No. 23-477

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

JONATHAN SKRMETTI, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE, *et al.*,

Respondents.

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

AMICUS CURIAE BRIEF OF NORTH CAROLINA VALUES INSTITUTE IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae respectfully urges this Court to affirm the decision of the Sixth Circuit.

NC Values Institute ("NCVI") is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom by working in various arenas of public policy to protect constitutional liberties, including the rights to life, religion, and conscience. See https://ncvi.com.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Transgender ideology is invading all corners of American society at an alarming pace. Public school districts adopt policies to facilitate transitioning young school children from one sex to the other, often without parental consent or knowledge—or even actively deceiving a child's parents. Parents struggle to exercise their long recognized fundamental rights to control the upbringing of their children, which includes protecting them from experimental sex-change procedures. "Detransitioner" lawsuits are emerging, as transitioned children come of age and regret their youthful decisions to undergo these risky procedures with irreversible consequences they were too young to appreciate.

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1. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

Amidst this confusion, states are beginning to enact legislation that bans sex transition procedures for persons under age 18, leaving adults free to undergo these treatments if they are willing to assume the risks. A few parents have bought into the transgender ideology and joined with others to challenge these laws as unlawful gender identity "discrimination" that intrudes on parental rights But a careful reading of the statutes reveals the flaws in these challenges. First, although parental rights are fundamental, the government places many restrictions on minors that do not apply to adults—e.g., alcohol, tobacco, prescription drugs, driving, voting. The state may enact reasonable restrictions on the practice of medicine, including limits on experimental treatments. Second, the statutes at issue apply to conduct the state may regulate, not pure speech protected by the First Amendment. Third, legal activists improperly manipulate this Court's ruling in *Bostock* to exalt transgender rights above all others and impose transgender ideology on numerous unwilling participants, manufacturing charges of "sex discrimination" against those who resist—but an *age*-based restriction is not discrimination on the basis of *sex*.

ARGUMENT

I. THE TENNESSEE LAW PRESERVES THE FUNDAMENTAL RIGHT OF PARENTS TO THE CARE, CUSTODY, AND CONTROL OF THEIR MINOR CHILDREN—INCLUDING MEDICAL DECISIONS.

Tennessee enacted a law that not only protects minors from physical harm but reasonably safeguards the right of parents to be involved in their children's development and

guide their ability to make informed decisions when they become adults. *See* Tenn. Code Ann. § 68-33-101 et seq. ("Prohibited Medical Procedures for Minors Act"). "The current use of puberty blockers and sex-reassignment surgery is an unethical human experimentation on our most vulnerable members of society." Claudia Bihar, *Let Them Be Children: How the Law Should Support Parents in Protecting Their Children From the Harmful Effects of Gender Affirming Treatment*, 21 Ave Maria L. Rev. 108, 119-120 (Spring 2023). This Court should uphold the Tennessee law and pave the way for other similar laws that protect both parents and minor children.[2]

The law was challenged by "[t]hree transgender minors, their parents, and a doctor," along with "several Tennessee officials," based on alleged violations of due process and equal protection. *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 469 (6th Cir. 2023). These challenges implicate parental rights, but raising the issue does not settle the matter.

Many laws impose specific restrictions on minors that parents may not override. The state may regulate the practice of medicine to protect the unique interests and safety of minors without imposing on the rights of adults—particularly where the treatments are experimental, the risks are high, and the science is unsettled. *This case is a prime example*, particularly at a time when parental rights are eroded by the imposition of transgender ideology on

2. The law enables injured minors and nonconsenting parents to sue healthcare providers for violations and extends the statute of limitations to 30 years after the minor reaches 18. *L.W. ex rel. Williams v. Skrmetti*, 83 F.4th 460, 469 (6th Cir. 2023); Tenn. Code Ann. §§ 68-33-105(a)(1)-(2), 68-33-105(e).

unwilling participants—including minor school children too young to appreciate the long-term physical and emotional dangers. The legislature was concerned that some treatments for gender identity "can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering adverse and sometimes fatal psychological consequences." *Skrmetti*, 83 F.4th at 468, citing Tenn. Code Ann. § 68-33-101(b).

It is difficult to imagine a more critical application of parental rights than to make basic medical decisions necessary to preserve the life and health of a child. Medical treatment ordinarily falls well within the rights and duties of a fit parent. Common law has long recognized that "the only party capable of authorizing medical treatment for a minor in normal circumstances is usually his parent or guardian." *Newmark v. Williams*, 588 A.2d 1108, 1115-1116 (Del. 1990) (child's parents declined chemotherapy); *see* W. Posser & W. Keeton, The Law of Torts § 118 at 114-115 (5th ed. 1984).

Medical decisions include evaluating the risks and benefits of a proposed treatment and then either giving or withholding informed consent. A child "lacks the "maturity, experience, and capacity for judgment" required in "making life's difficult decisions." *Parham v. J. R.*, 442 U.S. 584, 602 (1979). The law presumes that "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Ibid.* Historically, American jurisprudence "reflects Western civilization concepts of the family as a unit with broad parental authority over minor children" and "cases have consistently followed that course." *Ibid.* In *Parham*, this Court upheld Georgia's statutory procedure

for parents to voluntarily commit a minor to a hospital for mental health treatment, reversing the state court's conclusion that the law was unconstitutional.

The district court in this case concluded that "the Act infringes on the parents' 'fundamental right to direct the medical care of their children.'" *Skrmetti*, 83 F.4th at 469. The appellate court dissent agreed, citing the broad general rule that "parents possess a fundamental right to make decisions concerning the medical care of their children." *Id.* at 508 (White, J., dissenting), quoting *Kanuszewski v. Mich. Dep't of Health & Hum. Servs.*, 927 F.3d 396, 418 (6th Cir. 2019).

But parental authority is not absolute. The state may intervene where "necessary to ensure the safety or health of the child." *Newmark*, 588 A.2d at 1108, 1116; *In re Application of L. I. Jewish Med. Ctr.*, 147 Misc. 2d 724, 729, 557 N.Y.S.2d 239, 243 (N.Y. Sup. Ct. 1990). Courts have ordered medical care over parental objections in cases where the child's life was in danger. *See*, *e.g.*, *In re McCauley*, 565 N.E.2d 411 (Mass. 1991); *In re Guardianship of L.S. & H.S.*, 87 P.3d 521 (Nev. 2004). The procedures at issue in this case cause irreparable, long-term changes to a child's body, at a time when he or she is too young to appreciate and accept the risks.

A. Parents cannot lawfully allow their children to violate the law, including the many laws that place unique limitations on minors.

Parents lack authority to allow their children to violate *any* law under the rubric of parental rights, either generally applicable laws or restrictions on minors that

do not apply to adults. Parents have no legislative veto that entitles them "to reject democratically enacted laws" or regulatory policies. *Skrmetti*, 83 F.4th at 475. Many legal limits on children are obvious and widely recognized—alcohol, tobacco, driving, voting. Others are less obvious, e.g., the FDA "allow[s] some drugs to be used by adults but not by children." *Skrmetti*, 83 F.4th at 473; *id*. at 474, citing *In re Celexa & Lexapro Mktg. & Sales Pracs. Litig.*, 915 F.3d 1, 8-9 (1st Cir. 2019) (FDA limits approval for antidepressants by age). Even adults have no "constitutional right to use a drug that the FDA deems unsafe or ineffective"—even if it is "an experimental drug that a doctor believes might save a terminally ill patient's life." *Skrmetti*, 83 F.4th at 473. This case implicates a state law enacted to prohibit certain medical procedures solely for minors. No comparable restrictions are imposed on adults, who may decide for themselves whether to assume the risks associated with these treatments.

Laws that uniquely impact minors do not override this Court's strong recognition of parental rights. In upholding a child labor law, this Court explained that "[t]he state's authority over children's activities is broader than over like actions of adults" but simultaneously affirmed the paramount importance of parental rights: "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 168, 166 (1944); *see Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150, 156 (3d Cir. 2015) (rejecting "a right of parents to demand that the State make available a particular form of treatment"). Tennessee may lawfully impose restrictions on a novel medical procedure with

the potential to cause irreparable harm. That law neither changes nor challenges the time-honored recognition of fundamental parental rights.

B. Parental rights are inalienable and fundamental, as recognized by decades of American jurisprudence.

There is such "extensive precedent" on point that it cannot possibly be doubted that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). Due process rights to life, liberty, and property encompass "not merely freedom from bodily restraint but also the right of the individual to . . . marry, establish a home and bring up children, to worship God. . . ." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). These rights to establish a family are "essential." *Ibid.*; *see Troxel*, at 65. A parent's "right to the care, custody, management and companionship" of his or her children is a "right[] more precious . . . than property rights"—even more important than financial support from a former spouse. *May v. Anderson*, 345 U.S. 528, 533 (1953).

Parental rights fit comfortably within judicial definitions of "fundamental" rights. "Marriage and procreation are fundamental to the *very existence and survival* of the race." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (emphasis added). In *Skinner*, this Court struck down a sterilization requirement, stressing the potentially "far-reaching and devastating effects" of depriving the individual of "a basic liberty." *Ibid.* The often repeated language used to recognize fundamental rights is easily

applied to the rights of parents—"deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); "so rooted in the traditions and conscience of our people as to be ranked as fundamental," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed," *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937). *See Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1977) (discussing the criteria to recognize fundamental rights beyond those enumerated in the Bill of Rights).

C. Parental rights and other basic liberties are increasingly threatened by public school policies facilitating gender transitions for minor school children.

Transgender rights are often exalted at the expense of all those who reject the ideology. This trend is nowhere more evident than in public school policies demanding the use of a minor child's preferred name and pronouns—often without parental consent or even knowledge, and sometimes requiring that school personnel actively deceive parents. With the increase in these alarming policies, it is more important than ever to guard against secret gender transitions. Laws prohibiting sex transition surgeries, and other treatments that are not easily reversible, protect the many conscientious parents who object to transgenderism. There are many legal challenges around the country.

One transition policy emerged in Iowa's Linn-Marr School District. Like many of these policies, it combined the worst of two worlds in constitutional law—compelled speech and viewpoint discrimination. A challenge to

the policy reached the Eighth Circuit, which found that intervening legislation (Iowa Code § 279.78 (2023)) had provided the relief sought on one claim, but the court allowed a second claim (based on the First Amendment) to proceed. *Parents Defending Educ.*[3] *v. Linn-Marr Sch. Dist.*, 83 F.4th 658, 665 (8th Cir. 2023).

In Florida, the Leon County Schools LGBTQ+ Critical Support Guide jeopardizes First Amendment rights by demanding the use of a minor child's preferred name and pronouns, not only without parental consent or knowledge—but under an official policy that authorizes and directs school personnel to deceive a child's parents if they do not affirm the *child*'s life-altering decision to transition to the opposite sex. *Littlejohn v. Sch. Bd. of Leon Cnty.*, 647 F. Supp. 3d 1271 (N.D. Fla. 2022), pending in Eleventh Circuit, Case No. 23-10385.

In another variation on this theme, the Olentangy School District in Ohio adopted a policy demanding that *students* affirm the idea that gender is fluid and refrain from "misgendering" other *students*, even contrary to their own (or their parents') religious convictions. The Sixth Circuit recently affirmed the district court's denial of a request for preliminary injunction, over a long dissent by Judge Batchelor that acknowledged the presence of both compelled speech and viewpoint discrimination. *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 2024 U.S. App. LEXIS 18634 (July 29, 2024).

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3. https://defendinged.org. There are numerous indoctrination policies around the country and many ongoing legal challenges in process.

Parents in Montgomery County, Maryland sued the Board of Education over the emerging issue of public schools secretly socially transitioning minor children to alternate gender identities and deliberately withholding that information from parents. The School Board had adopted "Gender Identity" guidelines specifically providing that parents were *not to be informed* when their children announced that they identified as transgender, and furthermore, that school personnel had to take affirmative steps to hide from parents that their child was exhibiting as transgender at school by reverting to given names when communicating with them. The Fourth Circuit held that the parents did not allege sufficient injuries to establish legal standing. *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, 78 F.4th 622 (4th Cir. 2023), *cert. denied* WL 2262333 (May 20, 2024).

In pursuing its alleged goal to respect and support all students, including transgender students, the Brownsburg Community School Corporation in Indiana adopted a policy providing that if a student, the student's parents, and a health care provider asked that the student be called by a preferred name, teachers would be required to call the student by that name regardless of conscientious objections. The court held that a religious accommodation would be "detrimental not only to transgender students' well-being, but also to the learning environment for other students and faculty." *Kluge v. Brownsburg Cmty. Sch. Corp.*, 2024 U.S. Dist. LEXIS 78340, *2-3 (S.D. Ind. 2024). This is one of the few policies where parental consent is required, but even so, it tramples on the First Amendment rights of others in public education.

In a Petition currently pending before this Court, the Eau Claire Area School District in Wisconsin adopted

"Administrative Guidance for Gender Identity Support" that initiates a process for school staff to create a "Gender Support Plan" with a student. The Policy purports to offer parents limited rights to participation and information but nevertheless erodes parental rights and attacks the religious convictions of concerned parents. *Parents Protecting Our Child. v. Eau Claire Area Sch. Dist.*, 95 F.4th 501, *6 (7th Cir. 2024); Docket No. 23-1280.

D. The "detransitioner" lawsuits emerging among young adults are evidence of the dangers of sex transitions and the need to preserve parental rights to refuse these treatments for their minor children.

Evidence of the need for Tennessee's law can be found in the growing number of lawsuits filed by "detransitioners"—persons who were led (or misled) to believe that medical "transitioning" treatments would be beneficial but later regretted taking them. Detransitioner lawsuits are becoming a cottage industry.[4] As noted above (fn. 2), Tennessee extended the statute of limitations for these lawsuits to *30 years* after the minor reaches age 18.

Minors are not legally competent to give informed consent. "Even if minors consent to such treatment despite being made aware of the many risks, their age and immaturity renders informed consent pointless and highlights the necessity of parental consent and guidance

4. See, e.g., https://www.cmppllc.com/our-cases/ (Campbell, Miller, Payne is a law firm specializing in these lawsuits) (last visited 07/30/24); https://www.saveservices.org/2024/04/lawsuits-by-detransitioners-skyrocket-as-transgender-movement-retreats/ (last visited 07/30/27).

in such situations." Claudia Bihar, *Let Them Be Children: How the Law Should Support Parents in Protecting Their Children From the Harmful Effects of Gender Affirming Treatment*, 21 Ave Maria L. Rev. 108, 119 (Spring 2023).

This emerging detransitioner litigation is also evidence that transgenderism is not an "immutable" trait that warrants special deference. Petitioners declare that there is no reasonable dispute that transgender persons share "obvious, *immutable*, or distinguishing characteristics that define them as a discrete group," citing *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987) (emphasis added). Pet. 24. But unlike other suspect classes, transgender identity is not immutable because it is not "definitively ascertainable at the moment of birth." *Skrmetti*, 83 F.4th at 487, citing *Ondo v. City of Cleveland*, 795 F.3d 597, 609 (6th Cir. 2015) and referencing the stories of "detransitioners" described in Detransitioners' Amicus Br. 19-25. Tennessee's statute is based on *age*, another trait that is not "immutable" and undergirds numerous legal restrictions that could not be imposed on adults.

II. THE TENNESSEE LAW SOLELY REGULATES *CONDUCT*, NOT PURE *SPEECH*.

The Sixth Circuit dissent framed the issue in terms of "the *who*—who gets to decide whether a treatment otherwise available to an adult is right or wrong for a child?" *Skrmetti*, 83 F.4th at 510 (White, J., dissenting). But "the *what*"—*what* particular treatment—was also discussed. The dissent observed correctly that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Id.* at 511, citing *Parham*, 442 U.S.

at 603. But the nature of the "what" is critical. The dissent thus proposed that

> The state may, therefore, prohibit a parent from submitting a child to a genuinely harmful treatment. *See*, *e.g.*, *Pickup v. Brown*, 740 F.3d 1208, 1223, 1232, 1235-36 (9th Cir. 2014) (concluding that parents had no fundamental right to give children a "treatment that the state has *reasonably* deemed harmful" given "the well-documented" and "overwhelming consensus" "of the medical and psychological community that" sexual orientation change efforts therapy "was harmful and ineffective" (emphasis added). . . .

Skrmetti, 83 F.4th at 511 (White, J., dissenting). Judge White also cites a case about "extremely painful" female genital mutilation that "permanently disfigures the female genitalia, and exposes the girl or woman to the risk of serious, potentially life-threatening complications." *Abay v. Ashcroft*, 38 F.3d 634, 638 (6th Cir. 2004).

Abay's concern about genital mutilation has much in common with sex transition procedures that cause permanent, irreparable damage to a child's body. But these physically damaging treatments contrast sharply with cases that involve "sexual orientation change efforts" (SOCE), such as *Pickup v. Brown* and *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), *cert. denied*, 144 S.Ct. 33 (2023). SOCE *may* involve painful bodily procedures, but legal advocates have persuaded legislatures to enact broad unconstitutional bans on *pure speech*. These bans reflect the prevailing cultural viewpoint but defy the Constitution.

In *Tingley*, the Ninth Circuit erred in characterizing the law as a regulation of *conduct*, rationalizing its error by citing a young man's account of his experience with "conversion therapy." *Tingley*, 47 F.4th at 1083 n. 3, citing Sam Brinton, *I Was Tortured in Gay Conversion Therapy. And It's Still Legal in 41 States*, N.Y. Times (Jan. 24, 2018). Here is how Brinton described his experience: "The therapist ordered me bound to a table to have ice, heat, and electricity applied to my body. I was forced to watch clips on a television of gay men holding hands, hugging and having sex."[5] These practices are clearly *conduct* that could lawfully be prohibited—*conduct* that any reasonable counselor would abhor, *in contrast to the pure speech that Tingley sought to engage in with his counseling clients—speech consistent with the religious convictions of Tingley, his minor clients, and their parents.*

The Washington law in *Tingley* was a direct attack on *pure speech* that codified the State's viewpoint on one of the most contentious social issues of our time. The "fixed star in our constitutional constellation"—barring any public official from prescribing orthodoxy in religion (*West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))—shines across decades of precedent and prohibits this sort of draconian law that conditions professional counseling—*pure speech*—on the demise of the speech and religious liberties of both counselor and counselee. Such a statute flouts the Constitution, which "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Lynch v. Donnelly*, 465 U.S. 668, 672 (1974).

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5. https://www.nytimes.com/2018/01/24/opinion/gay-conversion-therapy-torture.html.

Free speech jurisprudence has long guarded even "the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting). Laws against pure speech crush the "bedrock principle" that government may not suppress an idea merely because some find it "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Otto v. City of Boca Raton*, 981 F.3d 854, 872 (11th Cir. 2020).

Washington bypassed the warning that "regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try." *Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 383 (2002); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002). No matter how politically popular it is to promote LGBT ideology, the government must nevertheless "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 573 U. S. 464, 476 (2014), quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984). Policing "professional" speech risks suppressing that free "marketplace." *Nat'l Inst. of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2374 (2018).

The Washington law in *Tingley* regulated *pure speech*. "If *speaking* to clients is not *speech*, the world is truly upside down." *Otto*, 981 F.3d at 866 (emphasis added). The Tennessee law properly regulates *conduct*. Professional *conduct* may be regulated even if it incidentally involves speech. *NIFLA*, 138 S. Ct. at 2372. The law requires "separately identifiable" conduct to which the speech is incidental. *Cohen v. California*, 403 U.S. 15, 18 (1971). No such conduct was presented in *Tingley*, but it *is* present here in the proscribed medical procedures.

In *Tingley*, the district court evaded the obvious First Amendment concerns by diverting its attention to "treatment," contending that "psychoanalysis is the treatment of emotional suffering and depression, *not* speech." *Tingley v. Ferguson*, 557 F. Supp. 3d 1131, 1139 (W.D. Wash. 2021), quoting *National Association for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology ("NAAP")*, 228 F.3d 1043, 1054 (9th Cir. 2000); *Pickup*, 740 F.3d at 1226. The government played word games, regulating speech by improperly "relabeling it as conduct." *Otto*, 981 F.3d at 865. Such "relabeling" is "unprincipled and susceptible to manipulation." *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1308 (11th Cir. 2017) (en banc). The "past aversive treatments" described in *Pickup*, 740 F.3d at 1222—"inducing nausea, vomiting, or paralysis; providing electric shocks; or having an individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts"—are *conduct* that may be prohibited. But in *Tingley* the government restricted "purely speech-based therapy" (*Otto*, 981 F.3d at 859), "talk therapy . . . administered solely through verbal communication." *King v. Gov. of the State of New Jersey*, 767 F.3d 216, 221 (3rd Cir. 2014). The Third Circuit had no trouble concluding that SOCE implicated *speech*, rather than *conduct*, for First Amendment purposes. *Id.* at 225, 229.

Washington's transparent viewpoint discrimination was revealed by its "significant carveout" (*Otto*, 981 F.3d at 860) for counseling that provides "acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development" but does "not seek to change sexual orientation or gender identity." Wash. Rev. Code

§ 18.130.020(4)(b); *Tingley*, 47 F.4th at 1065, 1073, 1091. Viewpoint-based regulations are "an egregious form of content discrimination" (*Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995)) and "a matter of serious constitutional concern" (*NIFLA*, 138 S. Ct. at 2378 (Kennedy, J., concurring)). Washington codified its viewpoint that "sexual orientation is immutable, but gender is not" (*Otto*, 781 F.3d at 864), and that homosexuality and transgenderism are normal and morally right.

As illustrated by the Sixth Circuit dissent, opponents of the Tennessee law seek a similar codification of their preferred pro-transgender viewpoint. Advocates would ban *pure speech* by counselors who hold an opposing viewpoint (*Skrmetti*, 83 F.4th at 511), but would strike down a ban on *conduct* that involves performing novel, potentially dangerous procedures on minor children who are too young to appreciate the risks and give their own informed consent.

Tennessee and Kentucky do not ban speech at all and do not prohibit sex transition procedures for persons over age 18. For minors, gender dysphoria may be treated "without physical interventions" which are "potentially irreversible . . . until the patient reaches 18." *Skrmetti*, 83 F.4th at 480.

III. *BOSTOCK* MUST BE NARROWLY INTERPRETED AND APPLIED.

This Court's "text-driven reasoning" in *Bostock v. Clayton County* "applies only to Title VII, as *Bostock* itself and many subsequent cases make clear." *Skrmetti*, 83 F.4th at 484, citing *Bostock*, 140 S. Ct. 1731, 1753 (2020).

Lower courts should have uniformly heeded this warning, but unfortunately many have not. *Bostock* is entirely consistent with the Sixth Circuit's decision and should not be distorted to create a conflict where none exists.

Bostock was narrowly crafted to apply solely to employment matters under Title VII. This Court began with the correct assumption that "sex" "refer[s] only to biological distinctions between male and female." 140 S. Ct. at 1739. "[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth." *Adams ex rel. Kasper v. Sch. Bd.*, 57 F.4th 791, 807 (11th Cir. 2022), quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). The sole question before this Court was whether an employer discriminated "because of sex" by taking action against an employee "simply for being homosexual or transgender." *Bostock*, 140 S. Ct. at 1753. This Court expressly disclaimed deciding whether "other policies and practices might or might not qualify as unlawful discrimination," even under Title VII (*id.*), let alone anywhere else.

Bostock bears minimal relevance to this case because it concerned a different law, with materially different language, and a different factual context. *See Skrmetti*, 73 F.4th at 420; *Eknes-Tucker v. Governor, of the State of Alabama*, 80 F.4th 1205, 1229 (11th Cir. 2023). It bears no resemblance to the state statutes now before this Court that limit access to novel medical procedures because of *age*—not because of *sex*. "The [Tennessee] laws regulate sex-transition treatments for all minors, regardless of sex. . . . Such an across-the-board regulation lacks any of the hallmarks of sex discrimination." *Skrmetti*, 83 F.4th at 480. The proscribed treatments are denied to all *minors*

(persons under 18) and freely available to all *adults*. If there is any "discrimination" here, actionable or not, it is solely based on age—*not* sex.

The state also does not condition healthcare treatment on the basis of sex stereotypes. "A concern about potentially irreversible medical procedures for a child is not a form of stereotyping." *Skrmetti*, 83 F.4th at 485. Similarly, Alabama's ban on sex-transition procedures "d[id] not further any particular gender stereotype" but "simply reflect[ed] biological differences." *Eknes-Tucker*, 80 F.4th at 1229. These laws do not "penalize[] a person identified as male at birth for traits or actions that it tolerates in [a person] identified as female at birth." *Bostock*, 140 S. Ct. at 1741-1742. The mere use of "sex-related language" in a statute is not tantamount to a "sex *classification*." *Skrmetti*, 83 F.4th at 482, citing *Eknes-Tucker*, 80 F.4th at 1233 (Brasher, J., concurring).

Bostock's reach should be limited to what this Court *did* decide—not what it *did not* decide. *Bostock* was a startling departure from the understanding of the Congress that enacted Title VII, 42 U.S.C. § 2000e, et seq., and the courts that interpreted it over several decades of litigation. *Bostock*'s majority and dissenting opinions all acknowledged there were many issues the Court did *not* address. Lower courts should not hastily employ *Bostock* as a band-aid to fix every perceived "discrimination" based on sexual orientation or gender identity. The case before this Court, concerning whether a state may prohibit the availability of "potentially irreversible medical procedures" for minor children, "falls far outside Title VII's adult-centered employment bailiwick." *Skrmetti*, 83 F.4th at 485.

Bostock's implications are potentially staggering. The employers in that case rightly worried that the Court's decision would "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," including private facilities and dress codes. *Bostock*, 140 S. Ct. at 1753. "But none of these other laws are before us," this Court assured them, and "we do not purport to address bathrooms, locker rooms, or anything else of the kind." *Ibid*. "Anything else" is now pounding on this Court's door in several cases. *Bostock*'s initial reassurance rings hollow as litigants import its rationale and conclusions into other wildly unrelated contexts.

Bostock is not a one-size-fits-all test that can be blindly applied in every context that happens to mention "sex." There are "[o]ver 100 federal statutes" that "prohibit discrimination because of sex." *Bostock*, 140 S. Ct. at 1778 (Alito, J., dissenting). Concerns about improper expansion of *Bostock* were hardly speculative. Justice Alito's list of possibilities included disputes over whether healthcare plans must cover sex reassignment surgeries. *Id*. at 1781, n. 56, 57. *See also* Rena M. Lindevaldsen, *Article*: Bostock v. Clayton County: *A Pirate Ship Sailing Under a Textualist Flag*, 33 Regent U.L. Rev. 39, 74 (2020-2021), citing a district court holding that a hospital staff 's refusal to use preferred pronouns violated the Affordable Care Act. *Prescott v. Rady Child.'s Hosp. San Diego*, 265 F. Supp. 3d 1090, 1098-100 (S.D. Cal. 2017).

Bostock's extreme literalism warrants restraint. Legal activists are using the case as a springboard to coerce sweeping social engineering in other unrelated contexts. Advocates demand that courts reinterpret a

broad swath of anti-discrimination laws to include sexual orientation and gender identity within the definition of "sex," stretching that three-letter word like a rubber band. In this troubling game of legal "leap frog," courts have radically reinterpreted the simple word "sex" through a breathtaking expansion of *Bostock*, leaping from employment policies to bathrooms, ballgames, and beyond. Respondents now demand to add experimental medical procedures to the list. A fair reading of *Bostock* neither requires nor even condones these radical legal maneuvers. A coherent limiting principle is needed to ensure that the word "sex" is not entirely emptied of meaning.

The *Bostock* majority admitted that "homosexuality and transgender status are distinct concepts from sex." 140 S. Ct. at 1746-47. Neither concept is "tied to either of the two biological sexes." *Id.* at 1758 (Alito, J., dissenting). But—whether intentionally or not—*Bostock* essentially treated them as synonymous. In addition to the massive public policy implications, "the potentially greater concern" with *Bostock*'s approach is "its characterization as a case decided on a plain meaning interpretation." Lindevaldsen, *A Pirate Ship*, 33 Regent U.L. Rev. at 78. The "plain meaning" camouflage obscures this Court's failure to consider dictionary and medical definitions, common understanding, or prior judicial rulings. *Id.* Chaos continues.

Even in the employment context Title VII covers, the prohibition is "discrimination because of *sex itself*, not everything that is related to, based on, or defined with reference to, sex." *Bostock*, 140 S. Ct. at 1761 (Alito, J., dissenting). Tennessee restricted certain medical

procedures on the basis of *age*, *not* on the basis of *sex*, and the state law is not tethered to Title VII in any way. *Bostock*'s extreme literalism should not be exported to an unrelated context and employed to place state legislatures in a straightjacket where they cannot enact reasonable limitations on risky, experimental treatments for minor children.

IV. THIS COURT SHOULD REFRAIN FROM MANUFACTURING A NOVEL "CONSTITUTIONAL" RIGHT TO GENDER FLUIDITY AND INSTEAD ALLOW CONTINUED DEBATE AND LEGAL DEVELOPMENT AT THE STATE AND LOCAL LEVELS.

This Court should decline to replicate the error of *Roe v. Wade*, 410 U.S. 113 (1973), overruled in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). "*Roe*'s abuse of judicial authority" (*ibid.*) did not settle the underlying debate surrounding abortion but instead spawned decades of contentious litigation. The Court "assume[d] authority over an area of policy that [was] not theirs to regulate," thereby "impos[ing] a constitutional straightjacket on legislative choices" in a time of "medical and scientific uncertainty." *Skrmetti*, 83 F.4th at 473. States struggled to enact even the most reasonable medical protections for pregnant women, thrusting this Court into the role of "ex officio medical board"—a role for which it is ill-equipped. *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989).

Just as the Constitution neither references abortion nor implicitly protects any such right (*Dobbs*, 597 U.S. at 231), the American people have never agreed to remove debates "over the use of innovative, and potentially irreversible, medical treatments for children," from "the conventional place for dealing with new norms, new drugs, and new public health concerns: the democratic process." *Skrmetti*, 83 F.4th at 471. The Sixth Circuit noted the novelty of both "gender dysphoria as a medical condition" and "drug treatments that change or modify a child's sex characteristics," alongside the fact that nineteen other states have recently passed statutes similar to the Tennessee and Kentucky laws at issue in this case. *Skrmetti*, 83 F.4th at 471-472. Under these circumstances, where the Constitution is silent and therefore neutral about the issue (gender identity), "skeptical judicial review" is prudent. *Id.* at 472. Creation of a brand new, unenumerated right is neither constitutionally required nor wise. Policy choices should remain with the fifty state legislatures, not usurped by "one judiciary, suddenly delegated with authority to announce just one set of rules." *Id.* at 487, citing *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). The judicial fiat that created half a century of legal chaos over abortion should not be employed to manufacture another "right" that lacks "deep[] root[s] in this Nation's history and tradition" and is not "implicit in the concept of ordered liberty." *Glucksberg*, 521 U.S. at 721.

CONCLUSION

This Court should affirm the Sixth Circuit decision.

Respectfully submitted,

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