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.

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

REPLY BRIEF FOR THE PETITIONER

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

A. The decision below is incorrect 3
B. The question presented warrants this Court's review now 10

TABLE OF AUTHORITIES

Cases:

City of Cleburne v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).. 5, 6
Dobbs v. *Jackson Women's Health Org.*, 597 U.S. 215 (2022)... 3
J.E.B. v. *Alabama*, 511 U.S. 127 (1994)................................ 3
Johnson v. *California*, 543 U.S. 499 (2005) 3
Massachusetts Bd. of Ret. v. *Murgia*, 427 U.S. 307 (1976).. 5, 6
Nguyen v. *INS*, 533 U.S. 53 (2001) 5
Poe v. *Labrador*, No. 23-cv-269, 2023 WL 8935065, (D. Idaho Dec. 26, 2023), appeal pending, No. 24-142 (9th Cir. filed Feb. 6, 2024)............................ 11
United States v. *Virginia*, 518 U.S. 515 (1996)................. 4, 5

Constitution and statutes:

U.S. Const., Amend. XIV (Equal Protection Clause).......... 3
Ohio H.B. 68 (Jan. 24, 2004).. 10
Tenn. Code Ann. (2023):
§ 68-33-101(m)... 2
§ 68-33-102(5)(B).. 4
§ 68-33-103(a)(1) 2, 4

Miscellaneous: Page

Diana M. Tordoff, *Mental Health Outcomes In Transgender & Nonbinary Youths Receiving Gender-Affirming Care*, JAMA Network Open (Feb. 25, 2022), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2789423 7

In the Supreme Court of the United States

No. 23-477

UNITED STATES OF AMERICA, PETITIONER

v.

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

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

REPLY BRIEF FOR THE PETITIONER

Respondents argue at length (Br. in Opp. 1-3, 6-10, 33-38) that Tennessee's ban on gender-affirming care for minors is justified by the State's interest in protecting adolescents. As every court to consider the issue has recognized, that interest cannot justify a categorical ban on medical treatments supported by the overwhelming consensus of the medical community. But the Sixth Circuit held that courts may not even consider whether the State has substantiated its asserted justification; instead, it held that laws like Tennessee's must be upheld so long as they are not irrational.

That was a profound and consequential error that warrants this Court's review. Tennessee's SB1, like similar bans enacted by other States, forthrightly classifies based on both sex and transgender status. By its terms, SB1 prohibits all medical treatments intended to

allow "a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to treat "purported discomfort or distress from a discordance between the minor's sex and asserted identity"—but SB1 permits the exact same treatments when prescribed for any other purpose. Tenn. Code Ann. § 68-33-103(a)(1) (2023). That focus on sex and gender conformity is deliberate: SB1 declares that its very purpose is to "encourag[e] minors to appreciate their sex" and to bar treatment "that might encourage minors to become disdainful of their sex." *Id.* § 68-33-101(m). Because SB1 classifies based on sex and transgender status, it must satisfy heightened scrutiny.

Respondents' efforts to demonstrate that SB1 withstands that scrutiny fall short. Respondents ignore the district court's detailed factual findings, which the Sixth Circuit did not disturb. Instead, respondents rely on their own selective and distorted presentation of the evidence. And none of respondents' arguments justifies a categorical ban on care that is consistent with the medical consensus and that the affected adolescents, their parents, and their doctors have concluded is appropriate and essential to their wellbeing.

Nor do respondents provide any other reason to deny review. They acknowledge that the Sixth Circuit's decision conflicts with decisions by other courts of appeals on both the ultimate validity of laws like SB1 and on key subsidiary questions. Given the wave of similar laws adopted in States around the country and the near-uniform conclusion by district courts that those laws are unconstitutional, respondents cannot plausibly deny that this Court will ultimately have to resolve those circuit conflicts. Delaying that authoritative resolution would needlessly leave transgender adolescents and

their families in limbo and inflict particularly acute harm in Tennessee and other States where these laws have taken effect.

A. The Decision Below Is Incorrect

1. Respondents offer no persuasive defense of the Sixth Circuit's conclusion that SB1 is subject only to deferential rational-basis review.

a. In insisting that SB1 does not classify based on sex, respondents repeat the Sixth Circuit's errors. They assert that SB1's express references to sex should be disregarded because SB1 prohibits "sex-transition treatments for all minors, regardless of sex." Br. in Opp. 22 (quoting Pet. App. 35a). But respondents do not dispute that the application of SB1 to any particular individual turns on that individual's sex. And this Court has already rejected the argument that a law that classifies based on race or sex can escape heightened review by targeting members of all races or both sexes equally. See Pet. 18, 20-21 (citing, *e.g.*, *J.E.B.* v. *Alabama*, 511 U.S. 127, 136 (1994), and *Johnson* v. *California*, 543 U.S. 499, 506 (2005)). Respondents do not respond to our citation of *J.E.B.* or *Johnson*, let alone try to reconcile their forgiving approach to sex-based line-drawing with the rule this Court has consistently enforced.

Respondents invoke (Br. in Opp. 24-25) this Court's holding that, absent evidence of pretext, laws regulating medical procedures that "only one sex can undergo" do not trigger heightened scrutiny under the Equal Protection Clause. *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 236 (2022). But as we have explained (Pet. 22), SB1 regulates procedures that all individuals can undergo, regardless of their sex: Healthcare providers cannot perform an abortion on a cisgender man, but they can prescribe "puberty blocker[s]" or

"hormone[s]," Tenn. Code Ann. § 68-33-102(5)(B) (2023), to any person, regardless of sex assigned at birth. Indeed, that is *why* the law speaks in explicit sex-based terms, prohibiting providers from prescribing treatments only "for the purpose" of "[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or "[t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity." *Id.* § 68-33-103(a)(1); see *id.* § 68-33-102(5)(B). That language is necessary to ensure that the targeted treatments—which can be given to members of both sexes—are prohibited only when prescribed to treat gender dysphoria.

Changing tack, respondents assert that despite this Court's holding that "all gender-based classifications" warrant "heightened scrutiny," *United States* v. *Virginia*, 518 U.S. 515, 555 (1996) (*VMI*) (citation omitted), some such classifications do not. Respondents put the point in different ways, but all of them reduce to the same basic error: Respondents seek to avoid heightened scrutiny altogether by invoking considerations that are relevant only in determining whether a sex-based classification *withstands* the scrutiny this Court's precedents require.

Respondents assert (Br. in Opp. 23), for example, that SB1 does not treat "*similarly situated* individuals differently based on their sex" because an adolescent boy receiving testosterone to "correct a deficiency" is not "similarly situated to an adolescent girl suffering from gender dysphoria" who receives testosterone to alleviate distress from that condition. Respondents also maintain (*ibid.*) that the cost-benefit calculus for prescribing puberty blockers and hormones to treat gender dysphoria is different than the calculus for prescribing

them to treat other conditions. But those are just different ways of saying that respondents believe that SB1's sex-based classifications are justified by biological differences between the sexes. And as we have explained (Pet. 20-22), when a legislature classifies based on sex, heightened scrutiny applies even if the legislature asserts that it had a good reason to do so—indeed, the whole point of heightened scrutiny is to give courts a principled yardstick for measuring such justifications.

Like the Sixth Circuit, respondents emphasize (Br. in Opp. 24) *VMI*'s recognition of "enduring" physical differences between men and women. 518 U.S. at 533. But *VMI* simply makes clear that those differences mean that sex-based lines will sometimes withstand heightened scrutiny; it does not suggest that courts can abandon heightened scrutiny altogether whenever a challenged law purports to rest on biology. Pet. 21-22. Respondents cannot reconcile their contrary view with *Nguyen* v. *INS*, 533 U.S. 53 (2001), where this Court applied heightened scrutiny to a law it described as based on the "biological" reality that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood." *Id.* at 63-64.

b. SB1 also discriminates based on transgender status, restricting care only for transgender individuals suffering from gender dysphoria. Pet. 19, 24-25. In response, respondents principally argue (Br. in Opp. 27-29) that transgender status is not a quasi-suspect classification warranting heightened scrutiny, citing *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976) (per curiam), and *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). But those decisions—which held that age and mental disability,

respectively, are not suspect classes—only reinforce the distinct nature of the classification at issue here.

In *Murgia*, the Court emphasized that "old age does not define a 'discrete and insular' group" because it "marks a stage that each of us will reach if we live out our normal span." 427 U.S. at 313-314 (citation omitted). In *City of Cleburne*, the Court similarly emphasized that those with mental disabilities are a "large and diversified group," and it saw no reason to expect that they faced a distorted political process. 473 U.S. at 442-443. Transgender individuals, in contrast, are a discrete minority accounting for roughly one percent of the population. Pet. 4. And respondents do not deny that transgender Americans face "a skewed or unfair political process," Pet. App. 46a—presumably because the Sixth Circuit's contrary assertion is refuted by the recent wave of legislation targeting transgender individuals in many different aspects of life. Pet. 3 n.1, 8 n.3.

2. The district court correctly held—consistent with every court to consider the question in the context of a similar law—that SB1 cannot survive heightened scrutiny. See Pet. 25-26. As the district court's detailed factual findings make clear, the record refutes respondents' assertion that SB1 furthers the State's interest in protecting transgender adolescents; rather, the evidence shows that when gender-affirming care is provided in accordance with prevailing medical standards, the benefits far outweigh any risks. Pet. App. 181a-205a. Indeed, every major American medical organization agrees that gender-affirming care is safe, effective, and can be medically necessary to treat gender dysphoria in transgender adolescents. Pet. 4-5. SB1's sweeping ban, moreover, cannot be described as "tailored" in any meaningful sense; SB1 categorically prohibits all

available medical treatments for all transgender adolescents suffering from gender dysphoria. Pet. 26.

The Sixth Circuit did not endorse respondents' argument that SB1 could survive intermediate scrutiny, nor did it disturb the district court's factual findings. And in attempting to justify SB1 here, respondents repeat factual assertions rejected by the district court, mischaracterize the record evidence, and rely on discredited or inapposite data. A complete response to respondent's assertions can await merits briefing, but a few examples illustrate the point.

Respondents assert (Br. in Opp. 9) that no reliable studies show that gender-affirming care lowers suicide rates or improves long-term mental health. But the district court joined courts across the country in rejecting that assertion: "[T]he weight of evidence in the record suggests the contrary—that treatment for gender dysphoria lowers rates of depression, suicide, and additional mental health issues faced by transgender individuals." Pet. App. 196a; see Pet. 7; 23-466 Am. Acad. of Pediatrics et al. (AAP) Amici Br. 17-20 & nn.55-66 (collecting dozens of studies). Respondents have not identified any data undermining the district court's detailed findings.*

---

* Respondents highlight (Br. in Opp. 9) a study suggesting that people who have received gender-affirming care have higher rates of suicide. But the study compares individuals who have received gender-affirming care to the population as a whole, not to the relevant comparator group—individuals who experience gender dysphoria but do not receive gender-affirming care. That distinction matters, because the suicide rate among the transgender population is much higher than the general population. Pet. App. 195a-196a. Studies that focus on the relevant population show that gender-affirming care meaningfully reduces the risk of suicide. See, *e.g.*, Diana M. Tordoff, *Mental Health Outcomes In Transgender &*

Respondents dismiss the medical evidence supporting gender-affirming care as "low quality" because it does not include randomized trials. Br. in Opp. 9-10, 36 (citations omitted). But as the district court found, the evidence supporting gender-affirming care is consistent with the type of evidence relied on in other clinical practices throughout the medical community, especially in the pediatric context. For example, "20% of the American Heart Association's Guideline for Pediatric Basic and Advanced Life Support include strong recommendations based on evidence of similar quality." Pet. App. 179a.

Respondents also assert that gender-affirming care is associated with various health risks, but the district court found that most of those risks are not supported by evidence. See, *e.g.*, Pet. App. 188a-189a (bone mineralization); *id.* at 190a (cardiovascular issues); *id.* at 192a (cancer). Again, respondents do not acknowledge, much less refute, those detailed findings.

Respondents also emphasize that hormone therapy may carry a risk of infertility. But the district court found that many transgender patients who are prescribed hormone therapy remain fertile, and any risk of infertility is comparable to that associated with other permitted treatments and can be mitigated in well-established ways. Pet. App. 185a-187a; see Pet. 7. Importantly, moreover, SB1 bans puberty blockers even though respondents have not identified any evidence suggesting that they pose a risk of infertility. To extend their infertility objections to puberty blockers, respondents

---

Nonbinary Youths Receiving Gender-Affirming Care, JAMA Network Open (Feb. 25, 2022) (finding "73% lower odds of suicidality" among adolescents who had received puberty blockers or hormone therapy).

note (Br. in Opp. 7) that "[n]early *all* minors who start puberty blockers" later progress to hormone therapy. But that does not establish any medical risk associated with puberty blockers themselves, or any justification for categorically banning them as a treatment for gender dysphoria.

Instead, respondents' observation that patients who receive puberty blockers typically progress to hormone therapy simply confirms that adolescents suffering from gender dysphoria find gender-affirming care beneficial and often choose—with their parents and in consultation with their doctors—to receive additional care. And that pattern is unsurprising: adolescents must undergo careful, individualized assessments before being prescribed puberty blockers, and it is rare for adolescents with sustained dysphoria to subsequently stop identifying as transgender. Pet. 5-7.

Respondents' reliance on the international landscape (Br. in Opp. 3, 10, 35) fares no better. Transgender adolescents "have access to gender-affirming medical care in developed nations across the world," including each of the countries that respondents cite; SB1 thus "make[s] Tennessee an outlier in the international medical community, not the norm." AAP Amici Br. 25-26; see Foreign Non-Profit Organizations Amici Br. 3-12 (documenting access to such care in Sweden, the United Kingdom, Finland, and Norway).

Finally, respondents repeatedly refer to a purported "surge" in youth identifying as transgender and seeking gender-affirming care. Br. in Opp. 1; see, *e.g.*, *id.* at i, 4, 15, 34. But until recently, today's transgender adolescents had been growing up in a world where transgender individuals had greater access to appropriate healthcare and faced less (but still significant)

discrimination and stigmatization than in earlier decades—which would naturally prompt a greater number of adolescents who would otherwise hide their gender dysphoria to disclose their condition and obtain essential care. See D. Ct. Doc. 144, at 11-13 (June 1, 2023). Insofar as respondents mean to invoke their experts' assertion that this purported "surge" is instead due to "social contagion," their experts relied almost entirely on a publication reporting the results of an "anonymous online survey" of parents of transgender youth "recruited from websites where this notion of 'social contagion' leading to transgender identity is popular." *Id.* at 10-11; see D. Ct. Doc. 143, at 8-9 (June 1, 2023).

B. The Question Presented Warrants This Court's Review Now

1. Respondents do not dispute that the courts of appeals are divided on the validity of laws like SB1: The Sixth and Eleventh Circuits have held that bans on gender-affirming care for adolescents trigger only rational-basis review and likely satisfy that standard, but the Eighth Circuit affirmed a preliminary injunction against Arkansas' ban after applying heightened scrutiny. See Pet. 27.

Respondents emphasize (Br. in Opp. 17) that proceedings in the Eighth Circuit are ongoing (as are proceedings in the Eleventh). But as respondents recognize (*id.* at i), SB1 is part of a recent wave of similar laws. More than twenty states have enacted such laws—including one since the petition was filed, see Ohio H.B. 68 (enacted on Jan. 24, 2024, over governor's veto). Those laws have given rise to suits in federal courts across the country. See Pet. 28 & n.7. Nearly every district court to rule has held that such laws are subject to heightened scrutiny and likely invalid—

including seven district courts before this petition was filed, and an additional district court in the months since, see *Poe* v. *Labrador*, No. 23-cv-269, 2023 WL 8935065, at *18 (D. Idaho Dec. 26, 2023).

An appeal involving the challenge to Oklahoma's ban was argued in the Tenth Circuit last month; an appeal involving a challenge to Indiana's ban was argued in the Seventh Circuit last week; and briefing is underway in an appeal pending in the Ninth Circuit. See *Poe* v. *Drummond*, No. 23-5110 (10th Cir. argued Jan. 17, 2024); *K.C.* v. *Medical Licensing Bd.*, No. 23-2366 (7th Cir. argued Feb. 16, 2024); *Poe* v. *Labrador*, No. 24-142 (9th Cir. filed Feb. 6, 2024). It is thus highly likely that the circuit conflict as to the validity of such bans will persist and require this Court's resolution—a reality respondents do not seriously dispute.

Respondents likewise do not contest that the courts of appeals are divided on key premises of the Sixth Circuit's equal-protection analysis. See Pet. 28-31. Those conflicts both make it more likely that the conflict over bans on gender-affirming care will endure and also independently warrant this Court's review. Respondents object (Br. in Opp. 18-19) that those conflicts involve decisions addressing different types of laws, some of which included alternative holdings. But respondents do not dispute that if this case had arisen in the Fourth, Seventh, or Ninth Circuits, SB1 would have been subject to heightened scrutiny.

2. Respondents offer no sound reason to defer this Court's review. They do not deny that the relevant legal issues have been fully ventilated in the lower courts, including in the decisions below. Pet. 27-28 & n.7, 32. Respondents urge the Court to wait for a case where trial proceedings have occurred, but this case was decided on

an extensive evidentiary record—after the parties agreed to present expert testimony in writing, Pet. 32—and respondents do not point to any additional factual development that could change the outcome here. Meanwhile, delay would prolong the profound harm suffered by adolescents in the Sixth and Eleventh Circuits who have lost access to critical medical care. And the present patchwork of decisions is imposing grave consequences on families across the Nation who are being forced to make weighty decisions about whether to abandon their homes, jobs, schools, and communities in the hopes of preserving access to necessary medical care for their children without knowing whether the bans in their State and neighboring States will be upheld or enjoined.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

FEBRUARY 2024