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*.

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

BRIEF OF KENTUCKY, ARKANSAS, INDIANA, ALASKA, FLORIDA, GEORGIA, IDAHO, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VIRGINIA, WEST VIRGINIA, AND WYOMING AS AMICI CURIAE SUPPORTING RESPONDENTS

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INTERESTS OF AMICI CURIAE

This case, like so many others, comes down to who decides. Who decides how best to protect health and welfare? Who decides what to do when faced with scientific and medical uncertainty? And who decides what medical interventions can be used on children?

In a word, the States do. They get to decide those questions as a matter of state law. Medical interest groups do not make those calls. Nor do the courts—not even this one. In our federalist system, the States determine how to ensure that medical procedures performed within their borders are safe and beneficial, especially when there is medical uncertainty and especially when it comes to our children.

And that's a good thing. In this case, it means that the States can, and do, take different policy approaches to doctors giving hormones and puberty blockers to children with gender dysphoria while a scientific and policy debate over those interventions continues. On one side, over 20 States have enacted laws like Tennessee's that prohibit such interventions. On the other, at least 14 States have enacted laws protecting those interventions. That diverse approach is the result of our federalist system. It shows the system working. The people, through their elected state representatives, are hashing out what procedures are safe and beneficial for children suffering from gender dysphoria.

The amici States are actively involved in that discussion. And their sovereign prerogative to continue participating is very much at stake here. Indeed, many are defending their laws regulating the use of

puberty blockers and hormones for children with gender dysphoria. Those laws may rise or fall with Tennessee's. Kentucky, Arkansas, Indiana, and the other amici States therefore submit this brief so that they are not judicially ousted from the ongoing debate about what interventions are safe and beneficial for children.

SUMMARY OF THE ARGUMENT

Since the founding, the States have enacted health-and-welfare laws. Doing so falls within the heart of their police power. That's why, time and again, this Court has recognized the deference due. Only rational-basis review applies when States regulate medical professions or procedures. All the more so when a law involves areas of medical uncertainty or endeavors to protect children.

Our nation's history of the States ensuring that medicine is safe and beneficial drives the constitutional analysis here. It provides the historical backdrop for the equal-protection challenge to Tennessee's law. It shows just how jarring it would be to our federalist system to require States to permit puberty blockers and hormones for children with gender dysphoria. And it explains the Court's recognition in *Dobbs* and *Geduldig* that the "regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny," unless just a pretext. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022); *see Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

If the Court sweeps away all the history supporting the States' broad power to protect health and

safety, especially when it comes to medical uncertainty and children, then the consequences are clear. Perhaps most worrying, the Court would constitutionalize an issue of intense public and scientific debate best left to the political branches. The Court would remove from the people and their representatives the chance to weigh the scientific claims, decide how best to address the competing interests, and make the difficult policy decisions.

This Court's equal-protection doctrine confirms what history teaches—States get to decide whether children can receive puberty blockers and hormones for gender dysphoria. And that's true even if intermediate scrutiny applies. Intermediate scrutiny is designed to ferret out illegitimate government objectives or means. It does not strip States of the space needed to resolve competing scientific claims nor weigh States' policy decisions regulating medicine. That means, in applying intermediate scrutiny, the judicial role is to determine that there is substantial evidence behind a policy choice. The Constitution does not make the judiciary the final arbiter of ongoing scientific debates. And whatever else one might say, there is no doubt that a scientific debate continues over whether puberty blockers and hormones are safe and effective for children. That's reason enough to uphold Tennessee's law.

ARGUMENT

Tennessee's law prohibits medical interventions before age 18 that enable boys and girls to identify or attempt to live as members of the opposite sex. Tenn. Code Ann. § 68-33-103(a)(1)(A). The prohibited proce-

dures include both performing surgery and administering puberty blockers or hormones. *Id.* § 68-33-102(5).

To be sure, in today's political environment, Tennessee's law is controversial in some quarters. But that does not change its status as a health-and-welfare measure designed to protect children in an area of scientific and medical uncertainty. That situation is exactly when a State's authority to regulate is at its highest and a court's authority to scrutinize is at its lowest.

Yet the United States and private plaintiffs brush aside the sovereign stakes of this case. As the United States puts it: "No one doubts that States have a compelling interest in protecting minors and ample authority to regulate the practice of medicine. So long as a State does not legislate based on sex or transgender status, its regulations receive only deferential rational-basis review." U.S. Br. 19.

That passing statement is all the United States has to say about the States' sovereign authority to regulate medicine and protect children (and the private plaintiffs say just as little). But that dismissive approach neglects the role that the States have always played in regulating medicine, especially when faced with medical uncertainty and especially when protecting children. It ignores that heightened scrutiny does not apply to regulations of medical procedures that only one sex can undergo. And it discounts the conse-

quences if the Court overlooks the States' role. Besides, even if intermediate scrutiny applies, the States still get to act in areas of medical uncertainty.

I. Tennessee's law falls within the States' traditional authority to regulate medicine.

1. Over and over, the Court has made clear that States may regulate medicine to ensure it is safe and effective. Doing so falls squarely within their police power. And that is not up for debate.

Early on, the Court explained: "The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud." *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). And that power necessarily includes regulating medicine. "Care for the public health is something confessedly belonging to the domain of that power." *Hawker v. People of N.Y.*, 170 U.S. 189, 193–94 (1898). Indeed, the Court has described regulating the practice of medicine as "a vital part of a state's police power." *Barsky v. Bd. of Regents of Univ.*, 347 U.S. 442, 449 (1954). And the flipside is that "there is no right to practice medicine which is not subordinate to the police power of the states." *Lambert v. Yellowley*, 272 U.S. 581, 596 (1926).

Consider two examples. First, take the States' ability to regulate who can practice medicine. A State can, "for the protection of society," exclude individuals from practicing medicine if they lack a license or are otherwise unqualified. *Dent*, 129 U.S. at 123; *see also Collins v. Texas*, 223 U.S. 288, 296 (1912). And it can do so for "all professions concerned with health."

Barsky, 347 U.S. at 449; *see also McNaughton v. Johnson*, 242 U.S. 344, 346 (1917) (optometry); *Graves v. Minnesota*, 272 U.S. 425, 427 (1926) (dentistry).

In that vein, a State can ensure not only that a physician "possess[es] a knowledge of diseases and their remedies" but also that he "may *safely* be trusted to apply those remedies." *Hawker*, 170 U.S. at 194 (emphasis added). Ensuring safety in medicine is therefore the key. The States' police power extends to regulating the medical profession precisely because it helps ensure "the lives and health of the people." *Watson v. Maryland*, 218 U.S. 173, 176 (1910); *see also Richardson v. State*, 2 S.W. 187, 188 (Ark. 1886); *Matthews v. Murphy*, 63 S.W. 785, 786 (Ky. 1901).

Second, turn to the States' authority to regulate drugs. Direct regulation of potentially dangerous medical treatments like providing drugs is another critical way that the States ensure safety in medicine. As the Court has explained, it "is, of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions." *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977). Or put differently: 'There can be no question of the authority of the state in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit[-]forming drugs." *Robinson v. California*, 370 U.S. 660, 664 (1962) (quoting *Minnesota ex rel. Whipple v. Martinson*, 256 U.S. 41, 45 (1921)). That power—needed to protect "the public health and welfare"—is "too firmly established to be successfully called in question." *Id.* (quoting *Whipple*, 256 U.S. at 45).

That's why the Tenth Circuit has held that there is no individual right to elect a drug or treatment that the government has prohibited. A patient's "selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health." *Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir. 1980). So the government may "limit the patient's choice of medication." *Id.*

And it's why the en banc D.C. Circuit has held much the same. There is no "affirmative right of access to particular medical treatments reasonably prohibited by the Government." *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 710 (D.C. Cir. 2007) (en banc). In so holding, the D.C. Circuit examined our nation's history and tradition, concluding that the government has long regulated drugs based on "the risks associated with both drug safety and efficacy." *Id.* at 703. For example, one colony's 1736 law "addressed the dispensing of more drugs than was 'necessary or useful' because that practice had become 'dangerous and intolerable.'" *Id.* at 704 (citation omitted). And by 1870, "at least twenty-five states or territories had statutes regulating adulteration (impure drugs), and a few others had laws addressing poisons." *Id.* (citation omitted). In other words, history shows the States responding to risks in medical treatments as they became known. *Id.* And critically, it shows this Court giving the States the latitude to do so.

Such deference is even more warranted when it comes to situations of medical uncertainty and to protecting children. A few words on both. First, the Court has repeatedly noted the high level of deference due when States regulate in areas in which the effects of

medicine are unknown. It "has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (collecting cases). Disagreement by health professionals does not "tie [a] State's hands." *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997). Rather, "it is precisely where such disagreement exists that legislatures have been afforded the widest latitude." *Id.* That is the "traditional rule." *Gonzales*, 550 U.S. at 163; *see also Lambert*, 272 U.S. at 597 (explaining how it would "be strange" if Congress could not act when medical authorities conflict).

Second, the Court has made clear the States' role in "preserving and promoting the welfare of the child." *Schall v. Martin*, 467 U.S. 253, 265 (1984) (citation omitted). Indeed, States have "an urgent interest" in children's welfare. *Lassiter v. Dep't of Soc. Servs. of Durham Cnty.*, 452 U.S. 18, 27 (1981). And their "authority over children's activities is broader than over like actions of adults." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). No doubt, that's because children are different than adults—their bodies and minds are not yet fully developed.

That difference matters in the medical context. The States can and do prohibit medical interventions for children but not adults or regulate them differently. *E.g.*, Tenn. Code Ann. §§ 33-8-301 (electroconvulsive therapy), 33-8-315 (child lobotomies). In fact, the Court has even held that States can do the opposite. In some cases, a State can require a medical procedure on adults but exempt children. *Jacobson v. Massachusetts*, 197 U.S. 11, 30 (1905) ("[T]here are obviously reasons why regulations may be appropriate

for adults which could not be safely applied to persons of tender years."). If a State has deference in exempting children from an otherwise required intervention, it likewise has deference in prohibiting a medical intervention for children otherwise allowed for adults.

2. Now compare Tennessee's law to all those circumstances in which deference is due. It is a law regulating medicine within the heartland of the States' police power. It fits within the long tradition of States ensuring that medicine is safe and beneficial. It concerns an area in which there is scientific and medical disagreement. And it regulates a medical intervention for children. Adding all those circumstances up, there should be layer after layer of deference due.

But the United States and private plaintiffs disagree. As they see it, *no* deference should be given simply because of their equal-protection challenge. *E.g.*, U.S. Br. 19. That could not be more wrong.

For starters, the Court has long applied deferential review to equal-protection challenges of regulations involving medicine. Consider *Watson* for example. There, the Court upheld a state law exempting some physicians from a registration requirement. *Watson*, 218 U.S. at 176. The Court explained that the "regulations of a particular trade or business essential to the public health and safety [are] within the legislative capacity of the state in the exercise of its police power" and that classifications need only a "reasonable basis." *Id.* at 178. Put differently, "the details of such legislation rest primarily within the discretion of the state legislature." *Id.* at 177. And the Court has reasoned similarly for other equal-protection challenges to regulations of the medical profession. *See*

Crane v. Johnson, 242 U.S. 339, 344 (1917) ("We cannot say that the state's estimate of the practices and of their differences is arbitrary, and therefore beyond the power of government."); *McNaughton*, 242 U.S. at 349.

The challengers' main response to that caselaw is that the traditional deference given to state regulations of medicine disappears altogether whenever a law classifies based on sex. But Tennessee's law does not classify based on sex.

In the United States' view, because a girl cannot get puberty blockers or testosterone to enable her to identify or live as a boy, but a boy can, then Tennessee's law discriminates based on sex. U.S. Br. 21–22. And the same argument in the United States' view goes for a boy: he cannot get puberty blockers or estrogen to enable him to identify or live as a girl, but a girl can. On the surface, that framing implicates a child's sex. But on closer look, the framing is wrong. All Tennessee's law does is regulate medical interventions for a particular purpose in an evenhanded way based on biological differences.

Under Tennessee's law, there are two relevant prohibited procedures. First, a boy cannot use puberty blockers and estrogen to identify or live as "a purported identity inconsistent with" his sex. Tenn. Code Ann. § 68-33-103(a)(1)(A). But only one sex can undergo that medical procedure: males. Biology dictates as much. Second, a girl cannot use puberty blockers and testosterone to identify or live as "a purported identity inconsistent with" her sex. *Id.* But again, only one sex can undergo that procedure: females. Biology also dictates as much.

That means the United States' argument runs directly into the deference owed to the States' regulation of medicine. Not only have the States long regulated medicine, but they have long done so for procedures, like those here, that only one sex can undergo. Abortion is the prime example. No doubt, that's a medical procedure that only women can undergo. And the Court in *Dobbs* thoroughly examined the history of state regulations of that procedure. *Dobbs*, 597 U.S. at 241. For example, when the Fourteenth Amendment was ratified, "three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow." *Id.* And the Court did more than just recount the history. It definitively foreclosed any equal-protection claim that might try to take the place of *Roe*.

Based on its precedent, the Court held that "abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications." *Id.* at 236 (citation omitted). That is because the "regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'"[1] *Id.*

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[1] The United States does not argue pretext, but the private plaintiffs do. L.W. Br. 33–34. There are a host of problems with that argument. Not only was it not pressed below, but the argument also runs headlong into the presumption of legislative good faith. That presumption requires courts to "draw the inference that cuts in the legislature's favor when confronted with evidence that could plausibly support multiple conclusions." *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 10 (2024). So even if there

(alteration in original) (quoting *Geduldig*, 417 U.S. at 496 n.20).

The result is that the challengers' frontline equal-protection argument falls under *Dobbs* and *Geduldig*'s holdings. And neither the United States nor the private plaintiffs urge the Court to overturn those holdings—for good reason.[2] Giving the States the same degree of deference when they regulate procedures only one sex can undergo as they usually get for medical regulations maps onto the history discussed. Nothing in passing the Fourteenth Amendment remotely suggests that the Equal Protection Clause was meant to override the States' traditional role in regulating medicine—not when the medical regulation is based on the "enduring" biological "differences between men and women." *United States v. Virginia* (*VMI*), 518 U.S. 515, 533 (1996).

As the Court explained long ago, "neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health,

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were some evidence that suggests pretext (there's not), at a minimum that evidence also supports Tennessee doing its level best to protect children.

[2] Instead, they argue that *Dobbs* and *Geduldig* do not apply because both sexes can receive the medical interventions in question. *E.g.*, U.S. Br. 26. But that conflates the medical interventions, which only one sex can undergo, with the drugs used in the interventions. And we know that the former is what matters. The Court in *Dobbs* looked to the "medical procedure" being regulated—not the drugs used in it. 597 U.S. at 241. And that makes sense. It is the procedure (that is, the specific intervention being done) that must factor in biological difference and whether only one sex can undergo it.

peace, morals, education, and good order of the people." *Barbier v. Connolly*, 113 U.S. 27, 31 (1884); *see also Terrace v. Thompson*, 263 U.S. 197, 216–17 (1923). To be sure, "discriminating against some and favoring others, is prohibited." *Barbier*, 113 U.S. at 32. But "legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." *Id.*

That historical understanding largely underlies why regulations of medical procedures that only one sex can undergo are not subject to heightened scrutiny—as it should. As Chief Judge Sutton noted below, the challengers have not argued "that the original fixed meaning" of the Equal Protection Clause "covers" their claim. *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 471 (6th Cir. 2023). And as the history recounted in *Dobbs* shows, the States have regulated medical procedures that only one sex can undergo since before the Fourteenth Amendment was ratified. That longstanding practice is no different from the tradition of States regulating medical professions and procedures or in areas of medical uncertainty and concerning children. And so the "traditional rule" applies to Tennessee's law. *Gonzales*, 550 U.S. at 163. Deference is due several times over.

3. If the Court overlooks that, if it waves away the history of deference owed to States ensuring medical interventions are safe and beneficial, then the consequences are clear.

For one thing, it would mean heightened scrutiny would logically apply to other laws regulating medical

procedures that only one sex can undergo. From pregnancy, to abortion, to even the prohibition in Tennessee's law on sex-transition surgeries for boys and girls, heightened scrutiny would logically apply. And for another, it would mean the Court inserting itself right in the middle of the public debate on transgender issues. Of course, that includes a host of topics—from bathrooms, *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020), to healthcare-plan coverage, *Kadel v. Folwell*, 100 F.4th 122, 133 (4th Cir. 2024) (en banc), to sports, *B.P.J. v. W.V. State Bd. of Educ.*, 98 F.4th 542, 556 (4th Cir. 2024), to all manner of things in between. But step back and look at the big picture.

The Court would remove the debate over such issues from the democratic process. It would sideline the States in an area where their power to legislate should be at its peak. And it would impose a judicial straitjacket across the nation, largely cutting off the chance for diverse approaches. That is the opposite of how our system is supposed to work. The States are meant to serve "as laboratories for devising solutions to difficult legal problems." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (citation omitted). Them doing so is one of the "happy incidents of the federal system." *Whalen*, 429 U.S. at 597 n.20 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). It lets the people try different approaches without affecting the whole nation in the hope of finding lasting solutions. And that experimentation is not something the Court should lightly cut off. "To stay experimentation in things social and economic is a grave responsibility." *Id.* (citation omitted).

Chief Judge Sutton said it well below. "Given the high stakes of these nascent policy deliberations—the long-term health of children facing gender dysphoria—sound government usually benefits from more rather than less debate, more rather than less input, more rather than less consideration of fair-minded policy approaches." *L.W.*, 83 F.4th at 472. The ability of the States to engage in that debate and take those different policy approaches is a "key premise" of our federalist system. *Id.* That way, the "people's electoral representatives [can] identify the strengths and weaknesses of any policy," leaving "the antidote for mistakes [to] the passage of time and the good sense and self-interest of election-tenured public officials to fix them." *Id.*

Or take the D.C. Circuit's description in *Abigail Alliance*. "The Alliance's arguments about morality, quality of life, and acceptable levels of medical risk are certainly ones that can be aired in the democratic branches, without injecting the courts into unknown questions of science and medicine." *Abigail Alliance*, 495 F.3d at 713. No doubt, that is because "the democratic branches are better suited to decide the proper balance between the uncertain risks and benefits of medical technology, and are entitled to deference in doing so." *Id.*

Or finally, consider how Judge Wilkinson put it in *Kadel*. "Plaintiffs envision an Equal Protection Clause that is dogmatic and inflexible, one that leaves little room for a national dialogue about relatively novel treatments with substantial medical and moral implications." *Kadel*, 100 F.4th at 193 (Wilkinson, J., dissenting). If the Court adopts such an approach, that would "encroach on a State's prerogative under its

basic police power to safeguard the health and welfare of its citizens." *Id.* Indeed, the arguments over "puberty blocking drugs, cross-sex hormones, and gender reassignment surgery" involve "matters of significant scientific debate and uncertainty." *Id.* And that means arguments to a court "are advanced in the wrong forum. The right forum is a legislative hearing." *Id.*

If the Court holds otherwise and constitutionalizes this issue, then it will commit the cardinal sin of *Roe* all over again. Rather than expanding substantive due process to intrude on the States' authority, this time it would expand equal protection. But the result would be the same. The Court just got out of the middle of deciding one issue of intense public debate that is had no business being in. *Dobbs*, 597 U.S. at 232. It should not step into the middle of another one.

The Court could not have been clearer in *Dobbs*. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting." *Id.* (citation omitted). Transgender issues are among those important questions. They are some of the "numerous other difficult questions of American social and economic policy that the Constitution does not address." *Id.* at 338 (Kavanaugh, J., concurring). So they are rightly left to "the people and their elected representatives to resolve through the democratic process." *Id.* That is who decides.

To hold otherwise would do exactly what the Court admonished the *Roe* Court for doing. Or take an even more recent example. Just last term, the Court reversed the Ninth Circuit for expanding the Eighth

Amendment to short-circuit the democratic process as it relates to homelessness. *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2216 (2024). The Ninth Circuit's decision did not encourage "'productive dialogue' and 'experimentation' through our democratic institutions." *Id.* at 2224 (citation omitted). Instead, under the decision, courts froze their own preferences and rules in place by judicial "fiat." *Id.* (citation omitted). And those rules only "produced confusion," given that the issuing courts were "removed from realities on the ground." *Id.* Worse still, they "interfered with 'essential considerations of federalism,' taking from the people and their elected leaders difficult questions traditionally" reserved to them. *Id.* (citation omitted). The Court ultimately recognized that people disagree over the best policy responses to homelessness. *Id.* at 2226. So they can experiment on different approaches and change them if they "find later another set works better." *Id.* The key is that, "in our democracy, that is their right." *Id.*

No less so than when regulating what medical procedures are safe and beneficial for children suffering from gender dysphoria.

II. Even under intermediate scrutiny, the equal-protection challenge fails.

States' traditional power to regulate medicine explains why rational-basis review applies. But even if the Court were to apply intermediate scrutiny, it should still uphold Tennessee's law. Intermediate scrutiny requires a court to determine whether a sex-based classification "serves important governmental objectives" and is "substantially related to the achievement of those objectives." *VMI*, 518 U.S. at 533

(citation omitted). That involves consideration of the legitimacy of the government's objective and chosen means, and the relational fit between the two. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (explaining that the government must show a "direct, substantial relationship between" its "objective and means"); *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 68 (2001) ("Having concluded that facilitation of a relationship between parent and child is an important governmental interest, the question remains whether the means Congress chose to further its objective—the imposition of certain additional requirements upon an unwed father—substantially relate to that end.").

Under this Court's caselaw, where a State's use of a sex-based classification is neither motivated by sex-based normative judgments or stereotypes nor carried out using sex as an awkward proxy for the State's true regulatory target, the classification survives heightened scrutiny. The lower-court decisions siding with plaintiffs challenging laws like Tennessee's have instead used heightened scrutiny's means-end-fit analysis to impermissibly convert the court's policy disagreement with the State's law into a constitutional problem. *See, e.g.*, *Doe v. Ladapo*, No. 4:23cv114-RH-MAF, 2024 WL 2947123, at *4–5 (N.D. Fla. June 11, 2024) (describing legislators and others who do not support puberty blockers and cross-sex hormone interventions as "transgender opponents" and commenting that "the arc of the moral universe is long, but it bends toward justice").

But this Court's sex-discrimination precedent has never given courts license to substitute their policy judgment for that of legislative bodies, especially on

disputed medical and scientific issues. In testing for a substantial relationship between a State's objective and chosen means of achieving it, this Court has always recognized that legislatures still get to resolve medical and scientific disagreements without second guessing by the courts. That principle makes all the difference here.

A. Intermediate scrutiny in sex-discrimination cases ferrets out illegitimate legislative objectives and means.

The courts siding against States that have enacted laws like Tennessee's have centered the intermediate-scrutiny analysis on testing the validity of States' policy and scientific or medical predictive judgments. *See, e.g.*, *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 921 (E.D. Ark. 2023) ("The State failed to meet [its] burden to show that the risks of [medical interventions for gender dysphoria] substantially outweigh the benefits."). But under this Court's caselaw, cases are won and lost on the legitimacy of the government's objective and means. When the government's objective is legitimate and its means are not mired with awkward sex-based proxies, this Court has not required that the government prove to statistical certainty that its chosen path is the best one or that its sex classification will ultimately accomplish its intended goal. Instead, a review of the caselaw reveals only two classes of cases where sex-based classifications are invalid.

1. The first category of sex-discrimination cases in which the government loses is where its objective is illegitimate. A sex-based classification must serve an "important governmental objective[ ]." *Sessions v. Morales-Santana*, 582 U.S. 47, 59 (2017). But this Court's

decisions do not weigh the relative level of an objective's importance, so long as the objective is not entirely arbitrary. *See, e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 211 n.9 (1977) ("[A]dministrative convenience and certainty of result have been found inadequate justifications for gender-based classifications."). Rather, they focus on ferreting out government objectives that are altogether illegitimate under the Equal Protection Clause.

The government invariably loses when its objective is rooted in a sex-based normative judgment concerning how men and women should behave, be regarded, or be treated simply by virtue of their sex. The caselaw has variously described these normative judgments as "outmoded notions of the relative capabilities of men and women," *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985), "gross, stereotyped distinctions between the sexes," *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973), and the "denigration of the members of either sex" by placing "artificial constraints on an individual's opportunity," *VMI*, 518 U.S. at 533.

In case after case, this Court's focus has been on identifying and eliminating those sex-based normative judgments. *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645, 648 (1972) (judgment that unmarried fathers, but not mothers, are presumably unsuitable parents); *Stanton v. Stanton*, 421 U.S. 7, 14 (1975) (reliance on "old notions" that "it is the man's primary responsibility to provide a home" and "girls tend to mature earlier than boys"); *Orr v. Orr*, 440 U.S. 268, 279 (1979) (a State's "preference for an allocation of family responsibilities under which the wife plays a dependent role"); *Caban v. Mohammed*, 441 U.S. 380, 388 (1979)

(judgment that "a natural mother, absent special circumstances, bears a closer relationship with her child than a father does" (cleaned up)); *Kirchberg v. Feenstra*, 450 U.S. 455, 459 (1981) (judgment that men, rather than women, should be designated as managers of community property); *Hogan*, 458 U.S. at 730 (the "old view that women, not men, should become nurses"); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 137–38 (1994) (stereotyped view of how men approach jury service).

In each case, the government lost not because it did a poor job of furthering the objective it set out to achieve, but because its objective was constitutionally illegitimate in the first place. When a State's objective seeks to impose or depends on these types of impermissible normative judgments and stereotypes, no "close means-end fit" can rescue it. *Sessions*, 582 U.S. at 68.

2. In the second category of sex-discrimination cases the government invariably loses, it acts in furtherance of what may well be a legitimate objective. But rather than drawing classifications to directly target the desired object of its regulation, the government instead uses sex as a clumsy proxy. *See Craig v. Boren*, 429 U.S. 190, 198 (1976) (explaining that statutes will be held invalid when they use sex "as an inaccurate proxy for other, more germane bases of classification"); *accord Hogan*, 458 U.S. at 726.

In numerous cases, this Court has held invalid well-meaning government action that used impermissible sex-based proxies. *See, e.g.*, *Frontiero*, 411 U.S. at 688 (using sex as a proxy for financial dependency); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 645 (1975)

(same); *Califano*, 430 U.S. at 214 (same); *Wengler v. Druggists Mut. Ins.*, 446 U.S. 142, 151 (1980) (same); *Craig*, 429 U.S. at 201 (sex as a proxy for propensity to drink and drive); *Califano v. Westcott*, 443 U.S. 76, 88 (1979) (sex as proxy for likelihood of familial desertion); *VMI*, 518 U.S. at 541 (sex as a proxy for suitableness for institution's educational model); *Sessions*, 582 U.S. at 67 (sex as a proxy for propensity to accept parental responsibility).

The rationale behind those cases is that the government has no legitimate reason to use sex as a proxy when it can simply regulate the actual target of its objective. *See Orr*, 440 U.S. at 281 (concluding there was "no reason . . . to use sex as a proxy for need" rather than examining an individual's circumstances); *Wienberger*, 420 U.S. at 653 (describing a sex-based distinction as "gratuitous" where "without it, the statutory scheme would only provide benefits to those men who are in fact similarly situated to the women the statute aids"). That rationale separates heightened scrutiny from rational-basis review, under which the State may rely on non-protected traits or behaviors as a proxy for the target of its objective. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 316 (1976) ("[W]here rationality is the test, a State 'does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.'" (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

B. Intermediate scrutiny does not allow courts to override legislative policy judgments, especially in resolving ongoing disputes about medical interventions.

As explained above, this Court's sex-discrimination caselaw has focused on eliminating sex-based normative judgments and the use of sex-based proxies in legislation. But the Court has recognized that States may draw sex-based distinctions without running afoul of those two constitutional guardrails. *See VMI*, 518 U.S. at 533 (recognizing that "[p]hysical differences between men and women . . . are enduring" and the "two sexes are not fungible" (citation omitted)). Indeed, sometimes doing so is necessary. As the Court has explained: "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it." *Tuan Anh Nguyen*, 533 U.S. at 73.

1. Across various contexts, this Court's precedents make clear that heightened scrutiny is not a license for courts to substitute their policy judgments for those of a legislature. *See, e.g.*, *Gonzales*, 550 U.S. at 161–64; *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 665 (1994). Indeed, so long as the government's objective is not constitutionally illegitimate and the government avoids using clumsy sex-based proxies, a sex-based classification will be upheld regardless of whether the Court thinks the policy is a good one.

Take *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), for example. There, the Court upheld a California statute that criminalized males engaging in sexual intercourse with an underage female, but not females for the reverse. *Id*. at 466

(plurality op.). As the lead opinion explained, the critical consideration was that the statute did not rest on "invidious[ ] discriminat[ion]" or "sexual stereotypes." *Id.* at 475–76. Rather, it reflected the biological reality that "young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse." *Id.* at 471; *see id.* at 482 (Blackmun, J., concurring) (judging the statute a "sufficiently reasoned" response to pressing problems). So assured that the legislature had a properly rooted rationale, the Court upheld the statute.

This approach holds even truer in the medical and scientific context. As history bears out, the "normal rule" is that courts must "defer to the judgments of legislatures 'in areas fraught with medical and scientific uncertainties.'" *Dobbs*, 597 U.S. at 274 (quoting *Marshall v. United States*, 414 U.S. 417, 427 (1974)). The United States treats heightened scrutiny as an exception. *See* U.S. Br. 19. But this Court reaffirmed its traditional approach once again in *Gonzales*, which involved a challenge to Congress's enactment of a ban on partial-birth abortion. 550 U.S. at 132. At the time, this Court applied heightened scrutiny to abortion regulations. *See id.* at 146, 156. Yet once again it did not attempt to resolve an ongoing "medical disagreement" about the "'necessity or safety'" of partial-birth abortions. *Id.* at 162, 164. Rather, the Court held that the "medical uncertainty" *itself* "provide[d] a sufficient basis" to uphold the challenged ban on a surgical intervention. *Id.* at 164. The Court thus deferred to Congress's evaluation of competing risk-benefit considerations rather than impose its own preferred view of the evidence.

2. This approach to heightened scrutiny makes sense—and not only because of the States' historic power to enact health-and-safety regulations for medicine. Institutionally, legislatures are "far better equipped than the judiciary" to set the rules for "complex and dynamic" issues. *Turner Broad. Sys.*, 512 U.S. at 665–66; *see Gonzales*, 550 U.S. at 164. Whereas courts are generally limited to considering the evidence that the parties present under time and resource constraints, *see Greenlaw v. United States*, 554 U.S. 237, 243 (2008), legislatures can conduct hearings, commission investigations, and direct agencies to collect missing data. Legislatures, moreover, need not wait for a new case or controversy to emerge to update their judgments. They can react to new information as soon as it emerges—which is singularly important in rapidly evolving areas of science.

Consider, too, the "risks of error." *L.W.*, 83 F.4th at 473. If the legislature errs, voters can select new representatives. If the judiciary gives a premature answer to a constitutional question, it risks shutting down further investigation and continued debate. *See City of Grants Pass*, 144 S. Ct. at 2224. This reality also means that there are greater institutional risks for the judicial than the legislative branch. In our representative system, legislatures derive their authority and legitimacy directly from the people. *See Bowsher v. Synar*, 478 U.S. 714, 722 (1986). The judiciary, however, exercises "neither force nor will, but merely judgment." *The Federalist* No. 78, at 402 (Alexander Hamilton) (Gideon ed., 2001). So the courts assume a greater risk should they declare something a scientific "truth"—only to be proven wrong in a few years.

As this case illustrates, that risk is far from theoretical. The United States and the private plaintiffs argue at length that Tennessee's law cannot withstand heightened scrutiny because the district court deemed Tennessee's experts to have "exaggerated" the risks of puberty blockers and hormones while understating their benefits. U.S. Br. 34–35, 41. But other district courts, including ones otherwise amenable to the United States and plaintiffs' positions, have found that the "safety and effectiveness of puberty blockers and hormone therapy is uncertain and unsettled." *K.C. v. Individual Members of Med. Licensing Bd. of Ind.*, 677 F. Supp. 3d 802, 816 (S.D. Ind. 2023); *see Florida v. Dep't of Health & Hum. Servs.*, No. 24-cv-1080, 2024 WL 3537510, at *19 (M.D. Fla. July 3, 2024) (science is "reasonably disputed").

And since the district court issued its decision below, new systematic reviews have found that the evidence for puberty blockers and hormones as an intervention for gender dysphoria is so weak that "[n]o conclusions can be drawn" about their safety and efficacy for youth. Jo Taylor et al., *Interventions to suppress puberty in adolescents experiencing gender dysphoria or incongruence: a systematic review*, *Arch Dis Child* at 13 (2024); *see* Jo Taylor et al., *Masculinising and feminising hormone interventions for adolescents experiencing gender dysphoria or incongruence: a systematic review*, *Arch Dis Child* at 7 (2024). With so much still unknown and debated it would be perilous to declare the issue settled—much less to do so based on the record in a single case. The constitutionality of more than 20 States' laws should not turn on which set of experts a single district judge happens to find most persuasive.

* * *

In our federalist system, the States get to decide within their borders what interventions are available for boys and girls suffering from gender dysphoria. Tennessee gets to decide that using puberty blockers and hormones as an intervention is not sufficiently safe or beneficial—that long-term it will do more harm than good. No equal-protection challenge can change that. Tennessee gets to choose caution and compassion based on its judgment just like other States can choose differently based on theirs. Either way, the States get to decide.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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