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

BRIEF OF ALLIANCE DEFENDING FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF AMICUS CURIAE[1]

Alliance Defending Freedom is a public-interest law firm dedicated to defending religious freedom, free speech, the sanctity of life, parental rights, and marriage and family. Because the law should protect children—including from irreversible and unproven medical interventions—ADF advocates for laws that protect them from drug treatments that potentially harm them for life.

ADF is deeply troubled about the use of puberty blockers and cross-sex hormones for children with gender dysphoria. Systematic reviews around the world have shown (a) insufficient evidence to support such use, and (b) the risks to children outweigh the hypothetical benefits. This has led many European nations and American states to regulate puberty blockers and cross-sex hormones for children with gender dysphoria. Given the high stakes and uncertain science, such caution is warranted.

ADF has served as co-counsel defending states that protect children from potentially dangerous drug interventions, e.g., *Boe* v. *Marshall*, No. 2:22-cv-184-LCB, 2023 WL 3702311 (M.D. Ala. Apr. 17, 2023). Accordingly, ADF has a strong interest in seeing this Court vindicate the states' historic rights to regulate medicine consistent with biological reality.

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

States have long enjoyed substantial deference when acting "to safeguard the public health and the public safety." *Jacobson* v. *Massachusetts*, 197 U.S. 11, 25 (1905). Following the best science available, Tennessee has done just that in regulating puberty blockers and cross-sex hormones for children with gender dysphoria.

Yet the United States now insists that Tennessee violates the Equal Protection Clause by protecting minors from receiving these high-risk medical treatments. This novel argument tramples on the states' long-standing authority to regulate the medical profession. It enshrines specific medical treatments as constitutional rights, effectively foreclosing states from regulating in this area in the future, no matter how definitive the science. And it flips the Equal Protection Clause on its head, jeopardizing protections for women and jettisoning common-sense distinctions in the law. Even laws prohibiting female genital mutilation would fail the federal government's novel reading of the Fourteenth Amendment.

History shows that no one would have understood the Fourteenth Amendment to accomplish such a result. Indeed, when regulating medical treatments, states historically have not even triggered heightened constitutional scrutiny. Biological differences between men and women "are enduring," *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) ("*VMI*"), so laws that regulate based on these differences neither engage in "invidious discrimination" nor further a "stereotype[ ]," *J.E.B.* v. *Ala. ex rel. T.B.*, 511

U.S. 127, 137 (1994). They instead engage in the "longstanding expression[ ] of the States' commitment to the protection … of all human life." *Washington* v. *Glucksberg*, 521 U.S. 702, 710 (1997).

Consistent with this history, Tennessee sought to protect children from unproven drug treatments that risk permanent harm. After examining the medical literature and best practices around the world, the State found that puberty blockers and cross-sex hormones for gender dysphoria can cause irreversible sterility, increase children's risk of disease and illness, and spark adverse and sometimes fatal psychological consequences. J.A. 583–84 (Finland Council finding "gender reassignment of minors is an experimental practice" and that "[t]he reliability of the existing studies" is "highly uncertain"); *Independent Review of Gender Identity Services for Children and Young People: Final Report* 13, 33, 194 (April 2024) (finding "remarkably weak evidence" on gender-transition interventions and emphasizing that the benefits of using "puberty blockers and masculinizing/feminizing hormones in adolescents are unproven"). At minimum, Tennessee found that using these drugs for this purpose is reckless because doing so is experimental, unsupported by high-quality evidence, and poses unknown risks. Yet Petitioner and its supporters seek a constitutional right to inject children with these experimental drugs.

The Constitution's text and history refute Petitioner's approach; so does an unbroken line of this Court's precedents. States have wide latitude to regulate medicine. That they can do so consistent with biological realities is neither controversial nor unconstitutional. Particularly in an area fraught with

"scientific uncertainty," the Constitution does not straightjacket the states' choices to what interest groups—or here, the federal government—may prefer. *Gonzales* v. *Carhart*, 550 U.S. 124, 166 (2007). Instead, the "traditional rule" is deference to the states' choices. *Ibid.* That principle applies even more forcefully in this context, where it "is indisputable 'that a State's interest in safeguarding the physical and psychological wellbeing of a minor is compelling.'" *Otto* v. *City of Boca Raton*, 981 F.3d 854, 868 (11th Cir. 2020) (quoting *New York* v. *Ferber*, 458 U.S. 747, 756–57 (1982)).

Nothing about Tennessee's law resembles statutes this Court has invalidated under the Equal Protection Clause. That the law references biological realities does not mean it targets sex. Nor does the law bear the hallmarks of sex-discriminatory laws that traditionally have raised judicial hackles. It is grounded in medical realities, not outmoded stereotypes. It makes distinctions based on age and medical purpose—categories reviewed solely for rationality.

To adopt Petitioner's contrary position would sow widespread constitutional chaos. It would sweep under heightened judicial review laws that have stood since the Founding. And many of these longstanding laws would not survive the constitutional scrutiny that Petitioner asks this Court to apply.

The Court should reject the invitation. "[W]hen a practice not expressly prohibited by the text of the" Constitution "bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic," this

Court should refrain from "striking it down." *Rutan* v. *Republican Party of Ill.*, 497 U.S. 62, 95 (1990) (Scalia, J., dissenting). "The people may decide to change" these practices "through [the] democratic process[,] but the assertion that" such longstanding practices are "unconstitutional through the centuries is not law, but politics-smuggled-into-law." *VMI*, 518 U.S. at 569 (Scalia, J., dissenting).

This Court should affirm.

ARGUMENT

I. Tennessee's law should be reviewed for rationality.

Constitutional analysis starts with "the language of the instrument." *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215, 235 (2022). That language "offers a fixed standard for ascertaining what our founding document means." *Ibid.* (cleaned up). The Equal Protection Clause forbids States from denying "to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "[T]o inform the meaning of [this] constitutional text," this Court looks to history for guidance. *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 25 (2022).

A. The Fourteenth Amendment's original public meaning does not condemn Tennessee's law.

As originally understood, the Equal Protection Clause did not deal with classifications or discrimination at all. *United States* v. *Vaello Madero*, 596 U.S. 159, 178 n.4 (2022) (Thomas, J., concurring); GianCarlo Canaparo & Jameson Payne, *Equal*

Protection and Racial Categories, 34 GEO. MASON UNIV. C.R.L.J. 225, 226 n.4 (2024) (collecting scholarly sources). Instead, the Clause "impose[d] a duty on each state to protect all persons and property within its jurisdiction from violence and to enforce their rights through the court system." Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 GEO. MASON UNIV. C.R.L.J. 1, 3 (2008). Accord Canaparo & Payne, *supra*, at 260. The clause's critical word, often overlooked today, is "protection." Cong. Globe, 42d Congress, 1st Sess. app. 182 (1871) ("You will observe, Mr. Speaker, the great object to be accomplished, the great end to be reached, is 'protection.'") (statement of Rep. Ulysses Mercur). Born from a long historical pedigree, the clause's phraseology would have resonated with Americans in 1868 as a promise to "equal fulfillment of the government's remedial and enforcement functions, not a generic right against improper legislative classifications." Green, *supra*, at 44.

But adherence to the text and history does not call for "abandoning traditional Equal Protection Clause doctrine." Green, *supra*, at 14. The Fourteenth Amendment *does* have a "generic antidiscrimination provision"—the Privileges or Immunities Clause. *Ibid.* That provision prevents the states from "abridg[ing] the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, § 1. The nondiscrimination work this clause was intended to accomplish, this Court has achieved through doctrine developed under the Equal Protection Clause. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 993 (1995); Randy E. Barnett & Evan D. Bernick, THE

ORIGINAL MEANING OF THE 14TH AMENDMENT: ITS LETTER AND SPIRIT 321 (2021). Because of this, the Court should use the history behind the Privileges or Immunities Clause to inform that jurisprudence. Cf. *McDonald* v. *City of Chi.*, 561 U.S. 742, 758 (2010); *Timbs* v. *Indiana*, 586 U.S. 146, 157 (2019) (Gorsuch, J., concurring).

As originally understood, the Privileges or Immunities Clause protected "every citizen of the United States [from] hostile and discriminating legislation against him in favor of others, whether they reside in the same or in different States." *Slaughterhouse Cases*, 86 U.S. (16 Wall.) 36, 100–01 (1873) (Field, J., dissenting). "[I]n 1868, when people discussed abridgements of the privileges or immunities of citizens, they mainly were talking about laws that deprived certain classes of citizens of the civil rights accorded to everyone else." John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1388 (1992).

To effectuate the Fourteenth Amendment's text as informed by its historical meaning, courts should ask two questions. First, does the challenged law implicate a citizen's rights? *Ramos* v. *Louisiana*, 590 U.S. 83, 138 (2020) (Thomas, J., concurring in the judgment) (noting the Clause grants "United States citizens a certain collection of rights—*i.e.*, privileges or immunities—attributable to that status"). Second, is the affected citizen differently situated such that the law reasonably burdens that citizen's rights? If the answer to the second question is "no," then the law operates on all similarly situated persons equally and does not implicate the Fourteenth Amendment's primary concerns—"intentional and arbitrary

discrimination." *Sunday Lake Iron Co.* v. *Wakefield Twp.*, 247 U.S. 350, 352 (1918). Accord *Vaello Madero*, 596 U.S. at 179 (Thomas, J., concurring) (noting that the Fourteenth Amendment "guarantees citizens equal treatment … with respect to civil rights").

Here, the Court need not grapple with the first question—whether Tennessee's law implicates a citizen's rights—because Petitioner cannot show that the law arbitrarily treats some citizens differently from "similarly situated" citizens. *Barbier* v. *Connolly*, 113 U.S. 27, 32 (1885). Specifically, Tennessee's law prohibits drugs and surgeries "for the purpose of" gender transition for a minor. Tenn. Code Ann. § 68-33-103(a)(1). It is the dangerous and experimental nature of drugs and surgeries for gender transition, *not* sex or gender identity, that differentiates who can obtain these drugs and surgeries (those addressing precocious puberty, congenital defects, disease, or trauma) from those who cannot. *Id.* § 68-33-103(b)(1)(A). In other words, Tennessee's law does not regulate based on *who* seeks the drugs and surgeries but based on the benefits and risks *of the treatment requested*.

The two groups are not remotely similarly situated. Consider Tennessee's regulation of surgery on minors for purposes of a gender transition. It makes a world of difference whether a young woman requests a mastectomy because she has breast cancer versus whether she wants to look more like a male. The risks and benefits of the procedure change drastically depending on the reason the treatment is requested. And the legislature's prohibitions on those who seek drugs and surgeries for gender transition

are rational. It's the same type of line that states draw in medicine all the time. Tenn. Br. 19.

As the framers understood it, the Fourteenth Amendment "merely require[d] that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." *Hayes* v. *Missouri*, 120 U.S. 68, 71–72 (1887). Accord Christopher R. Green, *Twelve Problems with Substantive Due Process*, 16 GEO. J. OF L. & PUB. POL'Y 397, 419 (2018) (Fourteenth Amendment asks "whether a distinction between citizens of the United States is arbitrary because those citizens are in fact similarly situated"). The history behind the Fourteenth Amendment, specifically the Privileges or Immunities Clause, demonstrates that plaintiffs must show a similarly situated comparator that the law arbitrarily treats differently. Petitioner's failure to do so here dooms its claims.

B. Tennessee's law satisfies this Court's modern equal-protection jurisprudence.

What history demonstrates, modern equal-protection precedents confirm. This Court has described the Equal Protection Clause as "keep[ing] governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger* v. *Hahn*, 505 U.S. 1, 10 (1992). A plaintiff invoking the Equal Protection Clause must show that the government has treated it differently from a "similarly situated" party. *Stradford* v. *Sec'y, Pa. Dep't of Corrs.*, 53 F.4th 67, 73 (3d Cir. 2022). Failure to do so "dooms an equal-protection claim." *Id.* at 74. And even if the law treats similar parties

differently, the law does not offend the Constitution if the legislature had a rational reason behind the disparate treatment.

Over time, the Court has added a gloss to this basic structure. Laws receive heightened scrutiny when they treat people differently based on some protected characteristic, such as "race, alienage, or national origin." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Sex constitutes one such protected class. Laws that classify based on sex run the heightened risk of perpetuating "outmoded notions of the relative capabilities of men and women," *id.* at 441, or the "traditional, often inaccurate, assumptions about the proper roles of men and women," *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 726 (1982).

Laws can classify based on sex—and thus receive heightened judicial scrutiny—in two ways. "The easiest way … is to show that a law facially classifies based on sex." *Kadel* v. *Folwell*, 100 F.4th 122, 166 (4th Cir. 2024) (en banc) (Richardson, J., dissenting). Traditionally, such laws "distribute[ ] burdens or benefits on the basis of" sex. *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007). By their own terms, these laws "explicitly distinguish between individuals on [protected] grounds." *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993).

Other laws package a discriminatory intent beneath neutral language but nonetheless result in a tellingly disparate impact. To show such laws offend the Constitution, plaintiffs must at least demonstrate a discriminatory purpose behind the law—usually through its "historical background" and its legislative

history. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 264–68 (1977).

Either avenue tracks the Fourteenth Amendment's historical focus on ensuring that similarly situated citizens are not subject to arbitrary or invidious discrimination. Tennessee's law fits neither mold.

1. Tennessee's law does not trigger heightened scrutiny because it does not classify by sex.

Start with the law's language. It creates divisions based on two factors: age and medical purpose. Under the law, an adult experiencing gender dysphoria is free to seek puberty blockers and hormone therapy, but a child with the same condition cannot. The law also classifies based on the risks and benefits of a particular medical treatment. Children may obtain hormone therapy to treat medical conditions like precocious puberty, Tenn. Code Ann. § 68-33-103(b)(1)(A), but the law prohibits hormone therapy for a minor's gender dysphoria, *id.* § 68-33-103(a)(1).

Under this Court's modern framework, neither laws that classify based on age nor those that classify based on medical purpose trigger heightened review. *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991) (holding that "age is not a suspect classification"). As this Court has repeatedly held, "[t]he regulation of a medical procedure … does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext designed to effect an invidious discrimination." *Dobbs*, 597 U.S. at 236 (cleaned up). Such

laws instead "are governed by the same standard of review as other health and safety measures." *Id.* at 237. They are "entitled to a strong presumption of validity" and "sustained if there is a rational basis on which the legislature could have thought that [the law] would serve legitimate state interests." *Id.* at 301 (cleaned up).

That Tennessee's law *references* sex does not mean that it *classifies* by sex. That's particularly true in the medical context, where laws frequently reference biology. Courts have consistently held that such references do not render a law sex-based. *E.g.*, *Adkins* v. *Rumsfeld*, 464 F.3d 456, 468 (4th Cir. 2006) (holding that a law providing retirement benefits to divorced military spouses and defining spouse as "the husband or wife ... of a member" was not a facial classification). Even where states regulate medical procedures "that only one sex can undergo," that "does not trigger heightened constitutional scrutiny." *Dobbs*, 597 U.S. at 236.

Mississippi's law prohibiting abortion after 15 weeks—the law at issue in *Dobbs*—proves the point. There, the legislature acknowledged its "legitimate interests from the outset of pregnancy in protecting the health of women." Miss. Code Ann. § 41-41-191(2)(v). Despite this overt reference to women on the law's face, and despite the law's 100% disparate impact on women, this Court did *not* hold that the law classified by sex. Instead, the Court held that review of that law's regulation of medical procedures was "governed by the same standard of review as other health and safety measures." *Dobbs*, 597 U.S. at 236–37. Accord *Geduldig* v. *Aiello*, 417 U.S. 484, 498 n.20 (1974) (applying rational-basis review to statute

excluding benefits for pregnancy even though the excluded condition encompassed "exclusively female" group).

More concretely, consider variations of the law at issue in this case. First imagine a state that prohibits "any person" from obtaining puberty blockers or hormone therapy. That law plainly does not classify based on sex (or, perhaps, at all). Then consider a state that prohibits "any man or woman" from obtaining puberty blockers or hormone therapy. The second statute uses sex-based words, but that does not automatically mean that the statute classifies based on sex. Even though the second law uses gendered terms, it has the same effect as the first law. And under either law, both sexes would be treated the same, as neither could receive puberty blockers or hormone therapy. *Vacco* v. *Quill*, 521 U.S. 793, 800 (1997) ("Generally speaking, laws that apply evenhandedly to all unquestionably comply with the Equal Protection Clause." (cleaned up)).

At bottom, then, "[d]etermining whether a law facially classifies based on sex … involves more than a mere word search for particular terms." *Kadel*, 100 F.4th at 167 (Richardson, J., dissenting). Instead, it requires determining "what functions those words serve in that law's operation." *Id.* at 167–68.[2]

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[2] Tennessee's law does not differentiate based on transgender status for the same reason it does not differentiate based on sex: the law regulates the risks and benefits of medical procedures, not a child's transgender status.

2. The Equal Protection Clause does not incorporate "but-for" causation.

Arguing otherwise, Petitioner attempts to smuggle "but-for" causation into the Equal Protection Clause and graft this Court's reasoning in *Bostock* v. *Clayton Cnty.*, 590 U.S. 644 (2020), onto the Fourteenth Amendment. That doesn't work for multiple reasons.

First, the hiring and firing of men and women in the employment context is not comparable to medical treatment for boys and girls. In the former, biological difference is irrelevant. In the latter, it means everything because the balance of benefits and risks are different. If both a boy and a girl are considering a mastectomy, only the girl gives up the ability to breastfeed her future child. That's why, unlike hiring and firing, the government *can* regulate procedures that only one sex can undergo, as in *Dobbs*.

Moreover, Title VII and the Equal Protection Clause have very different texts and histories. The Court's analysis in *Bostock* was driven specifically by Title VII's "sweeping" text. 590 U.S. at 656. In particular, the "but for" standard that Petitioner wants to gerrymander into the Constitution comes from Title VII's specific use of the phrase "because of." *Id.* at 656.

Yet the Fourteenth Amendment has no such text. Title VII has "independent force, with language and emphasis in addition to that found in the Constitution." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard College*, 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring). That's why, for example, Title VII's text encompasses disparate-

impact claims, but the Equal Protection Clause does not. Petitioner cannot flatten these differences.

Finally, unlike the Fourteenth Amendment, Title VII "does not direct courts to subject … classifications to one degree of scrutiny or another" and instead makes it "*always* unlawful to discriminate among [protected] persons even in part." *Students for Fair Admissions,* 600 U.S. at 309 (Gorsuch, J., concurring). Unlike the historical underpinnings of the Equal Protection Clause—that dissimilar entities can be treated differently with a reasonable justification—Title VII generally brooks no departures.

In short, the Fourteenth Amendment "contains none of the text that the Court interpreted in *Bostock*." *Eknes-Tucker* v. *Governor of Ala.*, 80 F.4th 1205, 1229 (11th Cir. 2023). Given the textual differences, it is "implausible" to suggest, as the United States does, that Title VII and the Equal Protection Clause, two "differently worded provisions," "mean the same thing." *Students for Fair Admissions*, 600 U.S. at 308 (Gorsuch, J., concurring).

Of course, even under *Bostock*'s "but-for" standard, Petitioner's claims fail. Consider the federal government's hypothetical that it says proves Tennessee's law classifies based on sex. The government argues that a female "cannot receive … testosterone to live and present as a male, but an adolescent assigned male at birth can." U.S. Br. 21–22. Yet the "adolescent assigned male at birth" does not receive testosterone *because of* his sex; he receives it "to treat a … congenital defect, precocious puberty, disease, or physical injury." Tenn. Code Ann. § 68-33-103(b)(1)(A). Two factors changed in this

hypothetical: sex *and* medical purpose. So "holding other things constant but changing the minor's sex" does *not* change the outcome under Tennessee's law. Contra U.S. Br. 22 (cleaned up).

3. Tennessee's law lacks the hallmarks of statutes that separate based on sex.

Tennessee's law lacks any of "the hallmarks of sex discrimination" found in historical laws that classified by sex. Pet.App.32a. It does not contain any preference for one sex over the other, *Reed* v. *Reed*, 404 U.S. 71, 73 (1971) (providing that "males must be preferred to females" when appointment the administrator of a decedent's estate), bestow benefits on one sex and not the other, *Michael M.* v. *Super. Ct. Sonoma Cnty.*, 450 U.S. 464, 466 (1981) (plurality op.) (making "men alone criminally liable" for statutory rape), or exclude one sex and not the other, *VMI*, 518 U.S. at 519–20 (denying women entry to military academy).

In each of these cases, context mattered. The preferences, benefits, and exclusions all occurred in contexts where sex generally does not matter, like the classroom or jury selection. That heightened the likelihood that the laws were perpetuating "archaic and overbroad generalizations about gender." *J.E.B.*, 511 U.S. at 135 (cleaned up). Nothing about sex mattered for jury selection *except* the "outmoded" idea that women needed to be protected from the "ugliness and depravity of trials." *Id.* at 135, 132 (quoting *Craig* v. *Boren*, 429 U.S. 190, 198–99 (1976)).

Yet nothing about Tennessee's law "distribut[es] benefits and burdens between the sexes in different ways." *City of Cleburne*, 473 at 441. As the Sixth Circuit correctly noted, the "law[] regulate[s] sex-transition treatments for *all* minors, regardless of sex." Pet.App.32a (emphasis added). And it regulates in a context where biological realities do not further stereotypes but reflect real differences. Given the law's "across-the-board" application in this particular medical context, the law lacks the historical features that typically denote facial sex discrimination. *Ibid.*

4. Tennessee's law neither advances discriminatory purposes nor is based on outmoded stereotypes.

Tennessee acted for the compelling purpose of protecting children from experimental procedures. Petitioner has pointed to no evidence indicating that the legislature "selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,'" sex. *Pers. Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979). Nor has Petitioner shown that the law was "motivated by a purpose … *directed specifically* at" men or "women as a class." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) (emphasis added).

Bray proves the point. That case involved abortion providers who attempted to enjoin protestors from obstructing access to clinics. To do so, they had to show that an "invidiously discriminatory animus lay behind the" protestors' "action[s]." *Bray*, 506 U.S. at 268. So the abortion providers argued that the protestors' actions discriminated against "women in general." *Ibid.* This Court rejected that, holding that

protesting abortion did not "focus[ ] upon women *by reason of their sex*" but instead on antipathy for a particular medical procedure. *Id.* at 270.

Likewise, given that there are "men and women … on both sides of the issue," nothing about Tennessee's law betrays "an irrational object of disfavor" based on sex. *Ibid.* Tellingly, Petitioner does not seek injunctive relief that would require Tennessee to treat men and women equally. Their proposed equitable remedy would instead force Tennessee "to *either* ban puberty blockers and hormones for all purposes *or* allow them for all purposes." *Ecknes-Turner*, 80 F.4th at 1233 (Brasher, J., concurring). That highlights the law's true object: medical use, not sex. And the "use of medical diagnosis as the discriminating factor is not so irrational that" courts "can presume that they discriminate by proxy." *Kadel*, 100 F.4th at 172–73 (Richardson, J., dissenting).

Petitioner nonetheless argues that Tennessee's law advances sex stereotypes by punishing "nonconforming" behavior. U.S. Br. 22–23. Not so. Though states discriminate based on sex when they premise laws on outmoded generalizations about the sexes' roles or capabilities, *Bostock*, 590 U.S. at 700, they do not engage in stereotyping when they acknowledge "enduring" realities, *VMI*, 518 U.S. at 533. And Tennessee's law bases the availability of drugs and surgeries on biological reality, which is "not a stereotype." *Nguyen* v. *INS*, 533 U.S. 53, 68 (2001). Rather than promote a generalization, the law protects children from permanently harming or altering bodies that are perfectly functional. It does not consider how these children act or even how they

identify. Like many medical judgments, the law merely reflects real and legitimate biological concerns. Cf. *id.* at 73 ("The differences between men and women in relation to the birth process is a real one."). To conflate these legitimate concerns with "stereotyping" only "obscure[s] those misconceptions and prejudices that are real." *Ibid.*

As Tennessee points out, laws can implicate "nonconforming" behavior without discriminating based on sex. Tenn. Br. 25. So too with Tennessee's law. Even if Tennessee's law reflected a desire to enforce conformity, it does not do so in a sex-based way. It applies equally to both sexes. That does not offend the Equal Protection Clause.

C. Petitioner's theory would sow constitutional chaos and entangle this Court in a political thicket.

Petitioner asks this Court to "engineer exceptions to longstanding background rules." *Dobbs*, 597 U.S. at 287. To do so would sow chaos across the constitutional landscape. It would superintend the federal judiciary over countless areas historically reserved to the states' domain, thereby "encroach[ing] on a State's prerogative under its basic police power to safeguard the health and welfare of its citizens." *Kadel*, 100 F.4th at 193 (Wilkinson, J., dissenting).

Consider the breadth of Petitioner's theory and the countless commonly accepted principles it would implicate. Under that theory, state laws regulating restroom access would receive heightened judicial scrutiny. *Hecox* v. *Little*, 104 F.4th 1061 (9th Cir. 2024), *cert. filed*. So, too, would state laws limiting

women's sports to female athletes. *B.P.J. ex rel. Jackson* v. *W. Va. State Bd. of Educ.*, 98 F.4th 542 (4th Cir. 2024), *cert. filed*. As would state laws reserving separate spaces for women to shower and change. See *Parents for Privacy* v. *Barr*, 949 F.3d 1210 (9th Cir. 2020). It would also subject schools' policies about overnight stays to scrutiny and demand that states justify sex-separated prisons. Ark. Code Ann. § 6-10-137(a) (requiring that overnight accommodations on school travel be separated by sex of the student); *Tay* v. *Dennison*, 457 F. Supp. 3d 657, 682 (S.D. Ill. 2020) (prisons). Petitioner's theory would even plunge the courts into scrutinizing state policies about birth certificates and insurance coverage for sex-specific medical procedures. *Fowler* v. *Stitt*, 104 F.4th 770 (10th Cir. 2024); *C.P. ex rel. Pritchard* v. *Blue Cross Blue Shield of Ill.*, 2023 WL 8777349 (W.D. Wash. Dec. 19, 2023). And it would subject to heightened scrutiny any state law that references sex, no matter the reason, even something as simple as a law that follows standard medical practice and prescribes different dosages of a particular drug for male and female patients. *E.g.*, Pet.App.35a (noting other such laws, such as those prohibiting "female genital mutilation" and those regulating medical procedures for testicular cancer, that would receive heightened scrutiny under Petitioner's theory).

Petitioner's theory would subject all these laws to heightened constitutional scrutiny and would invalidate many of them "by judicial fiat." *B.P.J.*, 98 F.4th at 580 (Agee, J., concurring and dissenting in part). If the Equal Protection Clause prevents the states from prohibiting minors' access to experimental medical treatments, the laws referenced above are the logical

"next stop on this runaway train." *Ibid.* Worse yet, Petitioner's theory puts this runaway train on a collision course with the First Amendment. *E.g.*, Br. of Christian Employers Alliance as Amicus Curiae in Support of Appellants, *Pritchard* v. *Blue Cross Blue Shield of Ill.*, No. 23-4331 (9th Cir.), at 28 ("Here, the lower court's ruling interferes with the ability of churches and other religious organizations to provide employee benefits according to their religious beliefs.").

That cannot be correct. Petitioner "envision[s] an Equal Protection Clause that is dogmatic and inflexible, one that leaves little room for a national dialogue about relatively novel treatments with substantial medical and moral implications." *Kadel*, 100 F.4th at 193 (Wilkinson, J., dissenting). But "we must never forget that it is a constitution we are expounding," and our Constitution does not empower the judiciary to micromanage every facet of society. *McCulloch* v. *Maryland*, 17 U.S. 316, 407 (1819). It instead entrusts these kinds of choices to the people. *City of Cleburne*, 473 U.S. at 440.

Recent history shows the "turmoil" that comes when the Court "depart[s] from the normal rule" of affording states their proper deference. *Dobbs*, 597 U.S. at 300, 274. When this Court has constitutionalized medical decisions without any textual or historical support, the judiciary has subsequently struggled to apply an "inherently standardless" rule covering an issue "of great social significance and moral substance." *Id.* at 281, 299. And a judiciary "so unmoored from constitutional text or history" inevitably "deplete[d] the store of public respect on which a branch devoid of sword or purse

must ultimately rely." *Kadel*, 100 F.4th at 192 (Wilkinson, J., dissenting).

Rather than plunge into this "unprecedented … thicket," this Court should allow the democratic process to provide the necessary solutions. *Kadel*, 100 F.4th at 192 (Wilkinson, J., dissenting). That's particularly important in an area of such great "medical and scientific uncertainty." *Gonzales*, 550 U.S. at 163. Cf. *City of Grants Pass* v. *Oregon*, 144 S. Ct. 2202, 2221 (2024) (declining to set up the judiciary as "the ultimate arbiter of standards of criminal responsibility" so as not to "interfere with essential considerations of federalism that reserve to the States primary responsibility for drafting their own criminal laws" (cleaned up)). After all, "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne*, 473 U.S. at 440.

The Equal Protection Clause "was not designed to compel uniformity in the face of difference." *Whitney* v. *State Tax Comm'n*, 309 U.S. 530, 542 (1940). Indeed, "fail[ing] to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial." *Nguyen*, 533 U.S. at 73. Because Tennessee's law does not classify based on sex or burden one sex more than the other, this case is straightforward. But Petitioner's theory threatens to undermine many longstanding laws where the states *do* recognize the "enduring" "differences" between men and women. *VMI*, 518 U.S. at 533. To prevent the constitutionalization of yet another state prerogative, this Court should hold that when a state regulates based on these biological and medical considerations, heightened scrutiny does not apply.

CONCLUSION

For the reasons above, the decision below should be affirmed.

Respectfully submitted,

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