No. 23-477

In The Supreme Court of the United States

UNITED STATES, *PETITIONER*,

v.

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

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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS PROJECT SUPPORTING RESPONDENTS

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The American Civil Rights Project (the "ACR Project") is a public-interest law firm dedicated to protecting and where necessary restoring the equality of all Americans before the law.

To that end, ACR Project attorneys have developed expertise and experience both in drafting and interpreting civil rights legislation and in litigating discrimination claims under America's core civil rights laws, both constitutional and statutory, with particular focus on the Fourteenth Amendment's Equal Protection and Due Process clauses (together, the "Fourteenth Amendment").

This case interests the ACR Project because of its potential impact on the nation's understanding of the Fourteenth Amendment and its impact on the sovereign states.

SUMMARY OF ARGUMENT

This case asks whether the Equal Protection Clause of the Fourteenth Amendment prevents states from exercising their health-and-safety police powers to protect children from potentially harmful medical interventions, when those interventions are related to children's purported "gender identities."

That determination may require direct answers to at least two questions this Court has so far avoided: (1) what, legally, *is* a potentially ephemeral "gender identity" at odds with one's biological sex and—as a result of the

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[1] No counsel for a party authored any part of this brief. No one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

Court's answer to that question—(2) what is the proper level of scrutiny for a statutory challenge based on it.

"Gender identity" could be a sex classification, or a classification sufficiently similar to sex as to merit similar scrutiny under intermediate (or some other form of heightened) scrutiny. This brief argues that would be a mistake, one that's impossible to pull off coherently. Instead, "gender identity" is something else, and like nearly everything else that isn't race or sex, statutes affecting it should be subject to rational-basis review.

If the Court disagrees, and treats equal protection of "gender identity" as the equivalent of the equal protection of sex, or even adopted "gender identity" as a spiritual shadow-sex possessed by each individual in addition to biological sex, and applies the "intermediate" scrutiny announced in the 1990s, it will create *thousands* of additional hazards around which legislators must navigate as they attempt to treat Americans fairly. Should the Court nonetheless apply an alternate to rational-basis review, it should take the opportunity to flesh out the yet-unnamed test it has applied when governments discriminate by sex in their sovereign capacities, as opposed to as market participants.

In any event, this Court should materially clarify the law of equal protection and uphold the Sixth Circuit's decision.

ARGUMENT

In the interest of assuring that children reach unmarred an age at which they are capable of understanding the risks and potentially irreversible consequences of refashioning their body in a new image, Tennessee's statute

(the "Statute") prohibits a small set of medical interventions for minors. The Statute so deals solely with sex-transition interventions, particularly hormonal and surgical treatments, of children. The Statute exercises Tennessee's core sovereign authority over setting health-and-safety standards through the exercise of its police power.

That exercise of the police power complies with the Equal Protection Clause, regardless of whether the Court applies traditional "intermediate" scrutiny, the "heightened" scrutiny its last decade of jurisprudence suggests would be more proper if the Court treats the Statute as implicating something akin to sex-discrimination, or the rational-basis review that the Statute appears to more clearly warrant.

I. TENNESSEE'S LAW PROTECTS ALL CHILDREN OF BOTH SEXES EQUALLY.

Because the Court's decisions establish different levels of scrutiny for laws discriminating on different bases, assessing the Statute's consistency with the Equal Protection Clause will require the Court to address a question it has thus far side-stepped: what people's decision to identify as transgender, often referred to as asserting "gender identities" at odds with their sexes (or desisting from so identifying) *is* for legal purposes.

Whatever "gender identity" is, it's definitionally not sex. This isn't simply a prescriptivist objection to shifting vocabulary over time (though such post-ratification shifts should be irrelevant to the Equal Protection Clause's meaning). It's a *functional* objection: the term "gender" *exists for the purpose* of distinguishing "gender" from "sex."

Sex, even more than race, is (always) genetically determined, (almost always) objectively verifiable, and (always) immutable. "Gender identity," by contrast, is *always* subjective, often (if not always) mutable, and unverifiable to any person *except* the interested party on whose unfalsifiable testimony anyone charged with determining it is forced to rely.

A. PRECEDENT OFFERS THREE POTENTIALLY-APPLICABLE STANDARDS: "INTERMEDIATE," HEIGHTENED (BUT NOT STRICT OR "INTERMEDIATE"), OR (OPTIMALLY) RATIONAL BASIS.

In light of "gender identity's" *radical* ineligibility to form the basis of any suspect classification based on immutability, the Court is presented with an opportunity to show lower courts how to apply rational-basis review to a state's garden-variety exercise of its health-and-safety police powers.

Even should the Court decide that a child's (reported, subjective) self-identification is sufficiently "immutable" to form the basis for a new suspect class, it should clarify the correct standard for lower courts to apply when governments, in their sovereign capacities, take actions differentiating between sexes or "gender identities."

Whichever route the Court chooses, though, the destination remains the same: Tennessee's Statute complies with the Equal Protection Clause, and—an extraordinarily rare circumstance before this Court—there is no good-faith case to the contrary.

1. RATIONAL BASIS REVIEW, BECAUSE TENNESSEE'S LAW DOESN'T DISCRIMINATE BY SEX, AND "GENDER IDENTITY" DOESN'T QUALIFY AS A SUSPECT CLASS.

Unless a valid exception applies, the default standard for Equal Protection Clause challenges to government actions, even challenges to health and welfare laws passed pursuant to states' police powers, has long been rational-basis review. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 236 and 301 (2022) ((a) dismissing out of hand a contention that a medical regulation must be assessed under the Equal Protection Clause through "heightened scrutiny" when only one sex can obtain it; and (b) holding, "unless the regulation is 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other" such laws are "entitled to a 'strong presumption of validity'" and "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests.") (internal citations omitted).

Exceptions to the baseline rule of rational basis scrutiny are limited to immutable and (at least potentially) *objectively observable* traits. First and most famously, the Court developed such an exception for the challenges to governmental racial discrimination. *E.g.*, *Students for Fair Admissions v. Harvard*, 143 S. Ct. 2141, 2162 (2023). The Court later created a similar exception for governmental sex discrimination. *U.S. v. Va.*, 116 S. Ct. 2264, 2274-2275 (1996) ("*VMI*").

The "intermediate" scrutiny of *VMI* won't work here any more than the strict scrutiny that applies to assessment of race discrimination would. That's because "gender identity" is neither sex *nor like* sex. Since its emergence as a concept in 1964, "gender identity" has *always* existed entirely in *dichotomy* with sex.[2] "Gender identity" is not even meaningfully *like* sex, at least here, because it exists only as a subjective experience in the psyche of the individual. Even if it weren't mutable (and many testify to their experience that it is), it is *effectively* mutable because it is unavailable to scrutiny; you literally have to take the word of the patient—here, a child—for it.

Nothing here warrants extending intermediate scrutiny's vague license to lower court judges to set aside rational regulations. The immutability and observability of race and sex are the reason these classifications are inherently suspect while mood and personality are not, despite the fact that unpopular moods and personalities regularly form the basis for (vidious) discrimination.

If immutability matters, moreover, the Court will have to deal with significant evidence of widespread "desistence." *See, e.g.*, Steensma TD, *et al., Factors Associated with Desistence and Persistence of Childhood Gender Dysphoria: A Quantitative Follow-Up Study*. J. AM. ACAD.

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[2] *See* Stoller, Robert J., *The Hermaphroditic Identity of Hermaphrodites*, THE JOURNAL OF NERVOUS AND MENTAL DISEASE, 139(5) November 1964 (originating term and concept) (available at https://journals.lww.com/jonmd/citation/1964/11000/the_hermaphroditic_identity_of_hermaphrodites.5.aspx (last accessed August 15, 2024)).

CHILD ADOLESC. PSYCHIATRY (2013). If a trait is, for some or many, "just a phase," it's mutable.

Bostock v. Clayton Co., 140 S. Ct. 1731 (2020) avails the United States not at all. The Equal Protection Clause was passed at a different time, by a different generation, using different words than the statutory language in *Bostock*. *E.g.*, *Students for Fair Admissions v. Harvard*, 143 S.Ct. 2141, 2219-2221 (J. Gorsuch, concurring) (2023). Unlike the Equal Protection Clause, Title VII mentions sex (though neither provision mentions "gender identity," a concept that didn't exist in public consciousness or language by the time they passed).

Even absent textual differences, *Bostock*'s *reasoning* offers no basis for this equal protection challenge. *Bostock* held that when someone is the subject of adverse action by an employer based on gender non-conforming behavior, that action was taken because of sex for purposes of Title VII, in that the person's sex was a "but-for" cause of the adverse action. *Bostock* explicitly declined to reach beyond that narrow issue in the Title VII (employment) context. *Bostock*, at 1753 (of "other federal or state laws prohibit[ing] sex discrimination" and "sex-segregated bathrooms, locker rooms, and dress codes[,]" noting that "none of these other laws are before us;" "we do not purport to address bathrooms, locker rooms, or anything else of the kind[;]" and concluding that "[w]hether other policies and practices might not qualify as unlawful discrimination or find justifications under other provisions of [even] Title VII are questions for future cases, not these."). Nor did this Court find a new protected class (much less hundreds of them) that had been hiding

undetected in Title VII's text for the last half-century. Instead, it held that Title VII's ban on *sex* discrimination requires—outside of statutory exceptions—that the *sexes* be treated identically: if an employer would allow a woman to wear a dress, then it must allow a man to do so.

After *Bostock*, as before, the core element of a Title-VII sex discrimination claim is still cross-*sex* differential treatment. The answer an employer in *Bostock* would've given in response to the question "will I get fired for wearing a dress" depended on the sex of the person asking the question; this Court held Title VII's ban on discrimination because of sex foreclosed such discrimination.

Tennessee's Statue, unlike a *Bostock* employer, gives the same answer to each child or parent asking "may I hire someone to mutilate this child's body (or perform other barred conversion therapies on it) so as to mimic the phenotype of the other sex?" Regardless of whether that child is a boy or a girl, the law's response is the same: "no." The Statute instead creates an *age*-based limitation on who may consent to (or have someone else consent on their behalf to) the proscribed treatments, *regardless* of sex. Tennessee's Statute doesn't make the patient's sex a but-for cause of anything, because if a dysphoric child's biological sex were flipped, when the parents asked to have that child's genitals removed, *the answer would still be no*.

Bostock makes this simple: would the question have a different outcome if the complainant were a different sex? If so, that's discrimination because of sex. If not, it's not. In *Bostock*, the answer was "yes," so there was sex

discrimination. Here, the answer is "no," so there's no sex discrimination.

Since there's no sex discrimination, there's no reason to introduce intermediate (or otherwise-heightened) scrutiny to the conversation. The appropriate level of scrutiny here is rational basis review.

2. REPLACE SEX WITH "GENDER IDENTITY" AS A SEX-CLASSIFICATION OR THE EQUIVALENT AND APPLY TRADITIONAL "INTERMEDIATE" SCRUTINY.

If the Court decides to play along with the Petitioner's proposal that it redefine "sex" to mean "gender," or determines that "gender identity" is equivalent to sex or close enough to it for these purposes, if it so sets aside the Statute's identical treatment of children regardless of sex, the Court should still not assess the Statute under the traditional "intermediate" scrutiny standard. That test properly applies only where the state acts as a market participant; this Court's decisions suggest a different test would be appropriate, here.

The Court created the traditional "intermediate" scrutiny standard to test equal protection challenges to sex-discriminatory government spending and programming. Its most famous application was in an equal protection challenge to Virginia's maintenance of a single-sex military academy. *See Va.*, 116 S.Ct. at 2274-75. That decision's predecessors unfolded in comparable settings. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1981) (an equal protection challenge to a sex-discriminatory

admissions policy for a state-run school); *Califano v. Webster*, 430 U.S. 313, 318 (1977) (an equal protection challenge to a sex-discriminatory federal formula for the calculation of social-security benefit).

Under traditional "intermediate" scrutiny, the Court searches for both an "exceedingly persuasive justification" and the use of discriminatory means that are "substantially related to the achievement of those objectives."

These cases state that "intermediate" scrutiny should apply to sex discrimination in more sweeping terms, but they *do not* apply "intermediate" scrutiny beyond a specific limited context shared by all of them: equal-protection challenges to government actors' policies governing its *own* behavior as a market participant.

3. TREAT AS A SEX-CLASSIFICATION OR THE EQUIVALENT AND APPLY THE "HEIGHTENED" SCRUTINY APPLIED IN ALL THE COURT'S REVIEWS OF SUCH CLASSIFICATIONS' USE IN SOVEREIGN CAPACITIES SINCE AT LEAST *OBERGEFELL*.

While no decision has overturned those cases as the proper test for courts to apply in gauging equal-protection challenges to sex-discriminatory policies governing state actions *solely in that market-participant context*, this Court's cases involving equal-protection challenges to the sex-discriminatory policies of governments *in their sovereign capacities* have taken a different tact for years.

Most squarely on point, in *Sessions v. Morales-Santana*, the Court faced a challenge to a Congressionally enacted, sex-discriminatory immigration policy. 198 L.Ed.2d 150, 158 (2017, Ginsburg, J.) ("This case concerns a gender-based differential in the law governing acquisition of U.S. citizenship by a child born abroad, when one parent is a U.S. citizen, the other, a citizen of another nation."). There, the plaintiff challenged a federal statute's constitutionality, not that of a state or local government, but this did not affect the Court's analysis—as it has consistently done for generations, the Court applied the same standard to gauge the constitutionality of federal and state actions.[3]

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[3] At least seven current Justices have recognized this. The Chief Justice did so, at least, in *Sessions v. Morales-Santana*, 198 L.Ed.2d 150, 159 n. 1 (2017), and—with Justice Alito—in *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Justices Sotomayor and Kagan have done so repeatedly, including in *Sessions*. In *U.S. v. Madero*, 142 S.Ct. 1439, 1544 (2022), Justice Thomas agreed, anchoring this constraint in the Fourteenth Amendment's citizenship clause, but retaining the same limits. Justice Gorsuch's concurrence in *Madero*, slightly less explicitly, recognizes the same contours. *Madero*, 142 S.Ct., at 1556 (noting that the majority, on the theory that the relevant Constitutional provision of the Fifth Amendment was "fundamental," had applied Fourteenth Amendment jurisprudence, and had held it to have been satisfied, and writing separately only to object to any analysis of what portions of the Constitution are sufficiently "fundamental" to apply). In 2021, Justice Kavanaugh joined a concurrence to a denial of certiorari, which agreed (by citation to *Sessions* and other authorities) that the "Fifth Amendment to the United States Constitution prohibits the Federal Government from discriminating" in terms paralleling the Court's application of the Equal Protection Clause of the Fourteenth Amendment. *Nat'l Coal. for Men v. Selective Srv. Sys.*, 141

In its discussion of the relevant legal standard, *Sessions* references the "intermediate" scrutiny cases described above. *However*, when the Court actually *gauged* the constitutionality of the federal statute, *it did not apply "intermediate" scrutiny.* Instead, it applied "heightened scrutiny." *Id.* at 168.

At no point in *Sessions* does the Court consider whether the Congressional policies in play are "exceedingly persuasive"—instead, the Court flatly announces that the policies' "[l]ump characterization" of men and women "no longer passes equal protection inspection." *Id.* at 169. Nor does the *Sessions* Court consider at any point whether the policies are "substantially related" to an "exceedingly persuasive" justification. Instead, the Court assesses whether Congressional policies meet "the close means-end fit required to survive heightened scrutiny." *Id.* Whatever its precise contours, "the close means-end fit required to survive heightened scrutiny" requires something dramatically greater than does "intermediate" scrutiny's standard of "substantially related[.]"

Still, the *Sessions* Court at no point disclaims the earlier cases dealing with governmental-actors-as-market-participants. The vast set of cases acknowledging that immigration policy goes to the core of sovereignty explain why. *E.g.*, *Landon v. Plasencia*, 459 U.S. 21, 22 (1982) (describing the setting of immigration policy as "a sovereign prerogative"); *Ting v. U.S.*, 149 U.S. 698, 705 (1893) (describing as "an accepted maxim of international law, that

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S.Ct. 1815, 1815 (2021). The remaining Justices appear to have not yet taken a position since their investitures.

every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation" to establish terms and limits of entry).

When faced with a sex-discriminatory policy embraced by a government in its *sovereign* capacity, rather than as a contracting party, the Court applied an affirmatively different standard. It applied "heightened scrutiny," composed of a flat-ban on justifications rooted in "lump characterizations" and the requirement of a "close means-end fit" for sex-discriminatory policies.

This alteration has neither gone unnoticed nor stood as a sole example of the modern Court's divergent approach to reviewing sex-discriminatory policies undertaken by governmental actors in their sovereign capacities.

As Justice Alito wrote in dissenting from *Bostock*, "[u]nder our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a 'heightened' standard of review is met." *Bostock*, 140 S.Ct. at1783 (citing *Sessions v. Morales-Santana*, 137 S.Ct. 1678). Justice Alito thought the "heightened" standard to be the relevant referent, rather than the alternative "intermediate" scrutiny long applied in spending and contracting contexts.

More sweepingly and meaningfully, Justice Kavanaugh highlighted in dissent in *Bostock* that the majority's understanding of sex discrimination retroactively altered the proper analysis of all the constitutional cases on gay rights issued over the prior 35 years, from *Bowers v. Hardwick* through *Obergefell v. Hodges*. *Id.* at 1832-1833 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986), *Romer v.*

Evans, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S. 558 (2003), *U.S. v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 576 U.S. 644 (2015)). Like *Sessions*, all of those cases affirmatively involved the rules imposed by governments acting as sovereigns, rather than as market participants. *Bowers* and *Lawrence* focused on the sovereign police powers of states. *Romers* invalidated a provision of the Colorado constitution dictating that state and local civil rights laws could not bar private discrimination based on sexual orientation. *Windsor* and *Obergefell* involved the power of sovereigns to define marriage as the unions, only, of one man and one woman.

So it is important for our purposes that in those case—as is most clear in *Obergefell*, where the Court affirmatively explained its decision, in part, as an application of the Equal Protection Clause—the Supreme Court employed *nothing like* traditional "intermediate" scrutiny. As Chief Justice Roberts highlighted in his *Obergefell* dissent, "Absent from this portion of the opinion … is anything resembling our usual framework for deciding equal protection cases." *Obergefell*, 576 U.S. at 706-707. While "[i]t is casebook doctrine that the 'modern Supreme Court's treatment of equal protection claims has used a means-end methodology in which judges ask whether the classification the government is using is sufficiently related to the goals it is pursuing[,]' [t]he majority's approach today is different[.]" *Id.* at 707. It searched for no "exceedingly persuasive" policy goal and made no effort to assess whether any such goal was "substantially related" to the discriminatory state laws it condemned.

As in *Sessions*, the *Obergefell* Court chose to apply a different, more exacting form of "heightened scrutiny" to consideration of an equal-protection challenge to a sex-discriminatory policy adopted by a government in its sovereign capacity. As in *Sessions*, it rejected what it saw as an overbroad policy without considering *at all* its "persuasiveness" or assuming a lowered threshold of how "related" the challenged discriminatory policy must be to such a justification in order to survive.

Having looked, it does not appear that—in the years since *Obergefell*—the Court has *ever* applied traditional "intermediate" scrutiny to *any* Equal Protection Clause sex-discrimination case, where the policy at issue was one adopted in a government's sovereign capacity.

Since at latest 2015, then, the Court has consistently handled sex-discrimination by governments acting in their sovereign capacities differently than it has handed sex-discriminatory policies undertaken by governments employing their spending and contracting powers. If the Court decides that this case involves a sufficiently sex-adjacent classification to allow it, this case presents an optimal chance for it to forthrightly explain the distinction it has employed for almost a decade.

B. THE STATUTE SATISFIES *ANY* OF THESE OPTIONS

Regardless of how the Court chooses to resolve the stature of "gender identity," and regardless of the level of scrutiny that decision leads it to apply, the Court should reach the same conclusion: the Equal Protection Clause poses no problems for the Statute.

The Court could apply the default rule and assess the Statute under rational-basis review. Should it do so, as Tennessee has demonstrated and the Sixth Circuit correctly concluded, Tennessee more than clears this most forgiving form of Constitutional inquiry. Authorities world-wide share Tennessee's concerns with the regulated treatments. There is no serious argument that Tennessee's enactment of the Statute was otherwise motivated. The Court's cases on legislated "invidious discrimination" are irrelevant: not only is there no reason to believe Tennessee *has* any relevant animus, the Statute itself, by protecting children and the ability of their future adult selves to make informed decisions about their own bodies, affirmatively *protects* those it effects.

If the Court applies traditional "intermediate" scrutiny, it should similarly find it satisfied. The Statute, in seeking to protect the ability of children to make their own choices when fully developed, advances an "exceedingly persuasive" legislative end. In prohibiting only those treatments of children that may have irreversible, negative ramifications for the future of such children, the Statute is more than "substantially related" to that valid legislative end.

And should the Court instead apply the "heightened" scrutiny it has consistently applied to gauging the constitutionality of governments' allegedly sex-discriminatory policies adopted in their sovereign capacities, it should still approve the Statute. The Statute makes no "lump characterizations" of the sexes (or of those of any "gender identity"). To the extent the Statute were so characterizable, it would be hard to imagine how Tennessee could

have more closely fit its means to its ends than prohibiting solely those treatments of children that may have irreversible, negative ramifications for the future of the children the Statute protects.

Under *any* available level of scrutiny, the Court should uphold Tennessee's Statute, which is in harmony with *any* coherent reading (whether supported by precedent or not) of the Equal Protection Clause.

II. TENNESSEE'S STATUTE ALSO PROVIDES DUE PROCESS, AND THE COURT SHOULD FORECLOSE ANY MORE EFFORTS TO ESTABLISH A RELEVANT NEW SO-CALLED "SUBSTANTIVE DUE PROCESS" RIGHT.

While the Court has not yet acted on the individual plaintiffs' petition for certiorari from the Sixth Circuit's decision below, amicus notes that it raised an additional question presented, omitted from the United States' petition currently at issue. Cognizant that the Court has the right to resolve this case on any basis, and wishing to assure that—if the Justices consider resolving this case on that one—the Court fully understands the stakes of the individual petitioners' alternative theory, amicus highlights that the proposed extension of any "substantive" component of the Due Process Clause would be unwarranted.

To the extent the Court recognizes a "substantive" component of the Due Process Clause, it has limited the sweep of that component to "guarantee [only] rights …

'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty.'" *Dobbs*, 597 U.S. at 560 (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

If that is the test for the consistency of the Statute with the Due Process Clause, the Court's precedents make extraordinarily clear that the Statute satisfies it.

A. Tennessee Statute Implicates No Right "Deeply Rooted" in American History and Tradition

In assessing whether any asserted right is "deeply rooted" in American history and tradition, the Court "engage[s] in a careful analysis of the history of the right at issue." *Id.* at 564. This analysis looks to common law history reaching back to Magna Carta and traces its subject asserted "right" through to the ratification of the Fourteenth Amendment. *Id.* (citing *Timbs v. Indiana*, 586 U.S. ___, ___ (2019, Ginsberg, J.) and *McDonald v. Chicago*, 561 U.S. 742, 767-8 (2010)). For further confirmation, the Court sometimes examines post-ratification history. *Dobbs*, 597 U.S. at 566. For example, in assessing the "rootedness" of a purported Constitutional right in *Dobbs*, the Court noted that:

> until the latter part of the 20th century, there was no support in American law for a constitutional right to abortion. No state constitutional provision recognized such a right… no federal or state court had recognized such a right. Nor had any scholarly

> treatise of which we are aware…. [It] had long been a *crime* in every single State.

Id.

At issue in this litigation is a purported right of parents to access for their children so-called "gender-affirming" care. That purported right holds no better claim to "rootedness" in American history and tradition than does a constitutional right to abortion. The clearest evidence of this lack of "rootedness" emerges from a simple review of the calendar.

Congress crafted, passed, and sent to the states for ratification the Fourteenth Amendment through a years-long process ending in 1866. Ratification promptly followed.[4]

The very first human being to undergo sex reassignment surgery was Lili Elbe. Bill Lamb, *Biography of Lili Elbe, Pioneering Transgender Woman*, ThoughtCo., Nov. 21, 2020, https://www.thoughtco.com/lili-elbe-biography-4176321 (last visited, Sep. 30, 2024). Lili Elbe underwent that surgery in 1930, more than six decades *after* ratification of the Fourteenth Amendment. Elbe died one year later from infections resulting from an attempted uterine implantation.

No *American* began "gender-affirming" hormonal treatment until Christine (qua George, Jr.) Jorgensen did so abroad in the 1950s. *From GI Joe to GI Jane: Christine Jorgensen's Story*, Jun. 30, 2020, The Nat'l WWII

[4] While there is some dispute concerning the date on which the requisite 28th state ratified, this occurred between December 1866 and July 1868.

Museum (New Orleans), https://www.nationalww2museum.org/war/articles/christine-jorgensen (last visited, Sep. 30, 2024). Jorgensen completed surgical transition in 1954.

No "gender-affirming" *facility* opened in America until 1965. Rachel Witkin, *Hopkins Hospital: a History of Sex Reassignment*, The Johns Hopkins News-Letter, May 1, 2014, https://www.jhunewsletter.com/article/2014/05/hopkins-hospital-a-history-of-sex-reassignment-76004/. The most famous "patient" of that clinic in the 1960s was "forced" as a child into "sexual reassignment surgery" and "later committed suicide after years of depression." *Id.*; *see also* Burkeman, Oliver and Younge, Gary, *Being Brenda*, The Guardian (12 May 2004) (available at https://www.theguardian.com/books/2004/may/12/scienceandnature.gender (last accessed August 15, 2004)). After that cutting-edge facility closed its doors in 1979, attributing the decision to a "study suggesting unsatisfactory long-term outcomes[,]" [b]y the mid-1990s, only two or three remained" in the US. Sophie Putka, *What Killed the First Gender-Affirming Surgery Clinic in the U.S.?*, MedPage Today, Oct. 3, 2022, https://www.medpagetoday.com/special-reports/features/101034 (last visited, Sep. 30, 2024).

It beggars belief that anyone would contend with a straight face that a procedure *never* performed in America until nearly a full century after the ratification of the Fourteenth Amendment was sufficiently "deeply rooted" in American history and tradition to have been constitutionally secured by the ratification of the Fourteenth Amendment as a procedure parents have the *right* to

elect, despite a contrary judgment of their state legislature.

If one was inclined to look further, one would discover that, as in the abortion context, "there was no support in American law for a constitutional right to [obtain a sex-change for one's child at any point over that almost-century]. No state constitutional provision recognized such a right… no federal or state court had recognized such a right." Nor, we should add, have we found any scholarly treatise arguing for such a right at any point in that nearly complete century following ratification.

As to the history of criminalization, that presents a more involved story….

B. Long-Standing Legal and Historical Precedents Prohibiting Comparable Treatments

Drawing analogies to the sex-transition treatments the Statute covers is necessarily fraught. Critics of such treatments highlight that, among their long-term effects, are permanent, irreversible infertility and sexual disfunction. App.52a. While the parallel is clearest for surgical interventions covered by the Statute, these critics' undisputed factual assertions suggest that, more broadly, analysis should analogize the Statute's covered treatments to the historical alternative with comparable results—surgical castration.

At common law, one could not consent to dismemberment. Vera Bergelson, *The Right to be Hurt: Testing the Boundaries of Consent*, 75 Geo. Wash. L. Rev. 165 (Feb. 2007). Lord Coke summarized this maxim in 1651 as follows: "that oft-cited, early seventeenth-century case [*R. v.*

Wright recognized the rule that when] a man asked his friend to cut off his hand so that he would have 'more colour to beg[,]' [t]he consent of the victim did not exculpate the perpetrator[.]" *Id.* at 175 (citing Sir Humphrey Davenport, *An Abridgement of the Lord Coke's Commentary on Littleton* 131-32 (Garland Publ'g. Inc. 1979).

Through the period of the Fourteenth Amendment's ratification, this remained the rule, with notable particularization. In this age before the rise of legal realism, one timely British treatise summarized the state of the law as follows: "Every one has a right to the infliction upon himself of bodily harm not amounting to a maim." Bergelson, 75 Geo. Wash. L. Rev. at 175 (quoting James Fitjames Stephen, *A Digest of the Criminal Law* 141-42 (3d Ed. London, Macmillan, 1883)). If that terminology is less than transparent to modern eyes, it would not have been to the era's legal readers—"in old law" dating back to the 14th Century "a maim" was understood to mean "injury causing loss of a limb, mutilation," drawn from the 13th Century term "maimen" meaning to "disable by wounding or mutilation, injure seriously, damage, destroy, castrate[.]" Online Etymology Dictionary, Douglas Harper 2001-2024, https://www.etymonline.com/word/maim (last visited, Oct. 2, 2024). Indeed, a Canadian reprint of Stephen's work made this express during the Gilded Age—"castration is a maim." Bergelson, 75 Geo. Wash. L. Rev. at 175 n.63 (citing George Wheelock Burbridge, *A Digest of the Criminal Law of Canada* 199 (Toronto, Carswell, 1890)).

The majority of American jurisdictions have retained these laws through the present, as captured in the Model

Penal Code. Bergelson, 75 GEO. WASH. L. REV. at 174. Specifically, while the MPC generally makes consent a defense, "[t]his general rule if of limited use … in the area of offenses involving bodily harm. MPC § 2.11(2) invalidates one's consent to personal harm in all but three sets of circumstances: [(1)] when the injury is not serious; [(2)] when the injury or its risk are 'reasonably foreseeable hazards' of participation in a 'lawful athletic contest…; and [(3)] when the consent establishes a justification for the conduct under Article Three[.]" *Id.* In turn, MPC Article III "contains only one provision that conditions justifiability … on another person's consent. Section 3.08(4) provides that the use of force toward another is justifiable if the actor is a physician … and '(a) the force is used for the purpose of administering a recognized form of treatment that the actor believes to be adapted to promoting the physical or mental health of the patient; and (b) the treatment is administered with the consent of the patient." *Id.* at 181.

While the Statute deals with treatments that doctors surely believe to be so justified, this definition retains an insurmountable rub for their argument. "Sometimes judicial characterization" of what is "recognized" "depends on the 'regulatory status of … a procedure[.]' " *Id.* (citing Lars Noah, *Informed Consent and the Elusive Dichotomy Between Standard and Experimental Therapy*, 28 AM. J.L. & MED. 361, 377 (2002)). This means that the traditional criminal law—including that of a majority of states—expressly makes the legality of a procedure dependent on the regulatory decisions of each state.

As *Dobbs* observed of abortion through the issuance of *Roe*, the norms of American criminal law, uninterrupted since common law, have barred individuals from consenting to their own dismemberment, at least everywhere the state chooses to override such consent. The Statute is entirely consistent with this uninterrupted history, making any assertion of a right to consent to what the Statute forbids untenable.

C. Modern Legislation and Cases Have Consistently Exercised Parallel Judgments and Rejected Parallel Constitutional Arguments Against Prohibitions on Conversion Therapy for Children

A final set of precedents, of more recent vintage, point in the same direction. These precedents involve states enacting prohibitions on particular medical treatments of children, the litigation of parallel attacks on the Constitutionality of those state prohibitions, and the consistent rejection of those attacks by the judiciary.

California, in passing SB 1172 in 2012, enacted the first state ban on conversion therapy. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). "SB 1172 does just one thing: it requires licensed mental health providers in California who wish to engage in 'practices … that seek to change a [minor's] sexual orientation' either to wait until the minor turns 18 or be subject to professional discipline." *Id.* at 1223. "The legislature's stated purpose in enacting SB 1172 was to 'protect the physical and psychological well-being of minors … and [to] protect[ ] its minors against exposure to serious harms caused by [such] efforts." *Id.* "The legislature relied on the well-documented,

prevailing opinion of the medical and psychological community" in determining to take this course of action. *Id.*

When it did, more than one set of plaintiffs sued for injunctive relief. For our purposes, the notable set were parents who asserted that "parents' fundamental rights" protected by a substantive component of the Due Process Clause "include the right to choose for their children a particular type of provider for a particular medical or mental health treatment that the state has deemed harmful." *Id.* at 1235.[5]

The Court of Appeals first recognized that California had a rational basis for its actions. *Id.* at 1231-2. It rejected any suggestion that the Court of Appeals could or should "decide whether [the treatments at issue] actually cause[ ] 'serious harms'; it is enough that it could 'reasonably be conceived to be true by the governmental decisionmaker.'" *Id.* at 1231 (citing *Nat'l. Assoc. for the Advancement of Psychoanalysis v. Cal. Board of Psychology*, 228 F.3d 1043, 1050 (9th Cir. 2000) ("NAAP")). Noting the legislative record of consideration of reports of various field organizations, the Court of Appeals had "no trouble concluding that the legislature acted rationally[.]" *Id.* at 1232. In so doing, the Court of Appeals acknowledged that the plaintiffs had counter authorities and asserted "a lack

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[5] A set of doctors also sued, arguing that SB 1172 infringed on their First Amendment free speech rights. While later decisional law called into question—to an extent—the Ninth Circuit's reasoning in rejecting their argument, the relevant precedents left undisturbed the Court of Appeals' sound reasoning concerning the alleged substantive due process rights of parents to select and obtain within the state treatment for their children banned by the state.

of scientifically credible proof of harm"—the Court of Appeals rejected these arguments, however, because "under rational basis review, '[w]e ask only whether there are plausible reasons for [the legislature's] action, and if there are, our inquiry is at an end.'" *Id.* (citing *Romero-Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir. 2013)).

Next, while recognizing that "Parents have a constitutionally protected right to make decisions regarding the care, custody, and control of their children," the Ninth Circuit concluded "that right is 'not without limitations.'" *Id.* (citing *Parham v. J.R.*, 442 U.S. 584, 603 (1979)). The Court of Appeals noted that courts had earlier "considered whether patients have the right to choose specific treatments for *themselves* [and] concluded that they do not." *Id.* (citing *NAAP*, 228 F.3d at 1050 (emphasis in original); *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993); *Rutherford v. U.S.*, 616 F.2d 455, 457 (10th Cir. 1980)). Concluding that "it would be odd if parents had a substantive due process right to choose specific treatments for their children—treatments that reasonably have been deemed harmful by the state—but not for themselves[,]" the Court rejected the idea that any plaintiff could "compel the California legislature, in shaping its regulation of mental health providers, to accept [their own] personal views of what therapy is safe and effective for minors." *Id.* at 1236. On this basis, it concluded that "SB 1172 does not infringe on the fundamental rights of parents." *Id.*

Similar laws have since been passed by nineteen other states and the District of Columbia. NeuroLaunch Editorial Team, *Conversion Therapy Legality in the U.S.: Current Status and State-by-State Analysis*, NeuroLaunch

Gray Matter Matters (Oct. 1, 2024), https://neurolaunch.com/is-conversion-therapy-legal-in-the-us/ (last visited, October 2, 2024).

None of these state laws have been held unconstitutional—at least those of Colorado, Washington, and New Jersey have specifically withstood related constitutional attacks (admittedly, challenging them under the First Amendment). *Chiles v. Salazar*, 2024 U.S. App. LEXIS 23181 (10th Cir. Sep. 2024); *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022); *King v. Gov. of N.J.*, 767 F.3d 216 (3d Cir. 2014); *but see Otto v. City of Boca Raton*, 41 F.4th 1271 (11th Cir. 2022) (rejecting en banc reconsideration of panel decision holding parallel *city* ordinance to violate First Amendment Freedom of Speech).

Respectfully *all* of the 9th Circuit's analysis of SB 1172 is equally applicable to the Court's consideration of the Statute. Indeed, the two scenarios are indistinguishable.

Tennessee, like California, has sought to protect children while they are children and to assure that they reach adulthood and the age of reason before treatments carrying irreversible ramifications are worked on them. Tennessee, like California, relied on a wide literature documenting the risks that concerned it. This is all rational-basis review requires and no further examination of the underlying merits of the scientific dispute is appropriate in this forum.

Here, as with SB 1172, a state legislature has judged how best to protect the state's children. Here, as in *Pickup*, some parents disagree and want to obtain the treatment they would prefer conveniently near their own home. Here, as in *Pickup*, they assert a fundamental right

to select for their child a treatment that they would not have the right to elect for themselves if the state so legislated. Here, as in *Pickup*, that asserted right is unknown to law and wars with a fundamental power of the state to regulate the provision of medicine within its borders.

That Tennessee's concerns extend to different treatments of children than do those of the twenty states to have banned conversion therapy is of no moment. The state power at issue is the same. The parental assertion of a right to override the state's legislative judgment is the same. The Court *cannot* recognize a "substantive" right under the Due Process Clause for parents to obtain for their children sex-transition treatments in Tennessee banned by the Statute without simultaneously creating a parallel right of all parents in all states to subject their children to conversion therapy.[6]

CONCLUSION

The Equal Protection Clause does not require Tennessee's legislature to let its children go under the knife of

[6] The same parallel appears applicable to the Equal Protection Clause question now before the Court. It is hard to imagine how any argument that the Statute violates the Equal Protection Clause would not be equally assertable by parents against SB 1172 and its progeny. Such parents would argue (parallel to the petitioners' contentions that they are denied equal treatment by a state allowing parents to get male hormonal treatments for their biological male children, but not for their biologically female children) that they are denied equal protection by laws allowing psychologists to affirm and encourage their children's sexual attraction to children of the same sex, but not of the other.

this century's Drs. Monizir. Nor does the Due Process Clause.

When the Court confirms this, it should clarify that the sufferers of gender dysphoria and autogynephylia are not a prospective pseudo-sex suspect class: it should leave lower courts no wiggle-room going forward to apply any standard other than rational-basis review to laws like Tennessee's.

If it doesn't apply that default standard, however, the Court should confirm and flesh out the one it has quietly developed for challenges to sex-based classifications used by states acting as sovereigns, rather than market actors, and admit that Tennessee has satisfied that test.

For the foregoing reasons, *amicus curaie* respectfully requests that this Court affirm the judgment of the Court of Appeals and deliver judgment for Respondents.

Respectfully submitted,

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