No. 23-477

In The Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
JONATHAN THOMAS SKRMETTI, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE, ET AL.,
Respondents,
and
L.W., BY AND THROUGH HER PARENTS AND NEXT FRIENDS, SAMANTHA WILLIAMS AND BRIAN WILLIAMS, ET AL.,
Respondents in Support of Petitioner.

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

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QUESTION PRESENTED

Whether Tennessee Senate Bill 1 (SB1), which 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," Tenn. Code Ann. § 68-33-103(a)(1), violates the Equal Protection Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States. Petitioner was the Intervenor-Appellee before the Sixth Circuit and Plaintiff-Intervenor before the district court.

Respondents in support of Petitioner are L.W.; Samantha Williams; Brian Williams; John Doe; Jane Doe; James Doe; Rebecca Roe; Ryan Roe; and Susan N. Lacy. Respondents in support of Petitioner were Appellees before the Sixth Circuit and Plaintiffs before the district court.

Respondents are Tennessee Attorney General Jonathan Skrmetti; the Tennessee Department of Health; Ralph Alvarado, the Commissioner of the Tennessee Department of Health; the Tennessee Board of Medical Examiners; Melanie Blake, the President of the Tennessee Board of Medical Examiners; Stephen Loyd, the Vice President of the Tennessee Board of Medical Examiners; Randall E. Pearson, Phyllis E. Miller, Samantha McLerran, Keith G. Anderson, Deborah Christiansen, John W. Hale, John J. McCraw, Robert Ellis, James Diaz-Barriga, and Jennifer Claxton, members of the Tennessee Board of Medical Examiners; and Logan Grant, the Executive Director of the Tennessee Health Facilities Commission. Respondents were Appellants before the Sixth Circuit and Defendants before the district court.

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INTRODUCTION

L.W., Ryan Roe, and John Doe are transgender adolescents who were born and raised in Tennessee. Today, they are happy, healthy, and thriving. But that was not always the case.

For years L.W., Ryan, and John experienced debilitating distress because of gender dysphoria. It was only after careful deliberation with their parents and doctors that they were prescribed puberty-delaying medication and hormone therapy that finally alleviated their suffering. As their parents describe, those treatments have allowed L.W., Ryan, and John to become "vocal, outgoing," "happy, confident," and "fully present." Pet. App. 61a; JA 84-85. John explains that he "[went] through a lot to finally get to [a] happy, healthy place." He "desperately hope[s] [it] doesn't all get taken away." Pet. App. 232a. Without this Court's intervention, it will.

Tennessee's SB1 bans the puberty-delaying medication and hormone therapy that have served as a lifeline for L.W., Ryan, John, and many other transgender adolescents—and it does so expressly because those medical treatments allow them to "live" and "identify" in ways the State deems "inconsistent" with their sex assigned at birth. Tenn. Code Ann. ("TCA") § 68-33-103(a)(1). The law's self-described purpose is to "encourage[] minors to appreciate their sex" by barring treatment "that might encourage minors to become disdainful of their sex." *Id.* § 68-33-101(m). SB1 thus does not prohibit puberty-delaying medication and hormone therapy across the board. Instead, it does so only when such treatment is used

to depart from what Tennessee considers typical of a minor's sex assigned at birth.

Recognizing that SB1 "imposes disparate treatment on the basis of sex," Pet. App. 164a, the district court applied heightened scrutiny. Reviewing extensive expert testimony and other evidence, the court found that puberty-delaying medication and hormone therapy for adolescents with gender dysphoria are safe, effective, and comparable in both risk profile and efficacy to many other forms of pediatric medicine that Tennessee permits. The court also found that the medications used to treat gender dysphoria are widely used to treat other medical conditions in adolescents, and that Tennessee's claims that such treatments are uniquely risky when prescribed for gender dysphoria were "not persuasive," "speculative," and replete with "inconsistencies and illogical inferences." Pet. App. 187a-189a, 191a. The court therefore granted a preliminary injunction.

A divided panel of the Sixth Circuit reversed. The panel refused to apply heightened scrutiny, failed to review the district court's factual findings, and held that SB1 passes constitutional muster under rational basis review. Justifying its decision not to apply heightened scrutiny, the panel declared that the "necessity of heightened review[] will not be present every time that sex factors into a government decision." Pet. App. 39a.

That holding breaks from a half century of this Court's precedents instructing that heightened scrutiny applies *whenever* the government draws classifications based on sex. In holding otherwise, the

Sixth Circuit conflated the question of whether a classification *triggers* heightened scrutiny with the distinct inquiry of whether the classification *survives* it. As this Court has explained, "[t]he fact that [heightened] scrutiny applies says nothing about the ultimate validity of any particular law; that determination is the job of the court applying [heightened] scrutiny." *Johnson v. California*, 543 U.S. 499, 515 (2005) (internal quotation marks omitted).

If left uncorrected, the Sixth Circuit's reasoning will have far-reaching consequences. It will effectively immunize all forms of government discrimination against transgender people from meaningful constitutional scrutiny. And it will force the families at the center of this case (and countless others like them) to lose the very medical care that has allowed their children to grow and thrive. This Court should vacate the Sixth Circuit's misguided decision, reaffirm that all sex classifications receive heightened scrutiny, and remand for further proceedings or reverse the judgment.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-101a) is reported at 83 F.4th 460. The stay opinion of the court of appeals (Pet. App. 102a-124a) is reported at 73 F.4th 408. The opinion and order of the district court (Pet. App. 130a-218a) is reported at 679 F. Supp. 3d 668.

JURISDICTION

The court of appeals entered its judgment on September 28, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall *** deny to any person within its jurisdiction the equal protection of the laws." Pet. App. 296a.

The text of SB1 (codified at TCA § 68-33-101 *et seq.*) appears at Pet. App. 296a-307a.

STATEMENT OF THE CASE

A. Factual Background

1. Over 1.5 million Americans are transgender, which means that they have a gender identity that differs from the sex they were assigned at birth. Pet. App. 251a. Being transgender is not a condition to be cured, but transgender people may experience gender dysphoria—a diagnosis characterized by clinically significant distress resulting from the incongruence between their gender identity and their sex assigned at birth. Pet. App. 251a, 283a. When untreated,

gender dysphoria can result in severe anxiety, depression, self-harm, and even suicide. Pet. App. 251a-252a. Treatment for gender dysphoria enables transgender people to live in accordance—and align their bodies—with their gender identity. Pet. App. 253a. With appropriate treatment, transgender youth with gender dysphoria can experience mental health outcomes comparable to their peers. Pet. App. 252a.

Treatment for gender dysphoria is provided in accordance with evidence-based clinical guidelines promulgated by the Endocrine Society and the World Professional Association for Transgender Health ("WPATH") (collectively, "Guidelines"). These Guidelines are comparable to clinical practice guidelines for other conditions, Pet. App. 252a-253a, 179a, 255a, and are based on decades of clinical experience and a substantial body of evidence showing the safety and efficacy of medical interventions to treat gender dysphoria, Pet. App. 293a. The level of evidence supporting medical treatment for gender dysphoria in adolescents is comparable to the evidence of safety and efficacy for many other forms of pediatric medicine. JA 115, 118.

Every major medical association in the United States supports the use of the Guidelines for treating gender dysphoria in adolescents and recognizes that puberty-delaying medication and hormone therapy are safe and effective treatments for adolescents. Pet. App. 254a, 274a-275a. Indeed, those medical treatments are the only evidence-based treatment shown to be effective at alleviating gender dysphoria in adolescents. JA 158.

The Guidelines from both the Endocrine Society and WPATH call for individualized assessments—including a comprehensive psychosocial evaluation—to determine appropriate diagnoses and treatments for each adolescent. Pet. App. 253a. Treatment may include puberty-delaying medication, hormone therapy, or both. Pet. App. 255a-256a, 259a, 288a. Under the Guidelines, the treatments at issue are prescribed only (i) with patient and parental consent, (ii) after the patient and the patient's family have been informed of the potential risks, benefits, and limitations of treatment, and (iii) to patients with "a long-lasting and intense pattern of gender nonconformity or *** gender dysphoria [that has] worsened with the onset of puberty." Pet. App. 256a-260a, 288a.

By allowing transgender adolescents to go through puberty in accordance with their gender identity, puberty-delaying medication and hormone therapy can dramatically reduce dysphoria, limit lifelong dysphoria, and potentially eliminate the need for future surgery. Pet. App. 263a. A delay or disruption in treatment can cause clinically significant distress, including anxiety and suicidality, as well as permanent physical changes from puberty that can be impossible to reverse. Pet. App. 87a, 270a-271a.

The same medications prescribed to treat adolescents with gender dysphoria are also prescribed to treat other medical conditions in both adolescents and adults. Pet. App. 263a-265a. For example, puberty-delaying medication is used to treat children with central precocious puberty, and is used to treat adolescents and adults with hormone-sensitive

cancers and endometriosis. Pet. App. 263a-264a. Non-transgender boys are also prescribed testosterone, and non-transgender girls estrogen, for delayed puberty. Pet. App. 266a. Testosterone suppression is also used in non-transgender girls with Polycystic Ovarian Syndrome to reduce some symptoms of the condition, including excess facial hair. *Id.* The potential risks associated with these medications when used to treat gender dysphoria are comparable to the risks associated with many other medical treatments to which parents routinely consent on behalf of their children—and that Tennessee permits. *Id.*; JA 129-131.

2. SB1 was enacted in 2023 as part of a wide-ranging series of laws targeting transgender people in Tennessee. *See* Pet. 8 n.3 (collecting laws).

SB1 prohibits any healthcare provider from providing *any* "medical procedure" 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." TCA § 68-33-103(a)(1)(A)-(B). The statute defines sex to mean a minor's sex assigned at birth, and it defines "[m]edical procedure" broadly to include, among other things, "[p]rescribing, administering, or dispensing any puberty blocker or hormone to a human being." TCA § 68-33-102(5)(B).[1]

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[1] TCA § 68-33-102(5)(A) also defines "medical procedure" to include "[s]urgically removing, modifying, altering, or entering into tissues, cavities, or organs of a human being." That clause is not at issue here. Pet. 9.

SB1 expressly permits such treatments to be prescribed when used to *conform* a patient's body to their sex assigned at birth. TCA §§ 68-33-102(1), 68-33-103(b)(1). Thus, the same medications that are permitted for people who seek to "live as" and "identify with" their sex assigned at birth are prohibited for people who seek to depart from those sex roles. In each instance, to know whether treatment is prohibited, the government must decide whether the treatment is "inconsistent with" the individual's sex assigned at birth—requiring an assessment of the birth-assigned sex of the patient and whether treatment conforms to, or departs from, that designation.

3. John Doe is a thirteen-year-old transgender boy who lives in Tennessee with his parents. Pet. App. 229a. John knew from an early age that he is a boy and remembers getting upset when people treated him as a girl. Pet. App. 230a. From about age three, John consistently told his parents, "I wish I was a boy." JA 88. When he was four, John's parents discovered that he had adopted a typical boy's name for himself and had been telling friends that he was a boy. JA 88-89; Pet. App. 230a. In first grade, John tried to do typical girl things because he felt like his parents were not listening to him when he repeatedly said he was a boy. JA 89. But he became "really sad" trying to please his parents when he thought they wanted him to live as a girl. *Id.* At that point, just before the start of second grade, John's parents found a therapist who saw him regularly and diagnosed him with gender dysphoria. JA 90. John has seen the same therapist ever since. *Id.*

As he got older, John experienced tremendous anxiety about undergoing puberty inconsistent with his gender. JA 91-92. When John was nine years old and had been seeing a therapist for two years, his therapist referred John and his parents to a pediatric endocrinologist at Vanderbilt University Medical Center ("VUMC") to learn about possible future treatment options should John continue to suffer from gender dysphoria. Pet. App. 61a-62a; JA 91. The endocrinologist discussed the risks and benefits of puberty-delaying medication with John and his family and began to monitor him until he reached the first stages of puberty. Pet. App. 62a, 231a; JA 91-92. When puberty began for John in 2021, his distress worsened and, after detailed informed-consent discussions with John and his parents, his doctors prescribed puberty-delaying medication. JA 92-93. That treatment greatly relieved John's distress. Pet. App. 231a; JA 93.

Since second grade, John has been known and seen only as a boy to everyone around him. JA 90. The prospect of having to stop treatment because of SB1 and being forced to experience the physical changes caused by endogenous puberty terrifies John. Pet. App. 231a-232a; JA 93-94. Losing access to treatment would cause John to undergo permanent bodily changes that are inconsistent with his male gender. He "cannot imagine losing control of [his] life" by going through a puberty that is wrong for him. Pet. App. 232a.

Ryan Roe is a sixteen-year-old transgender boy who lives with his parents in Tennessee. Pet. App. 239a. Ryan was vocal and outgoing as a young child, but when puberty started in fifth grade, he became

depressed, anxious, and withdrawn because of worsening distress from the incongruence between his gender identity and his body. Pet. App. 240a. His anxiety was so severe that he would vomit every morning before school. Pet. App. 241a. He even stopped talking in public because of the dysphoria he felt hearing his own voice. Pet. App. 236a.

Ryan was prescribed anti-anxiety medication, which stopped the vomiting and alleviated some of the extreme anxiety around school, but his distress about his body only got worse. Pet. App. 241a. He consistently went to psychotherapy, but it did not improve the distress. Pet. App. 235a, 241a.

Ryan was diagnosed with gender dysphoria in the summer after seventh grade. Pet. App. 242a. As his distress continued to mount, Ryan's therapist discussed medical treatment options with Ryan and his parents. *Id.* In 2021, the family consulted with an endocrinologist at VUMC and then spent the next several months discussing the possible risks and benefits of treatment, including potential impacts on fertility. Pet. App. 242a-243a. Ryan and his parents also continued to discuss treatment with Ryan's therapist. Pet. App. 243a. In 2022, when Ryan was fourteen years old, a pediatric endocrinologist at VUMC prescribed hormone therapy to treat Ryan's gender dysphoria after a "deliberate and careful medical process." Pet. App. 244a.

Since beginning treatment, Ryan's mental health has improved dramatically. Pet. App. 244a. He has transformed back into the vocal, outgoing person that he was before puberty. *Id.* For years he suffered from

gender dysphoria, and nothing could address his anguish the way hormone therapy has. Pet. App. 244a-245a. With testosterone, Ryan has "found [his] voice again" and is thriving. Pet. App. 237a. Without it, life is unimaginable for him. Pet. App. 238a.

L.W. is a sixteen-year-old transgender girl who lives with her parents in Tennessee. Pet. App. 60a; JA 78. Beginning around the age of ten, L.W. began to experience distress due to incongruence between her gender identity and her assigned sex at birth. Pet. App. 60a. She felt like she was "trapped" and "drowning." Pet. App. 60a, 223a. It was "hard [for her] to focus" because she "felt constant anxiety." Pet. App. 60a, 223a-224a. After coming out as transgender to her parents when she was twelve, L.W. was diagnosed with gender dysphoria. Pet. App. 64a; JA 81.

The following year, L.W.'s pediatrician recommended that L.W. and her parents meet with a team of clinicians at VUMC to assess treatment options. JA 82. After extensive assessments over several visits, discussions of the potential risks and benefits, and ongoing mental health care, L.W. began treatment with puberty-delaying medication and then estrogen to treat her gender dysphoria. JA 82-83; Pet. App. 226a-227a.

Since beginning that treatment, L.W. has grown more outgoing and is thriving. JA 84-85. She is "terrified" of the permanent changes that her body would undergo without the medication she relies on to treat her gender dysphoria. Pet. App. 228a. For L.W., "[i]t is painful to even think about having to go back to

the place [she] was in before [she] was able to *** access [this] care." *Id.*

SB1 prevents John, Ryan, L.W., and other transgender adolescents from continuing to receive puberty-delaying medication and hormone therapy, expressly because the treatments enable them to live in a manner that Tennessee considers "inconsistent" with their sex assigned at birth. Because stopping treatment would be catastrophic for their health and well-being, their families have been forced to seek care outside Tennessee. In addition to imposing a great financial burden, regularly traveling to seek care out of state has disrupted their schooling, their parents' work, and their relationships with their doctors. JA 86, 94-95; Pet. App. 246a.

Dr. Lacy is a physician licensed in Tennessee. JA 97. Her private practice in Memphis provides medical care to transgender and non-transgender people. JA 98. As part of her practice before SB1, Dr. Lacy prescribed hormone therapy to treat gender dysphoria, where appropriate, in transgender patients ages sixteen and up with parental consent. JA 98. SB1 has forced Dr. Lacy to stop treating her sixteen- and seventeen-year-old transgender patients with hormone therapy. JA 101. If the law were to be enjoined, Dr. Lacy would resume such treatment for those patients and similar new patients. JA 955.

B. Procedural History

1. L.W. and her parents, Ryan and his mother, John and his parents, and Dr. Lacy ("Plaintiffs") filed a complaint against the Tennessee Respondents ("Tennessee") alleging, *inter alia*, that the law violated

the equal protection rights of the adolescent plaintiffs and Dr. Lacy's patients under the Fourteenth Amendment. Pet. App. 135a.[2] Plaintiffs moved to preliminarily enjoin SB1 before its effective date of July 1, 2023. Pet. App. 131a.

The district court preliminarily enjoined SB1's prohibition on puberty-delaying medication and hormone therapy. Pet. App. 219a. The court held that SB1 classifies based on sex and transgender status because its prohibition applies only to treatment deemed "inconsistent" with a minor's sex assigned at birth—thus treating adolescents differently based on their sex assigned at birth and whether their treatment conformed to, or departed from, that birth-assigned sex. Pet. App. 149a-150a. The court applied heightened scrutiny both because of the law's facial sex classifications and because it held that transgender status constituted a quasi-suspect classification in its own right. Pet. App. 149a-150a.

The district court made extensive factual findings based on the voluminous record. Pet. App. 176a-205a. Crediting Plaintiffs' experts and finding several of Tennessee's experts unpersuasive, the court found that the benefits of the banned treatment are well-established; that Tennessee's claims about the harms of the banned treatments were not reliable or supported by the record; that the alleged risks are not unique to the prohibited care; and that SB1

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[2] The minors' parents also alleged that SB1 violated their fundamental rights as parents to direct the medical care of their minor children protected by the Due Process Clause, but that claim is not encompassed in the question presented here.

undermines rather than advances an interest in protecting the welfare of children. *Id.* Applying heightened scrutiny, the court held that Plaintiffs were likely to prevail on their equal protection claims because SB1's categorical ban is "not proportionate to the state's interest of protecting children from allegedly dangerous medical treatments," and is "severely underinclusive in terms of the minors it protects from *** alleged medical risks." Pet. App. 204a-205a.

2. Tennessee sought an emergency stay pending appeal from the Sixth Circuit. One week later, a divided motions panel granted the stay and ordered expedited consideration of the appeal. Pet. App. 103a, 121a. The same divided panel reversed the district court's preliminary injunction. Pet. App. 55a.[3]

a. The Sixth Circuit majority declared that the Constitution is "neutral" with respect to laws that discriminate against transgender people and therefore applied rational basis review to Plaintiffs' claims. Pet. App. 16a. The majority then concluded that Plaintiffs were not likely to succeed on the merits of their equal protection claim under that standard. Pet. App. 49a.

According to the panel majority, when sex classifications are applied "equally" to men and women, the classification should be treated as facially neutral and a "challenger must show that the State passed the law because of, not in spite of, any alleged

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[3] The case was consolidated for decision on appeal with a similar case from Kentucky, *Doe 1 v. Thornbury*, No. 23-5609 (6th Cir. July 8, 2023), *cert. petition filed*, *Doe 1 v. Kentucky*, No. 23-492 (Nov. 3, 2023).

unequal treatment." Pet. App. 37a. Despite acknowledging that this Court held in *Bostock v. Clayton County*, 590 U.S. 644 (2020), that discrimination against transgender people is discrimination "because of *** sex," the Sixth Circuit majority declined to apply *Bostock*'s logic to sex classifications under the Equal Protection Clause on the ground that it "applies only to Title VII." Pet. App. 40a (ellipsis in original).

Citing this Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), the majority also opined that "laws regulating 'medical procedure[s] that only one sex can undergo' ordinarily do not 'trigger heightened constitutional scrutiny.'" Pet. App. 33a (alteration in original) (quoting *Dobbs*, 597 U.S. at 236-37). Despite earlier characterizing SB1 as "regulat[ing] sex-transition treatments for all minors, regardless of sex," Pet. App. 32a, the majority reasoned that SB1 merely "restrict[s] medical procedures unique to each sex" because "only females can use testosterone as a transition treatment" and "only males can use estrogen as a transition treatment," Pet. App. 33a-34a.

The majority then rejected Plaintiffs' claim that transgender status independently constitutes a quasi-suspect classification. Pet. App. 44a. Reviewing the law under the "deferential" rational basis standard, the majority held that Plaintiffs failed to meet the high burden required to "invalidate a democratically enacted law on rational-basis grounds." Pet. App. 50a.

b. Judge White dissented, concluding that SB1 imposed "a facial [sex-based] classification, pure and

simple." Pet. App. 73a. Because sex and gender conformity each "'play[] an unmistakable *** role[]' in determining the legality of a medical procedure for a minor," Judge White opined that "[SB1] should raise an open-and-shut case of facial classifications subject to intermediate scrutiny." *Id.* (quoting *Bostock*, 590 U.S. at 660).

Judge White explained that "laws that classify on suspect lines do not escape heightened scrutiny despite 'evenhandedly' classifying all persons." Pet. App. 74a-75a (citations omitted). Unlike the statute at issue in *Dobbs*, Judge White observed, SB1 "expressly reference[s] a minor's sex and gender conformity—and use[s] these factors to determine the legality of procedures." Pet. App. 77a.

Judge White found further support in this Court's reasoning in *Bostock*—namely, that discrimination against transgender people "'necessarily' is discrimination 'because of sex.'" Pet. App. 77a (quoting *Bostock*, 590 U.S. at 665). The dissent explained that the differences between the texts of Title VII and the Equal Protection Clause do not concern whether a law *classifies* based on sex in the first instance, but only whether it is *permissible* under Title VII or *survives* heightened scrutiny under the Equal Protection Clause. Pet. App. 83a.

Judge White then concluded that SB1 failed heightened scrutiny because it lacked an exceedingly persuasive justification. Pet. App. 84a. Instead, the "'actual state purposes' *** rested on improper generalizations about boys and girls," namely the expectation that every person will—and should—live

and identify in a manner that conforms to their sex assigned at birth. Pet. App. 87a. Finding no clear error in the district court's findings that the benefits of the banned medical treatment outweigh the manageable side effects, Judge White concluded that Tennessee's assertion that the treatment was harmful to children was "without support in reality." Pet. App. 97a.

SUMMARY OF ARGUMENT

I. For the past half-century, this Court has held that all sex-based classifications warrant heightened scrutiny. Applying heightened scrutiny is particularly important when the government seeks to legislate based on overbroad generalizations about how individuals should order their lives according to their sex.

SB1 falls squarely within the heartland of sex-based classifications that arise from sex-based generalizations. It imposes differential treatment based on the sex an individual is assigned at birth. The law bans puberty-delaying medication and hormone therapy if—and only if—those treatments are provided in a manner that would allow a minor to "identify with, or live as" a sex "inconsistent with the minor's sex" assigned at birth. Thus, a minor assigned female at birth is prohibited from receiving the same testosterone medication that a minor assigned male at birth might receive—even if both minors are prescribed the medication for the purpose of masculinizing their bodies. And SB1 enforces this sex-based rule for the express purpose of imposing a government preference that minors conform to

overbroad sex-based generalizations. That is a classic sex classification, and it triggers heightened scrutiny.

This Court's reasoning in *Bostock* drives home the point. *Bostock* explained that discrimination based on a person's transgender status *necessarily* imposes differential treatment based, in part, on that person's sex assigned at birth. *Bostock*'s framework for identifying sex discrimination in the Title VII context applies with full force to identifying sex classifications under the Equal Protection Clause because both non-discrimination guarantees share the key principles undergirding *Bostock*: a textual commitment to protecting individuals from discrimination and a focus on rooting out discrimination when a protected characteristic is *a* but-for cause of the treatment, even if it is not the *only* one.

Contrary to the Sixth Circuit's reasoning, *Dobbs* does not preclude the application of heightened scrutiny to SB1. SB1 is not a restriction on a particular medical treatment that happens to be limited to one sex or the other. Rather, SB1 uses an individual's sex assigned at birth to define which treatments are prohibited and which treatments are permitted.

The Sixth Circuit's conclusory characterization of SB1 as a benign law divorced from government stereotyping puts the cart before the horse and defeats the whole point of heightened scrutiny—to distinguish permissible classifications based on sex from impermissible ones.

II. SB1 triggers heightened scrutiny for the independent reason that transgender status satisfies a faithful application of the four-factor test for

recognizing a quasi-suspect classification. The Sixth Circuit could find otherwise only by disregarding two critical considerations: the longstanding history of discrimination against transgender people and their ability to contribute to society.

III. The Court need go no further here than declaring that heightened scrutiny applies and remanding to the Sixth Circuit to conduct the heightened-scrutiny inquiry in the first instance. That said, SB1 cannot survive heightened scrutiny on the current record. Tennessee has an important interest in protecting minors from dangerous and risky treatment, but has failed to show a close "means-end" fit for SB1's use of sex classifications to accomplish that goal. Prohibiting medical treatment based only on whether it would allow minors to live "inconsistent with" their sex assigned at birth is an inaccurate proxy for prohibiting treatment based on dangerousness or riskiness. As the district court found, Tennessee's assertions about the risks of hormone therapy and puberty-delaying medication are wildly overstated and unsupported by evidence. And Tennessee has no explanation for why those medications are prohibited only when used to treat gender dysphoria but allowed for all other purposes. But even if SB1's sex classifications were accurate proxies for risky and harmful treatment, SB1's categorical ban is not a sufficiently tailored response.

IV. Even under rational basis, equal protection demands that distinctions drawn by a challenged law relate rationally to a legitimate government interest. Stripped of its illusory justifications, SB1 is a naked attempt to enforce Tennessee's stereotypes as to how

a person should "identify" and "live" based on their sex assigned at birth, imposing tremendous harm on transgender minors and their families in the process. That is not a legitimate governmental interest and SB1's categorical ban on medical treatment cannot survive any standard of review.

ARGUMENT

I. SB1 REQUIRES HEIGHTENED SCRUTINY BECAUSE IT CLASSIFIES BASED ON SEX

A. SB1 Imposes A Sex Classification By Forbidding Treatments That Are "Inconsistent" With An Adolescent's Sex Assigned At Birth

1. For nearly 50 years, this Court has subjected all sex classifications to heightened scrutiny, without exception. That categorical framework has played a vital role in protecting people who do not conform to generalizations about men and women.

In *Craig v. Boren*, 429 U.S. 190 (1976), this Court established that "all gender-based classifications today warrant heightened scrutiny." *United States v. Virginia*, 518 U.S. 515, 555 (1996) (internal quotation marks omitted). The Court has "adhered to that standard of scrutiny ever since." *Id.* at 558 (Rehnquist, C.J., concurring). That steadfast commitment to heightened scrutiny "responds to volumes of history," including the Court's own past decisions wrongly upholding discrimination based on sex-based generalizations under rational basis review. *Id.* at 531. As Chief Justice Rehnquist explained, that "long[,] *** extensive," and misguided history ultimately "prompted [this Court] to hold that measures that

differentiate on the basis of gender warrant heightened scrutiny." *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 730 (2003).

The Court has been particularly vigilant in applying heightened scrutiny to protect people who fail to conform to "overbroad generalizations about the way men and women are"—or how they should be. *Sessions v. Morales-Santana*, 582 U.S. 47, 57 (2017). Before adopting heightened scrutiny in *Craig*, the Court had all too often rejected sex discrimination claims based on group-based generalizations. In *Muller v. Oregon*, 208 U.S. 412, 422 (1908), for example, the Court sustained sex discrimination in maximum-hour laws, reasoning that women's "disposition and habits of life" make them more vulnerable to economic exploitation, even as it acknowledged that "there are individual exceptions." "[T]he rules of civil society," the Court opined during that period, "must be adapted to the general constitution of things and cannot be based upon exceptional cases." *Bradwell v. Illinois*, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring).

Not anymore. Under heightened scrutiny, the government may no longer use sex-based generalizations—even if they are true for most people—to deny equal protection to individuals who fall "outside the average description." *Virginia*, 518 U.S. at 517. "Overbroad generalizations of that order, the Court has come to comprehend, have a constraining impact, descriptive though they may be of the way many people still order their lives." *Sessions*, 582 U.S. at 63.

2. SB1's statutory text presents "an open-and-shut case of facial classifications subject to intermediate scrutiny." Pet. App. 73a (White, J., dissenting).

First, the law bans puberty-delaying medication and hormone therapy if—and only if—those treatments are provided "for the purpose" of "[e]nabling" an adolescent to "identify with, or live as," a gender "inconsistent with the minor's sex" assigned at birth, or treating distress "from a discordance between the minor's sex" assigned at birth and gender identity. TCA § 68-33-103(a)(1). That language imposes differential treatment based on whether the treatment is "inconsistent" with each individual's sex assigned at birth. Thus, the law prohibits testosterone from being prescribed to masculinize the bodies of birth-assigned females because such masculinization is deemed inconsistent with a female birth sex. Conversely, the law prohibits estrogen from being prescribed to feminize the bodies of birth-assigned males because Tennessee deems such feminization inconsistent with a male birth sex. And the law prohibits puberty-delaying medication from being prescribed for a birth-assigned male to live as a girl, and vice versa.

That is a straightforward sex classification. If a state law barred people from pursuing careers the government deemed "inconsistent" with their sex assigned at birth, no one would question that the law classifies based on sex. Such a law both enforces generalizations about sex and treats individuals differently based on their sex assigned at birth. SB1 does the same.

Second, SB1 imposes this differential treatment for the avowed purpose of "encouraging minors to appreciate their sex" and barring treatment "that might encourage minors to become disdainful of their sex." TCA § 68-33-101(m). Thus, by design, SB1 enforces a government preference that people conform to expectations about their sex assigned at birth. Driving home that statutory purpose, SB1 expressly allows risky and untested surgeries on intersex infants (who are too young to participate in the decision) to conform to the infant's sex assigned at birth. *Id.* § 68-33-103(b)(1)(A). The statute turns entirely on whether medical treatment is gender conforming, and nothing else.

"Classifications like these—motivated by perceptions of 'typically male or typically female tendencies'—are the kind of 'generalizations' at which courts must 'take a hard look.'" Pet. App. 73a (White, J., dissenting) (quoting *Virginia*, 518 U.S. at 541 (internal quotation marks omitted)).[4]

B. *Bostock* Confirms That SB1 Classifies Based On Sex

This Court's reasoning in *Bostock* confirms that SB1 classifies based on sex. Although *Bostock* was a Title VII case, the logic it uses to identify discrimination "because of sex" applies with equal force to identifying sex classifications under the Equal

[4] Though the Sixth Circuit emphasized that SB1 banned medical treatment only for "children" and not "adults," Pet. App. 31a-32a, a comparable ban on medical treatment for adults would also be considered facially neutral under the court's reasoning and subject only to rational basis review.

Protection Clause. *See, e.g.*, *Kadel v. Folwell*, 100 F.4th 122, 153-54 (4th Cir. 2024) (en banc), *cert. petition filed*, No. 24-99 (July 26, 2024); *id.* at 178 (Richardson, J., dissenting); *Fowler v. Stitt*, 104 F.4th 770, 789-93 (10th Cir. 2024), *petition for rehearing en banc filed*, Aug. 1, 2024. The Sixth Circuit erred in holding otherwise.

1. SB1 classifies based on sex under Bostock*'s reasoning.*

Bostock held that discrimination based on transgender status is inherently discrimination "because of sex" under Title VII, even assuming that "sex" refers exclusively to sex assigned at birth. SB1's prohibition on treatments "inconsistent" with sex assigned at birth classifies in precisely the same way.

This Court explained in *Bostock* that "[w]hen an employer fires an employee because she is *** transgender, two causal factors may be in play—*both* the individual's sex [assigned at birth] *and* something else (the sex *** with which the individual identifies)." *Bostock*, 590 U.S. at 661. But "[s]o long as the plaintiff's sex [assigned at birth] [is] one but-for cause of that decision, that is enough to trigger the law." *Id.* at 656.

Bostock also explained that discrimination against transgender people punishes individuals for not conforming to expectations of their sex assigned at birth. An employer who fires a transgender woman but retains an equally qualified cisgender woman has "penalize[d] a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth"—in that case, coming to

work identifying, living, and dressing as a woman. *Id.* at 660. "By discriminating against transgender persons, the employer unavoidably discriminates against persons with one sex identified at birth and another today." *Id.* at 669.

The same is true for SB1. Most obviously, SB1's prohibition on medical treatment treats individuals differently based on their sex assigned at birth. *See* I.A.2, *supra*. If the employer in *Bostock* had a policy of firing any employee who received medical treatment "for the purpose" of "[e]nabling" them to conform their body to and live as a gender "inconsistent with [their] sex," TCA § 68-33-103(a)(1), the result would have been the same. Just like firing an employee because she is transgender, such a policy would necessarily treat individual employees differently because of their sex assigned at birth. So too for SB1.

In addition, as in *Bostock*, SB1 "penalizes" people assigned female at birth for "actions" that Tennessee "tolerates" in persons assigned male at birth—namely, "living as" and "identifying with" a male gender identity. *Bostock*, 590 U.S. at 660. Under Tennessee's law, a person with a male birth-assigned sex may receive medical treatments to "live as" and "identify with" a male gender identity, but a person with a female birth-assigned sex may not. Indeed, the express statutory purpose is to "encourage" birth-assigned females to identify as girls (not boys), and to "encourage" birth-assigned males to identify as boys (not girls). For that reason as well, *Bostock* establishes that SB1 is a sex classification.

2. Bostock*'s reasoning applies to identifying sex classifications under the Equal Protection Clause.*

Both Title VII and the Equal Protection Clause are governed by the same principles underlying the outcome in *Bostock*. The Title VII analysis begins with identifying whether an employer has treated a person worse because of sex, and then asks whether the employer can avail itself of specified defenses. Similarly, the Equal Protection Clause requires a two-step inquiry. The court first identifies a sex classification, and then asks whether the government can justify the differential treatment under heightened scrutiny. The second steps of the two inquiries differ, but there is "nothing about these differences that would prevent *Bostock*'s commonsense reasoning *** from applying to the initial inquiry of whether there has been discrimination on the basis of sex in the equal protection context." *Fowler*, 104 F.4th at 790.

The Sixth Circuit declared *Bostock* irrelevant to equal protection claims because *Bostock*'s "text-driven reasoning applies only to Title VII." Pet. App. 40a. But the panel majority failed to identify any relevant difference, textual or otherwise, between Title VII and the Equal Protection Clause for the purposes of *identifying* a sex classification at the threshold. Rather, *Bostock*'s "text-driven reasoning," *id.*, focused on two "key drafting choices" in Title VII, *Bostock*, 590 U.S. at 680, both of which apply equally to the Equal Protection Clause.

First, Title VII "focus[es] on discrimination against individuals and not merely between groups." *Bostock*, 590 U.S. at 680. In holding that discrimination against gay and transgender employees is sex discrimination, *Bostock* explained that because Title VII refers to "individuals," not men and women as groups, it is no "defense for an employer to say it discriminates against both men and women because of sex." *Id.* at 659. "[A]n employer who fires a woman, Hannah, because she is insufficiently feminine and also fires a man, Bob, for being insufficiently masculine may treat men and women as groups more or less equally. But in *both* cases the employer fires an individual in part because of sex." *Id.*

The same principle applies to equal protection. Just as the text of Title VII refers to "any individual," the "neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with the rights of individuals, not groups." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring); *see Fowler*, 104 F.4th at 790. "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not as simply components of a racial, religious, sexual or national class.'" *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (adapting quotation originating in *City of Los Angeles, Department of Water & Power v. Manhart*, 435 U.S. 702, 708 (1978), a Title VII case). Thus, as the Sixth Circuit acknowledged, "States may not permit sex-based discrimination *** on the assumption that

men as a group and women as a group would be disadvantaged to a similar degree." Pet. App. 36a.

The Sixth Circuit reasoned that SB1 does not classify based on sex because it "regulate[s] sex-transition treatments for all minors, regardless of sex." Pet. App. 32a. But because the Equal Protection Clause protects "persons," not groups, it "is axiomatic" that facial classifications are not treated as neutral "on the assumption that all persons suffer them in equal degree." *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (prohibiting peremptory strikes based on race); *J.E.B.*, 511 U.S. at 142 n.13 (sex-based peremptory strikes are impermissible even "if each side uses its peremptory challenges in an equally discriminatory fashion").

Nor can facial classifications, including sex classifications, be erased by rephrasing the classification at a higher level of generality. *See Bostock*, 590 U.S. at 672. A law penalizing all people for believing in a religion "inconsistent with" the religion in which they were raised is not a religion-neutral policy against conversion. *See Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144 (1987). A law prohibiting all people from adopting a child "inconsistent with" their own race is not a race-neutral adoption policy. *Cf. Palmore v. Sidoti*, 466 U.S. 429, 434 (1984). And a law prohibiting all people from working in professions "inconsistent with" their sex is not a sex-neutral policy of "conform[ing] to 1950s gender roles." *Bostock*, 590 U.S. at 673. For the same reasons, a law prohibiting all minors from receiving medical treatment "inconsistent" with their sex assigned at birth is not sex-neutral either.

Tellingly, the Sixth Circuit admitted that its "equal application" reasoning could not apply to racial classifications. It opined that a different rule should govern sex classifications, however, because "the Court has never 'equat[ed] gender classifications, for all purposes, to classifications based on race.'" Pet. App. 37a (alteration in original) (quoting *Virginia*, 518 U.S. at 532). That is a non sequitur. Race and sex classifications are of course different, and different levels of scrutiny apply. *Virginia*, 518 U.S. at 532. But the fact that different levels of scrutiny apply once a classification is identified does not mean that a different analysis is used to determine whether a classification rests on a suspect or quasi-suspect basis in the first place.

Second, under Title VII, an adverse action is "because of" sex whenever sex is *a* but-for cause of the treatment, even if it is not the *only* one. The same holds true for equal protection.

In *Bostock*, this Court explained that Title VII's reference to discrimination "because of" sex "incorporates the simple and traditional standard of but-for causation." 590 U.S. at 656 (internal quotation marks omitted). "*Bostock*, then, did more than simply define the meaning of words in Title VII. It recognized that Title VII incorporates a widely used standard of but-for causation and articulated one way to establish it." *Kadel*, 100 F.4th at 178 (Richardson, J., dissenting).

The Sixth Circuit assumed that the Equal Protection Clause's reference to "equal protection" meant that it did not incorporate the traditional "but

for" causation standard. Pet. App. 41a. But this Court's precedents teach the opposite, routinely applying heightened scrutiny when sex is one element of a classification even if it isn't the *only* element. Thus, in *Craig v. Boren*, 429 U.S. 190, the Court treated a law that regulated alcohol sales based on both age and sex as a facial sex classification. *See also, e.g.*, *Stanton v. Stanton*, 421 U.S. 7 (1975) (law setting different ages of majority for parental support based on sex is sex classification); *Caban v. Mohammed*, 441 U.S. 380 (1979) (law establishing different rights for parents to withhold consent for adoption based on parents' sex and marital status is sex classification). Similarly, when challenging facially neutral policies, an equal protection plaintiff need not "prove that the challenged action rested solely on *** discriminatory purposes," *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977), as long as the "the same decision would [not] have resulted *** had the impermissible purpose not been considered," *id.* at 270 n.21. In other words, "but for" causation applies. *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 276 (1979).

The Sixth Circuit speculated that the Equal Protection Clause employs a different standard of causation since the word "because" is not part of its text. Pet. App. 40a-41a. But the court ignored the causation standard embedded in the term "equal." In *Comcast Corp. v. National Association of African American-Owned Media*, 589 U.S. 327 (2020), this Court interpreted the textual guarantee of the "same right" in 42 U.S.C. § 1981 to mandate "but for" causation. By focusing on ensuring that "[a]ll persons"

have "the same" right as white citizens, the Court explained, the statute "directs *** attention to the counterfactual—what would have happened if the plaintiff had been white," which "fits naturally with the ordinary rule that a plaintiff must prove but-for causation." *Id.* at 333 (alteration in original). Moreover, "the common law in 1866 often treated a showing of but-for causation as a prerequisite to a tort suit." *Id.* at 335.

So too for the Equal Protection Clause. Like the reference to "the same" right in Section 1981, the reference to "equal" protection in the Fourteenth Amendment "directs our attention to the counterfactual" of what would have happened if some characteristic of the plaintiff had been different. *Comcast Corp.*, 589 U.S. at 333. After all, that logic is what determines whether like is being treated alike. And the Equal Protection Clause was adopted in 1868, under the same background common law principles as Section 1981, enacted just two years earlier. Thus, whatever differences exist between Title VII and the Equal Protection Clause, both provisions are governed by the same key principles that drove the outcome in *Bostock*.

Consistent principles should lead to consistent results. There is no basis to "suddenly roll out a new and more rigorous standard" for identifying sex classifications when sex discrimination against transgender people is at issue. *Bostock*, 590 U.S. at 673. Doing so would "neglect the promise that all persons are entitled to the benefit of the [Constitution's] terms." *Id.* at 678. "Because these protections are afforded to everyone, they cannot be

denied to a transgender individual." *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011).

C. The Sixth Circuit's Additional Reasons For Withholding Heightened Scrutiny Are Unpersuasive

1. Dobbs *does not preclude the application of heightened scrutiny.*

The Sixth Circuit cited *Dobbs* for the proposition that "laws regulating 'medical procedure[s] that only one sex can undergo" ordinarily do not "trigger heightened constitutional scrutiny." Pet. App. 33a (alteration in original) (quoting *Dobbs*, 597 U.S. at 236-37). According to the Sixth Circuit, SB1 merely "restrict[s] medical procedures unique to each sex" because "only females can use testosterone as a transition treatment" and "only males can use estrogen as a transition treatment." *Id.* at 33a-34a.

That logic fails. SB1 is not a restriction on a particular medical treatment that happens to be limited to one sex or the other. Rather, SB1 uses an individual's sex assigned at birth to define which treatments are prohibited and which treatments are permitted. Consider a counter example: If SB1 prohibited surgical treatments for all forms of cancer, that prohibition would prevent men from having prostate surgery to treat prostate cancer and would prohibit women from having hysterectomies to treat uterine cancer. But even so, the prohibition would be facially sex-neutral because the categorical prohibition on all cancer surgeries does not turn on the sex of the patient. By contrast, a prohibition on "sex transition" treatment is not sex-neutral. It

"unavoidably discriminates against persons with one sex identified at birth and another today." *Bostock*, 590 U.S. at 669.

The Sixth Circuit expressed concern that "acceptance of this sex-classification theory would *** sidestep the conventional discretion given to legislatures" in regulating the practice of medicine. Pet. App. 38a. But a state's wide discretion in regulating the practice of medicine today is no different from its discretion in exercising any of its other police powers. *Compare Goesaert v. Cleary*, 335 U.S. 464, 465 (1948) (pre-heightened scrutiny decision upholding discriminatory sex classification prohibiting women bartenders because "the regulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers"), *with Craig*, 429 U.S. at 210 n.23 (post-heightened scrutiny decision disapproving of *Goesaert*). Whether any of Tennessee's purported justifications support its sex classification must be determined upon application of heightened scrutiny; those justifications do not erase the sex classification that SB1 draws. *See Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022) (rejecting "conflat[ion of] the classifications drawn by the law with the state's justification for it").

Moreover, nothing in *Dobbs* insulates government regulation of medical treatments from heightened scrutiny when the regulation is "designed to effect an invidious discrimination." 597 U.S. at 236. Thus, even under *Dobbs*, "the regulation of a course of treatment that only gender nonconforming individuals can undergo" would still trigger heightened scrutiny if "the regulation were a pretext for invidious

discrimination against such individuals." *Eknes-Tucker v. Governor of Ala.*, 80 F.4th 1205, 1229-30 (11th Cir. 2023), *petition for rehearing en banc filed*, Sept. 11, 2023. As discussed above, the text of SB1 openly declares precisely such an impermissible purpose: to require transgender minors to conform to their sex assigned at birth by banning treatment that would enable them to "live as" and "identify with" an "inconsistent" gender identity. TCA § 68-33-103(a)(1). The fact that SB1 not only facially classifies based on sex but does so to enforce Tennessee's preference for gender conformity compels heightened scrutiny.

2. There is no exception to heightened scrutiny for sex classifications purportedly based on biology.

As described in Part I.A., this Court has long held that heightened scrutiny applies to all sex classifications. The Sixth Circuit unilaterally declared otherwise: that "all" does not really mean "all." In its view, the "necessity of heightened review, will not be present every time that sex factors into a government decision," and this Court's precedents "show only that the government cannot classify individuals by sex when doing so perpetuates invidious stereotypes or unfairly allocates benefits and burdens." Pet. App. 39a. And, according to the Sixth Circuit, "[r]ecognizing and respecting biological sex differences does not amount to stereotyping." Pet. App. 43a. That reasoning fails for two reasons.

First, even if heightened scrutiny applied only where sex classifications are predicated on or reinforce "stereotypes," SB1 does precisely that. It requires

adherence to the sex-based stereotype that persons assigned a particular sex at birth should live their entire lives conforming their body and identity to that sex. That is an accurate generalization for most people, but it is patently false for the over 1.5 million transgender people in the United States. A sex-based stereotype is a generalization that individuals should conform to expectations for their sex, true for some but not for all. SB1 fits that description perfectly.

Second, the Sixth Circuit's reasoning puts the cart before the horse. The very purpose of heightened scrutiny is to guard against the "real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender." *J.E.B.*, 511 U.S. at 135. Allowing the government to escape heightened scrutiny by asserting at the outset that a sex classification is not based on a stereotype or fairly "allocates benefits and burdens" would defeat the point of the exercise.

In so holding, the Sixth Circuit collapsed heightened scrutiny's two-step inquiry. Whether a law *survives* heightened scrutiny is distinct from the antecedent question of whether a facial classification exists in the first instance. "The fact that [heightened] scrutiny applies says nothing about the ultimate validity of any particular law; that determination is the job of the court applying [heightened] scrutiny." *Johnson*, 543 U.S. at 515 (internal quotation marks omitted).

This Court's decision in *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 61 (2001), illustrates the point.

Nguyen applied heightened scrutiny to a statute that set different requirements for unmarried mothers to transmit United States citizenship to their children than unmarried fathers. The Court ultimately concluded that "[f]athers and mothers are not similarly situated with regard to the proof of biological parenthood," and that the statute was permissible because "the use of gender specific terms takes into account a biological difference between the parents." *Id.* at 63-64. But it did so only *after* recognizing that the statute classified based on sex and applying heightened scrutiny, requiring the government to show that the sex-based distinction substantially advanced an important governmental interest.

While the classification in *Nguyen* survived heightened scrutiny, not every classification purportedly based on biology will. Many of the discriminatory statutes that were wrongly upheld by this Court before 1971 under rational basis review relied on asserted biological differences between men and women. As noted above, before adopting heightened scrutiny for sex classifications, this Court upheld a law that restricted the number of hours that women (but not men) could work in certain jobs, reasoning that "woman's physical structure and the performance of maternal functions place her at a disadvantage." *Muller*, 208 U.S. at 421; *see also Radice v. New York*, 264 U.S. 292, 294 (1924) (upholding ban on women working at night because of "[t]he injurious consequences" of loss of sleep on women's "more delicate organism").

That erroneous reasoning shows why rational basis review is ill-suited to rooting out sex

discrimination. This Court now applies heightened scrutiny to all sex classifications to avoid repeating the same mistake. *Hibbs*, 538 U.S. at 730. The Sixth Circuit's free-wheeling approach to dispensing with heightened scrutiny would reverse that evolution and reintroduce the problems that prompted the Court to move to heightened scrutiny in the first place.

II. SB1 REQUIRES HEIGHTENED SCRUTINY BECAUSE TRANSGENDER STATUS IS A QUASI-SUSPECT CLASSIFICATION

Even if the Court were to reject the conclusion that SB1 classifies on the basis of sex, the statute independently triggers heightened scrutiny because it discriminates against minors because they are transgender.

Discrimination based on transgender status warrants heightened scrutiny as its own quasi-suspect classification. In short, and as discussed in further detail by the United States, transgender people as a group—a small minority that has long been the subject of irrational and stereotype-driven differential treatment—plainly satisfy the four criteria for identifying a suspect classification: (1) they have historically been subject to discrimination; (2) they have a defining characteristic that bears no relation to their ability to contribute to society; (3) they are defined by obvious, immutable, or distinguishing characteristics; and (4) they are a minority lacking political power. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 610-13 (4th Cir. 2020); *Karnoski v. Trump*, 926 F.3d 1180, 1200 (9th Cir. 2019); *see also* Pet. App. 158a-159a (collecting cases).

In concluding otherwise, the Sixth Circuit never addressed the two most critical considerations—a history of discrimination and whether the classification relates to the group's ability to contribute to society—and it misapplied the other two considerations. As demonstrated by the wave of similar laws that have passed across the country, transgender people, who make up a tiny percentage of the population, have little political power. The fact that major medical organizations oppose the bans as contrary to the best science says nothing about transgender persons' *political* power. Nor does the fact that a handful of law firms will represent them—a fact equally true of African Americans and women. And there is no requirement, in doctrine or logic, that a group's "discrete" characteristics be "definitively ascertainable at the moment of birth." *See* Pet. App. 46a. Both "alienage" and "legitimacy" are quasi-suspect classifications though neither is definitively ascertainable at the time of birth, and both are mutable. *See, e.g.*, *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) ("alienage" subject to strict scrutiny although mutable).

III. SB1 FAILS HEIGHTENED SCRUTINY

Once the Court determines that the Sixth Circuit erred in applying only rational basis review, it should vacate and remand for that court to apply heightened scrutiny in the first instance. But if this Court applies heightened scrutiny itself, it should conclude (like the district court did) that SB1 likely cannot meet that standard.

A. The Court Should Remand For Application Of Heightened Scrutiny

"[W]hen [this Court] reverse[s] on a threshold question, [it] typically remand[s] for resolution of any claims the lower courts' error prevented them from addressing." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). The Sixth Circuit never evaluated whether SB1 survives heightened scrutiny. Consistent with its usual practice, this Court should remand for the Sixth Circuit to conduct that analysis in the first instance. *See Johnson*, 543 U.S. at 515 (determining that strict scrutiny applied to race-based classifications in prison and remanding to the lower courts to apply that standard); *McLane Co. v. EEOC*, 581 U.S. 72, 85 (2017) (remanding because "the Court of Appeals has not had the chance to review the District Court's decision under the appropriate standard").

In addition, the Sixth Circuit's failure to assess the district court's extensive factual findings for clear error impedes this Court's resolution of the "step two" equal protection analysis. In opposing certiorari, Tennessee relied on multiple factual assertions that the district court rejected. *See* Tennessee, et al. Resp'ts Br. in Opp'n 7-10. And Tennessee's *amici* relied on evidence outside the record in this case. *See generally* Br. of Alabama as *Amicus Curiae* Supporting Resp't. As a court of review, this Court should not attempt to resolve those "predicate factual questions in the first instance." *CRST Van Expedited, Inc. v. EEOC*, 578 U.S. 419, 435 (2016). The Sixth Circuit should make the initial determination of whether the district court's findings were clearly erroneous and, if

necessary, remand to the district court to consider any evidence generated since the preliminary injunction record closed.[5]

B. Tennessee Has Failed To Show A Substantial Relationship Between The Law's Ban And Tennessee's Asserted Interests

If the Court chooses to conduct the heightened scrutiny analysis in the first instance, the Court should conclude that SB1 fails that standard. Under heightened scrutiny, "[t]he defender of legislation that differentiates on the basis of gender must show 'at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Sessions*, 582 U.S. at 59 (second alteration in original). A substantial relationship requires a "close means-end" fit. *Id.* at 68. The government also may not use sex classifications as an inaccurate "proxy for other, more germane bases of classification." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982). And the government may not impose inordinate burdens that are not sufficiently tailored to advance the government's asserted interests. *See Nguyen*, 533

[5] The Sixth Circuit suggested the deferential "clear error" standard does not apply when a district court makes findings on "a paper record." Pet. App. 49a. To the contrary, the "clear error" standard applies to all "findings of fact, whether based on oral or other evidence." Fed. R. Civ. P. 52(a)(6); *see American Premier Underwriters, Inc. v. General Elec. Co.*, 14 F.4th 560, 568 (6th Cir. 2021) (noting 1985 amendment to federal rules abrogating cases that limited clear error standard to live testimony).

U.S. at 70; *Trimble v. Gordon*, 430 U.S. 762, 770-71 (1977).

SB1 fails heightened scrutiny. Tennessee has an important interest in protecting minors from dangerous and risky treatments, but has failed to show a close "means-end" fit for SB1's use of sex classifications to accomplish that goal. *Sessions*, 582 U.S. at 68. Instead of actually classifying treatment based on whether it is risky or dangerous, Tennessee bans treatment based solely on whether it is "inconsistent with" an adolescent's sex assigned at birth. But the record shows that treatments that are inconsistent with one's sex assigned at birth are not an accurate proxy for treatments that are risky or dangerous. Many treatments prohibited by SB1 do not carry any of Tennessee's asserted risks. And to the extent the prohibited treatments do carry risk, SB1 is severely underinclusive because those same risks are present when the treatments are provided for other purposes.

Moreover, even if treatment inconsistent with sex assigned at birth were an accurate proxy for risky and dangerous treatment, SB1's categorical ban is not a sufficiently tailored response. Tennessee admits that the treatments are medically necessary for at least *some* transgender adolescents,[6] but SB1 nevertheless bans the treatments for *all* transgender adolescents

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[6] *See* Phil Williams (@NC5PhilWilliams), TWITTER (Aug. 7, 2023, 6:14 PM) https://twitter.com/NC5PhilWilliams/status/1688675082103566336?s=20 (interview with Tennessee Attorney General Jonathan Skrmetti about SB1).

under all circumstances. Far from advancing Tennessee's interests in protecting children, the record shows that SB1 undermines that interest by taking away critical medical care from adolescents who need it.

Applying heightened scrutiny here thus confirms that the only interest to which SB1 is *substantially* related is the impermissible purpose of enforcing Tennessee's preference for minors to "live as" and "identify with" their sex assigned at birth. But Tennessee cannot justify SB1's prohibition by demonstrating that it substantially advances an interest in adolescents living in accordance with their sex assigned at birth. That "notably circular" reasoning confuses the "means" with the "end[s]." *Virginia*, 518 U.S. at 545. Enforcing conformity with overbroad generalizations about sex is an "illegitimate" legislative purpose under heightened (or any standard of) scrutiny. *Hogan*, 458 U.S. at 725.

1. Inconsistency with sex assigned at birth is an overinclusive proxy for medical risk.

Tennessee argues that SB1's sex classifications substantially advance an interest in protecting children because the law allegedly prohibits "unproven and risky" treatments. Tennessee, et al. Resp'ts Br. in Opp'n 1. But Tennessee never explains why it drew a line banning all medical treatment based on inconsistency with sex assigned at birth, instead of regulating particular treatments based on specific risks.

Moreover, although all forms of medical treatment carry some degree of risk, the record shows that Tennessee's "allegations of *** harms and their prevalence" for the banned treatments are "not supported." Pet. App. 192a-193a. After crediting Plaintiffs' experts whose testimony was supported by extensive experience, sound research, and widely accepted clinical practice guidelines, the district court found that the prevalence of negative side effects is low and that any potential risks can be reduced with proper clinical management. Pet. App. 190a, 197a. Breaking down Tennessee's specific claims of risk highlights the paucity of support:

Fertility. Regarding Tennessee's claims about risk to fertility, the district court found that the evidence in the record "overwhelmingly demonstrates that many individuals receiving puberty blockers or cross-sex hormones will remain fertile for procreation purposes, and that the risk of negative impacts on fertility can be mitigated." Pet. App. 185a. The record also shows that puberty-delaying medication on its own poses no risk to fertility. Pet. App. 267a.

Delayed development. Tennessee's claims about puberty-delaying medication causing "delayed development" were based on the erroneous premise that the treatment delays puberty until the adolescent is outside the typical age range for starting puberty. The uncontested record testimony is that treatment "[p]rotocols used to treat transgender youth with pubertal suppression do not put them outside of the typical age range for puberty." Pet. App. 262a. And once pubertal suppression is stopped, endogenous puberty resumes, or the adolescent receives hormone

therapy to undergo puberty consistent with their gender identity. Pet. App. 256a.

Bone health. The record showed that the effects of puberty-delaying medication on bone health—and in general—are reversible and can be mitigated, and that hormones pose no risk to bone health. Pet. App. 189a.

Regret. Tennessee's claims regarding regret for receiving medical treatment for gender dysphoria are also overstated. JA 131 (noting that the rate of regret is very low for medical treatment for gender dysphoria). As another court found based on a similar record, "when gender-affirming care involving hormone therapy is provided in accordance with the WPATH standards of care, rates of regret are low." *Koe v. Noggle*, 688 F. Supp. 3d 1321, 1350-51 (N.D. Ga. 2023).

Other risks. As to the litany of claimed harms related to cardiovascular disease, sexual dysfunction, and cancer, the district court found Tennessee's evidence to be "contradict[ory]," "not persuasive," and replete with "inconsistencies and illogical inferences." Pet. App. 187a-189a, 191a.

Lack of benefits. In addition to overstating the potential risks of the banned treatment, Tennessee claims that the benefits of puberty-delaying treatment and hormone therapy to treat gender dysphoria are "unproven." But the record shows the opposite. The district court found that puberty-delaying medication and hormone therapy to treat gender dysphoria benefits adolescents who need it and that those benefits have been shown through a substantial body

of research. Pet. App. 179a-180a, 195a-196a. As the court found, the weight of the evidence demonstrates "that treatment for gender dysphoria lowers rates of depression, suicide, and additional mental health issues faced by transgender individuals." Pet. App. 179a-180a, 196a.

2. Inconsistency with sex assigned at birth is an underinclusive proxy for medical risk.

By using inconsistency with sex assigned at birth as a proxy for riskiness, SB1 is fatally underinclusive as well. SB1 does not bar—and, indeed, expressly allows—medical treatments that carry the same risks as the banned hormone treatments, including the same medications when used for other purposes. As the district court explained, SB1 is "severely underinclusive in terms of the minors it protects from the alleged medical risks of the banned procedures; it bans these procedures for a tiny fraction of minors, while leaving them available for all other minors (who would be subjected to the very risks that the state asserts SB1 is intended to eradicate)." Pet. App. 204a-205a.

For example, if Tennessee were concerned about the potential risk of cardiovascular problems from hormone treatments, that would not explain why those treatments are banned only for some minors, and not all—much less why it has drawn a distinction based on a minor's sex assigned at birth. Indeed, the record shows that the same cardiovascular risks are present regardless of the condition for which estrogen is prescribed and regardless of whether it is prescribed

to conform to or to depart from one's sex assigned at birth. Pet. App. 190a.

Similarly, with respect to fertility, the uncontested record evidence shows that "[m]any medical treatments that are necessary to preserve a person's health and well-being can impact an individual's fertility, but patients regularly proceed," and Tennessee does not ban those treatments. Pet. App. 268a.

Tennessee's asserted concern about regret and irreversibility suffers from the same underinclusivity problem. The State allows minors to have purely cosmetic surgeries like rhinoplasty and breast augmentation, regardless of the risk of regret or irreversibility, as long as the surgery is "consistent" with their sex assigned at birth. SB1 expressly permits irreversible surgical interventions on intersex infants, even though some have notably higher rates of regret among families. JA 132. SB1's failure to impose any restrictions on medical treatments that conform to–rather than depart from—expectations about a person's sex assigned at birth "seriously undermines the State's argument that the different[ial] treatment *** is substantially related to" its asserted interests. *Pickett v. Brown*, 462 U.S. 1, 15 (1983).

Tennessee's criticisms of the scientific evidence supporting transgender adolescents' health care are similarly underinclusive. Tennessee asserts that existing studies "lack[] control groups" and therefore constitute "low quality" evidence in scientific grading systems. Br. of Defendants-Appellants 14 (6th Cir. July 24, 2023), Doc No. 64. But that is a red herring.

The district court found that "to the extent [the Guidelines] rely on what is considered 'low-quality evidence,' [they] are not unique in this respect." Pet. App. 179a. The term "low quality," a term of art under medical grading systems, does not mean "poor" or "inadequate." JA 110-112. It simply refers to evidence that is not based on randomized controlled trials. *Id.*

The uncontested record testimony establishes that "[r]ecommendations for pediatric care made by professional associations in guidelines are seldom based on well-designed and conducted randomized controlled trials due to their rarity." JA 114. That is because randomized controlled trials are often not available in pediatric medicine. JA 113. *Accord Doe v. Ladapo*, No. 4:23-cv-114-RH-MAF, 2024 WL 2947123, at *33 (N.D. Fla. June 11, 2024) ("[O]nly about 13.5% of accepted medical treatments across all disciplines are supported by 'high' quality evidence on the GRADE scale."). Tennessee does not require that all pediatric medicine be supported by randomized controlled trials, but prohibits treatments for transgender adolescents—and only those treatments—for failing to satisfy a more onerous standard.[7]

[7] The fact that the banned treatments have not yet been approved by the FDA for the indications at issue does not support Tennessee's ban. "Off-label" use of drugs is common in medicine, particularly in pediatrics. JA 142. Tennessee does not generally ban off-label uses of medications, nor does it ban other off-label uses of the same medications at issue here.

3. SB1's categorical ban is not sufficiently tailored to Tennessee's asserted interests.

SB1 also fails heightened scrutiny because it categorically bans all medical treatments for adolescents with gender dysphoria when more tailored responses would fully serve the State's asserted interests. Under heightened scrutiny, even when sex constitutes a sufficiently accurate proxy for the state's interest, the government may not use that proxy to impose severe "burden[s]" or "erect[] inordinate and unnecessary hurdles." *Nguyen*, 533 U.S. at 70-71. Thus, a proxy that is constitutional when used to impose modest procedural requirements may fail heightened scrutiny when used to impose a categorical exclusion. *Compare Trimble*, 430 U.S. at 770-71 (challenges of proving paternity may justify some distinctions based on "legitimacy" but not "complete exclusion"), *with Lalli v. Lalli*, 439 U.S. 259, 268 (1978) (upholding narrower statute where "procedural demands *** bear an evident and substantial relation to the particular state interests this statute is designed to serve").

SB1's ban abandons any attempt at tailoring. Tennessee acknowledges that at least *some* transgender adolescents would benefit from the banned treatments if they "have showed gender dysphoria symptoms from a very early age and consistently shown them over the course of their lives." [8] The State claims "proper guardrails" are needed for treating adolescents with gender

[8] *See supra* note 6.

dysphoria. [9] But Tennessee has not established guardrails; it has bluntly prohibited *all* treatment for all transgender adolescents regardless of individualized need. *Cf. Trimble*, 430 U.S. at 770-71 (invalidating complete exclusion under heightened scrutiny because for "significant categories of ['illegitimate'] children of intestate men, inheritance rights can be recognized without jeopardizing" state's asserted interest).

SB1's complete ban on treatment for gender dysphoria is so sweeping that it effectively prohibits the very thing Tennessee's experts call for: more research. *See*, *e.g.*, JA 541, 551, 677, 683. Though Tennessee criticizes existing research supporting hormone therapy to treat adolescents with gender dysphoria and baselessly refers to the care as "experimental" and "untested," the law stifles further studies. The European countries to which Tennessee points highlight how mismatched the State's law is to its asserted goals. Each of those countries has expanded research to further study the efficacy of treatments for adolescents with gender dysphoria. JA 134-135. SB1 thwarts the development of additional data because it bans the treatments altogether.

In contrast to Tennessee's ban, the experience of other states like West Virginia and Nebraska have shown that more tailored restrictions—directed at specific concerns—are possible. *See* W. Va. Code § 30-3-20(c)(5) (allowing hormone treatment for adolescents with gender dysphoria only after certain conditions are met including: two independent

[9] *Id.*

clinicians, including one mental health clinician, having certified in writing that the adolescent has severe gender dysphoria; the diagnosing clinicians documenting in writing that the treatment is necessary to treat the minor's psychiatric symptoms); Neb. Rev. Stat. §§ 71-7301–71-7307. The Sixth Circuit may be right that the Constitution "surely permits more than one policy approach" to regulating treatment, Pet. App. 48a—but that does not answer the relevant question of whether Tennessee's blunderbuss ban passes constitutional muster.

Ultimately, SB1's categorical ban on the only evidence-based medical treatments for gender dysphoria *harms* Tennessee's interest in protecting children instead of advancing it. "[W]ithout appropriate treatment" adolescents with gender dysphoria experience "high rates of anxiety, depression[,] and suicidal ideation." Pet. App. 195a (second alteration in original). Withholding medical intervention increases those harms and forces adolescents to undergo physiological changes that can be difficult or impossible to reverse. Pet. App. 271a. That is why every court applying heightened scrutiny to such bans has enjoined them. *See* Pet. App. 122a-123a & n.2 (collecting cases).

IV. SB1 FAILS ANY LEVEL OF REVIEW

Even absent heightened scrutiny, SB1 fails rational basis review. The Constitution's "equal protection promise" is not "some generic guard against arbitrary or unlawful governmental action, merely replicating the work done by the Due Process Clause." *SECSYS, LLC v. Vigil*, 666 F.3d 678, 684 (10th Cir.

2012) (Gorsuch, J.). "Instead, the Equal Protection Clause is a more particular and profound recognition of the essential and radical equality of all human beings" and "seeks to ensure that *** those who 'appear similarly situated' are not treated differently without, at the very least, 'a rational reason for the difference.'" *Id.* (quoting *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008)).

In line with the basic principle that like be treated alike, a proper rational basis analysis focuses not on whether any plausible reason generally exists for a challenged law in the abstract, but on whether the *distinctions* drawn by the law are rational. Thus, to survive rational basis review, "the distinction [must] rationally further[] a legitimate state purpose." *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 618 (1985). Under this standard, whether a law has a rational basis must be determined "in light of how the [law] treat[s] other groups similarly situated in relevant respects." *Board of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001); *see also Eisenstadt v. Baird*, 405 U.S. 438, 452 (1972) (health risks of birth control pills not a rational basis for banning access for unmarried people versus married people).

Here, Tennessee's asserted rationales fail to justify the peculiar nature of SB1's classifications. Indeed, SB1's prohibition on any puberty-delaying medication or hormone therapy for minors if and only if it would be inconsistent with the minor's sex assigned at birth is "so far removed from [the asserted] justifications that *** it [is] impossible to credit" those interests. *Romer v. Evans*, 517 U.S. 620, 635 (1996). If

certain medical treatments present objective medical risks, Tennessee fails to explain why access to those treatments is banned *only* where they would allow a transgender minor to "identify" or "live" in a way "inconsistent" with their "sex" assigned at birth. As the district court concluded, the State's assertions "that these procedures are so dangerous that the state should be permitted to ban them entirely for treatment of gender dysphoria rings hollow when the state has no such qualms with minors receiving these procedures to treat other conditions." Pet. App. 203a n.55.

Stripped of its paper-thin justifications, what remains of SB1's purpose is to prevent transgender adolescents from accessing treatments that help them live openly as people who are transgender: "to force [birth-assigned] boys and girls to *look* and *live* like boys and girls." Pet. App. 85a (White, J., dissenting). Tennessee fears that medical treatment for gender dysphoria will encourage minors to "be disdainful" of their sex assigned at birth and make it more likely that adolescents will be transgender. That, in turn, stems from negative attitudes about transgender individuals because they do *not* conform to gender norms. *See* Pet. 8 n.3 (collecting recently passed Tennessee laws targeting transgender people). "But mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable *** are not permissible bases" to treat transgender minors differently from all others in Tennessee. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448 (1985). Indeed, this Court on multiple occasions has applied rational basis to invalidate laws that (like

SB1) appear animated in part by hostility toward a disfavored group, finding that the state failed to articulate a permissible justification for the law's differential treatment. *See Romer*, 517 U.S. at 632; *City of Cleburne*, 473 U.S. at 448; *Zobel v. Williams*, 457 U.S. 55, 65 (1982).

"Without careful attention to equal protection's demands, the integrity of surrounding law all too often erodes, sometimes to the point where it becomes little more than a tool of majoritarian oppression." *SECSYS, LLC*, 666 F.3d at 684. The Fourteenth Amendment promises equal protection as a check on that government abuse. Tennessee's attempt to ban essential medical treatment for a targeted class of individuals—based expressly on their departure from the State's sex-based generalizations as to the right way to "identify" or "live"—deprives transgender adolescents of the life-saving treatment that has allowed them to thrive. With it, SB1 deprives L.W., Ryan, John, and countless others of the equal protection the Constitution guarantees.

CONCLUSION

This Court should vacate the decision below and remand for the application of heightened scrutiny, or reverse the judgment.

Respectfully submitted,

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