No. 23-477

In the Supreme Court of the United States

UNITED STATES, PETITIONER

v.

JONATHAN THOMAS 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

BRIEF OF AMERICA FIRST LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Tennessee's Senate Bill 1 (SB 1) prohibits surgeries and medical treatments that are intended to enable minors to appear and live in a manner that departs from their biological sex. It subjects non-compliant medical providers to sanctions imposed by the state's attorney general and health-licensing officials, and it also exposes them to private civil lawsuits from the victims of these treatments and their parents.

The district court preliminarily enjoined the named defendants from enforcing certain provisions of SB 1 against anyone—and not just the named plaintiffs—after concluding that the plaintiffs were likely to succeed on their claim that the disputed provisions of SB 1 deny "the equal protection of the laws." The court of appeals vacated this preliminary injunction. The question presented is:

> Did the court of appeals correctly vacate the preliminary injunction that restrained the named defendants from enforcing certain provisions of SB 1?

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INTEREST OF AMICI CURIAE[1]

Amicus curiae America First Legal Foundation is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights guaranteed under the Constitution and federal statutes. America First Legal has a substantial interest in this case because it firmly believes, as part of its mission to

1. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief under Rule 37.2.

encourage understanding of the law and individual rights guaranteed under the Constitution of the United States, that a proper understanding of those rights must be informed by reference to their text, and any other rights not expressly mentioned must be deeply rooted in this nation's history and tradition. And further, America First Legal believes that a proper understanding of the law in the United States must include a coherent, consistent understanding of the role of federal courts in deciding cases or controversies presented to them.

SUMMARY OF ARGUMENT

A preliminary injunction is an "'extraordinary'" remedy, which cannot issue "'unless the movant, *by a clear showing*, carries the burden of persuasion.'" *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original) (citation omitted). The court of appeals correctly vacated the preliminary injunction because the plaintiffs failed to make a clear showing of standing. Pet. App. 53a (noting that the plaintiffs had failed to demonstrate redressability in the district court and remanding for factual development on that issue).

A plaintiff who seeks relief in federal court must plead and eventually prove that the requested relief is "likely" to redress his injuries. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" (citation omitted)). And to obtain a preliminary injunction, the plaintiffs needed to make a "clear showing" of likely success on the redressability issue. *See Murthy v. Missouri*, 144 S. Ct. 1972, 1986 (2024) ("At the preliminary injunction stage,

. . . the plaintiff must make a 'clear showing' that she is 'likely' to establish each element of standing." (citing *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 22 (2008)). Yet there is an obvious redressability problem in this lawsuit that the district court never discussed. Tennessee's ban on gender-transitioning treatments authorizes private civil lawsuits to be brought against non-compliant providers. *See* Tenn. Code § 68-33-105 (Pet. App. 304a–306a). It allows victims of prohibited treatments and their parents to sue for compensatory damages, punitive damages, and attorney's fees,[2] and it establishes an extraordinarily long period of limitations that allows suit to be filed "[w]ithin thirty (30) years from the date the minor reaches eighteen (18) years of age" or "[w]ithin ten (10) years of the minor's death if the minor dies."[3]

But the plaintiffs are seeking declaratory and injunctive relief only against the state's attorney general and health officials. J.A. 1 (caption); J.A. 50 (requested relief). The plaintiffs are not seeking (and cannot seek) relief that will prevent private litigants from suing providers who violate the statute. *See Whole Woman's Health v. Jackson* (*Whole Woman's Health II*), 595 U.S. 30, 39–40 (2021); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 & n.21 (1997); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) (en banc) ("[P]laintiffs lack standing to contest . . . statutes authorizing private rights of action . . . ."). So it is not at all apparent how a judgment

2. Tenn. Code § 68-33-105(a)(1) (Pet. App. 304a).

3. Tenn. Code § 68-33-105(e)(1)–(2) (Pet. App. 305a–306a).

that restrains the named defendants from enforcing SB 1 will cause providers to resume offering prohibited treatments when they remain exposed to private lawsuits and potentially ruinous liability. It certainly cannot be assumed that the requested relief will make these services available. Pet. App. 53a (noting the absence of "evidence about whether any of the plaintiff doctors plan to offer these treatments in the future if they succeed on these constitutional claims.").

The plaintiffs bear the burden of proving redressability,[4] and they cannot obtain a preliminary injunction by ignoring the redressability component of Article III standing. *See Murthy*, 144 S. Ct. at 1986 ("At the preliminary injunction stage, . . . the plaintiff must make a 'clear showing' that she is 'likely' to establish each element of standing." (citation omitted)). The plaintiffs needed to produce evidence in the district court showing that their requested relief would cause providers in Tennessee to barrel ahead and offer care in violation of SB 1 despite the ongoing risk of private lawsuits. And the district court was obligated to demand evidence of redressability before awarding a preliminary injunction. *See Dep't of Education v. Brown*, 600 U.S. 551, 560 (2023) ("We have an obligation to assure ourselves of litigants' standing under Article III" (citation and internal quotation marks omitted)). The district court's dereliction was inexcusable, and this Court should affirm the vacatur of

4. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 430–31 (2021) ("As the party invoking federal jurisdiction, the plaintiffs bear the burden of demonstrating that they have standing.").

the preliminary injunction on the ground that the plaintiffs failed to produce sufficient evidence of standing in the district court.

The Court should also rebuke the district court for awarding statewide relief rather than limiting its preliminary injunction to the named plaintiffs. *Compare* Pet. App. 221a (enjoining the named defendants from enforcing the disputed portions of SB 1 against anyone) *with Califano* v. *Yamasaki*, 442 U.S. 682, 702 (1979) ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*" (emphasis added)); Pet. App. 51a–52a (citing authorities). The plaintiffs produced no evidence showing that a universal remedy of this sort would be necessary to redress their injuries, and the statewide relief ordered by the district court is the latest in a long string of district-court rulings that assume the propriety of universal remedies whenever a district court or a litigant wants to categorically enjoin the enforcement of a statute. *See Trump v. Hawaii*, 585 U.S. 667, 715–21 (2018) (Thomas, J., concurring) (criticizing this practice); *Dep't of Homeland Security v. New York*, 140 S. Ct. 599, 600–01 (2020) (Gorsuch, J., concurring) (same). If the Court decides to remand this case per the Solicitor General's request, then it should instruct the lower courts to limit any preliminary injunctive relief to the named litigants.

ARGUMENT

I. A PRELIMINARY INJUNCTION CANNOT BE GRANTED UNLESS THE MOVANT MAKES A "CLEAR SHOWING" THAT IT IS ENTITLED TO THIS RELIEF

This Court has repeatedly held that a preliminary injunction is an "'extraordinary'" remedy, which cannot issue "'unless the movant, *by a clear showing,* carries the burden of persuasion.'" *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (emphasis in original) (citation omitted); *see also Winter v. Natural Resources Defense Council*, 555 U.S. 7, 22 (2008) (similar); *Whole Woman's Health v. Jackson* (*Whole Woman's Health I*), 141 S. Ct. 2494, 2495 (applicant for a preliminary injunction must make a "'strong showing'" that it satisfies all four requirements) (citation omitted); *Ex parte Young*, 209 U.S. 123, 166 (1908) ("[N]o injunction ought to be granted unless in a case reasonably free from doubt.").

The district court acknowledged this demanding standard at the outset of its opinion. Pet. App. 135a ("'A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it.'" (quoting *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 573 (6th Cir. 2002))). Yet the district court went ahead and awarded a preliminary injunction even though the plaintiffs fell far short of a "clear showing" of standing, and even though their constitutional claims rest on a novel and debatable application of this Court's Fourteenth Amendment doctrines.

II. THE PLAINTIFFS FAILED TO MAKE A "CLEAR SHOWING" OF STANDING

The plaintiffs consist of three "minor plaintiffs" who wish to obtain the treatments outlawed by SB 1,[5] five individuals who are parents of these minor children (the "parent plaintiffs"),[6] and one "provider plaintiff" (Susan Lacy) who has been providing the prohibited treatments to minors in Tennessee. Each set of plaintiffs failed to make a "clear showing" of standing. And because the plaintiffs failed to make a "clear showing" of standing, the United States has failed to make a "clear showing" that it is entitled to preliminary injunctive relief as an intervenor. *See Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149, 160 (2d Cir. 2012) ("Intervention is a procedural means for entering an existing federal action. . . . '[B]ecause intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a "nonexistent" law suit.'" (quoting *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965)).

A. The "Minor Plaintiffs" and the "Parent Plaintiffs" Failed To Make A Clear Showing Of Redressability

None of the minor plaintiffs or parent plaintiffs made a clear showing of redressability. They claim that they have been injured because the defendants' enforcement

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5. The names that the minor plaintiffs are using in this lawsuit are L.W., Ryan Roe, and John Doe.

6. The parent plaintiffs' names are Brian Williams, Samantha Williams, Rebecca Roe, James Doe, and Jane Doe.

of SB 1 has made gender-transitioning services unavailable to minors in Tennessee. But there is no evidence or reason to believe that a judgment that restrains the named defendants from enforcing SB 1 will cause providers in Tennessee to resume offering the prohibited services. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("[I]t must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" (citation omitted)). SB 1 not only subjects non-compliant providers to penalties imposed by the attorney general and state health officials, it also creates a private right of action that allows any minor (or parents of a minor) harmed by the forbidden treatments to sue for damages. *See* Tenn. Code § 68-33-105 (Pet. App. 304a–306a). The plaintiffs did not (and cannot) request an injunction against the enforcement of this private cause of action because none of the named defendants have any role in enforcing it. *See Whole Woman's Health II*, 595 U.S. at 39–40. So the plaintiffs (and the district court) needed to show that a judgment against the state's executive-branch officials, which will not bind the state courts or non-parties to the lawsuit,[7] will cause Vanderbilt University Medical Center (VUMC) or other providers in Tennessee to resume offering the services outlawed by SB 1—even though the requested relief does nothing to remove the threat of ruinous civil liability imposed by section 68-33-105.

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7. *See Arizonans for Official English*, 520 U.S. at 66 & n.21; *Haaland v. Brackeen*, 599 U.S. 255, 292–94 (2023).

The plaintiffs failed to make a "clear showing" that Vanderbilt University Medical Center or any other provider will violate SB 1 and expose itself to private civil lawsuits if the named defendants are enjoined from enforcing the statute. The only piece of evidence that the plaintiffs submitted on this issue was a carefully hedged declaration from C. Wright Pinson, which does more to undermine than support their case. J.A. 268–270. Paragraph 7 of Pinson's declaration says that Vanderbilt University Medical Center will not offer *any* hormone therapy to minors after SB 1 takes effect, even under the continuing-care exception:

> After the Act was signed into law, VUMC reviewed the Act and determined that on and after the Effective Date it could no longer offer any Hormone Therapy to minor patients. VUMC has communicated this determination to its patients through communications distributed through various media . . .

Pinson Decl. ¶ 7 (J.A. 269). But then Pinson tacks on this cryptic passage in paragraph 9:

> Should enforcement of the Act's provisions prohibiting Hormone Therapy be deferred, delayed or enjoined, VUMC would continue to provide Hormone Therapy consistent with prevailing standards of care for persons with gender dysphoria to those minor patients of VUMC for whom such care is clinically appropriate, given the assessment of the patient's condition.

Pinson Decl. ¶ 9 (J.A. 270). The condition described in paragraph 9—a ruling that enjoins "enforcement of the Act's provisions prohibiting Hormone Therapy"—is unclear on whether Vanderbilt needs an order that enjoins enforcement only by the named defendants in this lawsuit, or whether Vanderbilt needs a ruling that goes further and enjoins enforcement of SB 1 by the state judicial officials and private-party litigants who "enforce" the statute through civil litigation.

The most natural reading of Pinson's declaration is that Vanderbilt University Medical Center will not provide the outlawed treatments unless the plaintiffs obtain an injunction that blocks enforcement of SB 1's provisions by *everyone*. But that relief is unattainable[8] and the plaintiffs are not requesting it. J.A. 50. And the redressability inquiry turns on whether the *requested* relief will cause providers in Tennessee to offer hormone therapy despite the ongoing threat of private lawsuits.[9] Pinson's declaration is coy (perhaps deliberately so) on this question, and the plaintiffs failed to provide evidence that any other provider in Tennessee will offer hormone therapy

8. *See Whole Woman's Health II*, 595 U.S. at 44 ("[N]o court may 'lawfully enjoin the world at large'" (citation omitted)); *Arizonans for Official English*, 520 U.S. at 66 & n.21; *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) ("[P]laintiffs lack standing to contest . . . statutes authorizing private rights of action").

9. *See Babb v. Wilkie*, 589 U.S. 399, 413 (2020) ("It is bedrock law that 'requested relief' must 'redress the alleged injury.'" (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 103 (1998)).

and risk private lawsuits if the named defendants are enjoined.

Pinson's declaration is also hearsay[10] and the defendants had no opportunity to cross-examine him on the meaning of paragraph 9. Although it has become common for lower courts to admit hearsay declarations and affidavits into evidence at the preliminary-injunction stage,[11] neither this Court nor the federal rules of evidence have ever approved this practice. *See* Fed. R. Evid. 802. Any ambiguity in Pinson's declaration should redound to the detriment of the plaintiffs, who chose to present Pinson's statement in the form of a hearsay declaration that deprived the defendants of the opportunity to ask clarifying questions on the meaning of paragraph 9.

The minor plaintiffs and the parent plaintiffs needed to make a "clear showing" of redressability. The Pinson declaration falls far short of the required "clear showing," and the plaintiffs failed to offer any other evidence on the redressability issue.

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10. Many lower courts have allowed hearsay to be admitted into evidence at the preliminary-injunction stage, despite the prohibition on hearsay in Fed. R. Evid. 802, although neither this Court nor the federal rules of evidence have ever approved this practice. *See G.G. ex rel. Grimm v. Gloucester County School Board*, 822 F.3d 709, 725 (4th Cir. 2016) (collecting authorities), *vacated and remanded*, 580 U.S. 1168 (2017).

11. *See G.G.*, 822 F.3d at 725 (collecting authorities), *vacated and remanded*, 580 U.S. 1168 (2017).

B. The "Provider Plaintiff" Has Article III Standing But Failed To Make A "Clear Showing" Of Third-Party Standing To Assert The Constitutional Rights Of Her Patients

The only plaintiff who made a "clear showing" of Article III standing was Dr. Susan N. Lacy, the "provider plaintiff" who claims that the defendants' enforcement of SB 1 threatens her with the loss of her medical license if she offers or provides the prohibited treatments. *See* Lacy Decl. ¶ 19 (J.A. 101). Unlike the minor plaintiffs and the parent plaintiffs, Dr. Lacy does not need to prove that a favorable judgment will cause her (or other providers) to offer the services prohibited by SB 1, because Dr. Lacy's injury arises from the threat that SB 1 might be enforced against her by the named defendants. A judgment that restrains the state's executive officials from enforcing SB 1 will redress Dr. Lacy's injury by removing that threat, even if it continues to leave Dr. Lacy exposed to private lawsuits and even if it continues to deter Dr. Lacy from providing the prohibited services. *See Larson v. Valente,* 456 U.S. 228, 243 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury").

The problem for Dr. Lacy is not Article III standing. Yet Dr. Lacy nonetheless lacks standing to sue because she does not allege that SB 1 violates *her* constitutional rights. Dr. Lacy is not asserting the substantive-due-

process claim brought by the parent plaintiffs,[12] and neither the plaintiffs nor the United States is relying on the section 1557 preemption claims[13] in their motion for preliminary injunction. *See* Pls.' Mem. of Law in Support of Mot. for Prelim. Inj., *L.W. v. Skrmetti*, No. 3:23-cv-00376 (M.D. Tenn.), ECF No. 33, at 1–25 (no mention of section 1557 as a basis for preliminary injunctive relief); Intervenors' Mem. of Law in Support of Mot. for Prelim. Inj., *L.W. v. Skrmetti*, No. 3:23-cv-00376 (M.D. Tenn.), ECF No. 41, at 1–25 (same).

The only remaining claim that Dr. Lacy is asserting is equal protection.[14] But Dr. Lacy is not contending that the enforcement of SB 1 violates *her* equal-protection rights; she claims only that it violates the equal-protection rights of her patients. *See* Complaint ¶ 162 (J.A. 44) ("The ban violates the . . . equal protection rights of Dr. Lacy's current and future adolescent patients."). The plaintiffs therefore needed to make a "clear showing" that Dr. Lacy has "third-party standing" to assert her patients' equal-protection rights. And this Court has established a two-part test to determine whether a litigant may assert the constitutional rights of a third party:

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12. *See* Complaint ¶¶ 163–171 (J.A. 45–46) (conceding that only the "parent plaintiffs" are asserting the parental-rights claim under the Fourteenth Amendment).
13. *See* Complaint ¶¶ 172–190 (J.A. 46–50) (describing the section 1557 claims, which Dr. Lacy is asserting).
14. *See* Complaint ¶¶ 148–162 (J.A. 42–44).

> [T]here may be circumstances where it is necessary to grant a third party standing to assert the rights of another. But we have limited this exception by requiring that a party seeking third-party standing make two additional showings. First, we have asked whether the party asserting the right has a "close" relationship with the person who possesses the right. *Powers v. Ohio,* 499 U.S. 400, 411 (1991). Second, we have considered whether there is a "hindrance" to the possessor's ability to protect his own interests. *Ibid.*

Kowalski v. Tesmer, 543 U.S. 125, 129–30 (2004). But the plaintiffs failed to make a "clear showing" that Dr. Lacy could satisfy each of these criteria for third-party standing. Their opening brief in support of a preliminary injunction ignored the issue,[15] and their reply brief offered nothing more than a bald assertion unsupported by argument or evidence.[16] The presence of the transgender

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15. *See* Pls.' Mem. of Law in Support of Mot. for Prelim. Inj., *L.W. v. Skrmetti*, No. 3:23-cv-00376 (M.D. Tenn.), ECF No. 33, at 1–25 (no argument for third-party standing).

16. *See* Pls.' Reply in Support of Mot. for Prelim. Inj., *L.W. v. Skrmetti*, No. 3:23-cv-00376 (M.D. Tenn.), ECF No. 146, at 4 ("Dr. Lacy therefore has standing to seek relief on their behalf because: (i) she will suffer an injury from the Ban as it forces her to alter care for existing patients and/or threatens her ability to treat those patients in accordance with proper medical guidelines and her ethical obligations; (ii) as a medical provider, she has a close relationship to those patients subject to discrimination under the Ban; and (iii) those patients face meaningful

(continued…)

minors in this litigation defeats any contention that Dr. Lacy's patients face a "hindrance" to suing on their own behalf, and the eagerness of white-shoe law firms and public-interest litigation outfits to represent transgender patients who sue over laws like SB 1 makes it all but impossible to claim that transgender patients are incapable of protecting their own interests unless their medical providers sue on their behalf.

Finally, even if Dr. Lacy could somehow satisfy the *Kowalski* test for third-party standing, she would have no cause of action to sue state officials under 42 U.S.C. § 1983 or the Declaratory Judgment Act. *See Bates v. Sponberg*, 547 F.2d 325, 331 (6th Cir. 1976) ("42 U.S.C. § 1983 offers relief only to those persons whose federal statutory or federal constitutional rights have been violated"); David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41, 45 (explaining that the text of 42 U.S.C. § 1983 "authorizes suit by anyone alleging that he has been deprived of rights under the Constitution or federal law, *and by no one else*." (emphasis added)).

C. Because The Original Plaintiffs Failed To Make A "Clear Showing" Of Standing, The United States Cannot Seek Preliminary Injunctive Relief As An Intervenor

The United States separately moved for a preliminary injunction in the district court after intervening un-

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obstacles in enforcing their rights given the extraordinary privacy issues at stake.").

der 42 U.S.C. § 2000h-2.[17] But the United States cannot make a "clear showing" of likely success on the merits when the original plaintiffs failed to make an adequate demonstration of standing. A party cannot intervene into a case if the plaintiffs who brought the lawsuit lack standing. *See United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 163–64 (1914) ("These rights to intervene . . . presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit."); *Disability Advocates, Inc. v. New York Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149, 160 (2d Cir. 2012) ("Intervention is a procedural means for entering an existing federal action. . . . '[B]ecause intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a "nonexistent" law suit.'" (citation omitted); *see also id.* (citing authorities); *Walters v. Edgar*, 163 F.3d 430, 432–33 (7th Cir. 1998) (Posner, J.) ("[I]f the named plaintiffs lacked standing when they filed the suit, there were no other party plaintiffs to step into the breach created by the named plaintiffs' lack of standing").

Nor has the United States made any attempt to demonstrate that it independently possesses Article III standing to sue Tennessee's officials over SB 1. *Cf. Town of Chester v. Laroe Estates, Inc.*, 581 U.S. 433, 439 (2017)

17. *See* Intervenors' Mem. of Law in Support of Mot. for Prelim. Inj., *L.W. v. Skrmetti*, No. 3:23-cv-00376 (M.D. Tenn.), ECF No. 41, at 1–25.

("At least one plaintiff must have standing to seek each form of relief requested in the complaint."). The United States has not even alleged (let alone made a "clear showing") that it is suffering an injury in fact from the defendants' enforcement of SB 1. *See* United States' Complaint in Intervention, *L.W. v. Skrmetti*, No. 3:23-cv-00376 (M.D. Tenn.), ECF No. 38-2 (no allegations of Article III standing); Intervenors' Mem. of Law in Support of Mot. for Prelim. Inj., *L.W. v. Skrmetti*, No. 3:23-cv-00376 (M.D. Tenn.), ECF No. 41, at 1–25 (no argument or discussion of the United States' standing to sue). And no such injury is apparent. The United States is not seeking any of the services proscribed by SB 1, and it has not alleged that its employees or officers are offering or providing those treatments to minors in Tennessee.

* * *

The plaintiffs and the district court overlooked the redressability problems because they appear to be laboring under the widely held belief that a judicial pronouncement of unconstitutionality cancels or suspends the statute itself, rather than merely restraining the named defendants from enforcing the disputed law. *But see Whole Woman's Health v. Jackson* (*Whole Woman's Health I*), 141 S. Ct. 2494, 2495 (2021) ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves."); *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197, 253 (2020) (Thomas, J., concurring in part and dissenting in part) ("The Federal Judiciary does not have the power to excise, erase, alter, or otherwise strike down a statute."); *Arizona v. Biden*, 40 F.4th 375, 395–96 (6th Cir.

2022) (Sutton, C.J., concurring) ("A valid Article III remedy 'operate[s] with respect to specific parties,' not with respect to a law 'in the abstract.'" (quoting *California v. Texas*, 593 U.S. 659, 672 (2021)); *id.* at 396 ("[W]e do not remove—'erase'—from legislative codes unconstitutional provisions."). The plaintiffs' court filings and the district court's opinion are rife with statements and rhetoric that reflect this misunderstanding of judicial review.

The plaintiffs, for example, repeatedly told the district court that their requested relief would prevent SB 1 from going "into effect."[18] That is untrue; SB 1 would have taken effect regardless of whether a federal court awarded declaratory or injunctive relief against the named defendants.[19] And no preliminary injunction or final judgment from a federal district court can bind the state judiciary or stop non-parties from initiating private

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18. *See* Complaint ¶ 1 (J.A. 2) ("Absent intervention by this Court, the law will go into effect on July 1, 2023"); *id.* at ¶ 5 (J.A. 4) ("If the Health Care Ban goes into effect"); *id.* at ¶ 6 (J.A. 5) ("if the law takes effect"); *id.* at ¶ 140 (J.A. 39) ("If the Health Care Ban takes effect"); *id.* at ¶ 143 (J.A. 39) ("the Health Care Ban, if permitted to take effect"); Memorandum of Law in Support of Mot. for Prelim. Inj., *L.W. v. Skrmetti*, No. 3:23-cv-00376 (M.D. Tenn.), ECF No. 33, at 1 ("Absent intervention by this Court, the law will go into effect on July 1, 2023"); *id.* at 2 ("The Ban will cause immediate and irreparable harm if allowed to take effect"); *id.* at 22 ("If permitted to go into effect, the Ban will inflict on Plaintiffs severe and irreparable harm").

19. *See Whole Woman's Health I*, 141 S. Ct. at 2495 ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves."); *Haaland*, 599 U.S. at 292–94; *Arizona*, 40 F.4th at 395–96 (Sutton, C.J., concurring).

civil lawsuits under SB 1. *See Whole Woman's Health v. Jackson* (*Whole Woman's Health II*), 595 U.S. 30, 39–40 (2021); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66 & n.21 (1997); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001). Yet the plaintiffs claim that courts can "enjoin" statutes themselves, rather than the named defendants charged with enforcing those statutes,[20] and they falsely assert that a preliminary injunction will "preserve the status quo" even though the federal courts are powerless to thwart the private civil actions authorized by SB 1.[21]

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20. *See* Memorandum of Law in Support of Mot. for Prelim. Inj., *L.W. v. Skrmetti*, No. 3:23-cv-00376 (M.D. Tenn.), ECF No. 33, at 22 ("As the court noted in enjoining a similar Alabama law . . .").

21. *See* Memorandum of Law in Support of Mot. for Prelim. Inj., *L.W. v. Skrmetti*, No. 3:23-cv-00376 (M.D. Tenn.), ECF No. 33, at 2 ("[T]he State will not incur any harm if the *status quo* is maintained while this case proceeds."); *id.* ("[F]ederal courts have issued preliminary injunctions to preserve the *status quo* . . . . This Court should do the same."). It is also far from clear that a preliminary injunction can prevent the named defendants from enforcing SB 1 against providers who violate the statute while the preliminary injunction is in effect if the state ultimately prevails in this litigation. *See Edgar v. MITE Corp.*, 457 U.S. 624, 649 (1982) (Stevens, J., concurring in part and concurring in the judgment) ("The preliminary injunction did not purport to provide permanent immunity for violations of the statute that occurred during its effective period."); *Lake v. HealthAlliance Hospital Broadway Campus*, --- F. Supp. 3d ----, 2024 WL 3226273, *8 n.14 (N.D.N.Y.) ("[I]f an injunction is dissolved the State may enforce the statute against violators for conduct that occurred while the injunction was in place.").

The district court's opinion reflects a similar misunderstanding of the judicial role. The district court said that the plaintiffs were requesting "a statewide injunction of SB1 in its entirety,"[22] even though injunctions operate against defendants and not statutes. *See Whole Woman's Health I*, 141 S. Ct. at 2495; *Okpalobi v. Foster*, 244 F.3d 405, 426 n.34 (5th Cir. 2001) (en banc) ("An injunction enjoins a defendant, not a statute."). The district court later announced that it was imposing "a statewide injunction of SB1,"[23] once again implying that courts enjoin statutory provisions rather than litigants.[24] When district courts and litigants repeatedly deploy nomenclature suggesting that judicially disapproved statutes are formally suspended, it becomes easy for them to miss the Article III redressability issues that arise from the continued enforceability of the private rights of action in SB 1.

The Court should remind lower courts and litigants that: (1) Federal courts are incapable of "enjoining" statutes; they can enjoin only the named defendants in a

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22. Pet. App. 138a.

23. Pet. App. 212a; *see also id.* ("[A] state-wide injunction of SB1 is necessary to redress Plaintiffs' injuries."); Pet. App. at 216a ("[A] state-wide injunction of SB1 during the pendency of this litigation . . . is warranted.").

24. The writ-of-erasure rhetoric in the district court's opinion is puzzling given that the district court acknowledged elsewhere in its opinion that it could not enjoin enforcement of the private right of action. Pet. App. 209a–210a; *see also* Pet. App. 212a ("[A]ny injunction will not affect the private right of action under SB1 . . . .").

lawsuit;[25] (2) Neither a preliminary nor permanent injunction can prevent a statute from "taking effect";[26] and (3) An injunction from a federal court does not and cannot "preserve the status quo" when the disputed statute authorizes private civil lawsuits against those who violate the disputed statute. Repudiating this nomenclature would go a long way toward preventing a repeat of this episode, where the plaintiffs and the district court shirked their responsibilities to ensure that the requirements of Article III standing were met.

III. THE COURT SHOULD ADDRESS THE MERITS EVEN IF IT CONCLUDES THAT THE PLAINTIFFS FAILED TO MAKE A "CLEAR SHOWING" OF STANDING

If the Court concludes that the plaintiffs failed to make a "clear showing" of standing to justify a preliminary injunction, it should go on to address the merits and affirm the Sixth Circuit's refusal to subject SB 1 to heightened scrutiny. Although federal courts are forbidden to "hypothesize" Article III standing "for the pur-

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25. *See Whole Woman's Health I*, 141 S. Ct. at 2495 ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves."); *Arizona*, 40 F.4th at 395–96 (Sutton, C.J., concurring) ("A valid Article III remedy 'operate[s] with respect to specific parties,' not with respect to a law 'in the abstract.'" (quoting *California v. Texas*, 593 U.S. 659, 672 (2021)).

26. *See Arizona*, 40 F.4th at 395–96 (Sutton, C.J., concurring) ("[W]e do not remove — 'erase' — from legislative codes unconstitutional provisions.").

pose of deciding the merits,"[27] the Court would not violate the ban on hypothetical jurisdiction by affirming the court of appeals on the additional ground that the plaintiffs failed to make a "clear showing" of a constitutional violation.

First. This Court is not being asked to definitively resolve whether the district court has subject-matter jurisdiction over the lawsuit. The Court is determining only whether the plaintiffs made a sufficiently "clear showing" of standing to support a preliminary injunction. A negative answer does not deprive this Court or the district court of jurisdiction; it means only that the preliminary injunction should be vacated because it was unsupported by sufficient evidence of redressability at *this* stage of the litigation. It remains possible that the plaintiffs will prove redressability on remand, perhaps by presenting testimony from providers in Tennessee that unequivocally declare that they will offer the services outlawed by SB 1 despite the ongoing risk of lawsuits. Pet. App. 53a (inviting the parties to "introduce evidence" on remand "about whether any of the plaintiff doctors plan to offer these treatments in the future if they succeed on these constitutional claims."). And the federal judiciary will retain jurisdiction over the case until those final determinations are made.

Second. A court does not need to assure itself that subject-matter jurisdiction exists before it denies or vacates a preliminary injunction. A court *does* need to assure itself that subject-matter jurisdiction exists before

27. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999).

entering final judgment (or directing entry of judgment) for the plaintiff or defendant. But a motion for preliminary injunction is decided in a *preliminary* posture—before the parties have fully developed the factual record on the jurisdictional questions—and the court's task is to resolve only whether the plaintiffs have made a *preliminary* showing of standing based on the factual record as it currently exists. There is nothing wrong with a federal district court (or an appellate court) assuming for the sake of argument that the plaintiffs made a "clear showing" of standing yet denying (or vacating) a preliminary injunction because the plaintiffs failed to show likely success on the merits. And there is nothing wrong with a federal district court (or appellate court) addressing the merits of the case after determining that the plaintiffs failed to make a "clear showing" of Article III standing at the preliminary-injunction stage. None of this violates *Steel Co.* because no court is entering judgment (or directing entry of judgment) without first assuring that it has jurisdiction to do so. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) (denying the power to "decide the cause of action before resolving Article III jurisdiction").

Finally. Dr. Lacy indisputably has Article III standing to sue over SB 1. And although Dr. Lacy lacks third-party standing to assert any of the constitutional claims, the prudential-standing doctrines are not jurisdictional. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) ("'[P]rudential' . . . standing [is] a doctrine not derived from Article III . . . ."); *VR Acquisitions, LLC v. Wasatch County*, 853 F.3d 1142,

1146 n.4 (10th Cir. 2017) ("[P]rudential standing . . . isn't jurisdictional"); *id.* (citing authorities); David P. Currie, *Misunderstanding Standing*, 1981 Sup. Ct. Rev. 41. So there is not even a possible violation of *Steel Co.* if this Court weighs in on the merits of the Tennessee statute.

It also would further judicial economy for the Court to resolve the constitutional and remedial issues now. If this Court were to affirm the court of appeals' vacatur of the preliminary injunction solely on the ground that the plaintiffs failed to make a "clear showing" of standing, it would still remain possible for plaintiffs to establish standing on remand by supplementing the record. Pet. App. 53a. Then the plaintiffs would ask for (and likely obtain) a new preliminary injunction from the district court, and the parties will be back before this Court litigating the same merits issues that they have already briefed and argued.

This Court should also rule on the merits to provide much needed guidance and assurance to state legislatures who are considering laws similar to SB 1. It is crucial for legislators to know whether these laws are constitutional or, if they are constitutionally problematic, what needs to be done to fix them.

IV. THE DISTRICT COURT'S DECISION TO AWARD STATEWIDE RELIEF WAS INDEFENSIBLE

The most jarring aspect of the district court's ruling was its decision to extend relief beyond the named plaintiffs and enjoin the defendants from enforcing the disputed statutes against anyone. Pet. App. 212a–216a. But this lawsuit was not brought as a class action, and the plaintiffs lack Article III standing to assert the rights of

nonparties. The district court was therefore obligated to limit its remedy to the named plaintiffs and the providers who treat them. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975) ("[N]either declaratory nor injunctive relief can directly interfere with enforcement of contested statutes or ordinances except with respect to the particular federal plaintiffs, and the State is free to prosecute others who may violate the statute.").

The district court offered two reasons for disregarding these limits on the judicial power, but neither of them holds water. The district court first claimed that "a state-wide injunction of SB1 is necessary to redress Plaintiffs' injuries" because "it is far-fetched that healthcare providers in Tennessee would continue care specifically for Minor Plaintiffs when they cannot do so for any other individual to whom SB1 applies." Pet. App. 212a. But the district court cited no evidence to support this claim—and the plaintiffs did not provide any. All that the district court cited was a bald assertion in the plaintiffs' reply brief that says: "Permitting a provider such as VUMC to treat three patients out of hundreds to whom it previously offered care is hardly a guarantee such treatment will resume." Pls.' Reply in Support of Mot. for Prelim. Inj., *L.W. v. Skrmetti*, No. 3:23-cv-00376 (M.D. Tenn.), ECF No. 146, at 12 (cited at Pet. App. 212a). That won't cut it. Adults also receive hormone therapy at Vanderbilt University Medical Center—a fact that the district court appears oblivious to.[28] But

28. *See* Pinson Decl. ¶ 7 (J.A. 269) ("VUMC reviewed the Act and determined that on and after the Effective Date it could no (continued…)

more importantly, the burden was on the plaintiffs to make a "clear showing" that statewide relief is necessary to redress their injuries. *See* section I, *supra*. An ipse dixit is the antithesis of a clear showing, and the plaintiffs needed to produce declarations from VUMC personnel showing that they would provide hormone therapy to the plaintiffs only if statewide relief were granted.

The district court's second reason for flouting *Doran* is even more off base: It claimed it could award statewide relief and convert this lawsuit into a de facto class action because "SB1 is most likely unconstitutional on its face." Pet. App. 213a. But the district court had no jurisdiction to pronounce SB 1 "unconstitutional on its face" because it admits that the plaintiffs lack standing to litigate SB 1's ban on transgender surgeries,[29] and the plaintiffs are not challenging and cannot challenge SB 1's private cause of action in this pre-enforcement lawsuit. *See Whole Woman's Health II*, 595 U.S. at 39–40. The district court severed SB 1's transgender-surgery ban and

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longer offer any Hormone Therapy *to minor patients*." (emphasis added)).

29. Pet. App. 139a ("Plaintiffs do not have standing to challenge SB1's ban on 'surgically removing, modifying, altering, or entering into tissues, cavities, or organs of a human being' when the purpose of such procedures is to 'enable a minor to identify with, or live as, a purported identity inconsistent with the minor's sex' or to treat 'purported discomfort or distress from a discordance between the minor's sex and asserted identity.' Tenn. Code § 68-33-103(a)(1)(A)–(B) (Pet. App. 301a); Tenn. Code § 68-33-102(5)(A)–(B) (Pet. App. 300a). Accordingly, any relief provided Plaintiff pursuant to the Motion will not impact SB1's ban on such surgeries.").

private cause of action and excluded them from the scope of its ruling;[30] it cannot turn around after doing this and declare that "SB 1 is likely unconstitutional in all of its applications." Pet. App. 216a.

It is also a non sequitur to claim that a court can issue a universal remedy that protects non-parties to the litigation whenever it thinks a statute is "unconstitutional on its face." Pet. App. 213a. The holdings of *Doran* and *Califano* apply regardless of whether a statute is unconstitutional "on its face" or only with respect to some of its provisions or applications. And a plaintiff's entitlement to a universal or statewide remedy has nothing to do with whether the challenged statute is unconstitutional across the board, or whether it has discrete provisions or applications that can be severed and preserved. Even when a plaintiff demonstrates that a statute is unconstitutional in all its applications, a district court *still* cannot enjoin enforcement against non-parties unless it has certified a plaintiff class or unless the plaintiff has shown that broader relief is needed to redress its injuries. *See Califano*, 442 U.S. at 702 ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief *to the plaintiffs*." (emphasis added)).

The district court appears to believe that a finding of "facial" unconstitutionality means that a court can pre-

30. Pet. App. 138a–139a ("[T]he Court construes Plaintiffs' requested relief as an injunction to enjoin all provisions of SB1, *except* the private right of action codified at § 68-33-105."); Pet. App. 139a ("[A]ny relief provided Plaintiff pursuant to the Motion will not impact SB1's ban on such surgeries.").

tend as though SB 1 has been formally revoked, and that it can therefore enjoin state officials from enforcing the statute against anybody. *See Speet v. Schuette*, 726 F.3d 867, 871 (6th Cir. 2013) (falsely claiming that "[a] facial challenge to a law's constitutionality is an effort . . . 'to take the law off the books completely.'" (citation omitted)). But courts resolve cases or controversies between named litigants. They have no power to act directly on legislation,[31] and they cannot convert lawsuits into de facto class actions simply by declaring a challenged statute "unconstitutional on its face." *See United States v. National Treasury Employees Union*, 513 U.S. 454, 477–78 (1995) ("[W]e neither want nor need to provide relief to nonparties when a narrower remedy will fully protect the litigants").

31. *See Whole Woman's Health I*, 141 S. Ct. at 2495 ("[F]ederal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves."); *Arizona*, 40 F.4th at 396 (Sutton, C.J., concurring) ("[W]e do not remove—'erase'—from legislative codes unconstitutional provisions.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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