No. 23-477

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

—v.—

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

Respondents.

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

BRIEF FOR *AMICUS CURIAE* CITIZENS DEFENDING FREEDOM IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF AMICI CURIAE[1]

Citizens Defending Freedom is a nonprofit, utilizing its resources to ensure every American citizen is equipped and empowered to stand for and preserve their constitutional rights and freedoms for themselves and future generations. Citizens Defending Freedom is committed to helping ensure that states and federal agencies do not promulgate statutes, regulations, or final rules that are unconstitutional or impose additional compliance costs on its members, the public, parents, or students. Its purpose includes educating the American public on issues that must be considered in constitutional issues and the rights of individuals, parents, and groups. The outcome of this case will have a direct effect on Citizens Defending Freedom, including decisions on allocating its resources to educate and defend its members, donors, and all Americans' constitutional rights.

SUMMARY OF ARGUMENT

This Court has never before held that gender identity is a quasi-suspect class, nor has it held that the Constitution's express or implied references to "sex" include the concept of gender identity. But Petitioner[2] now seeks just that—a radical

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[1] No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel made a monetary contribution to the brief's preparation or submission.

[2] For ease of reference and readability, "Petitioner" in this brief is intended to include both the United States and the Parties termed "Respondents in Support of the Petition": L.W., Samantha Williams, Brian Williams, John Doe; Jane Doe, James Doe, Rebecca Roe, Ryan Roe, and Susan N. Lacy.

redefinition of the Equal Protection Clause which would constitutionalize hotly contested gender identity issues. If this Court were to accept Petitioner's novel arguments and find the Equal Protection Clause prevents Tennessee from implementing or enforcing SB1, it would have significant impacts on this Court's interpretation of the Equal Protection and Separation of Powers clauses, as well as essentially create a new constitutional right with untold limitations that will result in an entirely new area of law that would pit the Due Process Clause against the Equal Protection Clause. The Court should not accept Petitioner's invitation to effectively amend the Constitution through the courts.

ARGUMENT

I. The original public meaning of "sex" does not encompass gender identity; "gender" is not within the quasi-suspect class of "sex."

Central to the case is the original meaning of the word "sex." The Constitution is not a living document—its various provisions have a fixed "original public meaning" at the time of ratification. *United States v. Rahimi*, 144 S. Ct. 1889, 1925 (2024) (Barrett, J., concurring). Originally, the framers of the Fourteenth Amendment did not contemplate sex being a significant basis of the Amendment. Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. Rev. 723, 725 (1935) ("If in the law and public opinion of 1865–73 race discrimination stood at the head of all discriminations as needing attention, it is certain that sex discrimination was at the end of the line."); Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 14 WRLR 361, 363

(1978) ("And all of them, no doubt, are conscious of the historic reality that the framers of the fourteenth amendment evidenced no concern about the equality of men and women before the law").[3]

As the law has developed, however, this Court has identified "sex" as a quasi-suspect class under the Equal Protection Clause. *United States v. Virginia*, 518 U.S. 515, 532 (1996). Still, the question remains: what is the fixed meaning of "sex" that would have been understood at the time of the ratification of the Fourteenth Amendment? Dictionaries from the nineteenth and twentieth centuries provide some insight: the 1828 and the 1988 versions of the dictionary define "sex" to mean "[t]he distinction between male and female" (in the 1828 version) or "organisms distinguished respectively as male or female" (in the 1988 version). *See* WEBSTER'S DICTIONARY (1st ed. 1828) and NEW WEBSTER'S DICTIONARY (1988 ed.). It appears then, that both before and long after the period of Reconstruction, the public would have understood "sex" to mean male or female, or the distinction between male or female. The public would *not* have understood sex to refer to the contemporary concept of gender identity.

The Court's historical treatment of sex buttresses this conclusion. In a sex discrimination Equal Protection case, this Court has looked to whether an

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[3] While an argument could easily be made from these sources that the original public meaning of the Equal Protection Clause does not address sex discrimination in any form, amicus sees it as unlikely that the Court would abandon the years of sex-discrimination protection it has established. Therefore, this brief will address the meaning of "sex" in the context of the Equal Protection Clause, assuming that sex is, in fact, a quasi-suspect class. And it is clear that "sex" did not in any way refer to gender identity. *See infra.*

official action "closes a door or denies opportunity to *women (or to men)*." *Virginia*, 518 U.S. at 532 (emphasis added). As the Court's language suggests, the protection of "sex" as a quasi-suspect class addressed differential treatment between the biological sexes and had nothing to do with the amorphous concept of gender identity. *Id*. Critically, the very first time this Court treated sex as a quasi-suspect class, it did so because "*sex*, like race and national origin, *is an immutable characteristic determined solely by the accident of birth . . . .*" *Craig v. Boren*, 429 U.S. 190, 213 n.2 (1976) (Stevens, J., concurring) (emphasis added).

Gender identity, by contrast, according to Petitioner, is a concept completely divorced from the "accident of birth." U.S. Brief, at 39. Petitioner explains that L.W. would, absent puberty blockers, "experience a puberty completely foreign to her and inconsistent with her gender." U.S. Brief, at 39. By this Petitioner means that L.W. will experience the puberty *exactly congruent* with the "accident of birth," just not the one congruent to her[4] diametrically opposed—and inherently subjective—gender identity. This exercise alone demonstrates that "sex" has little in common, even conceptually, with gender identity. Further, the fact that gender identity is divorced from the "accident of birth" means that the Court's reason for using intermediate scrutiny with sex discrimination would flatly not apply to gender identity discrimination. *Boren*, 429 U.S. at 213 n.2.

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[4] *Amicus* takes no position on the merits of transgenderism as a philosophy or medical diagnosis but is conscious of the semantic power of using L.W.'s preferred pronouns: the use of "her" suggests that L.W. is, in fact, female, which is a contested issue. *Amicus* uses L.W.'s preferred pronouns out of collegiality but does not adopt or express the view that L.W. is female.

The Sixth Circuit understood this. As the Sixth Circuit correctly noted in this case, Equal Protection opinions from this Court look to whether one sex is preferred over the other, or whether one sex is excluded while the other is not. *L. W. by and through Williams v. Skrmetti*, 83 F.4th 460, 480 (6th Cir. 2023) (collecting cases). The meaning of "sex" does not include the gender identity protections that Petitioner seeks. Rather, the prevailing law merely focuses on whether an official action is treating the two binary sexes differently. *Skrmetti*, 83 F.4th at 480 (collecting cases).

Petitioner's challenge in this case harkens back to Justice Alito's warning in his dissent in *Bostock v. Clayton Cnty., Georgia.* 590 U.S. 644, 733 (2020) (Alito, J., dissenting). Justice Alito expressed concern that the *Bostock* decision, which recognized a protection of gender identity in the limited context of Title VII, "may exert a gravitational pull in constitutional cases," and that "equating discrimination because of sexual orientation or gender identity with discrimination because of sex" would result in "subjecting all three forms of discrimination to the same exacting standard of review." *Id*.

Aware of these concerns—and faithful to the text of *Bostock* itself which expressly limited its holding to Title VII—the Sixth and Eleventh Circuits held *Bostock* solely applies in the Title VII context, and its reasoning does not extend to an interpretation of the Equal Protection Clause itself. *Skrmetti*, 83 F.4th at 484; *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205, 1229 (11th Cir. 2023). This is because the text of each contains "materially different language." *Eknes-Tucker*, 80 F.4th at 1229. Specifically:

> Title VII focuses on but-for discrimination: It is "unlawful . . . for an employer . . . to discriminate against any individual . . . because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). The Equal Protection Clause focuses on the denial of equal protection: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Skrmetti, 83 F.4th at 484. This differing language "explains why Title VII covers disparate impact claims, and the Fourteenth Amendment does not." *Id.* (citing *Washington v. Davis*, 426 U.S. 229, 238–39 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971)); *see also Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring) (noting that Title VI contains language in addition to that of the constitution, and so the two are not interchangeable).

Respectfully, this Court should follow suit and reject Respondents' attempts to expand the framework of the Equal Protection Clause to encompass gender *identity*. The bar for creating a new suspect class is high, this Court having declined to do so for the past 40 years. *Id.* at 486. Sex discrimination under the Equal Protection Clause plainly does not include gender identity.

II. Practical difficulties abound if this Court adopts Petitioner's view.

If this Court recognizes gender identity as a quasi-suspect class under the Equal Protection Clause, it will pit fundamental parental due process rights against a child's equal protection "right" to receive "gender affirming" medical intervention. It would also

short-circuit the political and legislative process on this hotly contested political issue. For these additional reasons, the Court should reject Petitioner's view.

a. Petitioner asks the Court to put the Due Process and Equal Protection Clauses at war.

As this Court has noted, "the interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Indeed, "[t]here can be no doubt that the Due Process Clause does protect the parents' right to control their children's upbringing." *Fields v. Palmdale School Dist.*, 447 F.3d 1187, 1189 (9th Cir. 2006) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc. of Sisters*, 268 U.S. 510 (1925)).

As this Court recently explained, provisions within the Constitution are meant to complement one another, "not warring ones where one Clause is always sure to prevail over the others." *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 532–33 (2022). If the Court recognizes a child's constitutional right to puberty blockers, this right would undoubtedly be at "war" with the parent's right to control the upbringing of their child.

Suppose a young teenage transgender girl (a biological boy) has parents that do not approve of their child's decision to obtain and use puberty blockers. Suppose that same child seeks puberty blockers from a state-operated medical provider, over the objections of the parents. The state-operated medical provider would then be put in a position to choose between the constitutional right of the parents

and the constitutional right of the child. But this Court has held that the Constitution does not have "warring" clauses, and so the Constitution would not permit such a scenario. *Id*. This Court should not write an opinion that ignites a war between the Due Process and Equal Protection Clauses.

b. Petitioner's formulation would short-circuit the legislative process and damage the separation of powers.

The briefing in this case highlights the inherent conflict of determining SB1 to be a constitutional issue, thereby removing it from the ongoing legislative process in the states and the "most deeply rooted tradition in this country" of "look[ing] to democracy to answer pioneering public-policy questions[.]" *Skrmetti*, 83 F.4th at 472–73 (citing *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 289 (2022)). This Court recently reaffirmed that "courts cannot 'substitute their social and economic beliefs for the judgment of legislative bodies.'" *Id.* at 300 (citing *Ferguson v. Skrupa*, 372 U.S. 726, 729–30 (1963); *Dandridge v. Williams*, 397 U.S. 471, 484–86 (1970); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938)). Yet, this is exactly what the federal government asks this Court to do: to take this fiercely contested political issue out of the hands of voters.[5]

As the Sixth Circuit noted, 19 states have recently enacted laws similar to those enacted by Tennessee

[5] Petitioner expressly foregoes any Due Process Clause argument. In its Petition, the United States directly offered its perspective that the Court should not consider the Due Process issued raised by Respondents in Support at all. U.S. Pet. for Cert. at 17 n.6.

and Kentucky—seeking similar restrictions—likely due to the drastic increase of gender dysphoria diagnosis. *Skrmetti*, 83 F.4th at 471 (citing bills passed by state legislatures); *id.* at 468 ("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.") (citing Jeremi M. Carswell et al., *The Evolution of Adolescent Gender-Affirming Care: An Historical Perspective*, 95 Hormone Rsch. Paediatrics 649, 653 (2022)). In addition, 14 other states have recently implemented protections for those seeking treatment for gender dysphoria. *Id.* at 471 (citing state bills adopted by state legislatures) (citations omitted).

Therefore, if anything is clear regarding the various states' consideration of the issues underpinning SB1 and similar laws across the nation, it is the disagreement among state legislatures regarding the correct path forward on this public policy issue. Nevertheless, Petitioner requests this Court remove the reasoned consideration of this issue from the legislatures and determine that there is a legal remedy that requires a resolution in a certain direction.

This Court has repeatedly found that "state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (collecting cases). The evidence in this case, where Petitioner, Respondents in Support, and the State of Tennessee all point to the *same* authorities for contradicting information about the risk and benefit of the treatments evidence uncertainty. J.A. 110–14. The record below shows both sides pointing to the potentially irreparable harms that face the individuals that may or may not be permitted to obtain

the restricted (or protected depending on the state) treatments. This uncertainty is supported by the number of states that have reached different conclusions about the best path forward.

There are costs and benefits to the treatments restricted by the Tennessee statute at issue, as well as other such statutes passed by other states. The weighing of those costs, at least in the determination of whether a minor should have access to certain treatments, is an issue best left to the branch that is assigned to consider public policy issues. Instead, this Court is confronted with statistic-laden briefing, with conflicting expert medical opinions, and asked to decide the underlying public policy questions, considering cost-benefit analysis and weighing of parental rights. But these are questions best left to the halls of state and federal legislatures, not to courtrooms. Otherwise, lower courts will find themselves confronted with more statistic-laden briefing by supposed experts on both sides weighing the merits of such "constitutional" claims.

This Court was unequivocal in determining that "respect for a legislature's judgment applies even when the laws at issue concern matters of great social significance and moral substance." *Dobbs*, 597 U.S. at 300 (citing *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365–68 (2001) ("treatment of the disabled"); *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) ("assisted suicide"); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 32–35, 55 (1973) ("financing public education")). SB1, and other bills considering the same issues, certainly qualify as an issue of great social significance and moral substance. The significant consequences of both restricting and protecting treatment for the conditions addressed make this clear.

Yet, in substance, Petitioner's proposal seeks to constitutionalize an issue out of the hands of ongoing public debate *during* a time of passionate public, political debate amongst states. This Court has previously applied such a consideration when addressing issues under the Due Process clause and determining if there was a rational basis for the legislation.

In *Washington v. Glucksberg*, this Court determined courts of all levels must be cautious when finding a new constitutional liberty interest since they are essentially removing that issue from the arena of public debate and legislative action. 521 U.S. 702, 720 (1997). This is especially so when "the States are currently engaged in serious, thoughtful" debates about the issue. *Id.* at 719. The *Glucksberg* Court grappled with whether there should be a due process right to physician assisted suicide, and it ultimately determined that there was not. *Id.* at 728 ("[O]ur decisions lead us to conclude that the asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."). After making this determination, the *Glucksberg* Court continued to consider whether there was a rational basis for the Washington law restricting physician-assisted suicide and determined that there was because, in part, of the ongoing public debate about the issue. *Id.* at 735 ("Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.").

This cautious and measured approach is equally wise when considering extending constitutional protection to an issue under the Equal Protection clause. This Court

should reject the invitation to remove this issue from the public arena—the democratic debate should instead continue. This is especially true when considering the serious nature of the policy question being debated—the rearing of children. As the Sixth Circuit eloquently stated, "[t]he unsettled, developing, in truth still experimental, nature of treatments in this area surely permits more than one policy approach, and the Constitution does not favor one over the other." *Skrmetti*, 84 F.4th at 488.

Moreover, the state legislature's role as a generator for social and economic development via the will of the people is not something that should be restricted lightly. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("This Court has the power to prevent an experiment. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles."). The Court should exercise caution before putting an end to democratic debate on this vigorously contested issue.

III. Even under intermediate scrutiny, SB1 survives.

Setting the above aside, and subjecting SB1 to intermediate scrutiny, it still survives review. First, it bears repeating that Tennessee has clearly expressed its entirely non-discriminatory interest in ensuring the health of its minor citizens. *Skrmetti*, 83 F.4th at 489. The Sixth Circuit found that Tennessee had advanced evidence that:

> [a]dministering puberty blockers to prevent pubertal development can cause diminished bone density, infertility, and sexual dysfunction. Introducing high doses of

> testosterone to female minors increases the risk of erythrocytosis, myocardial infarction, liver dysfunction, coronary artery disease, cerebrovascular disease, hypertension, and breast and uterine cancer. And giving young males high amounts of estrogen can cause sexual dysfunction and increases the risk of macroprolactinoma, coronary artery disease, cerebrovascular disease, cholelithiasis, and hypertriglyceridemia.

Id.

But even assuming SB1 discriminates on the basis of sex, such discrimination can be justified through intermediate scrutiny: by showing that the methods employed by Tennessee are substantially related to a compelling governmental interest. This Court has previously found that states have an important and compelling interest to protect public health and safety. *Boren*, 429 U.S. at 199–200 ("[T]he protection of public health and safety represents an important function of state and local governments"); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("[T]he States have a compelling interest in the practice of professions within their boundaries, and [the] power to protect the public health [and] safety"); *see also Glucksberg*, 521 U.S. at 728 (finding an "unqualified interest in the preservation of human life") (citing *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261, 282 (1990)).

SB1 seeks to protect the minor citizens of Tennessee from risky and potentially irreversible treatments that can result in a variety of life altering effects ranging from infertility to heart and brain issues. "[F]or a policy's means to be substantially related to a government objective, there must be

'enough of a fit' between the means and the asserted justification." *Eknes-Tucker,* 80 F.4th at 1226. This does not, however, require a "perfect fit between the means and ends when it comes to sex." *Id.* (citing *Adams v. Sch. Bd. of St. Johns Cnty.,* 57 F.4th 791 at 801 (11th Cir. 2022); *Nguyen v. INS*, 533 U.S. 53, 70 (2001) ("None of our gender-based classification equal protection cases have required that the [policy] under consideration must be capable of achieving its ultimate objective in every instance.")).

The discriminatory means employed are substantially related to the achievement of those objectives because there is a clear fit between means and the asserted justification. In *Boren,* Oklahoma prohibited the sale of certain beer to males under the age of 21 and females under the age of 18. *Boren,* 429 U.S. at 192. This Court determined that the rationale advanced by Oklahoma, based on the public health and safety, was an important governmental interest meeting the first prong of this analysis. *Id.* at 199–200. This Court, however, went on to determine that there was not an adequate fit between the gender-based distinction and the objective. *Id.* at 200. The *Boren* Court considered the statistics advanced by the State of Oklahoma and found that they did not adequately support the different treatment of males 18–21 years old versus females of the same age. *Id.*

Unlike in *Boren,* the matter before this Court does not suffer from such a defect. The only difference in treatment of the sexes under SB1 is that female minors are restricted from obtaining treatment with testosterone as gender-affirming care and male minors are restricted from obtaining treatment with estrogen as gender-affirming care. Both genders are equally prohibited from accessing puberty blockers as part of gender-affirming care. These restrictions are

substantially related to Tennessee's objective of protecting public health as they prevent the damage to minors Tennessee has identified, and which even Petitioner's and Respondents' experts cannot refute. Therefore, SB1's means are a fit, unlike in *Boren*. Because Tennessee employed the appropriate means to further its compelling governmental objective, SB1 survives.

CONCLUSION

The federal government asks the Court to take a hotly contested issue away from the voters and expand the Constitution in the process. Even if the Court were sympathetic to this extraordinary request, the federal government would still fail on the merits. For all those reasons, this Court should reject Petitioner's view of the law.

Dated: October 15, 2024

Respectfully submitted,

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