Nos. 23-466, 23-477

In the Supreme Court of the United States

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

v.

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

UNITED STATES,
Petitioner,

v.

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

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In recent years, the number of minors receiving gender-dysphoria diagnoses have exploded. States have also seen a corresponding surge in unproven and risky medical interventions for these underage patients. It is undisputed that these hormonal and surgical interventions carry serious and potentially irreversible side effects, including infertility, diminished bone density, sexual dysfunction, cardiovascular disease, and cancer.

States across the country have responded to these developments by enacting laws designed to ensure that potentially irreversible sex-transition interventions of uncertain benefit are not performed on minors who may not be able to fully grasp their lifelong consequences and risks. Tennessee, for example, prohibited three types of medical interventions for minors—puberty blockers, cross-sex hormones, and sex-transition surgeries.

Plaintiffs, supported by the United States, challenged Tennessee's law as violating equal protection and substantive due process. The Sixth Circuit, in an opinion by Judge Sutton and joined by Judge Thapar, upheld Tennessee's commonsense child-protection law. *See L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023); *accord Eknes-Tucker v. Gov'r of Ala.*, 80 F.4th 1205 (11th Cir. 2023). As the Sixth Circuit explained, the Constitution is "neutral about legislative regulations of new and potentially irreversible medical treatments for minors," and "[p]lenty of rational bases exist for these laws." No.23-466 App'x

(App.) 19a, 52a. "Th[is] is precisely the kind of situation in which life-tenured judges construing a difficult-to-amend Constitution should be humble and careful about announcing new substantive due process or equal protection rights that limit accountable elected officials from sorting out these medical, social, and policy challenges." App.57a.

The questions presented are:

Whether the Equal Protection Clause of the Fourteenth Amendment prohibits States from enacting laws protecting children from sex-transition medical interventions with risks of lifelong harm.

Whether the substantive component of the Due Process Clause gives a parent a right to demand cross-sex medical interventions for children that a State has found to be unproven and excessively risky.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

As the Sixth Circuit and courts across the country have recognized, States are facing an unexplained surge of minors receiving gender-dysphoria diagnoses. "The percentage of youth identifying as transgender has doubled from 0.7% of the population to 1.4% in the past few years, while the percentage of adults (0.5% of the population) has remained constant." App.9a-10a. In 2021, for example, there were "three times more diagnoses of gender dysphoria among minors than 2017." App.10a.

States have also seen the rise of a startling adoption in pediatric medicine of unproven and risky sex-transition interventions, particularly hormonal and surgical treatments. App.9a. "[N]o one disputes that these treatments carry risks or that the evidence supporting their use is far from conclusive." App.52a; *accord Eknes-Tucker*, 80 F.4th at 1225. The harms to patients—many of which are irreversible, even if the interventions are discontinued—include infertility, sexual dysfunction, diminished bone density, myocardial infarction, cardiovascular disease, and cancer. App.52a.

Even Petitioners' allies concede that these treatments carry severe risks.[1] WPATH acknowledges that cross-sex hormones cause permanent changes to a per-

[1] Respondents use "Plaintiffs" to refer to only the private plaintiffs in the *L.W.* case and "Petitioners" to refer to the private plaintiffs and the United States collectively.

son's body, as well as *clinically significant* risks of infertility and blood clots. *See* App.53a. And the Endocrine Society recognizes that puberty blockers can cause "adverse effects on bone mineralization," "compromised fertility," and "unknown effects on brain development." App.52a-53a.

Tennessee, like many other States, acted to ensure that minors do not receive these treatments until they can fully understand the lifelong consequences or until the science is developed to the point that Tennessee might take a different view of their efficacy. The law challenged here prohibits certain medical interventions for minors for which there is scant scientific support, while leaving "other helpful, less risky, and non-irreversible treatments … available." App.10a-11a.

Tennessee did not rush to judgment in its policymaking. In adopting the Act, Tennessee's General Assembly found that the prohibited procedures can lead to minors "becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences." Tenn. Code Ann. §68-33-101(b). It also determined that the harms of these interventions "are not yet fully known" and, in any case, outweigh any potential near-term benefits because they "are experimental in nature and not supported by high-quality, long-term medical studies." *Id.*

Tennessee backed up the General Assembly's findings in court. It "offered considerable evidence about the risks of these treatments and the flaws in existing research." App.52a. And it highlighted that "some of

the same European countries that pioneered these treatments now express caution about them and have pulled back on their use." App.28a; *accord Eknes-Tucker*, 80 F.4th at 1225.

The Sixth Circuit, in an opinion by Judge Sutton and joined by Judge Thapar, vacated a preliminary injunction against Tennessee's law. The court concluded that the Constitution is "neutral" on the key issue: "legislative regulations of new and potentially irreversible medical treatments for minors." App.19a. The Due Process Clause has nothing to say because Plaintiffs could not identify any deeply rooted right to prevent the government "from regulating the medical profession in general or certain treatments in particular." App.20a.

The Equal Protection Clause also has little to say because Tennessee's law "treat[s] similarly situated individuals evenhandedly," no matter how "one characterizes the alleged classifications in the law." App.33a. Whether a medication may be prescribed "does not turn on invidious sex discrimination but on the age of the individual and the risk-reward assessment of treating this medical condition (as opposed to another) with these procedures." App.40a. The court found that Petitioners were unlikely to succeed on a claim that Tennessee's law violates the highly deferential rational-basis standard.

Petitioners now accuse the Sixth Circuit of creating a circuit split and shirking its duty to "follow controlling Supreme Court precedent." Pltfs.-Pet.29. They

say the court was "dismissive" of a "deeply rooted fundamental right." Pltfs.-Pet.36. And they accuse the panel majority of adopting "manifestly false," invidious "stereotypes and generalizations." Pltfs.-Pet.27.

To the contrary, the decision below respects this Court's "most deeply rooted tradition" of "look[ing] to democracy to answer pioneering public-policy questions." App.19a. It ensures unelected federal judges do not "impose a constitutional straightjacket on legislative choices before anyone knows how that 'medical and scientific uncertainty' will play out." App.21a. It guarantees that the health and welfare of this Nation's most vulnerable children will benefit "from more rather than less debate, more rather than less input, more rather than less consideration of fair-minded policy approaches." App.17a-18a. And it exudes the type of judicial humility that this Court demands when there is no clear text, history, or tradition on the issue. In the face of an unexplained surge of pediatric gender dysphoria and the profound risks of the interventions at issue, "life-tenured judges construing a difficult-to-amend Constitution should be humble and careful about announcing new substantive due process or equal protection rights that limit accountable elected officials from sorting out these medical, social, and policy challenges." App.57a.

At bottom, there is no concrete circuit split implicated here, and the Sixth Circuit faithfully and correctly applied this Court's precedents. Even if the split solidifies or deepens because of recent cases like this one in a preliminary-injunction posture, superior ve-

hicles will arrive at the Court shortly (from the Eleventh and Eighth Circuits) where significant discovery and trial proceedings have occurred. The Court should decline Petitioners' request to remove an important and constantly evolving issue from the normal democratic process.

STATEMENT OF THE CASE

A. Tennessee acts to protect children from unproven medical interventions.

Seeking to "protect the health and welfare of minors" (those under the age of 18) in Tennessee, state legislators introduced the Act in November 2022. *See* S.B.1, 113th Gen. Assem. (2023), codified at Tenn. Code Ann. §68-33-101, *et seq.*; §68-33-102(6). It took effect July 1, 2023.

In adopting the Act, the General Assembly was concerned that sex-transition medical and surgical interventions can lead to minors "becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences." §68-33-101(b). It determined that these potentially irreversible and lifelong harms outweigh any potential near-term benefits because these interventions "are experimental in nature and not supported by high-quality, long-term medical studies." *Id.*

To further the goal of "protect[ing] minors from physical and emotional harm," the Act prohibits certain medical interventions "for the purpose of" either (1) "[e]nabling a minor to identify with, or live as, a

purported identity inconsistent with the minor's sex" or (2) "[t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity." §68-33-103(a)(1); §68-33-101(m). Prohibited procedures include surgery and the use of puberty blockers and cross-sex hormones. §68-33-102(5). The Act, with some limitations, allows minors currently receiving certain interventions to continue to do so until March 31, 2024. §68-33-103(b). It also expressly states that healthcare providers may continue to perform procedures to treat congenital defects, the physical condition known as precocious puberty, and physical injuries. *Id.* And it notes that other less risky and non-irreversible treatments, such as therapy, remain available. *See* §68-33-101(c).

The Act empowers the Tennessee Attorney General to enforce its prohibitions. §68-33-106. It permits state regulatory authorities to start disciplinary proceedings against providers who violate the Act. §68-33-107. And it creates a private right of action, not at issue here, enabling minors and non-consenting parents to sue offending providers, extending the statute of limitations for such lawsuits to 30 years after the minor reaches 18. §68-33-105.

The General Assembly's concerns were well-founded, as shown by the declarations that Tennessee produced from experts in endocrinology, psychiatry, and clinical psychology.

Start with puberty blockers, the on-ramp for many minors to sex-change interventions. Giving puberty blockers to a physically healthy adolescent going

through normal pubertal development induces the diseased state of hypogonadotropic hypogonadism, causing diminished bone density, as well as infertility and sexual dysfunction because of undeveloped sex organs. DCt.Doc.113-7 at 17-25 ¶¶63-108. Even the Endocrine Society acknowledges that the "primary risks of pubertal suppression" to treat gender dysphoria are "adverse effects on bone mineralization," "compromised fertility if the person subsequently is treated with sex hormones," and "unknown effects on brain development." DCt.Doc.113-10 at 15. The FDA has approved puberty blockers to rectify a hormonal imbalance in young children caused by precocious puberty but has not approved their use to treat gender dysphoria. DCt.Doc.113-5 at 65 ¶175; DCt.Doc.113-7 at 18-19, 22 ¶¶74-77, 94-96.

While some proponents say puberty blockers are merely a "pause button," research disagrees. Nearly *all* minors who start puberty blockers progress to sterilizing cross-sex hormones, and the majority go on to have sex-reassignment surgery. *See* DCt.Doc.113-5 at 51 ¶¶128-29 (UK study found 98% of adolescents who used puberty blockers progressed to cross-sex hormones); DCt.Doc.113-7 at 21 ¶92 (Dutch study found similar results, with most progressing from cross-sex hormones to surgery). This is alarming because, without hormonal intervention, nearly all children exhibiting gender dysphoria align their gender identity with their sex by the time they reach adulthood, and desistence is increasingly observed among teens and young adults who first manifest gender dysphoria during or after adolescence. DCt.Doc.113-5 at 39, 44-47

¶¶93, 105-18; DCt.Doc.113-4 at 26-27 ¶62 (peer-reviewed literature reported desistence in approximately 85% of children before the adoption of the "affirming" model).

Tennessee reasonably concluded that the well-documented risks of cross-sex hormones outweigh any purported benefits. Giving adolescent girls high doses of testosterone induces the diseased state of severe hyperandrogenism, causing clitoromegaly, atrophy of the lining of the uterus and vagina, irreversible vocal-cord changes, hirsutism, a "[v]ery high risk of" erythrocytosis, increased risk of myocardial infarction, severe liver dysfunction, coronary artery disease, cerebrovascular disease, hypertension, and breast or uterine cancer. DCt.Doc.113-7 at 27-33 ¶¶117-44; *see* DCt.Doc. 113-10 at 19. And giving adolescent boys high doses of estrogen induces the diseased state of hyperestrogenemia, causing sexual dysfunction and leading to a "[v]ery high risk of" thromboembolic disease and increased risk of macroprolactinoma, breast cancer, coronary artery disease, cerebrovascular disease, cholelithiasis, and hypertriglyceridemia. DCt.Doc.113-7 at 34-35 ¶¶145-54; *see* DCt.Doc.113-10 at 19. Like puberty blockers, the FDA has not approved the use of cross-sex hormones to treat gender dysphoria. DCt. Doc.113-7 at 23 ¶119. Moreover, both puberty blockers and cross-sex hormones threaten a child's fertility and, if successful in blocking puberty, will render the child infertile. DCt.Doc.113-4 at 23, 41 ¶¶52, 89.

The General Assembly also found that "minors lack the maturity to fully understand and appreciate the life-altering consequences of such procedures and

that many individuals have expressed regret for medical procedures that were performed or administered on them for such purposes when they were minors." Tenn. Code Ann. §68-33-101(h); *see* DCt.Doc.113-8 at 84-86 ¶¶154-58. With increasing frequency, detransitioners have come forward lamenting the harmful effects of receiving cross-sex interventions as minors. DCt.Doc.113-5 at 45-47 ¶¶110-18; DCt.Doc.113-11 at 3-6; DCt.Doc.113-12 at 3-5; DCt.Doc.113-13 at 2-3. Parents—including a Tennessee father whose daughter saw the same Vanderbilt doctor as minor Plaintiffs—have voiced concern over healthcare providers pressuring them to place their children on the "conveyor belt" of medical transition without first treating psychological comorbidities or explaining the long-term harms. DCt.Docs.113-14–113-19.

No reliable studies show that medical transition lowers suicide rates or improves long-term mental health relative to other lower-risk treatments, such as therapy. DCt.Doc.113-3 at 70-73 ¶¶147-153, at 89-94 ¶¶177-200; DCt.Doc.113-7 at 47-48 ¶¶207-11 (long-term study showed suicide rate for sex-reassigned group was 19 times higher than for the general population); DCt.Doc.113-8 at 73 ¶¶145-47 (describing benefits of psychodynamic therapy). And the protocols adopted by WPATH and the Endocrine Society promoting medical transition for minors are based on "very low quality" evidence under established research-evaluation standards. DCt.Doc.113-3 at 43-52, ¶¶82, 88-104; DCt.Doc.113-5 at 53, 64-65 ¶¶134-37, 173-74, 187; DCt.Doc.113-7 at 39-41, ¶¶173-182. Studies cited by proponents of these interventions often

lacked control groups, were short-term, ignored confounding factors, and at most showed correlation rather than causation. DCt.Doc.113-3 at 28-36, 119-31, ¶¶45-69, 277-80, 285, 293-95, 298-311.

Systematic reviews by national health authorities in Sweden, the United Kingdom, Finland, and Norway have all concluded that the harms associated with these interventions are significant, and the long-term benefits are unproven. DCt.Doc.113-6 at 7-17 ¶¶14-38; DCt.Doc.113-3 at 14-23 ¶¶16-36, at 39-46 ¶¶76-87. That is, "some of the same European countries that pioneered these treatments now express caution about them and have pulled back on their use." App.28a; *see* App.50a; *Eknes-Tucker*, 80 F.4th at 1225.

Recently, 21 medical professionals from nine countries published a letter in the Wall Street Journal reiterating how every systematic review to date "has found the evidence for mental-health benefits of hormonal interventions for minors to be of low or very low quality" and how there is "no reliable evidence to suggest that hormonal transition is an effective suicide-prevention measure." *Youth Gender Transition Is Pushed Without Evidence*, Wall St. J. (July 14, 2023), perma.cc/P9GM-MHF7. They urged American medical societies "to align their recommendations with the best available evidence—rather than exaggerating the benefits and minimizing the risks." *Id.*

B. Proceedings below

1. The district court grants a preliminary injunction.

Six weeks after the law's enactment, three minors currently on cross-sex hormones or puberty blockers, their parents, and Dr. Lacy (a Memphis physician) sued multiple Tennessee officials for declaratory and injunctive relief, claiming the Act violates due process and equal protection. DCt.Doc.1. Plaintiffs do not challenge the Act's private right of action under §68-33-105. App.112a, 184a. They moved for a "statewide" preliminary injunction, by which they apparently meant an injunction against enforcement not just with respect to Plaintiffs, but against anyone—a preliminary writ of erasure. DCt.Docs.21, 33.[2]

Plaintiffs' complaint and declarations state that Vanderbilt was the sole institution providing the minor Plaintiffs with hormones or puberty blockers for treatment of gender dysphoria. But Vanderbilt subsequently announced it would stop providing these interventions by July 1, 2023, despite the Act allowing them to continue until March 31, 2024. *E.g.*, DCt. Doc.1 at 25-31 ¶¶97-103, 113-21, 128-32; DCt.Doc.23 at 5-8 ¶¶16-26. The only other providers in Tennessee identified here—Dr. Lacy herself and CHOICES in Memphis—do not provide these interventions to minors under 16. So "[w]ith care being cut off at Vanderbilt on July 1st," Plaintiffs asserted "there are no in-

[2] The United States intervened in support of Plaintiffs and also sought a preliminary injunction. DCt.Doc.40. Its preliminary-injunction motion remains pending in the district court.

state options for treatment" of the minor Plaintiffs—who were all under 16 at the time. DCt.Doc.139 at 1-2 ¶¶4-5; *see* DCt.Doc.28 at 3 ¶12. Tennessee responded that it was, at best, unclear whether Vanderbilt would resume cross-sex interventions for the minor Plaintiffs even if there were a preliminary injunction. But the district court denied Tennessee's request for an evidentiary hearing on this issue. DCt.Docs.122, 148.

On June 28, the district court partially granted Plaintiffs' motion and enjoined the State's enforcement of the Act as to puberty blockers and cross-sex hormones. App.104a-90a. The court held that these portions of the Act likely violate both due process and equal protection and that an injunction would likely prevent irreparable harm to the minor Plaintiffs and their parents. *Id.* The injunction did not extend to the Act's surgery prohibition, which the court found Plaintiffs lack standing to challenge, a ruling neither Plaintiffs nor the United States contests. App.112a-16a.

2. The Sixth Circuit grants a stay pending appeal, reverses the district court, and vacates the injunction.

Tennessee asked the Sixth Circuit for an emergency stay pending appeal, which the court granted. App.195a-215a. The court then consolidated Tennessee's appeal with a similar one out of Kentucky. DCt. Doc.45.

After merits briefing and oral argument, the Sixth Circuit reversed the district court and vacated the preliminary injunction. Judge Sutton, joined by Judge

Thapar, concluded that neither Plaintiffs' equal-protection claim nor their substantive-due-process claim would succeed on the merits and that the other preliminary-injunction criteria were not met. App.5a-57a. Judge White dissented on both claims.

As to due process, the court concluded that "[t]his country does not have a 'deeply rooted' tradition of preventing governments from regulating the medical profession in general or certain treatments in particular, whether for adults or their children." App.20a; *see* App.19a-33a. Quite the opposite. App.20a. The court also rejected Plaintiffs' reliance on "parental rights." App.24a. Plaintiffs "overstate the parental right by climbing up the ladder of generality to a perch … in which parents control all drug and other medical treatments for their children." App.24a-25a. Neither "case law" nor this Nation's "traditions" support such a right. App.24a-25a. At bottom, "parents do not have a constitutional right to obtain reasonably banned treatments for their children." App.24a.

As to equal protection, the court concluded that Tennessee's law "treat[s] similarly situated individuals evenhandedly … however one characterizes the alleged classifications in the law." App.33a. The Act "regulate[s] sex-transition treatments for all minors, regardless of sex." App.35a. "[N]o minor may receive puberty blockers or hormones or surgery in order to transition from one sex to another." App.35a. Because the Act "treats like people alike," it "does not trigger heightened review." App.33a. *Bostock* did not change this conclusion. App.42a-46a. *Bostock*'s "text-driven

reasoning applies only to Title VII," not the Equal Protection Clause, "as *Bostock* itself … make[s] clear." App.43a. "That such differently worded provisions … should mean the same thing is implausible on its face." App.43a (cleaned up).

The court next rejected Petitioners' argument that the Act discriminates based on transgender status, which Petitioners claimed was a quasi-suspect class warranting heightened scrutiny. To the contrary, the law draws classifications only based on age or medical condition, neither of which warrants heightened scrutiny. *See* App.33a-36a. Nor was there animus or pretext, as Petitioners conceded. App.49a. At any rate, Petitioners had not met the "high" burden to "recogniz[e] a new suspect class." App.47a. Recognizing a new class would remove "policy choices from fifty state legislatures to one Supreme Court" and exacerbate the obvious "fraught line-drawing dilemmas" involved. App.47a-48a. Nor is transgender status "an immutable group," as "the stories of 'detransitioners'" confirm. App.48a.

Finally, the court concluded that the Act easily passed the rational-basis standard. "[N]o one disputes that these treatments carry risks or that the evidence supporting their use is far from conclusive." App.52a. There were "[p]lenty of rational bases" for the law. App.52a. And because Tennessee was likely to succeed on the merits, the remaining factors favored denying a preliminary injunction. App.56a-57a.

Judge White dissented. She concluded that the law violates both due process and equal protection.

According to Judge White, the Act violates due process because it "prohibit[s] Parent Plaintiffs from deciding whether their children may access medical care that the states leave available to adults." App.89a. That reasoning turned largely on her own assessment of the risks and efficacy of these interventions. Although Judge White agreed that States "may … prohibit a parent from submitting a child to genuinely harmful treatment," she concluded that Tennessee deemed the interventions "harmful to children without support in reality." App.98a.

Judge White also concluded that the law violates equal protection. First, she concluded that the law discriminates based on sex because "'medical procedures that are permitted for a minor of one sex are prohibited for a minor of another sex'" and because the law "condition[s] the availability of procedures on a minor's conformity with societal expectations associated with the minor's assigned sex." App.73a-74a. Judge White then concluded that the law fails intermediate scrutiny because the law's "purpose … to force boys and girls to look and live like boys and girls" is not a legitimate justification. App.86a. And the law's tailoring is inadequate because the interventions are purportedly "well accepted." App.87a-88a.

REASONS FOR DENYING THE PETITION

States across the country are facing a surge of minors receiving gender-dysphoria diagnoses and being administered unproven and risky medical interventions with potentially irreversible effects on their health and fertility. The question here is whether the

Constitution prohibits Tennessee from acting to protect minors who may not fully grasp the lifelong implications of these interventions. The Sixth Circuit correctly held that the Constitution is ultimately silent on this question, leaving it and similar issues to the democratic process.

Petitioners now assert that this Court's intervention is needed because there is a circuit split, this case is a good vehicle, the issues are important, and the Sixth Circuit got it wrong. They are wrong across the board. There is no concrete circuit split directly implicated here, and the Sixth Circuit faithfully applied this Court's due-process and equal-protection jurisprudence. This Court should deny certiorari and leave the questions presented for another day, and ultimately where they belong: with the People's elected representatives.

I. There is no circuit split warranting the Court's review.

Plaintiffs concede there is no circuit split on substantive due process. Pltfs.Pet.21-25. And the United States insists that this question does *not* warrant this Court's review because it does not meet the "traditional certiorari standards." U.S.-Pet.17 n.6.

Petitioners do argue, however, that their equal-protection claim implicates three circuit splits. Pltfs.-Pet.21-25; U.S.-Pet.27-31. But those splits are illusory and would not be implicated here regardless.

A. Petitioners assert that the Sixth Circuit "deepens an existing split with the Eighth Circuit as to laws

banning gender-affirming medical treatment for transgender adolescents." Pltfs.-Pet.21 (citing *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022)); U.S.-Pet.27 (same). But as Petitioners concede, *Brandt* was decided at the preliminary-injunction stage and has now progressed to final judgment and a permanent injunction. The State appealed and sought initial rehearing en banc, which the Eighth Circuit granted. The en banc court will soon decide many of the same issues addressed by the panel—and may, of course, reach a different result. *See Brandt v. Rutledge*, 2023 WL 4073727 (E.D. Ark. June 20), *hearing en banc granted*, *Brandt v. Griffin*, No. 23-2681 (8th Cir. Oct. 6, 2023).

Petitioners try to minimize the Eighth Circuit's en banc review because the earlier, preliminary-injunction decision was "not vacated." Pltfs.-Pet.23. That argument is unpersuasive. When the en banc Eighth Circuit issues an opinion, the *Brandt* panel opinion will have to be affirmed, reversed, or abrogated. *See United States v. White*, 863 F.3d 784, 787 n.4 (8th Cir. 2017) (en banc) ("The Court en banc is not, of course, bound by prior opinions of panels" and can "overrule" them.). So the alleged circuit split may soon be resolved without this Court's intervention.

To the extent Plaintiffs are speculating about what the en banc Eighth Circuit will do, their optimism is unwarranted. Several judges emphasized that the Eighth Circuit denied en banc review the first time around only because of the interlocutory "posture" of the panel decision, not based on any assessment of its "merits." *Brandt ex rel. Brandt v. Rutledge*, 2022 WL

16957734, at *1 (8th Cir. Nov. 16) (Colloton, J., concurral). The *Brandt* panel decision did not consider *Dobbs*, which was decided shortly before. Nor did the panel have the benefit of subsequent jurisprudence upholding state laws similar to Arkansas's. *See L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023); *Eknes-Tucker v. Gov'r of Ala.*, 80 F.4th 1205 (11th Cir. 2023); *Poe v. Drummond*, 2023 WL 6516449 (N.D. Okla. Oct. 5).

There is no reason to grant certiorari based on one outlier panel decision that is actively being reconsidered by the full court. If the full Eighth Circuit splits from the Sixth and Eleventh Circuits, then this Court can grant certiorari in one of those matters—in a case with a full trial record.

B. Petitioners also say the Sixth Circuit split with the Fourth, Seventh, and Ninth Circuits "on whether discrimination against transgender individuals triggers heightened scrutiny." Pltfs.-Pet.24-25 (citing *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017); *A.C. ex rel. M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760 (7th Cir. 2023); *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023)); U.S.-Pet.28-30 (same).

But this Court does not take cases to opine about "broa[d]," Pltfs.-Pet.24, social issues, such as gender identity. It has "the power to adjudicate only genuine 'Cases' and 'Controversies.'" *California v. Texas*, 141 S.Ct. 2104, 2113 (2021). Yet, as Petitioners concede,

these other cases involve different state laws (and different state interests) involving matters such as school sports and access to bathrooms.

The cited decisions also involve alternative grounds not presented here. The courts in those cases held that the challenged action was independently unlawful because of Title IX of the Education Amendments of 1972 (20 U.S.C. §1681). *See Grimm*, 972 F.3d at 616-19 ("[W]e hold that the Board's application of its restroom policy against Grimm violated Title IX."); *Whitaker*, 858 F.3d at 1046-50 (same); *A.C.*, 75 F.4th at 769-70 (same); *cf. Hecox*, 79 F.4th at 1020, 1038 (acknowledging the case also involves Title IX claim and limiting equal-protection ruling to categorical bans given that the "U.S. Department of Education has proposed new Title IX regulations addressing restrictions on transgender athletes' eligibility").

C. Petitioners last contend that the Sixth Circuit split with the Fourth and Ninth Circuits on whether individuals who identify as transgender are a "quasi-suspect class." Pltfs.-Pet.25-26 (citing *Grimm*, 972 F.3d at 610; *Karnoski v. Trump*, 926 F.3d 1180, 1200-01 (9th Cir. 2019)); U.S.-Pet.30-31 (same). But, here, this issue was an additional ground for rejecting Petitioners' equal-protection claim.

The Sixth Circuit also concluded that the law did not classify based on transgender status *at all*, but drew lines based on age and medical condition. App.33a. Not all individuals who identify as transgender undergo medicalized gender transitions, and many individuals who do undergo those interventions

later stop identifying as transgender. *See* App.41a, 8a; DCt.Doc.113-5 at 45-47 ¶¶110-18; DCt.Doc.113-11 at 3-6; DCt.Doc.113-12 at 3-5; DCt.Doc.113-13 at 2-3. And even assuming transgender status is a quasi-suspect class, "the regulation of a course of treatment that only gender nonconforming individuals can undergo would not trigger heightened scrutiny unless the regulation were a pretext for invidious discrimination against such individuals." *Eknes-Tucker*, 80 F.4th at 1229-30; *see* App.49a (same). No such finding was, or could be, made here. Judge White, even in dissent, did not address this issue or endorse Petitioners' view. *See* App.71a-72a n.6.

II. The Sixth Circuit's decision was correct.

As the Sixth Circuit explained, the first question is "whether the Constitution is neutral about legislative regulations of new and potentially irreversible medical treatments for minors." App.19a. The answer is yes. As a result, the rational-basis standard applies, and "legislatures have considerable discretion to regulate the matter." App.18a. But even if the Constitution somehow required heightened scrutiny, Tennessee's law protecting children from harmful procedures easily passes such scrutiny.

A. The most demanding standard that can apply is rational-basis review.

1. The Act does not classify individuals in a way that warrants heightened scrutiny under the Equal Protection Clause.

Tennessee's law does not classify based on sex. At most, it draws lines based on age and the nature of the medical intervention. Certain medical interventions may not be administered to minors for certain purposes, but boys and girls are treated equally. *Nobody* under 18 in Tennessee can obtain puberty blockers, hormones, or surgery for the prohibited purposes. The law thus "treat[s] similarly situated individuals even-handedly" and is not based on sex. App.33a.

Petitioners repeatedly invoke this Court's generic statement that "'all gender-based classifications today' warrant 'heightened scrutiny.'" *United States v. Virginia*, 518 U.S. 515, 555 (1996); *e.g.*, Pltfs.-Pet.16-17, 26, 29-30; U.S.-Pet.18, 20-21. According to Petitioners, the Sixth Circuit violated this command by concluding that *some* sex classifications do not receive heightened scrutiny. U.S.-Pet.21; Pltfs.-Pet.26-27. The Sixth Circuit did nothing of the sort.

As Petitioners concede, this Court's precedents impose a critical threshold question of whether the law *classifies* based on sex. *See* Pltfs.-Pet.27 ("The first question is whether a sex classification exists."). To answer that question, the court must determine whether the challenged law treats similarly situated individuals differently based on sex. *E.g.*, *Tuan Anh*

Nguyen v. INS, 533 U.S. 53, 63 (2001) ("[T]he Equal Protection Clause 'is essentially a direction that all persons similarly situated should be treated alike.'"); *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike."); *Reed v. Reed*, 404 U.S. 71, 77 (1971) ("similarly situated"); *Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (same); *Sessions v. Morales-Santana*, 582 U.S. 47, 64 n.12 (2017) (same); *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality) (same).

Here, the Sixth Circuit asked the right question and reached the right answer: the law does not treat differently persons *who are in all relevant respects alike* based on their sex. To the contrary, the law "regulate[s] sex-transition treatments for all minors, regardless of sex." App.35a. "[N]o minor may receive puberty blockers or hormones or surgery in order to transition from one sex to another." App.35a. Tennessee's law thus "lacks any of the hallmarks of sex discrimination":

- "It does not prefer one sex over the other."
- "It does not include one sex and exclude the other."
- "It does not bestow benefits or burdens based on sex."
- "And it does not apply one rule for males and another for females." App.35a.

Simply put, the law "is best understood as a law that targets specific medical interventions for minors, not

one that classifies on the basis of any suspect characteristic under the Equal Protection Clause." *Eknes-Tucker*, 80 F.4th at 1227.

Petitioners respond that Tennessee allows a boy (but not a girl) to receive testosterone and a girl (but not a boy) to receive estrogen, so it must be a sex-based classification. But, again, the Act does not treat *similarly situated* individuals differently based on their sex. "[B]y the nature of their biological sex, children seeking to transition use distinct hormones for distinct changes." App.36a. An adolescent boy might be given testosterone to correct a deficiency and restore the biological baseline. But that boy suffering from a disorder (testosterone deficiency) is in no relevant sense similarly situated to an adolescent girl suffering from gender dysphoria who is administered testosterone to induce different physical traits than would otherwise develop. *See* App.37a ("Using testosterone or estrogen to treat gender dysphoria (to transition from one sex to another) is a different procedure from using testosterone or estrogen to treat, say, Kleinfelter Syndrome or Turner Syndrome (to address a genetic or congenital condition that occurs exclusively in one sex)."); *Poe*, 2023 WL 6516449, at *15-16 (describing the difference in risks between the procedures). Patients receiving a procedure for different medical conditions present a different risk-benefit proposition and are in no way similarly situated. Petitioners' position is mechanistic and ignores critical medical context. Implanting a fertilized egg into a human female is IVF. Doing so to a human male is quackery. They are not the same treatment even though the same physical act is involved.

Petitioners respond that considering biological reality in the threshold inquiry "improperly collapses equal protection's two-step analysis." Pltfs.-Pet.27. Not so. Judges need not be "blind" to what "all others can see and understand." *Trump v. Mazars USA, LLP*, 140 S.Ct. 2019, 2034 (2020) (cleaned up). This Court has repeatedly acknowledged that "[p]hysical differences between men and women … are enduring," *Virginia*, 518 U.S. at 533, and it is a simple reality that "the sexes are not similarly situated in certain circumstances," *Michael M. v. Sup. Ct. of Sonoma Cnty.*, 450 U.S. 464, 469 (1981) (plurality). The Sixth Circuit correctly concluded that sex-transition medical interventions are not similar enough to other types of interventions using the medications in question, and thus are not a sex-based classification that triggers heightened scrutiny.

Petitioners pivot to arguing that because the statute *refers* to sex, it also *classifies* individuals based on sex. *E.g.*, U.S.-Pet.2, 19, 21. But "the statute refers to sex only because the medical procedures that it regulates—puberty blockers and cross-sex hormones as a treatment for gender dysphoria—are themselves sex-based." *Eknes-Tucker*, 80 F.4th at 1228; *see* App.37a-38a. "[I]t is difficult to imagine how a state might regulate the use of puberty blockers and cross-sex hormones for the relevant purposes in specific terms *without* referencing sex in some way." *Eknes-Tucker*, 80 F.4th at 1228. If a mere reference to sex in a law "dictated heightened review, virtually all abortion laws would require heightened review." App.38a. But *Dobbs* forecloses that argument.

Petitioners try to distinguish *Dobbs*, arguing that "*Dobbs* merely restated the conclusion in *Geduldig v. Aiello*, 417 U.S. 484 (1974), that classifications based on pregnancy do not automatically trigger heightened scrutiny even if they exclusively affect women." Pltfs.-Pet.29. But that ignores *Dobbs*'s clear equal-protection holding: "The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext designed to effect an invidious discrimination against members of one sex or the other." *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2245-46 (2022) (cleaned up).

Plaintiffs suggest hyperbolically that the Sixth Circuit's understanding of "*Dobbs* overrule[s] *VMI*'s command that all sex classifications warrant heightened scrutiny." Pltfs.-Pet.29. Such a reading, they argue, violates the principle that "[l]ower courts must follow controlling Supreme Court precedent even if the lower court thinks the precedent is in tension with some other line of decisions." Pltfs.-Pet.29. Once again, that argument is circular because it assumes—incorrectly and contrary to *Dobbs* itself—that Tennessee's law draws sex classifications. The Sixth Circuit's decision reflected a straightforward and correct application of this Court's precedents.

Petitioners next contend that the Sixth Circuit misread *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020). Pltfs.-Pet.30-33. In their view, "*Bostock* established that discrimination against transgender individuals is necessarily sex-based." Pltfs.-Pet.30; *see* U.S.-Pet.23 (similar). Petitioners overread *Bostock*.

Bostock's "text-driven reasoning applies only to Title VII, as *Bostock* itself … made clear." App.43a. *Bostock* expressly did "not prejudge" the meaning of other laws governing sex discrimination. 140 S.Ct. at 1753. Plus, the Equal Protection Clause uses different words and "predates Title VII by nearly a century, so there is reason to be skeptical that its protections reach so far." *Brandt*, 2022 WL 16957734, at *1 n.1 (Stras, J., dissental); *see Eknes-Tucker*, 80 F.4th at 1229 (same); U.S.-Pet.23 ("'Title VII and the Equal Protection Clause are not identical.'"). Title VII goes "beyond the Equal Protection Clause." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 310 (2023) (Gorsuch, J., concurring); *see* App.43a-44a ("Title VII covers disparate impact claims and the Fourteenth Amendment does not."). Reading *Bostock* to dictate the meaning of a constitutional provision is "implausible." *SFFA*, 600 U.S. at 308 (Gorsuch, J., concurring). "Because *Bostock* … concerned a different law (with materially different language) and a different factual context, it bears minimal relevance to the instant case." *Eknes-Tucker*, 80 F.4th at 1229; *accord Poe*, 2023 WL 6516449, at *6.

Even if *Bostock* applied here, it would support Tennessee. *Bostock* emphasized that to determine whether an act "discriminate[s]," a court must use a comparator—*i.e.*, compare the plaintiff to "others who are *similarly situated*." *Bostock*, 140 S.Ct. at 1740 (emphasis added). In *Bostock*, male and female employees were similarly situated because "[a]n individual's homosexuality or transgender status is not relevant to employment decisions." *Id.* at 1741. Here, by contrast,

using testosterone or estrogen to treat a deficiency and restore naturally occurring levels is in no way similar to using those drugs to elevate hormone levels far above the naturally occurring baseline to induce or prevent certain physical changes. Petitioners' reliance on *Bostock* fails on its own terms.

Finally, Tennessee's law does not trigger heightened scrutiny on the ground that it targets individuals who identify as transgender. The Sixth Circuit correctly concluded that the law did not target transgender-identifying individuals. App.49a-50a. The law does not classify based on transgender identity but based on age and medical condition. App.33a-36a. "Plaintiffs also have not made the case that animus toward transgender individuals as a class drives this law." App.49a. The absence of any finding of animus dooms this claim, so Petitioners' failure to engage with this part of the analysis is fatal too. *See Eknes-Tucker*, 80 F.4th at 1229-30.

Alternatively, the Sixth Circuit correctly concluded that transgender status is not a suspect class. *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 803 n.5 (11th Cir. 2022) (en banc) ("[W]e have grave 'doubt' that transgender persons constitute a quasi-suspect class."); *Eknes-Tucker*, 80 F.4th at 1230 (same). Recognizing a new suspect class is an extraordinarily "high" bar. App.47a.

Petitioners say there are "four considerations for identifying a suspect classification" and claim that the Sixth Circuit failed to analyze all of them. Pltfs.-

Pet.33; U.S.-Pet.24.[3] But this Court has never announced a rigid framework for assessing whether to identify a new quasi-suspect classification. At most, courts must consider the totality of the relevant circumstances. That is precisely what the Sixth Circuit did. It concluded that Petitioners failed to show at least two of Petitioners' four considerations and explained that several other considerations cut against recognizing transgender identity as a quasi-suspect class. *See* App.46a-52a.

The Sixth Circuit's analysis was sound. Transgender status is not immutable in the relevant sense. "Unlike existing suspect classes, transgender identity is not 'definitively ascertainable at the moment of birth.'" App.48a. Indeed, "stories of 'detransitioners'" who have abandoned a transgender identity show as much—"as plaintiffs do not dispute." App.48a. Hardly a "'discrete group.'" App.48a.

The United States responds that "immutability is not required"; rather, "it is sufficient that transgender individuals share 'distinguishing characteristics that define them as a discrete group,'" like that all "their gender identities do not align with their respective sexes assigned at birth." U.S.-Pet.24-25. If that's all

[3] They include: (1) "whether the class has been subjected to discrimination"; (2) "whether the class has a defining characteristic that 'frequently bears no relation to the ability to perform or contribute to society'"; (3) "whether members of the class have 'obvious, immutable, or distinguishing characteristics that define them as a discrete group'"; and (4) "whether the class lacks political power." U.S.-Pet.24; Pltfs.-Pet.33 (same).

that's required, then this consideration is meaningless—and would surely encompass traits like age or mental disability, which this Court has rejected as suspect classes. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442-46 (1985) (mental disability); *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-14 (1976) (age); App.33a. Even so, transgender identity is not a "discrete group" because it can describe an infinite "'variety of gender identities and expressions.'" App.48a.

2. The Act does not interfere with any unenumerated substantive-due-process rights.

Plaintiffs (but not the United States) briefly challenge the Sixth Circuit's substantive-due-process analysis. Pltfs.-Pet.34-36. But the court correctly concluded that parents have no substantive-due-process right to override state law and obtain puberty blockers or hormones to perform sex transitions on minors.

Plaintiffs must establish that their asserted right is "deeply rooted in our history and tradition" and "essential to our Nation's scheme of ordered liberty." *Dobbs*, 142 S.Ct. at 2246 (cleaned up). But this Nation lacks a "'deeply rooted' tradition of preventing governments from regulating the medical profession in general or certain treatments in particular, whether for adults or their children." App.20a. "Quite to the contrary in fact. State and federal governments have long played a critical role in regulating health and welfare." App.20a.

Plaintiffs dispute none of that. Instead, Plaintiffs double down on the argument that parental rights require States to permit risky and potentially irreversible sex-change interventions for children.

But Plaintiffs do not even try to solve their level-of-generality problem. This Court "requires 'a "careful description" of the asserted fundamental liberty interest.'" App.25a (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)). Plaintiffs "overstate the parental right by climbing up the ladder of generality to a perch—in which parents control all drug and other medical treatments for their children—that the case law and our traditions simply do not support." App.24a-25a.

Nor do Plaintiffs dispute that even adults lack a substantive-due-process right to demand access to a particular medication. That concession dooms their argument. "A parent's right to make decisions for a child does not sweep more broadly than an adult's right to make decisions for herself." App.24a. It "would make little sense for adults to have a *parental* right to obtain these medications for their children but not a *personal* right to obtain the same medications for themselves." *Eknes-Tucker*, 80 F.4th at 1224 n.18.

According to Plaintiffs and Judge White, "'the issue is not the *what* of medical decision-making—that is, any right to a particular treatment or a particular provider.'" Pltfs.-Pet.35 (quoting App.95a (White, J., dissenting)). "'Rather, the issue is the *who*—who gets to decide whether a treatment otherwise available to an adult is right or wrong for a child?'" *Id.* But this

alternative framing does not change the outcome. At bottom, the parents' "claim is derivative from, and therefore no stronger than," the child's right to treatment. *Whalen v. Roe*, 429 U.S. 589, 604 (1977); *cf. Doe v. Pub. Health Tr. of Dade Cnty.*, 696 F.2d 901, 903 (11th Cir. 1983) (A father's "rights to make decisions for his daughter can be no greater than his rights to make medical decisions for himself."). And, if anything, the "state's authority over children's activities is *broader* than over like actions of adults." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (emphasis added).

Finally, Plaintiffs cite *Parham v. J.R.*, 442 U.S. 584 (1979). Pltfs.-Pet.34-35. But that case does not support Petitioners' "untraditional request for relief." App.27a. *Parham* involved a claim "resolved on procedural, not substantive, due process grounds." App.27a. Plaintiffs dismiss this distinction because "the threshold issue" in *Parham* was "whether parents have a fundamental right to decide on medical care for their children." Pltfs.-Pet.35. It is, of course, true that to state a procedural-due-process claim, the plaintiff must first show "a liberty or property interest of which a person has been deprived." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011). But it is not true that all liberty or property interests protected by the procedural component of the Due Process Clause are protected by the substantive component. *Parham* cannot be reasonably read to answer the substantive-due-process question when the parent's right at issue there was "provided by the state itself" via statute. *Eknes-Tucker*, 80 F.4th at 1223.

Regardless, "[e]ven if we might 'imply' a liberty interest in [parental rights] generally speaking, that must give way when there is a tradition denying the specific application of that general interest." *Kerry v. Din*, 576 U.S. 86, 95 (2015). "State and federal governments have long played a critical role in regulating health and welfare," including by exercising "the power to reasonably limit the use of drugs" for both adults and minors. App.20a-25a; *see Eknes-Tucker*, 80 F.4th at 1224 n.18. "Nothing in *Parham* supports an affirmative right to receive medical care, whether for a child or an adult, that a state reasonably bans." App.27a.

B. The Act passes any level of review.

Petitioners make no sustained argument that the Sixth Circuit erred in concluding that the Act passes rational-basis review.[4] Rightly so. States have "wide discretion" to regulate "in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). The Act "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Dobbs*, 142 S.Ct. at 2284. "Plenty of rational bases exist for these laws, with or without evidence." App.52a; *see Poe*, 2023 WL 6516449, at *12-16 (detailing the many rational bases for a similar law).

[4] Plaintiffs suggest that the Sixth Circuit failed to analyze "the reasonableness of" the law. Pltfs.-Pet.36. But the Sixth Circuit extensively detailed why "[p]lenty of rational bases exist for" this law. App.52a; *see, e.g.*, App.50a-53a.

The United States argues that the Act fails "heightened scrutiny." U.S.-Pet.25-26. But even if the Act were subject to heightened scrutiny, Petitioners would fare no better. *See Eknes-Tucker*, 80 F.4th at 1235-36 (Brasher, J., concurring) (concluding that a similar law passed intermediate scrutiny). The intermediate-scrutiny standard requires that laws serve "important governmental objectives" and employ means "substantially related to the achievement of those objectives." *Virginia*, 518 U.S. at 533. Tennessee's law serves governmental interests that are not just important, but compelling. And its prohibition of these risky and potentially irreversible medical interventions for minors was substantially related to the achievement of its goals.

1. The Act has an exceedingly persuasive justification. It is "well established that states have a compelling interest in safeguarding the physical and psychological well-being of minors." *Eknes-Tucker*, 80 F.4th at 1225 (cleaned up). Similarly, "states have a compelling interest in protecting children from drugs, particularly those for which there is uncertainty regarding benefits, recent surges in use, and irreversible effects." *Id.*

Tennessee "offered considerable evidence about the risks of these treatments and the flaws in existing research." App.52a. Indeed, "no one disputes that these treatments carry risks or that the evidence supporting their use is far from conclusive." App.52a; *see Eknes-Tucker*, 80 F.4th at 1225 ("[T]he record evidence is undisputed that the medications at issue present *some* risks," including "'loss of fertility and sexual

function.'"). The risks include "infertility," "sexual dysfunction," "diminished bone density," "myocardial infarction, "liver dysfunction," cardiovascular disease, and "cancer." App.52a.

It is especially imperative to proceed with caution in the face of these risks because States are facing an unexplained surge of minors receiving gender-dysphoria diagnoses. "The percentage of youth identifying as transgender has doubled from 0.7% of the population to 1.4% in the past few years, while the percentage of adults (0.5% of the population) has remained constant." App.9a-10a. This epidemic is particularly affecting adolescent girls and minors on the autism spectrum. *E.g.*, DCt.Doc.113-5 at 15-16 ¶29.

In the face of this unexplained surge of cases, Tennessee acted reasonably to protect its children from potentially irreversible and lifelong harms. Tennessee's General Assembly determined, among other things, that the risks of puberty blockers, cross-sex hormones, and surgery when performed on a minor "are not yet fully known" and, in any case, outweigh any potential near-term benefits because they "are experimental in nature and not supported by high-quality, long-term medical studies." Tenn. Code Ann. §68-33-101(b). And it found that "minors lack the maturity to fully understand and appreciate the life-altering consequences of such procedures and that many individuals have expressed regret for" such medical interventions. §68-33-101(h). With the stakes so high, Tennessee chose to protect the State's most vulnerable with "fair-minded caution." App.51a.

Plaintiffs disagree, asserting that "[a] substantial body of evidence … has shown that these medical interventions greatly improve the mental health of adolescents with gender dysphoria." Pltfs.-Pet.7. And they claim that "the evidence supporting this treatment is comparable to evidence supporting other pediatric care." Pltfs.-Pet.7. But neither claim holds up to scrutiny, as outlined above. The extensive record shows that Petitioners' assertions about the purported benefits of the prohibited interventions are exaggerated or simply unfounded, and that Petitioners downplay or outright ignore their potential harms.

The harms to children from sex-transition medical interventions are well-documented. Petitioners' own allies confirm as much. WPATH, for example, acknowledges that cross-sex hormones will result in permanent changes to a person's body as well as *clinically significant* risks of blood clots and infertility. App.53a. The Endocrine Society recognizes that puberty blockers can cause "adverse effects on bone mineralization," "compromised fertility," and "unknown effects on brain development." App.52a-53a. It also acknowledges an increased risk of breast cancer in males and breast or uterine cancer in females related to the use of cross-sex hormones. DCt.Doc.113-10 at 19. Independent systematic reviews have likewise found that these drugs cause increased risk of cardiovascular disease and cancer. DCt.Doc.113-3 at 19, 102 ¶¶27, 223. "And some of the same European countries that pioneered these treatments now express caution about them and have pulled back on their use." App.28a; *see Eknes-Tucker*, 80 F.4th at 1225 (same).

The supposed benefits of these interventions are also unproven at best and illusory at worst. For example, no studies have found a causal link between sex-transition medical interventions and a reduction in suicide rates. DCt.Doc.113-3 at 70-71 ¶147. To the contrary, multiple studies show high rates of suicide even following medical transition, including a long-term Swedish study that found transgender adults who had completed medical transition had a suicide rate 19 times higher than the general population. *Id.* ¶¶147-48.

Plaintiffs' cited evidence about the purported benefits of cross-sex medical interventions is not "comparable to evidence supporting other pediatric care." Pltfs.-Pet.7. Most studies cited by proponents of sex-transition hormonal interventions are unreliable and low-quality because of their failure to include randomized control groups, lack of representative participants, small sample sizes, limited time periods, and failure to control for confounding variables, such as concurrent psychotherapy. *See* DCt.Doc.113-3 at 115-26 ¶¶265, 278, 293-94, 298-99. Plaintiffs have also failed to meaningfully grapple with the testimony of detransitioners who have come forward to share the horrifying physical and psychological effects they have experienced because of these interventions, as well as the testimony of parents who were pressured by healthcare providers to approve such interventions on their children.

In sum, the record before the Sixth Circuit comprehensively documented the significant harms and illusory benefits of the prohibited interventions,

thereby providing ample ground to uphold Tennessee's law. But even if there were any uncertainty, it wouldn't matter for intermediate-scrutiny purposes. Under that scrutiny, Tennessee "doesn't have to conclusively prove these things to have an important governmental interest." *Eknes-Tucker*, 80 F.4th at 1235 (Brasher, J., concurring). Even intermediate scrutiny "permits 'the legislature [to] make a predictive judgment' based on competing evidence." *Id.* (alteration in original) (quoting *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 799-800 (2011)).

2. Tennessee's law is also substantially related to its objective. The law's chosen method passes intermediate scrutiny if it is "not substantially broader than necessary to achieve the government's interest." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 218 (1997) (cleaned up). The "fit" between the means and the objective need not be "perfect" but only "reasonable." *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (cleaned up).

Even if Tennessee's law were a sex-based classification, it draws the lines it does "because there is no other way to regulate treatments for [gender dysphoria] without drawing such a distinction." *Eknes-Tucker*, 80 F.4th at 1235 (Brasher, J., concurring) (cleaned up). And the law's means "ha[ve] a close and substantial bearing on the governmental interest," which is enough under intermediate scrutiny. *Nguyen*, 533 U.S. at 70.

It is no answer to say, as the United States does, that Tennessee could adopt a less restrictive alternative to a ban for all minors. *See* U.S.-Pet.26 (suggesting "informed consent"). The law is "not … invalid simply because [of] some less-[rights]-restrictive alternative." *Turner*, 520 U.S. at 218 (cleaned up). "It is well established a regulation's validity 'does not turn on a judge's [or party's] agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.'" *Id.* Tennessee fully documented its findings that these interventions have far too serious risks and far too speculative benefits to be permitted for minors, full stop.

Nor is it an answer to say that the law is "severely underinclusive because it bans the prohibited 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 [the law] is intended to eradicate)." U.S.-Pet.26 (cleaned up). That is just another version of Petitioners' incorrect assertion that minors seeking sex-transition hormonal interventions are similarly situated to those seeking other types of medical treatments that employ the same drugs to treat a physical deficiency or abnormality.

* * *

Tennessee acted rationally, reasonably, and compassionately to protect its children, and the Act survives any level of review. Nothing in the Constitution deputizes Petitioners to override the legislature's judgment and demand a policy they believe to be more

favorable. Concluding otherwise would violate "the most deeply rooted tradition in this country … that we look to democracy to answer pioneering public-policy questions." App.19a (cleaned up).

III. Plaintiffs' alleged injuries may not be redressable even if this Court grants certiorari and reverses.

Finally, it is far from clear Plaintiffs' alleged injuries could be redressed even if this Court agreed with their view of the law. The Sixth Circuit left for the district court on remand to consider "standing, more specifically redressability." App.55a-56a. As the court explained, "[b]efore reaching the final injunction stage of the case, the parties may wish to introduce evidence about whether any of the plaintiff doctors plan to offer these treatments in the future if they succeed on these constitutional claims." App.56a. "As a factual and legal matter," the court stressed, "the point is undeveloped and potentially knotty." App.56a.

In a footnote, Plaintiffs dismiss the panel majority's redressability remand. Pltfs.-Pet.38 n.4. In their view, redressability is likely here because "providers in Tennessee are willing to provide [sex-transition] treatment to adolescents age 16 and older if [the law] is enjoined," and one plaintiff is already 16 and another will be soon. Pltfs.-Pet.38 n.4. But that argument does not address the Sixth Circuit's concern because Plaintiffs' representation about *post*-filing events does not count for *standing*. *See West Virginia v. EPA*, 142 S.Ct. 2587, 2606 (2022) ("[S]tanding con-

cern[s] whether a plaintiff has satisfied the requirement *when filing suit*." (emphasis added)). On remand, Plaintiffs must put forth evidence that at the time of the suit's filing, there was a redressable injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). There are sufficiently serious questions about standing to deny certiorari.

CONCLUSION

This Court should deny certiorari.

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