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,
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 *AMICI CURIAE* OF LEGAL SCHOLARS AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONER AND OF RESPONDENTS IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amici curiae are scholars of constitutional and anti-

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

discrimination law and the National Women's Law Center, a non-profit legal advocacy organization that fights for gender justice.

The National Women's Law Center ("NWLC") is a non-profit legal advocacy organization that fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls—especially women of color, LGBTQ people, and low-income women and families. Since its founding in 1972, NWLC has worked to advance educational opportunities, workplace justice, health and reproductive rights, and income security. This work has included participating in numerous cases, including before the U.S. Supreme Court, to ensure that rights and opportunities are not restricted based on sex. Additionally, NWLC has a particular interest in ensuring that discrimination against LGBTQ individuals is not perpetuated in the name of women's rights.

Amici submit this brief to explain the equal protection principles that support Petitioner's position and warrant vacatur of the judgment below. A list of *amici* is set forth in the Addendum.

SUMMARY OF ARGUMENT

The fundamental error of the court below was its failure to recognize that Tennessee's Senate Bill 1 ("SB1") facially classifies on the basis of sex and therefore is subject to heightened scrutiny. In light of this error, this Court should vacate the judgment below and remand this case for reconsideration in accordance with the proper level of scrutiny.

Heightened scrutiny of sex-based classifications is a two-part inquiry. First, courts ask whether a law classifies on the basis of sex. If it does, they require the

defender of the challenged action to "show 'at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *United States* v. *Virginia*, 518 U.S. 515, 533 (1996) (quoting *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)). Thus, whether a sex classification is *justified* is a consideration reserved for the second part of the inquiry; the sole concern of the first part is whether the law classifies based on sex.

It is beyond reasonable dispute that SB1 facially classifies on the basis of sex. The law specifically defines "sex" and then expressly conditions the availability of medical treatments on a "minor's sex." Tenn. Code Ann. §§ 68-33-102(6); 68-33-103(a).

In nevertheless subjecting SB1 to mere rational-basis review, a divided Sixth Circuit panel placed itself opposite decades of this Court's sex equality jurisprudence—and, in doing so, erred twice over.

First, the court erred in concluding that laws that apply equally to men and women cannot classify based on sex. The fallacy of such "equal application" reasoning is plain from the text of the Constitution itself: The right to equal protection is guaranteed to the individual, not the class. *See* U.S. Const. amend. XIV, § 1 ("No State shall * * * deny to *any person* within its jurisdiction the equal protection of the laws.) (emphasis added).

Indeed, the Court's sex discrimination precedents reflect the core principle that government may not enforce traditional conceptions of appropriate roles, behaviors, or relationships—as to both men and women. Whether any individual is the victim of sex

discrimination does not turn on whether someone of another sex *also* suffers discrimination at the hands of the government based on their sex. It matters only whether the government denies to any individual a benefit or opportunity on account of his or her sex.

The court below also erred in concluding that laws that purport to make distinctions based on biological differences between the sexes do not classify based on sex. Pet. App. 33a.

When it comes to sex, American law historically mistook biology for destiny. In *Muller* v. *Oregon*, for example, this Court upheld a law limiting women's working hours based on "a widespread belief that woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting or qualifying the conditions under which she should be permitted to toil." 208 U.S. 412, 420 (1908). In *Bradwell* v. *Illinois*, 83 U.S. (16 Wall.) 130 (1872), a concurring Justice agreed in excluding women from the practice of law, opining that "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman." *Id.* at 141 (Bradley, J., concurring in the judgment).

The Court's heightened scrutiny of sex-based classifications developed in reaction to this history. The very purpose of such rigorous review is to determine whether biological or other factors *justify* a sex classification. This means that consideration of asserted biological differences between the sexes comes only in the second part of the heightened scrutiny inquiry; they are not a consideration in determining, in the first instance, whether a classification is sex-based. *See, e.g., Tuan Anh Nguyen* v. *INS*, 533 U.S. 53, 61

(2001); *Caban* v. *Mohammed*, 441 U.S. 380, 391–392 (1979).

Contrary to the Sixth Circuit's alarmism, applying the established rule that all sex-based classifications trigger heightened scrutiny does not require this Court to "break new ground." Pet. App. 43a. Rather, the Sixth Circuit itself departed from this Court's precedents. This Court should conclude that SB1 requires heightened scrutiny because it facially classifies based on sex.

Because the decision below is fundamentally at odds with the plain text of the Equal Protection Clause and this Court's precedents, the Court should vacate the judgment of the court below and remand this case for reconsideration in accordance with the proper level of scrutiny.

ARGUMENT

I. SB1 IS A SEX-BASED CLASSIFICATION

Under the Equal Protection Clause, "all gender-based classifications" are subject to heightened scrutiny. *Sessions* v. *Morales-Santana*, 582 U.S. 47, 57–58 (2017) (quoting *J.E.B.* v. *Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994)); *see also, e.g.*, *Hogan*, 458 U.S. at 724 (explaining that "[o]ur decisions * * * establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender" must show that the statute survives heightened scrutiny). At a minimum, a law classifies based on sex where, as here, sex appears on the face—i.e., in the text—of that

law and the law conditions a benefit or opportunity on an individual's sex.[2]

To survive heightened scrutiny, a sex-based classification must serve an important government interest, and the discriminatory means employed must be substantially related to the achievement of that interest. *Virginia*, 518 U.S. at 533. The government's justification for a sex-based classification must not rely on "overbroad generalizations" about differences between the sexes. *Hibbs*, 538 U.S. at 729 (quoting *Virginia*, 518 U.S. at 533).

1. A law facially classifies based on sex where the law expressly conditions a benefit or opportunity on an individual's sex. In *Morales-Santana*, this Court explained that "[l]aws granting or denying benefits on the basis of the sex of the [beneficiary] * * * differentiate on the basis of gender, and therefore attract heightened review." 582 U.S. at 58 (internal quotation marks omitted). In *Hogan*, this Court stated that a "challenged policy [that] expressly discriminates among [individuals] on the basis of gender[ ] is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment," describing the review

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[2] Because SB1 expressly defines "sex" and conditions the availability of health care on a minor's sex, this Court need not address questions of whether the use of particular proxies for sex amount to facial sex classifications. A law also can raise particular equal protection concerns even in the absence of a facial sex classification. For example, a law that is facially neutral can trigger particular constitutional concern if it is "applied in discriminatory ways" as to sex, *Nev. Dep't of Hum. Res.* v. *Hibbs*, 538 U.S. 721, 732 (2003), or designed to effect invidious sex discrimination. *Pers. Adm'r* v. *Feeney*, 442 U.S. 256, 273–274 (1979). But because SB1 facially classifies on the basis of sex, this Court need not go beyond that.

applicable to such express classifications as a "firmly established principle[ ]." 458 U.S. at 723–724.

The Court has assessed facial sex classifications with heightened scrutiny in a broad range of cases. A law that "expressly discriminates among [individuals] on the basis of [sex]" to the exclusion of all members of a sex is a facial sex classification. *Id.* at 723 (striking down a single-sex enrollment policy denying all male applicants the right to enroll). However, laws that apply only to a subset of men or women can also facially classify based on sex. For example, in *Craig* v. *Boren*, the Court held that a law that set a different age minimum for young men to purchase low-alcohol beer was a facial classification despite the law's application only to "males 18-20 years of age." 429 U.S. 190, 192 (1976).

A law can also facially classify based on sex where sex is a qualification embedded within a defined term in an otherwise gender-neutral statutory provision. The Court recognized such a facial sex classification in *Califano* v. *Westcott*, when it held that a benefits program granting aid to "families" classified based on sex by defining a dependent child as one deprived of the support of a "father." 443 U.S. 76, 80, 84 (1979). *Westcott* held that a law that uses a "gender qualification" is subject to heightened scrutiny, even if the impact of that qualification is "felt by family units." *Id.* at 84.

A law need not turn exclusively on sex to facially classify based on sex. For example, a law can facially classify based on both sex and a non-suspect or quasi-suspect characteristic. *See, e.g.*, *Morales-Santana*, 582 U.S. at 58 (holding that a law entailed a facial sex classification even though the law also turned on

citizenship, marital status, and duration of residency); *Nguyen*, 533 U.S. at 61 (similar). The fact that a law turns on multiple types of classification does not make the law facially neutral. *See, e.g.*, *Craig*, 429 U.S. at 197 (applying heightened scrutiny to a facial classification based on sex, even though the law also classified by age); *Caban*, 441 U.S. at 388 (applying heightened scrutiny to statute that distinguished based on both sex and marital status). A classification is facial even if it is no more than one component in a "highly individualized, holistic review." *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 337 (2003)).

2. SB1 is a facial sex classification because the law expressly conditions the availability of medical treatments on a "minor's sex." SB1 defines "sex" as "a person's immutable characteristics of the reproductive system that define the individual as male or female, as determined by anatomy and genetics existing at the time of birth." Tenn. Code Ann. § 68-33-102(9). The law then proscribes certain "medical procedures"[3]—but only in specified circumstances: health care providers are prohibited from "prescribing, administering, or dispensing any puberty blocker or hormone" for the purpose of "[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex; or [t]reating purported discomfort or distress from a discordance between the

[3] "Medical procedures" is a defined term. *See* Tenn. Code Ann. § 68-33-102(5). The procedures at issue in this case are limited to the second category set forth in the definition: "[p]rescribing, administering, or dispensing any puberty blocker or hormone to a human being." *Id.* § 68-33-102(5)(B).

minor's sex and asserted identity." *Id.* §§ 68-33-102(5)(B); 68-33-103(a)(1). But those same medications are permitted, for the same purposes, such as treating discomfort or distress, so long as the minor seeks to live in accord with an identity that SB1 defines as consistent with that minor's sex. By its very terms, whether SB1 applies depends on the patient's sex. To determine whether a specified medical procedure is in violation of the law, a health care provider must classify the patient as male or female.

The Sixth Circuit characterized SB1 as classifying based only on age and medical condition. Pet. App. 31a, 36a. But the statute, on its face, classifies based on the "minor's sex," plain and simple. Tenn. Code Ann. § 68-33-103(a)(1). The medical conditions the Sixth Circuit identified as the conditions for the law's application—gender dysphoria and treatment for "transition"—are both defined based on sex classifications. Whether a minor can be said to be engaged in "transition" depends on whether that minor is seeking treatments that the law regards as "inconsistent" with the "minor's sex." *Id.* § 68-33-103(a)(1). And "gender dysphoria," defined as "distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender," is a diagnosis that also turns on an individual's sex. Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (5th ed. rev. 2022) ("DSM V").[4]

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[4] SB1 provides that puberty blockers or hormones are permitted "to treat a minor's congenital defect, precocious puberty, disease, or physical injury," Tenn. Code Ann. § 68-33-103(b)(1)(A), as long as the "disease" is not one of several excluded conditions, including "gender dysphoria, gender identity disorder," and "gender

The fact that a statute also classifies on other bases in addition to sex does not change the fact that it classifies on the basis of sex. Under the plain text of SB1, whether a medical procedure is banned for an individual expressly turns on that individual's sex, as specifically defined in the law. A facial sex classification does not get clearer than that. It straightforwardly follows that SB1 requires heightened scrutiny.

II. THE SIXTH CIRCUIT CONTRAVENED ESTABLISHED SUPREME COURT PRECEDENT THAT REQUIRES HEIGHTENED SCRUTINY FOR ALL SEX-BASED CLASSIFICATIONS.

In *United States* v. *Virginia*, this Court found that the Fourth Circuit erred in applying a deferential review standard to a challenged classification that was "inconsistent with the more exacting standard our precedent requires" for sex-based classifications. 518 U.S. at 555. As this Court explained, the Fourth Circuit had improperly "revis[ed] the applicable standard of review[,] * * * displaced the standard developed in

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incongruence." *Id.* § 68-33-103(b)(2). Knowing the minor patient's sex is necessary to confirm whether these excluded conditions, each of which is defined based on incongruence with the patient's sex, apply. *See* DSM V (defining "gender dysphoria"); Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. rev. 2000) (describing "gender identity disorder" as "evidence of a strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex)" and "persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex"); World Health Org., International Classification of Diseases – 11th Revision (rev. 2024) (defining "gender incongruence" as "a marked and persistent incongruence between an individual's experienced gender and the assigned sex").

our precedent, and substituted a standard of its own invention." *Id.* (internal citation omitted).

The Sixth Circuit committed much the same error by inventing two exceptions to this Court's established rule that heightened scrutiny applies to all classifications based on sex: an "equal application" and "biological difference" exception. The text of the Constitution is clear that the equal protection of the laws is guaranteed to the person, not the class. Thus, whether an individual has been classified by sex does not depend on whether someone of another sex has also been classified. And whether a classification is based in biology is of no matter to the individual right to equal liberty; heightened scrutiny is required to ensure that the law does not make biology destiny.

A. Sex-Based Classifications Trigger Heightened Scrutiny Because They Infringe on Individual Rights Protected by the Equal Protection Clause.

On a plain reading of its text, the Fourteenth Amendment "protect[s] *persons*, not *groups*." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995) (emphasis in original). "The neutral phrasing of the Equal Protection Clause, extending its guarantee to 'any person,' reveals its concern with rights of individuals, not groups (though group disabilities are sometimes the mechanism by which the State violates the individual right in question)." *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring). Indeed, the Equal Protection Clause and this Court's "constitutional tradition are based on the theory that an *individual* possesses rights that are protected against lawless action by the government." *Id.* (emphasis added). As this Court recently explained, "[a]t the heart of the

Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard Coll.*, 600 U.S. 181, 231 (2023) (quoting *Miller* v. *Johnson*, 515 U.S. 900, 911 (1995)).

It was not always thus. Sex-based classifications have historically been used "to create or perpetuate the legal, social, and economic inferiority of women." *Virginia*, 518 U.S. at 534. They often did so by constraining individual women's choices. For instance, in *Bradwell*, the Court held that a state bar could deny Myra Bradwell's application for admission on the basis of her sex. 83 U.S. (16 Wall.) 130. Concurring in the Court's judgment, Justice Bradley opined that "[t]he harmony * * * of interest and views which belong * * * to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband." *Id.* at 141. Justice Bradley declared: "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother." *Id.*

Decades later, the Court upheld a Michigan law that barred women from tending bar unless their husbands or fathers owned the establishment. *Goesaert* v. *Cleary*, 335 U.S. 464, 465 (1948), *overruled by Craig*, 429 U.S. 190. Holding that this law did not violate the Equal Protection Clause, the Court explained that states were not precluded "from drawing [this] sharp line between the sexes" because female bartenders required the "protecting oversight" of their husbands or fathers. *Id.* at 466.

In the 1970s and 1980s, this Court corrected course, realigning its Equal Protection doctrine to comport with the text of the Fourteenth Amendment. It invalidated a "broad range of statutes" that used sex-based classifications in the service of "traditional, often inaccurate, assumptions about the proper roles of men and women." *Hogan*, 458 U.S. at 726.

The Court has now recognized that such laws have "a constraining impact" on individual choices. *Morales-Santana*, 582 U.S. at 63. For example, in *Weinberger* v. *Wiesenfeld*, this Court struck down a sex-based classification entitling widows, but not widowers, with minor children to social security benefits, noting that underlying the law was the belief that widowed fathers, but not widowed mothers, should be required to work. 420 U.S. 636, 650–652 (1975). In *Kirchberg* v. *Feenstra*, the Court struck down a statute giving the husband, as "head and master" of community property, unilateral right to dispose of property jointly owned with his wife. 450 U.S. 455, 461 (1981). In *Hogan*, this Court rejected a law based in a sex-based stereotype that restricted men's abilities to chart their own careers. 458 U.S. at 729 (nursing school's policy of excluding males from admission "tends to perpetuate the stereotyped view of nursing as an exclusively woman's job"). And in *Virginia*, this Court held that a state-run military academy could not categorically exclude women from its enrollment. 518 U.S. at 519.

The Court's consistent, Constitution-driven practice of treating people as individuals, not as members of groups, is apparent from its routine rejection of laws that harm individual men who defy sex stereotypes. *See, e.g.*, *Caban*, 441 U.S. at 389, 394 (striking down

an adoption law based on the presumption that "unwed mothers as a class were closer than unwed fathers to their newborn infants" because such presumptions are unfair to individual "loving fathers"); *Wiesenfeld*, 420 U.S. at 652. For example, the Court has held that the Equal Protection Clause forbids the use of peremptory strikes to exclude men from juries, because "[t]he message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree." *J.E.B.*, 511 U.S. at 142.

In addition to the principle that every individual must be afforded equal autonomy, without constraints based on their sex, such examples illustrate the Court's longstanding concern with the "injury to personal dignity" a sex-based classification may cause. *J.E.B.*, 511 U.S. at 153; *cf. Parents Involved in Cmty. Schs.*, 551 U.S. at 789 (Kennedy, J., concurring) (explaining that the problem with facial classifications, as opposed to racially neutral means, is that they "tell[ ] each student he or she is to be defined by race").

Heightened scrutiny is required because of the particular threat that sex-based classifications pose to the principle that each individual should be treated with equal "respect, dignity, and autonomy." *See* Jessica A. Clarke, *Scrutinizing Sex*, 92 Univ. of Chi. L. Rev. (forthcoming 2025).[5] Thus, when a law classifies on the basis of sex, the Court undertakes a "searching

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[5] *Available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4787833.

analysis," even if the state asserts that the objective of the classification is "benign" or "compensatory." *Hogan*, 458 U.S. at 719 (quoting *Wiesenfeld*, 420 U.S. at 648).

B. There Is No "Equal Application" Exception to Heightened Scrutiny.

The Sixth Circuit reasoned that SB1 does not classify based on sex because it "regulate[s] sex-transition treatments for all minors, regardless of sex," *i.e.*, males and females alike are denied such treatments. Pet. App. 32a. This "equal application" exception contravenes this Court's longstanding equal protection doctrine and principles.

It is established that racial classifications trigger heightened scrutiny, even if they apply equally to the affected classes. In *Loving* v. *Virginia*, for example, the Commonwealth of Virginia maintained that "because its miscegenation statutes punish equally both the white and the Negro participants in an interracial marriage, these statutes do not constitute an invidious discrimination based upon race." 388 U.S. 1, 8 (1967). This Court flatly rejected that contention: "[T]he mere 'equal application' of a statute containing racial classifications is not enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations." *Id.*; *see also McLaughlin* v. *Florida*, 379 U.S. 184, 192 (1964) ("Judicial inquiry under the Equal Protection Clause * * * does not end with a showing of equal application among the members of the class defined by the legislation."). This Court reiterated this conclusion in *Powers* v. *Ohio*, explaining that "racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree." 499 U.S.

400, 410 (1991). And in *Johnson* v. *California*, the Court applied strict scrutiny to a penal policy that matched cellmates based on race, despite California's argument that the racial classification at issue "may be said to burden or benefit the races equally." 543 U.S. 499, 506 (2005) (internal quotation marks omitted).

The Sixth Circuit acknowledged this Court's rejection of the "equal application" arguments in facial classification cases involving race. But it took the view that, unlike racial classifications, sex-based classifications that "on their face treat both sexes equally" do not receive heightened scrutiny absent a showing of discriminatory purpose. Pet. App. 37a.

That is wrong. This Court has repeatedly emphasized that sex-based classifications require heightened scrutiny because they may cause individual injury, even if members of both sexes are harmed. In *J.E.B.*, for example, this Court repudiated an equal application argument in a challenge to the use of sex-based peremptory strikes to exclude *men* from a jury. 511 U.S. at 133. It held that sex-based strikes violate the Equal Protection Clause even though the other side could also use sex-based strikes to exclude *women*. *See id.* at 159 (Scalia, J., dissenting). Similarly, in *Westcott,* the government argued that a program that provided welfare benefits only to families with unemployed fathers did not classify based on sex because both the husband and wife in the ineligible family unit would be denied aid. 443 U.S. at 84. This Court rejected the argument. *Id.* Because sex-based classifications may infringe on individual rights, there is no exemption to the "searching analysis" required by heightened scrutiny for classifications that aim "to

balance the burdens borne by males and females." *Hogan*, 458 U.S. at 728.

Moreover, a rule permitting sex classifications with "equal application" to evade scrutiny would insulate many sex-based classifications based in gender stereotypes from heightened review. This is because gender stereotypes are, by nature, "parallel," with separate and complementary strictures for each sex. *Hibbs*, 538 U.S. at 736 (explaining that certain state laws providing shorter periods of parental leave to fathers on the basis of sex were facially discriminatory). The Court has struck down sex classifications that enforce the ideology of separate spheres, in other words, the view that "the female [is] destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas." *Stanton* v. *Stanton*, 421 U.S. 7, 14 (1975). This principle applies broadly to all complementary but distinct expectations for each sex; heightened scrutiny must be "applied free of fixed notions concerning the roles and abilities of males and females." *Hogan*, 458 U.S. at 725.

There can be no exception for laws that might be said to treat the sexes equally "on their face." Pet. App. 37a. A law requiring that "all employees must conform with the traditional roles for their sexes" treats the sexes equally on its face—but it indisputably classifies by sex. On the same logic, a law that forbids medical treatments a legislature defines as "inconsistent" with a minor's sex classifies by sex. If a law contains a facial sex classification, it does not matter whether men as a class are treated differently than women as a class. The plain language of the Equal Protection Clause makes clear that the right to

equal protection of the laws belongs to the individual, not the class.

C. There Is No "Biological Difference" Exception to Heightened Scrutiny.

The Sixth Circuit concluded that SB1 does not classify based on sex because it is "by the nature of their biological sex" that "children seeking to transition use distinct hormones for distinct changes." Pet. App. 33a. The panel majority took the view that the "anti-discrimination principle" does not call into question laws such as SB1, because those laws are unlike rules enforcing "stereotypes." *Id.* at 41a. But biology-based sex classifications are sex classifications just like any other; it defies constitutional history, doctrine, and principle to refuse to recognize them for what they are.

Historically, biology has been a "central" justification for women's subordination. Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 957 (1984). Justice Bradley's concurrence in *Bradwell* sought to justify the exclusion of women from the practice of law based on "nature herself," which was thought to erect "a wide difference in the respective spheres and destinies of man and woman." 83 U.S. (16 Wall.) at 141–142 (Bradley, J., concurring in the judgment). The Court in *Muller* upheld a law limiting women's, but not men's, working hours, citing a "woman's physical structure" and "maternal functions." 208 U.S. at 421. As the Court saw it at the time, "continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care

in order to preserve the strength and vigor of the race." *Id.*

Against this historical backdrop, it is not surprising that, as a matter of doctrine, the Court has concluded that biological distinctions are a consideration only in the second part of the heightened scrutiny analysis. *See, e.g., Caban*, 441 U.S. at 391–392 (testing the argument that that mothers and fathers have different levels of "natural parental interest" at the second step of the heightened scrutiny framework). They do not inform whether a classification is sex-based and therefore subject to heightened scrutiny in the first instance.

Take this Court's decision in *Nguyen* v. *INS*. The immigration law at issue in *Nguyen* drew distinctions between men and women based on the fact that, due to pregnancy, it is easier to establish the biological relationship between an unwed mother and her child than that between an unwed father and his. 533 U.S. at 60–61. Under the Sixth Circuit's approach, because this sex-based classification tracked biological differences, the law should have merited mere rational-basis review. But this Court applied heightened scrutiny to test the government's argument from biology. *Id.* at 60; *see also Morales-Santana*, 582 U.S. at 66–67 (applying heightened scrutiny in a case in which the government justified a sex-based classification on the ground that, due to "childbirth," an unwed citizen mother is immediately recognized as a legal parent, while "[a]n unwed citizen father enters the scene later, as a second parent").

If courts were to decline to apply heightened scrutiny to a sex classification premised on biological differences, it would defeat a fundamental objective of

the Court's extension of heightened scrutiny to sex-based classifications—to determine whether proffered biological justifications are "acting as smokescreens, obscuring a set of social judgments inconsistent with contemporary equal protection principles." Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. Rev. 83, 177 (2010).

Whether physical differences between the sexes are inherent is immaterial to the question of classification. Accordingly, the Sixth Circuit erred in concluding that "necessary references to 'enduring' differences between men and women do not trigger heightened review." Pet. App. 39a (*quoting Virginia*, 518 U.S. at 533). In *Virginia*, this Court held that inherent differences inform whether a classification meets the heightened scrutiny standard. 518 U.S. at 533. They do not mean that rational-basis review applies to laws reflecting such sex-based differences.

To suggest that laws reflecting biological distinctions between the sexes are immune from heightened scrutiny because biological sex differences are enduring is to misconstrue the principle animating the Court's sex discrimination jurisprudence: The core problem with stereotyping is its offense to the equal liberty and dignity of the individual, not its inaccuracy. "[T]hat a difference is grounded in biology * * * fails to guarantee that the use of the sex-based classification will not constrain freedom in morally problematic ways." Deborah Hellman, *Sex, Causation, and Algorithms: How Equal Protection Prohibits Compounding Prior Injustice*, 98 Wash. U. L. Rev. 481, 500 (2020). This is the lesson of cases like *Muller* and *Bradwell*, which justified restrictions on women's occupational

choices based on their biology. As a matter of constitutional principle, the harm in laws that enforce sex stereotypes is not merely that they may be overbroad generalizations; it is that they put the individual in a "cage," assigning him or her to a particular role in life at birth. *J.E.B.*, 511 U.S. at 133 (quoting *Frontiero* v. *Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion)).

Heightened scrutiny extends to all sex-based classifications. There is no threshold determination of whether the classification is enduring or contingent, biology or stereotype, invidious or benign.

CONCLUSION

The Sixth Circuit erred in concluding that SB1, despite its facial sex classification, is not subject to heightened scrutiny. The Court should vacate the judgment of the Sixth Circuit and remand this case for further consideration in accordance with the proper level of scrutiny.

Respectfully submitted,

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