exist."[7]

Petitioners deprecate free will and self-control. Their appetites define them.[8] This passivity is baked into the language they use. They view people not as free individuals choosing their actions, but as "gender dysphoric" or "transgendered" persons. They claim their identity politics is backed by "science" as declared by the psychological and medical establishment. Instead of viewing their appetites as tendencies to be controlled, these medical associations

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[6] *See*, *supra*, notes 2-5.

[7] Chase Strangio, *Chelsea Manning Fights for Her Right to Exist. She Shouldn't Have To*, ACLU News & Commentary (Feb. 14, 2015), https://guides.loc.gov/federalist-papers/text-51-60#s-lg-box-wrapper-25493431.

[8] "[T]heir God is their belly." *Philippians* 3:19

contend the best way to relieve a distressing passion is to act upon it; conversely, repressing desire produces distress. From these psychological premises they leap to a *policy judgment*: children, also, should not be expected to control their desires. From that *policy judgment* they leap to the *legal conclusion* that prohibiting the outward expression of desire is a denial of equal protection.

Petitioners argue the Constitution demands that minors mentally distressed by their biological sex must be allowed professional assistance to chemically alter their natural bodies. They contend SB1, which bans such regimens, is presumed to violate equal protection unless it withstands heightened scrutiny. They offer two legal arguments for heightened scrutiny. First, they contend that SB1, which protects mentally disturbed children from assisted self-harm, is a sex-based classification. Second, they argue the children's mental distress about their sex makes them a quasi-suspect class. Finally, they argue SB1 does not survive heightened scrutiny.

How best to address children's distressing desires is a *policy* judgment, and the constitutional implications a *legal* one. Policy judgments are for legislators; legal judgments for judges. Psychiatrists are not lawgivers.

Petitioners grounded their arguments in equal protection, no doubt to establish a statutory basis for the intervention of the United States. But their equal protection arguments are actually a disguised attempt to have this Court recognize an ahistorical fundamental right of assisted self-harm for mentally

disturbed children. Recognizing such a right would contradict our deeply rooted constitutional traditions.

Objective, evenhanded standards of harm based on self-evident, deeply rooted truths are the foundation of law. Unlike Petitioners, the Founders viewed the passions negatively. They understood that passions are not irresistible compulsions, and that self-control is necessary for ordered liberty.[9] When our passions lead us to cause harm, the law must hold us accountable, else law will give way to license.

Children, especially, lack self-control. The law may prevent them from harming themselves, and certainly may prevent adults from aiding them in doing so.

Petitioners would create a polity in which subjective identities legitimized by elite opinion create exemptions to constitutionally enacted, evenhanded legal standards founded on self-evident truths. That would be the polar opposite of equal protection of the laws.

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[9] Indeed, self-control is so integral to ordered liberty, that it was honored in a beloved national song, "America the Beautiful":

> America! America!
> God mend thine every flaw,
> Confirm thy soul in self-control,
> Thy liberty in law!

Connie Deng, AMERICA THE BEAUTIFUL, Encyclopedia Britannica (June 18, 2024), https://www.britannica.com/topic/America-the-Beautiful.

SB1's classifications are based on age and mental state, not sex. The Court has never held that mentally distressed persons, generally, or mentally distressed children, particularly, are a suspect class or that they have a fundamental right to assisted self-harm. If the Court takes that bait, every legal bar to acting out a subjective "identity" must survive heightened scrutiny. Given the boundlessness of subjective "identity" claims, equal justice under law would be converted into an unequal patchwork of identity-based constitutional exemptions. This Court should not turn down that perilous path.

The judgment of the Court below should be affirmed.

ARGUMENT

I. What Equal Protection Requires

As a rule, the law differentiates based on acts and their consequences, but it is blind to persons. The law generally may not assign responsibility based on obvious physical traits or other accidents of birth that do not impact conduct or the ability to contribute to society. Race, sex, national origin and birth out-of-wedlock are each of this type.[10] These are objective

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[10] Race is the oldest recognized suspect class. *See Korematsu v. United States*, 323 U.S. 214, 216 (1944) (finding that race-based legislation is subject "to the most rigid scrutiny"). Indeed, protecting the immutable characteristic of race from unequal protection was the principal reason for the adoption of the Reconstruction Amendments that included the 14th Amendment's equal protection clause. Aliens, i.e., persons who

characteristics present from birth that have no impact on conduct or societal contribution. Legal classifications may not target these traits without heightened justification.

Mental states are entirely different. The law is concerned with acts and their consequences. Because we freely will our actions, our mental states have legitimate legal implications that immutable physical traits or other accidents of birth do not. The law constantly differentiates based on mental states that predispose one to harm oneself or others or diminish one's ability to contribute to society. Cold calculation and malice are dealt with more severely than carelessness. Criminal sentences are shortened by remorse and lengthened for the lack of it. Sex offenders must enter their names and addresses on public registries. Persons found *non compos mentis* may not execute wills or contracts. Mentally disturbed

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by an accident of birth are not American citizens, were recognized as being afforded special protection in *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948) ("[T]he power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."). Sex, also an objective characteristic from birth, was accorded quasi-suspect class status in 1973 because it was an "immutable characteristic determined solely by the accident of birth" and, therefore, violated "the basic concept of our system that legal burdens should bear some relationship to individual responsibility." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Illegitimacy, also an objective characteristic arising from birth, was recognized as a quasi-suspect class receiving intermediate scrutiny in *Trimble v. Gordon*, 430 U.S. 762 (1977).

Religious classifications clearly require strict scrutiny because religion was accorded explicit protection in the constitutional text with the adoption of the First Amendment.

persons threatening themselves or others may be held against their will for treatment. A divorced parent exhibiting callousness to their child may lose custody. Persons with abusive tendencies may be denied adoptions. Instances could be repeated *ad infinitum.*

Legal classifications based on age are also distinguishable. The law constantly makes age-based classifications without offending equal protection. Children's mental development is incomplete, so their judgment is suspect. Their physical development is also incomplete. To protect their healthy development and for the good of society, the law more sharply limits their freedom as compared to adults. They may not execute contracts or vote in elections. They may not purchase tobacco or alcohol. They may not be admitted on their own recognizance to R-rated films. They may not labor in hazardous occupations. They may not enlist in the military. Innumerable examples could be given.

This Court has restricted suspect or quasi-suspect class status to groups that are explicitly protected in the constitutional text—religion, via the First Amendment—or who possess objective, immutable characteristics present from birth—race, national origin, sex, and illegitimacy.[11] There is no precedent for extending quasi-suspect class status to legal classifications based on age or mental state.[12]

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[11] See, supra, n. 10.

[12] *See*, *infra*, sections II. D. and II.E.

II. The Equal Protection Clause Does Not Grant Mentally Distressed Children a Right to Assisted Self-Harm

For several reasons, the court below correctly found that SB1 treats similarly situated children of both sexes evenhandedly and does not trigger heightened equal protection scrutiny.

A. SB1 Classifies Based on Age, Not Sex

The statutory classifications are premised on age, not sex. Adults of both sexes may receive gender transition procedures; children of either sex may not. Pet.App.31a.

Statutory classifications based on age receive rational basis review. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-14 (1976) (per curiam) (age). "The state's authority over children's activities is broader than over like actions of adults. . . . A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

B. SB1 Classifies Based on Mental State, Not Sex

Additionally, the statutory classifications are premised on mental state, not sex. Male children may receive testosterone, and females may receive estrogen to relieve abnormally low levels, but neither may receive them to alter their bodies to address their mental discomfort with their sex. Statutory

classifications based on mental condition also receive deferential review. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-46 (1985) (mental disability).

The court below further correctly reasoned that Tennessee was permitted to classify "gender dysphoria" as a diagnosis inappropriate to be treated during childhood, while allowing childhood treatment for disorders of normal sex development. Pet.App.34a-35a. Altering pathological physiology to restore normal development is categorically different than altering normal physiology to address a mental disturbance. The court below therefore sensibly found that "[s]tates may permit varying treatments of distinct diagnoses, as the 'Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.'" *Id.* (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)); *see also Vacco v. Quill*, 521 U.S. 793, 808 (1997).

This Court in *Vacco* held that a New York law did not trigger heightened review when it treated assisted suicide differently than withholding life support. *Vacco*, 521 U.S. at 807-808. In the former instance the deliberate act of the patient and those assisting him were the cause of the harm. In the latter instance the cause of the harm was a natural process. *Id.* Just so with SB1. It differentiates based on the type of condition and the nature of the harm it causes—natural disorders of sex development versus mental conditions more likely to cause harm. It does not differentiate based on the *sex* of the patient. Just as

in *Vacco*, these distinctions should receive rational basis review.[13]

C. *Bostock* Is Inapposite.

The Sixth Circuit correctly found that *Bostock* did not require heightened scrutiny, because that case's holding and rationale were explicitly limited to Title VII cases. *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644 (2020). Pet. App.40a-41a (*citing Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2220 (2023) (Gorsuch, J., concurring) ("That such differently worded provisions"—comparing the Equal Protection Clause and Titles VI and VII—"should mean the same thing is implausible on its face.")).

For all these reasons, the Sixth Circuit correctly found that the Tennessee law was not a sex-based classification that triggered heightened scrutiny.

D. Mentally Distressed Children Are Not a Quasi-suspect Class

To reiterate, Petitioners' core complaint is that minors who are distressed about their sex want medical assistance to chemically alter their bodies to conform to their feelings. They argue their mental distress makes them a suspect or quasi-suspect class and that denying them the procedures violates equal protection. Pet.17.

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[13] Moreover, this Court has emphasized that states have an interest in "the elimination of particularly gruesome or barbaric medical procedures . . . ." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 300-01 (2022).

This Court has rejected the argument that persons sharing a particular mental condition constitute a suspect class. *City of Cleburne*, 473 U.S. at 442-46 (mental disability not a suspect or quasi-suspect class). More specifically, this Court has rejected the argument that mentally distressed persons seeking assisted self-harm are a suspect class. *See Vacco,* 521 U.S. at 799 (equal protection was not violated by New York statutes outlawing assisting suicide, stating those laws "neither infringe fundamental rights nor involve suspect classifications.")

Rather, this court has always restricted suspect or quasi-suspect class status either to groups that are explicitly protected in the constitutional text—religion—or who possess objective, immutable characteristics present from birth—race, sex, national origin, and illegitimacy.[14]

The minors at issue in this case exhibit none of those traits. As the Sixth Circuit correctly found, the minors' mental condition is not an objectively ascertainable birth characteristic like race or sex. Pet.App.45a.

Nor do they constitute a discrete group. Rather, "'transgender' can describe a huge variety of gender identities and expressions." Pet.App.46a (internal quotations omitted) (citing *Standards of Care for the Health of Transgender and Gender Diverse People*, Version 8, 23 Int'l J. of Transgender Health S1, S15 (2022) [hereinafter *WPATH Guidelines*]).

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[14] *See*, *supra*, n. 10 and accompanying text.

And, the minors' mental state is not immutable, as many individuals' feelings of discomfort with their biological sex change. Indeed, Petitioners do not contest that "gender dysphoria" is not immutable and that those who have "transitioned" sometimes change their minds and desire to "detransition." Pet.App.45a-46a; *see also* Pet.25.

Moreover, the court of appeals correctly found that the mentally distressed minors were not a politically powerless group, as they were supported by the President, the Department of Justice and twenty states. Pet.App.46a.

They also were not the targets of an animus-driven law, because the subject laws were directed only to children who expressed distress about their birth sex, not also to adults who did so. *Id.*

Petitioners also claim the minors are a suspect or quasi-suspect class because their mental condition "bears no relation to [the] ability to perform or contribute to society." Pet.24. The societal contribution element has application when the issue is a person's performance or contribution to, for example, a military career,[15] to a family,[16] or as a student.[17] The societal contribution element has no

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[15] *United States v. Virginia*, 518 U.S. 515, 541 (1996).

[16] *Frontiero*, 411 U.S. at 686.

[17] *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 745 (1982).

application when the state law has nothing to do with performance or contribution to a particular role in society but deals only with protecting persons against self-harm. Thus, this case is unlike *Frontiero* or *Hogan*, which applied heightened scrutiny to laws dealing with societal contribution, and is like *Vacco*, which applied rational basis review to a law that prohibited assisted self-harm.

E. Recognizing Suspect Class Status Based on Subjective Identity Undermines the Rule of Law.

If the Court accepts Petitioners' argument, future litigants will claim a law violates equal protection whenever it prohibits them from acting out their self-defined identity, especially when those acts have been historically prohibited. Any legal prohibitions of those acts would have to run the gauntlet of heightened scrutiny.

In this era of identity politics, considering sexuality alone, a vast range of new and increasingly bizarre identities are being recognized by the official medical establishment.[18] Indeed, many psychiatrists

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[18] *See* Natl. Inst. of Health, Office of Diversity, Equity and Inclusion, Sexual and Gender Minority Safezone, Terminology, https://www.edi.nih.gov/people/sep/lgbti/safezone/terminology last visited Aug. 23, 2024) [hereinafter *NIH Terminology*]. This publication describes well more than a dozen different sexual identities, including agender, aromantic, asexual, bi-curious, bigender, bisexual, demisexual, gay, gender neutral, gender noncomforming, genderfluid, genderqueer, heteroflexible, pansexual, polyamorous, queer, stud, transgender, two-spirit, and others.

and psychologists consider sexual identity to exist on an individuated spectrum and object to defining discrete categories of sexual identity.[19] This means innumerable persons could qualify for quasi-suspect class status under Petitioners' argument.

In addition to identities grounded in sexual feelings, according to the National Institutes of Health, there exists a vast expanse of identities grounded in characteristics unrelated to sex.[20] Such categories include groupings related to neurology (e.g., neurodiversity, ADHD, dyslexia), weight (e.g., obesity or its "less stigmatizing, more inclusive" synonym, "people with higher weight"),[21] drug and alcohol use (e.g., "alcohol use disorder," described as "a complex brain disorder rather than a moral failing or personality flaw" and "person in recovery," or "person who uses drugs"),[22] and many others.

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[19] *See* B.B. Lahey, et al., *Seven reasons why binary diagnostic categories should be replaced with empirically sounder and less stigmatizing dimensions*, JCPP ADV. (Oct. 9, 2022) (Ver. 2(4)), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10242872 ("Categorical diagnoses ignore the unique needs of the individual . . . encourage the reification of psychological problems and promote viewing them as unchanging rather than dynamic . . . [and] promote stigmatizing views of persons with problems as being fundamentally different from others.")

[20] *See*, *generally*, Natl. Inst. of Health Style Guide, https://www.nih.gov/nih-style-guide (last accessed Aug. 23, 2024) [hereinafter *NIH Style Guide*].

[21] *NIH Style Guide*, https://www.nih.gov/nih-style-guide/obesity.

[22] *Id.* at https://www.nih.gov/nih-style-guide/alcohol-substance-use.

If Petitioners, as children, are a quasi-suspect class, there is no reason these other identity categories, especially adults in those categories, may not also gain newly protected status. Petitioners' novel equal protection argument, if accepted, would open the door to a multitude of new suspect or quasi-suspect classes and could privilege a vast range of historically prohibited conduct. If the Court opens this Pandora's box, the federal courts will be very busy indeed.

F. Petitioners' equal protection argument is a disguised fundamental right argument.

In the district court, in addition to their equal protection claim, the Petitioners argued they had a fundamental right to assisted body alteration under substantive due process. To give the United States a statutory basis to intervene on their behalf, Petitioners had to couch their certiorari petition in terms of equal protection instead of substantive due process.[23] However, the distinction between Petitioners' equal protection claim and their substantive due process claim is form over substance.

Petitioners ask the Court to recognize that minors' mental distress about their sex makes them a quasi-suspect class such that they cannot be barred from assisted self-harm unless SB1 survives heightened

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[23] *See* Pet.12, n. 4. "Because the United States intervened under 42 U.S.C. 2000h-2, which applies to suits 'seeking relief from the denial of equal protection of the laws,' it has not addressed that separate due-process claim."

scrutiny. Petitioners admit this class-defining distress is not fixed from birth. It fluctuates over time and between members of the putative class. Pet.25; Pet.App.45a-46a. Thus, the putative class lacks the inborn immutable characteristic required for traditional suspect class status. If the Court accepts that a distressing desire for these medical procedures defines a quasi-suspect class such that any law banning them must satisfy heightened scrutiny, that is no different than recognizing a fundamental right to the procedures.[24]

At times, some members of this Court have poetically invoked fundamental rights in boundless language,[25] but more recently the Court has emphasized that such undisciplined fundamental rights doctrines are inimical to ordered liberty:

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[24] As the court of appeals reasoned:

> One simply cannot define, or create, a protected class solely by the nature of a denied medical benefit: in this instance childhood treatment for gender dysphoria. Else every medical condition, procedure, and drug having any relation to biological sex could not be regulated without running the gauntlet of skeptical judicial review.

Pet.App.35a-36a.

[25] *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) *and Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (Douglas, J.) (finding vagrancy laws violated due process under the "void for vagueness" doctrine because they infringed upon the "right to wander" and citing in support writings of Walt Whitman, Vachel Lindsey, and Henry David Thoreau).

> *Casey* elaborated: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Ibid.* The Court did not claim that this broadly framed right is absolute, and no such claim would be plausible. While individuals are certainly free *to think* and *to say* what they wish about "existence," "meaning," the "universe," and "the mystery of human life," they are not always free *to act* in accordance with those thoughts. License to act on the basis of such beliefs may correspond to one of the many understandings of "liberty," but it is certainly not "ordered liberty."

Dobbs, 597 U.S. at 255-56 (2022); *see also West Coast Hotel v. Parish*, 300 U.S. 379, 391 (1937) (ending the now-discredited *Lochner* era of judicially invented extra-textural rights and cautioning that "[t]here is no absolute freedom to do as one wills . . . *Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.*") (emphasis added) (internal citations and quotation marks omitted).

The Court has adopted a two-step inquiry that "disciplines the substantive due process analysis." First, it insists on a "careful description of the asserted fundamental liberty interest." *Dep't of State v. Munoz*, 144 S. Ct. 1812, 1822 (2024) (citing *Washington v. Glucksberg*, 521 U.S. 702, 720-721) (internal quotation marks omitted). Second, it

stresses that "the Due Process Clause specially protects" only "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Id.*

There is no deeply rooted history[26] of children in this country being allowed to alter their bodies because they are distressed about their birth sex. Nor, more broadly, is there any deeply rooted history of mental states conveying fundamental rights.

No doubt realizing this, Petitioners couch their claims in terms of equal protection to make the historical factor work for them instead of against them. They argue that children's historical lack of access to sex reassignment makes them a historically oppressed class. Pet.24. But it would be absurd for this Court to temper the substantive due process doctrine with a historical safeguard only to allow the absence of historical examples to work the opposite way in an equal protection argument. Whether couched in terms of equal protection or substantive due process, the relief sought is functionally the same. Petitioners are functionally asking the Court to recognize a bizarre, ahistorical fundamental right to chemically alter children's natural biological sex. Equal protection of the law is not really in issue here. The Court should look to the function of Petitioners' argument and not be misled by labeling.

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[26] *Dobbs*, overruling *Roe*, demonstrates that "deeply rooted" must involve more than a few decades in the late 20th and early 21st centuries. *Roe v. Wade,* 410 U.S. 113 (1973), overruled by *Dobbs*, 597 U.S. 215, and holding modified by *Casey*, 505 U.S. 833.

III. Professional Medical Associations Must Not Dictate Policy or Legal Judgments

All parties surely recognize that the mental state labeled "gender dysphoria" can produce distress. From that point their disparate *values* lead them to different judgments. The people of Tennessee value objective standards, self-control, maturity, and natural biological development. They adjudge that it is harmful for a minor to chemically alter their healthy body to address a distressed mind, especially because minors do not yet possess the maturity to exercise self-control. They reflected those values in a democratically enacted law. Petitioners[27] and their medical allies[28] do not contest that gender dysphoric

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[27] Pet.App.45a-46a; *see also* Pet.25.

[28] Petitioners' support their position with the Declaration of Deanna Adkins, M.D., and repeated references to the "scientific" and "medical" consensus of various professional associations. Pet.4-8. Dr. Adkins states that it is impossible to change a "gender dysphoric" person's "gender identity," and that "being transgender is not itself a mental disorder or a medical condition to be cured.' Pet. App. 251a. In support of these statements, she cites the "Endocrine Guidelines." W.C. Hembree, et al., *Endocrine treatment of gender-dysphoria/gender incongruent persons: An Endocrine Society clinical practice guideline*, 102 J CLIN ENDOCRINOL. METAB. 11, Vol. 102, at 3869–3903 (Nov. 1, 2017), https://academic.oup.com/jcem/article/102/11/3869/4157558 [hereinafter *Endocrine Guidelines*].

Dr. Adkins' opinion is contradicted by the very guidelines upon which she relies, which state "With current knowledge, we cannot predict the psychosexual outcome for any specific child. Prospective follow-up studies show that childhood [gender dysphoria]/gender incongruence *does not invariably persist into adolescence and adulthood* (so-called "desisters")." *Id.* (emphasis

minors can later change their minds. Yet, they value subjective identity and its outward expression over objective standards, to the point of chemically altering children's natural biological development before they become adults.

A cursory review of the submissions of Petitioners' expert and allied medical association materials reveals that they are not *descriptive* statements of fact by unbiased scientists applying the scientific method. Rather, they are *normative* policy statements by political advocacy organizations. Take, for example, this clearly political statement from the introduction to the WPATH guidelines:

> WPATH recognizes that health is not only dependent upon high-quality clinical care but also relies on social and political climates that ensure social tolerance, equality, and the full rights of citizenship. Health is promoted through public policies and legal reforms that advance tolerance and equity for gender diversity and that eliminate prejudice, discrimination, and stigma. WPATH is

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added). This contradiction is likely why Petitioners themselves do not contest that "gender dysphoria" is *not* immutable. Nevertheless, this flawed assumption dictates the rest of Dr. Adkins' opinions, which amount to the baseless contention that the "gender dysphoric" minor's mind cannot be changed, so the body should be chemically altered to conform to the distressed mind.

> committed to *advocacy* for these policy and legal changes."[29]

Generating a hypothesis and testing it against observation, which is what science is, cannot determine that "being transgendered" is "not a disorder"[30] or that "health is promoted through public policies and legal reforms that advance tolerance and equity for gender diversity . . . ."[31] These are not empirical observations reached through the scientific method. They are value statements reflecting political biases. Science can only tell us what is, not what ought to be. Science cannot make ethical judgments.[32] Medical science can tell us if administration of chemical agents *could* make a child's body take on characteristics opposite from their birth sex, but science cannot tell us whether that *should* be done—that is a value-based policy judgment for legislators.

The court of appeals correctly refused to allow Petitioners' experts and allied medical associations to

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[29] E. Coleman, et al., *Standards of Care for the Health of Transgender and Gender Diverse People*, Ver. 8, INTERNATIONAL JOURNAL OF TRANSGENDER HEALTH, Vol. 23, at S1-S259 (Sept. 15, 2022), https://doi.org/10.1080/26895269.2022.2100644 [hereinafter *WPATH SOC 8*] (emphasis added).

[30] *See*, *supra*, n. 28.

[31] *See*, *supra*, n. 29 and accompanying text.

[32] K. Popper, The Open Society and Its Enemies (1945), Chapter 9, note 11 (agreeing that "ethical problems cannot be solved by the rational methods of science . . . ."), https://archive.org/stream/in.ernet.dli.2015.59272/2015.59272.The-Open-Society-And-Its-Enemies_djvu.txt.

dictate value-laden policy judgments to Tennessee or to the Courts, cautioning that "expert consensus, whether in the medical profession or elsewhere, is not the North Star of substantive due process,[33] lest judges become spectators rather than referees in construing our Constitution." Pet.App.29a-30a (citing *Dobbs*, 597 U.S. at 272 (criticizing use of "the 'position of the American Medical Association'" to indicate "the meaning of the Constitution") *and Gonzales v. Raich*, 545 U.S. 1, 27-28 (2005) (explaining that Congress may prohibit marijuana use even when doctors approve its use for medical purposes)).

As the court below found, Tennesseans' elected representatives confronted a policy problem that is a question of values, not science. They made a rational,[34] evenhanded policy judgment. This Court's

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[33] Although the court of appeals referenced the substantive due process analysis, the point is the same for Petitioner's equal protection argument.

[34] Petitioners insinuate that SB1 is unscientific and irrational because it conflicts with the WPATH guidelines. In addition to consisting primarily of value-based policy judgments, those guidelines are largely discredited pseudo-science. *See*, *generally*, Mia Hughes, *The WPATH Files, Pseudoscientific Surgical and Hormonal Experiments on Children, Adolescents, and Vulnerable Adults* 3 (last accessed Aug. 28, 2024), https://static1.squarespace.com/static/56a45d683b0be33df885def6/t/6602fa875978a01601858171/1711471262073/WPATH+Report+and+Files111.pdf.

In any case, by labeling the positions of these associations as unassailable "science," Petitioners commit the logical fallacy of appeal to authority. Science is not about counting heads. As

resolution of the constitutional questions is a legal question to be answered by judges, not "experts" or medical associations. "[A]llowing an expert to give his opinion on the legal conclusions to be drawn from the evidence both invades the court's province and is irrelevant." *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983). *Cf. Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2267 (2024) ("[E]ven when an ambiguity happens to implicate a technical matter, it does not follow that Congress has taken the power to authoritatively interpret the statute from the courts and given it to the agency.").

One of darkest chapters in the history of this Court was when it allowed the medical and scientific consensus to dictate policy and legal judgments, leading to the horrors of eugenical sterilization. *See Buck v. Bell*, 274 U.S. 200, 207 (1927) (relying on the "scientific" consensus of the 1920s to uphold forced sterilization and declaring infamously that "[t]hree generations of imbeciles is enough"). "[W]ithin the U.S. and European scientific communities these ideas [eugenics] were not fringe but widely held and taught

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Nobel laureate physicist Richard Feynman observed, "[s]cience is the belief in the ignorance of experts." R. Feynman, *What is Science*, http://www.feynman.com/science/what-is-science/ (last accessed Aug. 23, 2024).

The psychological profession should set its own house in order before attempting to dictate to the people of Tennessee or to the courts in the name of "science," as it suffers from a replication crisis in which some 65% of its published results cannot be replicated. *See* William A. Wilson, *Scientific Regress*, First Things, May 2016, https://www.firstthings.com/article/2016/05/scientific-regress.

in universities" and by the time the scientific consensus changed, "over 60,000 forced sterilizations were already performed in the United States on mostly poor (and often African-American) people confined to mental hospitals."[35]

Even if the Court accepts the medical premise that children are distressed by their natural bodies, it does not follow *as a matter of medicine or science* that the Constitution guarantees them a right to chemically alter their growing bodies before adulthood. The policy implications of this distress are determinations for legislators and their constitutional implications are questions for this Court. Petitioners' "experts" and supporting medical associations' opinions on these ultimate legal issues are irrelevant. This Court should not be cowed by a politicized, fabricated medical consensus.

CONCLUSION

Several core tenets of our legal system are under threat in this case. Children do not have the maturity and self-restraint to make life-altering decisions. They sometimes need the protection of the law to avoid self-harm and may not be assisted in that self-harm by lawless adults. When constitutionally enacted laws establish objective, evenhanded standards of harm, those standards should be followed, and should not be voided by medical or judicial fiat based on subjective identity claims.

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[35] Steven Farber, U.S. SCIENTISTS' ROLE IN THE EUGENICS MOVEMENT (1907-1939): A CONTEMPORARY BIOLOGIST'S PERSPECTIVE, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2757926/.

In our legal system one may *think* or *feel* whatever one wants, but one may not *do* whatever one wants. Desires do not create constitutional rights, especially where children are concerned. There are exceptions for fundamental rights explicitly stated in the constitutional text or deeply rooted in the history of the nation. Subjective claims of identity satisfy neither of those tests. If they were held to do so, the rule of law would be undermined, as every individual would become a law unto himself.

The decision of the court below should be affirmed.

October 9, 2024 Respectfully submitted,

TREY DELLINGER
Counsel of Record for Amici Curiae
Senior Legal Fellow
American Family Association, Inc.
AFA Action, Inc.
108 Parkgate Drive
Tupelo, Mississippi 38801
662-821-2024 ext. 523
trdellinger@afa.net

APPENDIX

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Alabama Legislature

Senator Shay Shelnutt, primary sponsor of SB 184

Senate President Pro Tempore Greg J. Reed, supported and voted in favor

Senator Larry Stutts, supported and voted in favor

Majority Leader Representative Scott Stadthagen, supported and voted in favor

Representative Russell Bedsole, supported and voted in favor

Representative Chip Brown, supported and voted in favor

Representative Jim Carns, supported and voted in favor

Representative Danny Crawford, supported and voted in favor

Representative Tracy Estes, supported and voted in favor

Representative Corey Harbison, supported and voted in favor

Representative Jamie Kiel, supported and voted in favor

Representative Ed Oliver, supported and voted in favor

Representative Phillip J. Pettus, supported and voted in favor

Representative Chris Sells, supported and voted in favor

Arkansas General Assembly

Representative Robin Lundstrum, primary sponsor of HB 1570

(Former) Senator Jason Rapert, cosponsor

Florida Legislature

Representative Doug Bankson, supported and voted in favor of SB 254

Representative Berny Jacques, supported and voted in favor

Georgia General Assembly

Majority Caucus Vice Chair Senator Matt Brass, primary sponsor of SB 140

Idaho Legislature

Representative Bruce Skaug, primary sponsor of HB 71

Representative Joe Alfieri, cosponsor

Representative Kevin Andrus, cosponsor

Representative Vito Barbieri, cosponsor

Representative Jacyn Gallagher, cosponsor

Representative Dale Hawkins, cosponsor

Representative Mike Kingsley, cosponsor

Representative Elaine Price, cosponsor

Representative Jordan Redman, cosponsor

Representative Heather Scott, cosponsor

Representative Charlie Shepherd, cosponsor

Representative Julianne Young, cosponsor

Senator Lori Den Hartog, primary Senate sponsor

Senator Tammy Nichols, cosponsor

Indiana General Assembly

Senator Tyler Johnson, M.D., primary sponsor of SB 480

Assistant Majority Floor Leader Representative Joanna King, primary House sponsor

Iowa General Assembly

Senator Sandy Salmon, committee cosponsor of SF 538

Representative Steven Holt, floor manager of SF 538

Kentucky General Assembly

Senator Gary Boswell, sponsor of SB 150

Senator Robby Mills, sponsor

Louisiana State Legislature

Representative Gabe Firment, primary sponsor of HB 463

Majority Leader Representative Mark Wright, supported and voted in favor

Mississippi Legislature

Representative Gene Newman, primary sponsor of HB 1125

(Former) Speaker Philip Gunn, cosponsor

(Former) Representative Nick Bain, cosponsor and floor manager

Representative Randy Boyd, supported and voted in favor

Representative Dan Eubanks, cosponsor

Representative Jill Ford, cosponsor

Representative Bill Kinkade, cosponsor

Representative Mark Tullos, cosponsor

Senator Joey Fillingane, floor manager

Senator Angela Hill, supported and voted in favor

Missouri General Assembly

Senator Mike Moon, primary sponsor of SB 49

Representative Brad Hudson, joint House sponsor

Montana Legislature

Senator John Fuller, primary sponsor of SB 99

Nebraska Legislature

Senator Kathleen Kauth, primary sponsor of LB 574

Senator Joni Albrecht, cosponsor

Senator Steve Halloran, cosponsor

North Carolina General Assembly

Senator W. Ted Alexander III, supported and voted in favor of HB 808

North Dakota Legislative Assembly

Representative Lori VanWinkle, primary sponsor of HB 1254

Representative Donna Henderson, supported and voted in favor

Representative Jeff Hoverson, supported and voted in favor

Representative SuAnn Olson, supported and voted in favor

Representative Kelby Timmons, supported and voted in favor

Ohio General Assembly

Representative Gary Click, primary sponsor of HB 68

Representative Sarah Fowler Arthur, cosponsor

Representative Bill Dean, cosponsor

Representative Jennifer Gross, cosponsor

Representative Beth Lear, cosponsor

Representative Bernard Willis, cosponsor

Senator Sandra O'Brien, cosponsor

Oklahoma Legislature

Senator Julie Daniels, primary sponsor of SB 613

Representative Toni Hasenbeck, primary House sponsor

South Carolina Legislature

Majority Leader Representative David Hiott, primary sponsor of HB 4624

Representative John R. McCravy III, cosponsor

South Dakota Legislature

Senator Al Novstrup, primary Senate sponsor of HB 1080

Texas Legislature

Senator Bob Hall, coauthor of SB 14

Representative Steve Toth, joint House author/sponsor

Utah Legislature

Representative Katy Hall, primary House sponsor of SB 16

Representative Kay Christofferson, supported and voted in favor

Representative Trevor Lee, supported and voted in favor

West Virginia Legislature

Delegate Geoff Foster, primary sponsor of HB 2007

Wyoming Legislature

Senator Anthony Bouchard, primary sponsor of SF 99