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,
and
L.W., BY AND THROUGH HER PARENTS AND NEXT FRIENDS, SAMANTHA WILLIAMS AND BRIAN WILLIAMS, ET AL.,
Respondents in Support of Petitioner.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF CITIZENS FOR SELF-GOVERNANCE, *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Citizens for Self-Governance is a nonprofit, non-partisan 501(c)(3) organization dedicated to recruiting, educating, training, equipping, and motivating a nationwide network of citizens to be actively engaged in all levels of government and working to preserve their rights of self-governance and restore the rule of law.

Crucial to the rule of law set forth in The Constitution of the United States is the division of power, both among the three branches of the federal government and between the federal government and the states. The nature of governing authority vested in the federal government differs significantly from that retained by the states. The federal government is vested solely with specifically enumerated powers. The states, however, retain broad authority to govern within the context of their own constitutions, provided they do not transgress the limitations set forth in the United States Constitution.

As the final interpreter of constitutional language, this Court is frequently called upon to determine whether state lawmakers have, in fact, respected constitutional boundaries. If the Court fails to interpret constitutional text according to its original, public meaning in such cases, its decisions effectively *move* those constitutional boundaries, thus upsetting the delicate balance of power between the

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[1] No counsel to any party authored this brief in whole or in part, nor has any party or counsel to a party made a monetary contribution funding the preparation of the brief. No person other than *amicus*, its members, and counsel, have made any such monetary contribution.

federal and state governments and eroding the rule of law. "It must be remembered . . . that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973).

Moreover, to the extent that this Court expands upon the constitutional limitations that are, in fact, in the text, the Court effectively makes an illegitimate amendment to the Constitution, usurping the function of lawmaker and subverting Article V's prescribed processes for constitutional amendment.

Amicus respectfully submits this brief in the interest of ensuring proper respect for the states' sovereignty within their constitutional jurisdiction and of reminding this honorable Court of its institutional limitations.

SUMMARY OF THE ARGUMENT

In their zeal to protect liberty, our Constitution's framers devised multiple divisions and separations of power. Not only did they distribute power at the national level among three separate, co-equal branches, but they carefully protected a more fundamental division of power between the national government and the states. We commonly refer to the former division as "the separation of powers," and the latter as "federalism." Both are essential to the proper functioning of our constitutional system.

The Petitioner in this case, representing the Executive Branch of the federal Government, invites the Court to engage in brazen overreach that would violate both principles. While many years of similar invitations–and many precedents in which they have been accepted—may tend to desensitize the legal community to the judiciary's proper jurisdictional competencies and limitations, *Amicus* urges the Court to pause and carefully consider what it is being asked to do.

The nine unelected Justices on this Court are being asked to rule that a duly-enacted state law prohibiting children from receiving medical treatments aimed at changing their gender deprives people of the equal protection of the law under the Fourteenth Amendment. Specifically, Petitioner asks this Court to hold that this state law, which applies equally to male and female children, discriminates against people on the basis of sex.

For the Court to accept that argument would be to not only dramatically expand the Court's own Equal Protection doctrine, but to effectively rewrite the Equal Protection Clause by unmooring it from its original public meaning. The Court should be especially wary of doing so in this particular case, because the law in question is the product of a state's political process, operating in the context of medical novelty and social controversy, upon a subject over which the states have broad policy-making authority.

Amicus maintains that the Court should not apply heightened scrutiny to SB1 because the law does not make any sex-based classifications. Even if the law could be deemed to make a sex-based classification, the Court should still apply only ordinary scrutiny because the law does not treat one sex less favorably than the other or otherwise demonstrate prejudice or animus. *Amicus* will further argue that it is constitutionally inappropriate for this Court to apply heightened scrutiny by creating a new "quasi-suspect class" for transgender individuals. Finally, even if the Court were to apply heightened scrutiny, the Court should uphold SB1 in light of the nature of the state interests it advances.

Our Constitution sets a number of limitations upon the states' policymaking authority. So long as they do not transgress those limitations, however, the states' elected legislators must remain free to enact the policies they deem wisest and most reflective of the will of their constituents. Because SB1 in no way transgresses the boundaries set by the Equal Protection Clause, this Court should affirm the Sixth Circuit's decision below.

ARGUMENT

I. Because SB1 Treats Both Sexes Equally, Applying Heightened Scrutiny Would Dramatically Expand the Boundary Set By the Equal Protection Clause and Constitute Gross Federal Judicial Overreach.

This Court's constitutional duty in this case is to determine whether or not Tennessee's SB1 has transgressed the limitations of state authority set forth in the United States Constitution. In so doing, the Court should faithfully apply the text according to its original, public meaning in order to respect the core principles of federalism and separation of powers. *See Bostock v. Clayton Cnty.*, 590 U.S. 644, 654-55 (2020) (in context of Title VII); *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) ("[T]he function of this Court is to *preserve* our society's values regarding . . . equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees).

The United States claims that SB1 violates the right to the equal protection of the laws under the Fourteenth Amendment. To accept that claim, this Court would have to dramatically expand upon the original, public meaning of the Equal Protection Clause.

A. The Guarantee of the Equal Protection Clause Is That No Person Be Subjected To Special Legal Disabilities or Removed From the Law's Protections Based on Unjustified or Animus-Based Discrimination.

On June 13th, 1866, in the wake of the Civil War, Congress passed the Fourteenth Amendment. U.S. Const. amend. XIV. The states ratified it on July 9th, 1868. Its Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

The phrase, "equal protection of the laws" was a common demand in abolitionist rhetoric. *See* Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 Geo. L. J. 1, 24-29 (2021). The "protection" they demanded stemmed from the Founding-era conviction that citizens' obligation of allegiance to their government corresponds to the government's duty to protect their life, liberty, and property. *Id.*, at 24. Essentially, then, the Equal Protection Clause requires that states afford such "protection" to *all* people within its borders. U.S. Const. amend. XIV. While the primary motivating desire was to ensure that previously enslaved people would be provided the full benefits of state law, the text does not limit its application to any particular class or group. *Id.*

More than a century and a half has passed since the Equal Protection Clause was incorporated into our Constitution. While this Court has described its

requirements in varying ways over the years, its core demand has remained constant: similarly situated people must be treated alike. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982)). Courts reviewing claims of an Equal Protection violation are tasked with invalidating unjustified or animus-based distinctions in the law. *See*, *e.g.*, *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974) (looking for evidence of "invidious discrimination"); *Michael M. v. Superior Court*, 450 U.S. 464, 477-78 (1981) ("The Constitution is violated when government, state or federal, invidiously classifies similarly situated people on the basis of the immutable characteristics with which they were born.") (Stewart, J., concurring).

Where a state law or action does, in fact, treat some people less favorably than others based on a classification the Court has deemed "suspect," courts have applied heightened levels of scrutiny to ferret out prejudice-based, unjustified discriminations.[2] *See United States v. Carolene Products Co.*, 304 U.S. 144, FN 4 (1938) (noting that "prejudice against discrete and insular minorities" may call for a "more searching judicial inquiry"). Classifications based on race or national origin, for instance, always trigger the highest level of judicial scrutiny because those traits rarely, if ever, provide any legitimate basis for legal distinctions.

The Court has considered classifications based on sex to necessitate more than the typical rational-

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[2] While this is the prevailing analytical framework in Equal Protection cases, *Amicus* will explain, below, why it is an unnecessary judicial expansion of the Fourteenth Amendment.

basis review *See*, *e.g.*, *Sessions v. Morales-Santana*, 582 U.S. 47 (2017) (applying intermediate scrutiny for citizenship rule that differentiated between mothers and fathers); *Nguyen v. INS*, 533 U.S. 53 (2001) (same); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (applying intermediate scrutiny to male-only military institution); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-24 (1982) (applying heightened scrutiny to all-female nursing school); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (applying heightened scrutiny to statute treating males and females differently in determining "dependent" benefits).

However, even where a given law treats one sex less favorably than another, the Court will uphold the law where it substantially relates to an important government objective rather than prejudice or animus. *See*, *e.g.*, *Michael M.*, 450 U.S. 464 (statutory rape liability for males); *Nguyen v. INS*, 533 U.S. 53 (parent-based citizenship requirements); *Miller v. Albright*, 523 U.S. 420 (1998) (same). This is because, sex-based distinctions are sometimes relevant to valid government objectives. The Equal Protection Clause only prohibits irrational or animus-based distinctions.

> [B]ecause the Equal Protection Clause does not demand that a statute necessarily apply equally to all persons or require things which are different in fact . . . to be treated in law as though they were the same, this Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that

> the sexes are not similarly situated in certain circumstances.

Michael M., 450 U.S. at 469 (internal quotations and citations omitted).

B. SB1 Does Not Trigger Heightened Scrutiny Under the Equal Protection Clause Because It Makes No Sex-Based Classification.

SB1 prohibits healthcare providers from "[p]rescribing, administering, or dispensing any puberty blocker or hormone" if the treatment is provided "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 minor's sex and asserted identity." Tenn. Code Ann. §§ 68-33-102(5)(B), 68-33-103(a)(1).

The statute applies equally to males and females. As the Sixth Circuit pointed out below, SB1 contains two key classifications of people: one based on age, and the other based on medical condition. *L.W. v. Skrmetti*, 83 F.4th 460, 480 (6th Cir. 2023). The law prohibits certain medical treatments for minors, but not adults. And it prohibits those treatments when they are sought to treat the condition of gender dysphoria, but not when they are sought to treat other medical conditions.

As the Sixth Circuit recognized below, these are distinctions commonly made in state law, and they are subject only to deferential, rational-basis review.

Id. (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (age); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (age); *Cleburne*, 473 U.S. at 445-46 (medical treatment); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 369-70 (2001) (medical treatment). There can simply be no plausible claim that a law that forbids a certain type of medical treatment for children until they reach a certain age denies anyone of the equal protection of the law within the meaning of the Fourteenth Amendment.

In asserting that SB1 "classifies based on sex, through and through," (Brief of Petitioner at 21), the United States makes a dizzying sort of argument. The United States maintains that because SB1 prohibits a girl seeking gender transition treatment from receiving a drug that would be allowed for a boy who is not seeking gender transition treatment, the law discriminates based on sex. *Id.*

But again, SB1 does not distinguish at all between males and females; it prohibits gender-transition treatments for minor males and females alike. The United States appears to focus on the idea that, when asked to prescribe a certain drug to a minor, a *physician* would ascertain the minor's sex to determine whether SB1 permitted the treatment. But that cannot convert SB1 into sex discrimination. In fact, the physician in question can determine whether SB1 prohibits the requested treatment even *without* knowing the child's sex. The physician only needs to know the purpose for which the treatment is being sought in order to determine SB1's applicability. What the state has prohibited is a certain type of treatment for minors of both sexes.

This Court has held that even where a law's prohibition of a specific medical treatment affects only one sex, that fact does not trigger heightened constitutional scrutiny. *See Dobbs v. Jackson Women's Health*, 597 U.S. 215, 236-37 (2022) (regulation of abortion does not trigger heightened scrutiny unless it is mere pretext for invidious discrimination against women). So the fact that SB1 might prohibit a male hormone regimen only for females and a female hormone regimen only for males does not trigger Equal Protection concerns; SB1 prohibits a certain type of treatment (gender transition treatment) just as the law upheld in Dobbs prohibited a certain type of treatment (abortion). It entails no unjustified or animus-based discrimination against either sex.

The United States simply cannot make out a case that SB1 triggers Equal Protection Clause concerns, because the statute does not distinguish between males and females. For this Court to apply heightened scrutiny to such a law would be to dramatically expand the reach of the Equal Protection Clause in gross violation of the core principles of federalism and separation of powers.

C. Even If SB1 Could Be Considered to Make a Sex-Based Classification, It Should Not Be Subject To Heightened Scrutiny Because It Does Not Treat One Sex Less Favorably Than Another.

Because SB1 simply does not make any sex classification, the United States grasps at straws to

find a basis for invalidating it. The United States zeroes in on SB1's purpose to "encourage[e] minors to appreciate their sex" and to ban treatments "that might encourage minors to become disdainful of their sex," and then boldly posits, "That is sex discrimination." (Brief of Petitioner at 16) (citing Tenn. Code Ann. § 68-33-101(m)). To accept that proposition would require a sweeping redefinition of the word "discrimination"—and a sweeping expansion of the Equal Protection Clause's requirements.

This Court recently defined "discrimination" in a way that forecloses the United States' position. In *Bostock v. Clayton County*, this Court said, "To 'discriminate against' a person, then, would seem to mean treating that individual worse than others who are similarly situated." 590 U.S. 644, 657 (2020). That definition, though stated in the context of a Title VII case, describes the kind of unequal treatment under the law that might trigger a heightened form of judicial scrutiny under this Court's Equal Protection Clause jurisprudence.

By contrast, the notion of "discrimination" urged by the United States would deem mere reference to "sex" or a legislative purpose for minors to "appreciate their sex" to be "discrimination." Consider that according to that definition, a state law designed to encourage all minors to "appreciate" their national origin (another classification deemed to trigger heightened scrutiny) would constitute discrimination. Such a rule is too absurd to be seriously maintained.

As we have seen, the Equal Protection Clause, interpreted according to its original public meaning,

prohibits the unjustified or animus-based denial of legal rights and benefits. "Sex discrimination," as defined by this court in *Bostock* and as relevant for purposes of the Equal Protection Clause, thus requires not only a distinction between the two sexes, but a distinction that treats one sex less favorably than the other. So even if the Court were to accept the Petitioners' convoluted argument that SB1 somehow makes a sex-based classification, the next step in an Equal Protection analysis should be to ask: "Which sex is favored, and which is disfavored, by SB1?" The answer is obvious: neither. SB1 treats both sexes equally. It is therefore not a proper subject of heightened review under the Equal Protection Clause.

The Court's Equal Protection cases dealing with sex-based classifications bear this out. The common bond of those cases is the state's treatment of one sex less favorably than the other. *See e.g.*, *Reed v. Reed*, 404 U.S. 71 (1971) (preferring male executors); *Mississippi University for Women*, 458 U.S. 718 (denying university admission to men); *Craig v. Boren*, 429 U.S. 190 (1976) (higher age for men to consume alcohol), *Frontiero*, 411 U.S. 677 (only males could claim spouse as dependent), *Sessions v. Morales-Santana*, 582 U.S. 47 (2017) (easier for mothers to confer citizenship on children than fathers); *Nguyen v. INS*, 533 U.S. 53 (2001) (easier for mothers to prove citizenship of child than for fathers); *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (criminalized males for having sex with underage females, but not vice versa); *United States v. Virginia*, 518 U.S. 515 (1996) (denying military school admission to women).

These cases do not involve statutes that merely include the word "sex" or refer to the concept of sex. Rather, they concern laws that treat one sex less favorably than the other, thus triggering some concern that the state is affording less protection to persons of one sex than the other without any legitimate justification.

In light of these prior holdings, which are consistent with the meaning and purpose of the Equal Protection Clause, applying heightened scrutiny to SB1 would be an expansion of the Court's Equal Protection framework, effectively moving the Fourteenth Amendment's boundary on state policymaking. The Court should refuse to do this, and rule that sex-based classifications cannot trigger heightened review where they do not relegate one sex to less favorable treatment than the other. *See Carolene Products*, 304 U.S. at FN 4 ("*prejudice* against discrete and insular minorities" may call for higher level of judicial scrutiny) (emphasis added).

Amicus respectfully submits that even if the Court were to find that SB1 made sex-based classifications, the Court should apply only ordinary, rational-basis review because SB1 does not treat either sex less favorably than the other, and therefore cannot evince unjustified or animus-based discrimination, which is the *sine qua non* of an Equal Protection violation.

II. The Court Should Refuse To Create a New "Quasi-Suspect Class" for Equal Protection Analysis Because To Do So Would Be To Expand the Reach of the Fourteenth Amendment In Violation of Core Principles of Federalism and Separation of Powers.

Still desperately searching for a foothold for its Equal Protection claim, the United States urges the Court to create a new "quasi-suspect class" for transgender individuals. Brief of Petitioner, at 29. This request should be denied.

This Court's adjudication of Equal Protection claims requires assiduous respect for federalism and the separation of powers, because these claims require the Court to decide whether the state has acted within its proper sphere of authority, respecting a particular boundary set by the Constitution. *See United States v. Virginia*, 518 U.S. at 568 (1996) (Scalia, J., dissenting).

Under the Equal Protection Clause, the Court must uphold the state law unless it singles out certain people for disfavored treatment without justification or on the basis of prejudice or animus. *Geduldig*, 417 U.S. at 494.

The Equal Protection Clause does *not* create classes of people who are entitled to greater protection than other classes of people. It forbids the state to deny the equal protection of the laws to "any person within its jurisdiction." U.S. Const. amend. XIV, §1. There is no basis in the text for interpreting that requirement as triggering a higher degree of judicial scrutiny when the Court determines that the claimant

meets certain extra-constitutional criteria that it fabricates out of whole cloth. In essence, such an approach suggests that certain types of claimants are entitled to *greater* protection of the laws than others, because they believe themselves justified in suspecting discrimination.

For these reasons, judicial frameworks that apply varying levels of scrutiny based upon judicially created "suspect" and "quasi-suspect" classes miss the mark, expanding upon rather than faithfully applying the original public meaning of the Equal Protection Clause. These types of analyses invite courts to upset the constitutional balance of powers by effectively *moving* the constitutional boundaries that limit state policymaking authority.

The heightened scrutiny framework, moreover, is fraught with pitfalls. It looks not to determine simply whether a law is rationally related to a legitimate (non-animus-based) government interest, but to whether the law is "substantially related" to an "important" government interest.

> How is the Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed as

> 'important' objectives or, whether the relationship to those objectives is 'substantial' enough.

Craig v. Boren, 429 U.S. 190, 219 (1976) (Rehnquist, J., dissenting).

Courts need not dabble in the problematic and extra-constitutional business of applying varying levels of scrutiny and creating classes of people to benefit from them, because the Court's ordinary rational-basis test is perfectly adequate to invalidate laws that actually violate the Equal Protection Clause. In a concurring opinion joined by Justice Thurgood Marshall, Justice Stevens described the efficacy of the rational-basis test in Equal Protection cases:

> The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause. It would be utterly irrational to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply 'strict scrutiny' or even 'heightened scrutiny' to decide such cases.

Cleburne, 473 U.S. at 432 (Stevens, J., concurring). Classifications based on characteristics like race and national origin will rarely survive rational-basis review because, in fact, a state will rarely, if ever, have a legitimate basis for making such classifications.[3]

If, in fact, the command of the Equal Protection Clause is that similarly-situated people be treated similarly, the same analysis should apply whether the claimant of a violation is part of a "suspect class" or not. The goal is to root out irrational or prejudice-based lawmaking. Because human nature is a perennial manufacturer of new prejudices, the Court's practice of creating suspect classes for Equal Protection analysis risks excluding some people from the guarantee of equal protection even as it illegitimately builds upon the Clause's text.

While this case certainly does not require the Court to consider whether to discontinue the practice of applying varying standards of review to Equal Protection claims based on the "class" of the claimant, this Court should refuse to indulge the Petitioner's request to further validate and expand upon that type of analysis by creating a new "quasi-suspect class."

The Equal Protection Clause does not create different "classes" of people who are entitled to varying levels of freedom from state regulation, and there is no constitutional basis for this Court to take

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[3] *Amicus* is not suggesting that the Court should change its Equal Protection analysis for race-based classifications, but merely pointing out the efficacy of the rational-basis test for all Equal Protection claims.

up that task. The core principles of federalism and separation of power require the Court to abstain from moving the constitutional boundaries on state policymaking authority. Accepting the United States' invitation to create a new quasi-suspect class would both move the boundary set by the Equal Protection Clause and validate the idea that it is amenable to constant variation.

Finally, even if this Court chose to engage in the business of creating new "classes" of people for purposes of Equal Protection analysis, it would be inappropriate to create a new quasi-suspect class for transgender individuals for the reasons articulated by the Sixth Circuit below. *See* 83 F4th at 487 (noting that transgender individuals are not an immutable nor politically powerless group).

III. To Invalidate SB1, Even Under Heightened Scrutiny, Would Constitute Gross Federal Judicial Overreach In Violation of Core Principles of Federalism and Separation of Powers.

As *Amicus* has set forth above, SB1 should be subjected only to the Court's general requirement that laws be rationally related to a legitimate government interest. *Amicus* maintains that applying heightened scrutiny to SB1 would constitute an expansion of this Court's Equal Protection jurisprudence and an illegitimate judicial broadening of the Equal Protection Clause.

Amicus has also expressed grave concerns that the Court's prevailing Equal Protection framework unnecessarily departs from the text of the Fourteenth

Amendment in recognizing varying "classes" of people and applying varying levels of judicial scrutiny based upon the characteristics of the person claiming a denial of Equal Protection.

However, even if this Court chooses to apply heightened scrutiny to SB1, the Court should uphold the statute in order to avoid unconstitutional judicial overreach and to respect the core principles of federalism and the separation of powers.

In the words of James Madison,

> The powers delegated . . . to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961).

The authority to legislate in the area of public health and to regulate the medical profession are among the quintessential powers reserved to the

states. "Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (Roberts, C. J., concurring) (quoting *Jacobson v. Massachusetts*, 197 U. S. 11, 38 (1905)). Chief Justice Roberts continued:

> When those officials "undertake[ ] to act in areas fraught with medical and scientific uncertainties," their latitude "must be especially broad." Where those broad limits are not exceeded, they should not be subject to second-guessing by an "unelected federal judiciary," which lacks the background, competence, and expertise to assess public health and is not accountable to the people.

Id., quoting *Marshall v. United States*, 414 U. S. 417, 427 (1974) (internal citations omitted).

"Second-guessing" the reasoned conclusions of elected state officials is precisely what the United States urges the unelected federal judiciary to do.

SB1 recites the state's interests in, among other things, protecting "the health and welfare of minors," the "integrity and public respect of the medical profession," and "the ability of minors to develop into adults who can create children of their own." Tenn. Code Ann. Sex. 68-33-101(a) and (m). The Tennessee legislature set forth detailed findings that chronicle its reasons for determining that the prohibited

treatments, when performed for the specified purposes, carry unacceptable risks for minors and the potential to damage the public view of the medical profession.

The United States is clearly offended by the Tennessee legislature's conviction that children should be encouraged to appreciate their sex. See Brief of Petitioner at 16 ("SB1 declares that its very purpose is to 'encourag[e] minors to appreciate their sex'. … That is sex discrimination."). But the Constitution leaves that determination within the province of the Tennessee legislature, without regard to the opinions of the federal Executive or Judiciary.

In the face of the careful litany of findings and rationale set forth in SB1, the United States urges this Court to rule that this duly-enacted state law prohibiting certain medical treatments for children violates the Constitution because it is not substantially related to any important governmental objectives. Brief for Petitioner at 32. For this Court to issue such a ruling would be a brazen and unjustified intrusion of the federal judiciary into the jurisdiction of a state legislature. *See Craig*, 429 U.S. at 221 (Rehnquist, J., dissenting) (courts should leave decision as to what governmental objectives are "important" to popularly elected branches of government and avoid imposing their subjective preferences).

The United States' reliance on this Court's holding in *Bostock* is misplaced. 590 U.S. 644. In *Bostock*, the Court effectively equated discrimination on the basis of homosexuality or transgenderism with

"sex discrimination." But in *Bostock*, a Title VII case, that conclusion effectively decided the matter. 590 U.S. at 665 ("An employer who fires an individual merely for being gay or transgender defies the law.").

But in this case, under the Equal Protection Clause, even if SB1 could be deemed to treat some individuals less favorably than others because of their sex, it must still be upheld if it is supported by a sufficient government interest. SB1 satisfies that test. It seeks to *protect all children* by prohibiting certain sex-altering medical treatments until they attain the age of majority. It shields them from making a life-altering decision at a point in their development where there is still a likelihood that they will change their minds. This government interest clearly has no basis in prejudice, nor is it based on mere stereotypes about males and females. As the Sixth Circuit stated, "A concern about potentially irreversible medical procedures for a child is not a form of stereotyping." 83 F.4th at 485.

The type of state interests advanced by SB1 (protection of children, regulation of medicine) are highly pedigreed state prerogatives that are entitled to great deference. The type of legislation represented by SB1 is also entitled to particular deference because it seeks to further those venerated state interests in a relatively novel, fluid context.

As the Sixth Circuit's opinion below demonstrates with its review of the still-developing medical protocols for treating gender dysphoria, this is a relatively new area of medicine, unfolding in the context of a controversial social issue. 83 F.4th, 466-

68. This is precisely the type of policy area that warrants broad judicial deference to state policymakers. *See South Bay United Pentecostal Church*, 140 S. Ct. at 1613.

The United States seeks a ruling that effectively short-circuits the public debate about whether children should or should not be permitted to receive the gender transition treatments proscribed by SB1. Our Constitution demands that the debate unfold not in a courtroom, but in a legislature, and not in Washington, D.C., but in the states. *See Obergefell v. Hodges*, 576 U.S. 644, 687-88 (2015) (Roberts, C. J., dissenting).

A state legislature, comprising policymakers elected by and accountable to their constituents, is the institution best suited to prescribe policy addressing developing medical protocols and the evolving social issues presented by transgenderism. State legislatures have the opportunity to hear from subject matter experts as well as citizens as they determine how to craft wise public policy that reflects the will of a self-governing citizenry.

Part of the beauty of our federal system is that it leaves the states free to take different approaches in confronting policy issues, each being sensitive to the needs of its own constituency. *See Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)). Justice Brandeis called it "one of the happy incidents of the federal system that s ingle courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the

rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932`) (Brandeis, J., dissenting). Federalism allows for policy innovation and experimentation, and facilitates meaningful citizen involvement in the process. *Bond*, at 221.

Indeed, that is precisely what is happening around the nation right now. As noted by the Sixth Circuit below, at the time of its ruling nineteen states had laws similar to SB1, while fourteen other states provided specific protections for those seeking treatment for gender dysphoria, and most of that legislation occurred within the prior two years. 83 F.3d at 471. This is federalism in action, and it is the way our constitutional system was designed to operate.

For the Court to superimpose itself upon the properly-functioning, democratic process of policymaking in this novel area that lies squarely within state jurisdiction would be to strike a serious blow to our federal system. As Justice Powell once explained:

> [D]emocratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and political importance at the very time they are under consideration within the prescribed constitutional processes.

Frontiero, 411 U.S. at 692 (Powell, J., concurring).

The collective judgment of the majority of the elected members of the Tennessee legislature, as expressed in SB1, is that the risks of providing the prohibited medical treatments to minors suffering from gender dysphoria outweigh the potential benefits. Nothing in the Constitution precludes a state legislature from making that judgment and promulgating policies that reflect it. It would be inappropriate for a federal court to second-guess the importance of the legislature's asserted interests or to reject the legislature's explicit, detailed rationale for achieving it via SB1.

> The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution.

United States v. Virginia, 518 U.S. at 567 (Scalia, J., dissenting).

Amicus prays that this Court will resist all invitations to "seize for itself a question the Constitution leaves to the people, at a time when the people are engaged in a vibrant debate on that question." *Obergefell*, 576 U.S. at 687-88 (Roberts, C. J. dissenting). Indeed, core principles of federalism and separation of powers require it to do so.

CONCLUSION

In urging this Court to rule that SB 1 is an unconstitutional violation of the Fourteenth Amendment's Equal Protection Clause, the Petitioner invites the Court to step well beyond its proper role of interpreting and applying constitutional text. Petitioner asks the Court to find a sex-based classification in a law that applies equally to males and females, and to create a new "suspect class" entitled to greater protection under the Equal Protection Clause than others. In so doing, the Petitioner urges the Court to dramatically expand upon the original, public meaning of the Equal Protection Clause, intrude upon a sphere of policymaking reserved to the states, and second-guess reasoned decisions of elected lawmakers that lack any evidence of prejudice or animus toward any person.

Amicus respectfully requests that the Court decline this invitation to further erode the core principles of federalism and separation of powers, and affirm the ruling of the Sixth Circuit below.

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Respectfully Submitted,

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