No. 23-466

In The Supreme Court of the United States

L.W., BY AND THROUGH HER PARENTS AND NEXT FRIENDS, SAMANTHA WILLIAMS AND BRIAN WILLIAMS, ET AL.,

Petitioners,

v.

JONATHAN SKRMETTI, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

INTRODUCTION 1

I. THE CIRCUITS ARE DEEPLY DIVIDED 1

II. THE SIXTH CIRCUIT'S EQUAL PROTECTION HOLDING DEFIES THIS COURT'S PRECEDENTS 4

A. The Sixth Circuit flouted this Court's sex discrimination precedent 4

B. SB1 Fails Heightened Scrutiny 9

III. THE SIXTH CIRCUIT MISUNDERSTOOD THE FUNDAMENTAL RIGHT OF PARENTS TO MAKE DECISIONS CONCERNING THE MEDICAL CARE OF THEIR MINOR CHILDREN 10

IV. THIS IS AN IDEAL VEHICLE TO REVIEW THE URGENT QUESTIONS PRESENTED 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Bostock v. Clayton Cnty.,
140 S. Ct. 1731 (2020) 2, 7, 8

Brandt v. Rutledge,
47 F.4th 661 (8th Cir. 2022) 1, 2

Craig v. Boren,
429 U.S. 190 (1976) 6

Doe v. Snyder,
28 F.4th 103 (9th Cir. 2022) 8

J.E.B. v. Alabama ex rel. T.B.,
511 U.S. 127 (1994) 7

Johnson v. California,
543 U.S. 499 (2005) 4

Larson v. Valente,
456 U.S. 228 (1982) 12

Michael M. v. Superior Court of Sonoma Cnty.,
450 U.S. 464 (1981) 5, 6

Nguyen v. INS,
533 U.S. 53 (2001) 5

Parham v. J.R.,
442 U.S. 584 (1979) 10, 11

Poe ex rel. Poe v. Labrador
No. 1:23-cv-00269-BLW, 2023 WL 8935065 (D. Idaho Dec. 26, 2023) 2

Powers v. Ohio,
499 U.S. 400 (1991) 7

Troxel v. Granville,
530 U.S. 57 (2000) 10, 11

United States v. Virginia,
518 U.S. 515 (1996) 4

Whalen v. Roe,
429 U.S. 589 (1977) 10

Statutes

Tenn. Code Ann.
§ 68-33-101(m) 7
§ 68-33-103(a)(1)(A) 6

Other Authorities

Kiara Alfonseca, *Ohio Senate overrides governor veto of trans care, sports ban* HB68, ABC NEWS (Jan. 24, 2024) 13

House Bill 520, 67th Leg., 2d Reg. Sess. (Idaho 2024) 13

INTRODUCTION

In defending Tennessee's ban, Respondents do not dispute the profound importance of the constitutional questions presented or the profound consequences of SB1 for transgender youth and their families. Instead, Respondents advance—without any support in the district court's factual findings—misconceptions about gender-affirming care that the district court rejected, and that were not questioned, much less deemed clearly erroneous, by the court of appeals. Those assertions have no proper place here.

On the merits, the Constitution is not "neutral," as the Sixth Circuit put it, about laws that classify based on a person's sex or transgender status. App. 18a. Such laws carry a presumption of unconstitutionality, and the government must provide an exceedingly persuasive justification for the differential treatment. The Sixth Circuit's sweeping declaration that laws targeting transgender people and the medical decision-making of their families are subject only to rational basis review creates multiple circuit splits, contravenes well-settled precedent, and imposes immediate and devastating harm. This Court's review is warranted now.

I. THE CIRCUITS ARE DEEPLY DIVIDED

The circuits are divided with respect to the constitutionality of laws banning gender-affirming medical care for minors—and that split is not going away. Respondents concede that the decision below conflicts with the Eighth Circuit's decision in *Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022), which

affirmed a preliminary injunction blocking Arkansas's comparable law upon finding that it likely could not survive heightened scrutiny. The *Brandt* decision has not been vacated, leaving Respondents to speculate that the "circuit split may soon be resolved" in forthcoming en banc proceedings. Opp. 17. But even if Respondents could accurately predict the future, broader and deepening circuit splits remain.

Indeed, since the Petition was filed, the Ninth Circuit has joined the fray. Applying circuit precedent, a federal district court held that Idaho's ban on gender-affirming care for minors discriminated based on sex and transgender status, and issued a preliminary injunction upon finding that the law likely could not survive heightened scrutiny. *Poe ex rel. Poe v. Labrador* No. 1:23-cv-00269-BLW, 2023 WL 8935065, at *12, *13-19 (D. Idaho Dec. 26, 2023). The Ninth Circuit denied Idaho's motion for a stay pending appeal, *see Poe v. Labrador*, No. 24-142 (9th Cir. Jan. 30, 2024), ECF No. 24, and also denied the State's request for en banc review of that denial, *id.*, ECF No. 31 (Feb. 9, 2024).

The decision below also creates an intractable split with the Fourth, Seventh, and Ninth Circuits regarding the standard of equal protection scrutiny for laws discriminating against transgender people. Consistent with this Court's reasoning in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020), those circuits have held that discrimination against transgender people is sex discrimination under the Equal Protection Clause. *See* Pet. 24-25. In addition, the Fourth and Ninth Circuits have held that discrimination based on transgender status

independently triggers heightened scrutiny as a quasi-suspect classification. *See* Pet. 25. The Sixth Circuit's holding that discrimination against transgender people calls for only rational basis review creates a clear divide that only this Court can resolve.

Respondents argue that "these other cases involve different state laws (and different state interests) involving matters such as school sports and access to bathrooms." Opp. 19. But the Sixth Circuit reasoned that rational basis review would apply in those very circumstances: Heightened scrutiny, the majority explained, would require "fraught line-drawing dilemmas," including with respect to "[b]athrooms and locker rooms" and "[s]ports teams and sports competitions." App. 47a. "Such "policy choices," the Sixth Circuit opined, are better left to the whims of "fifty state legislatures." *Id.* According to the majority, the Constitution is "neutral" with respect to discrimination against transgender people, no matter the context. App. 19a.

Respondents also maintain that the Sixth Circuit independently concluded that Tennessee's ban "did not classify based on transgender status *at all*," and instead classified based solely on age and medical condition. Opp. 19. Not so. While Respondents *argued* that the law discriminated based only on medical condition and not transgender status, the Sixth Circuit did not adopt that position. *See* Brief in Opposition at 14, *Jane Doe 1 v. Commonwealth of Ky.*, No. 23-492 (U.S. Feb. 5, 2024) (conceding that "the Sixth Circuit did not resolve that . . . issue"). Instead, after analyzing whether SB1 classified based on age, medical condition, and sex, the Sixth Circuit separately considered whether the statute

discriminates against transgender people as a class. App. 46a. The court then rejected that "distinct theory" based solely on the erroneous conclusion that transgender status is not a quasi-suspect classification. App. 46a-50a.[1]

The Sixth Circuit's declaration that rational basis review applies to all government discrimination against transgender people extends far beyond the issue of medical care and squarely diverges from four other Circuits. Those circuit conflicts urgently require this Court's resolution.

II. THE SIXTH CIRCUIT'S EQUAL PROTECTION HOLDING DEFIES THIS COURT'S PRECEDENTS

The Sixth Circuit's equal protection analysis disregards this Court's precedents. Review is imperative to restore the directive that "all gender-based classifications today" receive heightened scrutiny. *United States v. Virginia*, 518 U.S. 515, 555, (1996).

A. The Sixth Circuit flouted this Court's sex discrimination precedent.

1. Under this Court's precedents, a court must first determine whether a law classifies based on sex before determining whether the classification is

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[1] Respondents point to a portion of the opinion where the majority concluded that Tennessee's ban was not motivated by "animus toward transgender individuals as a class." Opp. 27 (quoting App. 49a). But the question of whether animus *motivates* a classification is distinct from whether a law *classifies* at all. *Cf. Johnson v. California*, 543 U.S. 499, 506 (2005).

justified. The Sixth Circuit jettisoned that established framework in favor of an ad hoc assessment of whether particular sex classifications bear “the hallmarks of sex discrimination.” App. 35a. That subjective inquiry finds no grounding in this Court’s decisions.

Respondents’ defense of the Sixth Circuit’s opinion repeats its errors. Although they concede that the threshold question is whether a law classifies based on sex, Opp. 21, Respondents (like the Sixth Circuit majority) side-step that critical question and pivot to a different inquiry—whether males and females are similarly situated with respect to SB1’s ban on treatment. But this Court evaluates whether affected persons are similarly situated when *applying* heightened scrutiny to sex classifications, not as an antecedent question to determine whether a sex classification exists. And the order of inquiry matters because it requires all sex classifications to undergo heightened scrutiny.

For example, in *Nguyen v. INS*, 533 U.S. 53 (2001), this Court applied heightened scrutiny to an immigration law treating mothers and fathers differently, but concluded that the law *survived* that demanding standard because “[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood.” *Id.* at 63. Similarly, the plurality in *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), applied heightened scrutiny to a sex-based statutory rape law and concluded that the law’s disparate treatment of men survived heightened scrutiny because “young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse.”

Id. at 471. Whether men and women are similarly situated, thus, is an element in assessing the validity of a sex classification under heightened scrutiny; it is not a reason to apply only rational basis review.

Respondents maintain that SB1 classifies based on medical procedure and age but not sex. Respondents insist that there are justifications for the differential treatment based on "different risk-benefit proposition[s]." Opp. 23. But examining the justifications for differential treatment is precisely what *applying* heightened scrutiny entails—not what it takes to identify a sex classification in the first place. And the fact that SB1 may classify based on other factors such as age or medical treatment *in addition to sex* does not make the sex classification go away. *See Craig v. Boren*, 429 U.S. 190, 199 (1976) (applying heightened scrutiny to age- and sex-based law).

Respondents also assert that heightened scrutiny does not apply because Tennessee's ban "merely" *references* sex without *classifying* based on sex. But Tennessee's ban is nothing like a law regulating abortion that happens to refer to the word "woman." *See* Opp. 24. Such a law would have precisely the same meaning if the word "woman" were changed to "person." By contrast, under SB1, the legality of medical treatment expressly turns on whether the care "[e]nabl[es] a minor to identify with, or live as, a purported identity inconsistent with the minor's sex." Tenn. Code Ann. ("TCA") § 68-33-103(a)(1)(A). That Tennessee must treat boys and girls differently to regulate gender-affirming care is not a reason for discarding heightened scrutiny. It is why heightened scrutiny is required.

Critically, Respondents do not even attempt to defend the Sixth Circuit's assertion that sex classifications do not require heightened scrutiny if they apply "equally" to both men and women. Like racial classifications, it is "axiomatic" that sex classifications do not somehow become neutral "on the assumption that all persons suffer them in equal degree." *See Powers v. Ohio*, 499 U.S. 400, 410 (1991). As this Court explained in *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), subjecting "even one" person to a sex-based classification harms that individual even where the system as a whole is "evenhanded" as to men and women as groups. *Id.* at 142 n.13; *id.* at 159-60 (Scalia, J., dissenting).

The Sixth Circuit attempted to distinguish *J.E.B.* by claiming that heightened scrutiny applied in that case because the sex-based peremptory strikes relied on "gender stereotypes." App. 42a. But *J.E.B.* mandates heightened scrutiny even if the gender-based assumptions for the peremptory strike are statistically accurate. *See* 511 U.S. at 148-49 (O'Connor, J., concurring). Moreover, SB1 *does* seek to enforce gender-based stereotypes. The statute's explicitly stated purpose is "encouraging minors to appreciate their sex" and banning medication and treatment "that might encourage minors to become disdainful of their sex." TCA § 68-33-101(m). It permits care designed to conform to sex stereotypes, and outlaws care designed to depart from them.

2. This Court's longstanding sex discrimination precedents are reinforced by its more recent decision in *Bostock*, which recognized that discrimination against transgender individuals is sex-

based because it punishes people for being identified as "one sex . . . at birth" and a different sex "today." 140 S. Ct. at 1746. That remains true whether the disparate treatment is imposed at work or in the doctor's office.

Here, SB1 "penalizes" treatment for a minor "identified as male at birth" but "tolerates" the same treatment for a minor "identified as female at birth," *see Bostock*, 140 S. Ct. at 1741, and vice versa. That is a facial [sex] classification, pure and simple." App. 75a (White J., dissenting). Whether a medication or procedure is permitted depends not on the risk involved, the science supporting its efficacy, or any other neutral criteria, but expressly on whether it conforms with what the government deems typical of a minor's sex.

The Sixth Circuit stands alone in declaring that *Bostock*'s "reasoning applies only to Title VII." App. 43a. The Fourth, Seventh, Eighth, and Ninth Circuits have all applied *Bostock*'s reasoning in identifying sex classifications under Title IX, the Equal Protection Clause, or both. Pet. 21-25; *see also Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (Callahan, J.) ("Given the similarity in language prohibiting sex discrimination in Titles VII and IX, we do not think *Bostock* can be limited" to Title VII). And Respondents point to no difference in language that would prevent the logic this Court employed in *Bostock* from being deployed in cases brought under the Equal Protection Clause.

B. SB1 Fails Heightened Scrutiny.

No court has ever found that a ban on gender-affirming healthcare for minors satisfies heightened scrutiny. In arguing that SB1 survives that exacting standard, Respondents rely on factual assertions the district court rejected and—as a result of the panel's erroneous application of rational basis review—were never evaluated, much less found clearly erroneous, by the Sixth Circuit.

Based on the "voluminous" preliminary injunction record, App. 155a, the district court found that: (1) "the weight of evidence in the record suggests . . . that treatment for gender dysphoria lowers rates of depression, suicide, and additional mental health issues faced by transgender individuals," App. 168a; and (2) Respondents' "allegations . . . of harms [associated with treatment] and their prevalence is not supported by the record," App. 165a. Under heightened scrutiny, it is not enough to baldly assert that "Tennessee acted rationally, reasonably, and compassionately to protect its children," Opp. 38, without showing that the means taken substantially relate to that goal. Far from "protecting its children," the district court found that SB1 has caused many of them significant harm. App. 178a.

By relegating Tennessee's law to rational basis review, the Sixth Circuit avoided reviewing that determination, along with all other factual disputes in the record. Accordingly, Respondents' recitation of factual assertions about gender-affirming care rejected by the district court's findings have no place here. And the court of appeals never asked whether,

on the facts found by the district court, heightened scrutiny could be satisfied. That error calls out for this Court's review.

III. THE SIXTH CIRCUIT MISUNDERSTOOD THE FUNDAMENTAL RIGHT OF PARENTS TO MAKE DECISIONS CONCERNING THE MEDICAL CARE OF THEIR MINOR CHILDREN

The Sixth Circuit's dismissive treatment of the fundamental rights of parents to make decisions concerning medical care for their minor children contravenes this Court's longstanding respect for this "oldest" liberty interest. *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). Left undisturbed, the Sixth Circuit's analysis would open the door to widespread intrusions by the state into the decision-making of parents.

In defending the Sixth Circuit's decision, Respondents misconstrue *Parham v. J.R.*, 442 U.S. 584 (1979), as being solely about the procedural due process rights of minors. Opp. 31. But the *Parham* Court balanced the procedural due process protections afforded to a minor child against the substantive due process rights of the child's parents. By contrast, where, as here, the decision of the parents, adolescents, and medical providers are all aligned, the fundamental right of parents is at its apex.

Respondents' citation to *Whalen v. Roe*, 429 U.S. 589, 604 (1977), is also unpersuasive because the law at issue was an across-the-board regulation of particular drugs, not one targeting parental decision-making in certain circumstances. As Judge White correctly recognized, because Tennessee "banned

treatment for minors only, despite what minors or their parents wish, . . . the issue is not the . . . right to a particular treatment or a particular provider." App. 95a. Rather, SB1 is an attempt by "the State to inject itself into the private realm of the family," *Troxel*, 530 U.S. at 68-69, to overrule the aligned decision of parents, adolescents, and their physicians regarding treatments that are otherwise legally permitted. That "statist notion that governmental power should supersede parental authority in *all* cases because *some* parents" allegedly make the wrong decision "is repugnant to American tradition." *Parham*, 442 U.S. at 603.

IV. THIS IS AN IDEAL VEHICLE TO REVIEW THE URGENT QUESTIONS PRESENTED

This case presents an excellent vehicle for this Court to resolve questions of undisputed importance. The thorough opinions of the district court and court of appeals (majority and dissent) fully address the legal issues, and the fulsome record provides helpful context for the passage, operation, and impact of the law.

Respondents' attempt to muddy the waters on redressability is baseless. A witness from Vanderbilt University Medical Center executed a sworn declaration that its physicians would resume such care for eligible patients of all ages if SB1 were enjoined. App. 181a-182a. And any purported dispute about whether Vanderbilt University Medical Center would resume care for patients under sixteen is also irrelevant because two of the three adolescent plaintiffs are now over sixteen, and it is *uncontested*

that several other Tennessee providers—including the provider plaintiff—would provide gender-affirming care to people over sixteen if SB1 is enjoined. *Id.* That is not, as Respondents assert, a "post-filing" development. Opp. 39. At the time they filed suit, these two plaintiffs were less than a year away from their sixteenth birthdays, and an injunction would have redressed their impending injuries once they turned sixteen. Because a plaintiff "need not show that a favorable decision will relieve [their] *every* injury," whether such an injunction would have also redressed their injuries for the time period before they turned sixteen makes no difference. *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982).

Respondents also claim that this Court's review would be premature and should await a case with a full trial record. But nothing in the Sixth Circuit's decision to apply rational basis review turns on facts in the record. Indeed, this case presents the critical antecedent question of *which* standard of review applies. This Court can answer that question and, as it often does, remand for the lower courts to apply that standard based on the district court record.

Delay will only exacerbate Petitioners' injuries. Neighboring Ohio, another Sixth Circuit state, has now also banned gender-affirming medical care for transgender adolescents, making finding care even more challenging for Petitioners and other adolescents in Tennessee. Also underscoring the urgent need for review, an increasing number of states are considering restrictions on the provision of gender-affirming care for transgender adults, which under the Sixth

Circuit's analysis would also be subject only to rational basis review.[2]

Without this Court's prompt intervention, transgender youth and their families will remain in limbo, uncertain of whether and where they can access needed medical care. With such critical issues in the balance, Petitioners and others across the country affected by laws like SB1 simply cannot afford to wait.

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[2] *See, e.g.*, Kiara Alfonseca, *Ohio Senate overrides governor veto of trans care, sports ban HB68*, ABC NEWS (Jan. 24, 2024), https://abcnews.go.com/US/ohio-senate-overrides-governor-veto-trans-care-sports/story?id=106634032; http://webserver1.lsb.state.ok.us/cf_pdf/2023-24%20INT/SB/SB1777%20INT.PDF (Oklahoma bill severely restricting care for adults); House Bill 520, 67th Leg., 2d Reg. Sess. (Idaho 2024), https://legislature.idaho.gov/sessioninfo/2024/legislation/H0520/ (Idaho bill regarding trans adults).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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