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 INDEPENDENT WOMEN'S LAW CENTER AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICUS CURIAE[1]

Independent Women's Law Center is a project of Independent Women's Forum ("IWF"), a nonprofit, nonpartisan organization founded by women to foster education and debate about legal, social, and economic issues. IWF promotes access to free markets and to the marketplace of ideas and supports policies that expand liberty, encourage personal responsibility, and limit government.

IWF believes in the importance of amplifying the voices of independent women and in protecting the rights of women and girls. IWF further believes that, to maintain and advance women's rights, it is crucial that society and the law recognize the biological uniqueness of women and the importance of maintaining single-sex sports leagues and other fora where women and girls can flourish.

SUMMARY OF ARGUMENT

To the extent this Court's reasoning in *Bostock v. Clayton County* applies to the Constitution's Equal Protection Clause, it resolves this case in favor of Tennessee. Tennessee's law triggers intermediate scrutiny only if it discriminates on the basis of sex. The law does not do so for two independent reasons: (1) Tennessee's law is sex-neutral, turning on the

[1] No counsel for any party authored this brief in whole or in part, and no individual or entity other than Independent Women's Law Center made any monetary contribution intended to fund the preparation or submission of this brief.

purpose of a medical procedure rather than the child's sex, and (2) even if Tennessee's law does somehow treat the sexes differently, which it does not, it treats boys and girls equally and is accordingly not discriminatory. Holding otherwise would cast aside the 150-year-long consistent public meaning of equal protection—with extraordinarily disruptive effects for all.

First, Tennessee's law forbids sex trait modification surgeries and related procedures for all children. Children seeking medically indicated care for the *purpose* of treating a recognized medical condition are entitled to receive it; children seeking a medical procedure for the *different* purpose of disabling or removing physically healthy sex characteristics cannot receive it. The law's touchstone is the purpose of the procedure not the sex of the child.

Bostock confirms that Tennessee's law is not discriminatory. Under *Bostock*, the touchstone of discrimination is whether "changing the employee's sex would have yielded a different choice by the employer," in which case "a statutory violation has occurred." *Bostock v. Clayton County*, 590 U.S. 644, 659-60 (2020). In Tennessee, "changing" the patient's sex does not "yield[] a different choice." *Id.* Unlike the employer who fires a man for being attracted to men but not a woman for being attracted to men—applying a different rule to the man than to the woman—Tennessee applies the same rule to boys and girls. Doctors do not need to know a child's sex to know that medical procedures for the purpose of altering healthy sex traits are forbidden. The child's sex never enters the equation.

Second, even if this sex-neutral policy somehow treated boys and girls *differently*, the law is not *discriminatory* because it does not treat any "individual worse than others who are similarly situated." *Bostock*, 590 U.S. at 657. While Tennessee's law may have the effect of denying certain surgeries and drugs to male children while allowing those surgeries and drugs for female children, that sort of allocation is not "discrimination." It is, instead, the equal treatment of both sexes in accord with their innate biological differences.

Differential treatment of the sexes is not discrimination warranting heightened scrutiny so long as the treatment is equal and corresponds to the innate biological differences between men and women. No less than Justice Ginsburg recognized as much in this Court's famous decision requiring the Virginia Military Institute to admit women, explaining that "[p]hysical differences between men and women . . . are enduring," such that "'[t]he two sexes are not fungible.'" *United States v. Virginia*, 518 U.S. 515, 533 (1996) (quoting *Ballard* v. *United States*, 329 U.S. 187, 193 (1946)).

It would have been unthinkable to English speakers in 1868 that the 14th Amendment's promise of "equal protection" imposed heightened review on the non-discriminatory differential treatment of men and women. Sports, locker rooms, dormitories, bathrooms, prisons, and countless other institutions have long separated men and women based on their innate biological differences. So long as these separate spaces are of equal quality, there is no discrimination.

Finally, accepting the Government's invitation to deem every separation of men and women "sex discrimination" that triggers intermediate scrutiny would have the bizarre effect of subjugating women all over again. Consider women's sports, a particular concern of Independent Women's Forum. Men are generally stronger and faster than women, with differences evident before puberty and durable even after medical intervention. Allowing men to join women's teams reduces opportunities for women to compete and sometimes puts women in physical danger from stronger and faster opponents than female athletes are equipped to face. Tarring girls' sports as vessels of "sex discrimination" and requiring every girls' basketball team to run the gauntlet of intermediate scrutiny—at the cost of hiring sophisticated counsel and under threat of fee-shifting—would turn equal protection upside down. Most schools will simply let men play women's sports rather than bear the stigma of defending a "discriminatory" policy and shoulder the significant legal risks that the Government seeks to foist on them.

In short, Tennessee's law triggers only rational basis review. The judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

ARGUMENT

I. *Bostock* Makes Clear that Prohibiting Non-Medically Indicated Medical Procedures Is Not Sex Discrimination.

Tennessee's law does not depend on a patient's sex and is not discriminatory. The statute hinges on the *purpose of a medical procedure* rather than the *sex of the patient*. Like a law that permits the amputation of limbs for the purpose of treating physical conditions like gangrene but prohibits the amputation of limbs for the purpose of treating psychological distress, Tennessee's law permits appropriate medical care for physical medical conditions but prohibits the medical alteration of a child's healthy sex traits "for the purpose of" either "[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. § 68-33-103(a)(1). Tennessee's law thus does not require that physicians first ask whether the patient is a boy or a girl.

Bostock explained that discrimination exists if "the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee" and holds that "if changing the employee's sex would have yielded a different choice by the employer," then "a statutory violation has occurred." 590 U.S. at 659-60. *Bostock* held that sex discrimination is present where a man identifying as a man is treated differently from a woman identifying as a man; the

employers in *Bostock* allowed men to identify as men while forbidding women from identifying as men. Changing the employee's sex thus made a difference—men identifying as men kept their jobs, while women identifying as men received pink slips.

Tennessee's law does not function this way. In Tennessee, a boy identifying as a girl who wants a procedure to change his sex traits is treated identically to a girl identifying as a boy who wants a procedure to change her sex traits. In both situations, the procedure is forbidden. Similarly, boys identifying as boys and girls identifying as girls who seek medical procedures to change their healthy sex traits cannot receive those procedures. There is never an inquiry into the child's sex. The only question is the medical purpose of the procedure (or lack thereof).

Nor is any elaborate analysis required to see that biology dictating the menu of indicated medical treatments does not constitute "sex discrimination." States that fund prenatal services for women or prostate cancer screening for men are not discriminating between women and men. They are providing medical services to the only sex that could ever medically need those services: Only women can get pregnant and only men have prostates. The touchstone of these examples is what medical treatments are indicated, not the patient's sex. Attempting to shoehorn these examples into "sex discrimination" is simply the wrong analysis because the policy does not even treat the sexes differently in the first place. *See, e.g.*, *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 236 ("[T]he regulation of a medical procedure

that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a mere pretext designed to effect an invidious discrimination against members of one sex or the other." (cleaned up)).

The same is true for medical procedures or accommodations that are available for some purposes and not others. For example, Tennessee women are entitled to receive mastectomies when appropriate to address breast cancer. But a girl in Tennessee is not permitted to receive a mastectomy when the purpose is to alter her healthy sex traits in conformance with her asserted gender identity. And a boy in Tennessee similarly cannot receive a mastectomy for the purpose of conforming to his asserted gender identity. Or as another example, an employer might maintain a private room for the purpose of allowing nursing mothers to nurse or pump while denying employees (male and female) access to the room for any other purpose. The permissibility of the treatment or accommodation depends on its purpose—not on the person's sex—even if the function of the treatment or accommodation means that only members of one sex will ever be able to use it.

Tennessee's law thus complies with the *Bostock* framework. Whatever the sex of a particular child, that child cannot obtain a hysterectomy, a mastectomy, estrogen, testosterone, or any similar medical procedure if the child is seeking that procedure for the purpose of changing his or her healthy sex traits. Children seeking these medical treatments for different, medically indicated purposes might sometimes

receive different medical procedures, but that is a function of medical need rather than some sort of "discrimination" baked into Tennessee's law. For that simple reason, rational basis review is appropriate.

II. *Bostock* Makes Clear that Treating the Sexes Differently to the Extent They Are Biologically Different Is Not Sex Discrimination.

Even if Tennessee's law did somehow treat the sexes differently, treating the sexes differently to the extent they are different is not "discrimination" that triggers heightened review. Discrimination on the basis of sex means treating an "individual worse than others who are similarly situated." *Bostock*, 590 U.S. at 657. Tennessee's law does not do that. It differentiates between boys and girls only to the extent that boys and girls have different biological attributes. Such biology-based, distinct-but-equivalent treatment is not sex discrimination.

A. *Bostock* involved employers treating similarly situated individuals worse on the basis of sex.

In *Bostock,* the Court found that terminated employees had been treated "worse" than similarly situated employees of the opposite sex. But nothing in *Bostock* suggested it is discriminatory to treat men and women differently to the extent that men and women are *actually different*. As the Court explained, "[t]o discriminate against a person, then, would seem to mean treating that individual worse than others

who are similarly situated." 590 U.S. at 657 (internal quotation marks omitted; emphasis added).

1. Differential treatment of the sexes in accord with their innate differences is not inherently discriminatory, as the Government explained last Term in *Muldrow v. City of St. Louis*. Certain "distinctions based on sex"—such as sex-specific "bathrooms or . . . grooming standards"—"have always . . . been treated as innocuous" and are not "injurious" to the people subjected to those biologically justified distinctions. Transcript of Oral Argument at 61, *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024) (No. 22-193). "[W]hen you're talking about protected characteristics," the Government explained, "there are some differences with sex and . . . this Court has recognized those." *Id.* In "the mine run case, a gender-specific bathroom or a uniform is not going to give rise to the kinds of stigmatic or dignitary harms that we usually associate with unequal treatment on the basis of sex." *Id.* at 62. Differential treatment in these contexts does not, in other words, trigger heightened review because no "individual" is treated "worse than others who are similarly situated." *Bostock*, 590 U.S. at 657.

Bostock embraced these fundamental points. The Court explained—consistent with its own precedent—that "[a]n individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.'" *Id.* at 660 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (plurality opinion)). In making decisions about which employees to hire or fire,

there is generally no basis for employers to treat men and women differently.

Bostock accordingly asked whether the employers were treating any particular employee worse on the basis of sex, concluding that the employers were. Terminating employees "simply for being homosexual or transgender" constituted sex discrimination, the Court explained, because such terminations hinged on the employee's sex. 590 U.S. at 651. The employers allowed men to identify as men and profess attraction to women while they forbade women from identifying as men and professing attraction to women. The Court said that constitutes sex discrimination because "[a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex." *Id.* at 651-52.

In short, *Bostock* determined there was no workplace-relevant biological difference between men and women, and the Court accordingly held that the policies at issue discriminated on the basis of sex. At the same time, the Court noted that its decision did not bear upon "sex-segregated bathrooms, locker rooms, and dress codes." *Id.* at 681. Unlike in decisions about hiring and firing, in *those* situations there *are* relevant biological differences between the sexes.

2. Although the Court referenced differential treatment in *Bostock*, it did not say that differential treatment of the sexes invariably triggers heightened review. In *Bostock*, the Court was using *differential*

treatment interchangeably with *discriminatory* treatment—*i.e.*, treatment of an "individual worse than others who are similarly situated." *Bostock*, 590 U.S. at 657. The Court's statements were predicated on the same premise that underlay the entire decision: Firing an employee on a basis that ultimately turns on his or her sex treats that individual worse than "similarly situated" employees and thus constitutes sex discrimination.

The Court's references to differential treatment make this clear. For example, the first time the Court discusses differential treatment, it does so as a synonym for discriminatory treatment: "Not because homosexuality or transgender status are related to sex in some vague sense or because discrimination on these bases has some disparate impact on one sex or another, but because *to discriminate on these grounds* requires an employer to *intentionally treat individual employees differently* because of their sex." 590 U.S. at 661 (emphasis added). Reading the opinion in full, it is plain the Court was not saying that differential treatment of the sexes is inherently discriminatory even when the treatment is equal and predicated on innate biological differences. The Court was simply saying that *when* treating the sexes differently treats any "individual worse than others who are similarly situated," *id.* at 657, *then* the employer is engaging in sex discrimination.[2]

[2] The Court's other references to differential treatment are in the same vein. *See, e.g.*, *Bostock*¸590 U.S. at 664 (referring to an "employer's intentional discrimination on the basis of sex" and "whether an individual female employee would have been

The decisions the Court analyzed in these passages underscore the point. In each of those Title VII decisions, the plaintiff had been treated "worse than others who are similarly situated." *Bostock*, 590 U.S. at 657. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam) (company allegedly refused to hire women with young children, but did hire men with children the same age); *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702 (1978) (employer required women to make larger pension fund contributions than men); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) (male plaintiff alleged that he was singled out by his male coworkers for sexual harassment). None of those cases support the Government's claim that *any* differential treatment—even if equivalent between the sexes and predicated on their innate biological differences—is *per se* discriminatory, triggering heightened review.

* * *

Bostock recognizes that differential treatment of the sexes is not discriminatory when the sexes are differently situated in a relevant way. Employers cannot, for example, require that men use one water fountain while women must use another (even if the water fountains are equivalent), but they can provide separate bathrooms for men and women (so long as

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treated the same regardless of her sex"); *id.* ("the plaintiff alleged that the harassment would not have taken place but for his sex—that is, the plaintiff would not have suffered similar treatment if he were female"); *id.* at 667 ("an employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules").

the bathrooms are equivalent). That is because for water fountains male and female employees *are* similarly situated in all relevant respects—*unlike* in bathrooms, dorms, sports, prisons, or the provision of certain medical treatments. The Government's contrary interpretation of *Bostock* is wrong.

B. This Court's earlier precedent further confirms that differential treatment based on relevant biological differences does not trigger heightened review.

What matters for sex discrimination purposes is whether the sexes are treated *equally*, not whether they are treated *identically*. This Court's other decisions support what *Bostock* took as given—that heightened review is appropriate only where an individual is treated "worse than others who are similarly situated." *Bostock*, 590 U.S. at 657. For example, Justice Ginsburg's opinion for the Court in *United States v. Virginia* could not have been clearer that "sex" is not "a proscribed classification," given that "[p]hysical differences between men and women . . . are enduring." 518 U.S. at 533. The Court had no trouble recognizing that admitting women to VMI "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." *Id.* at 550 n.19.

Nowhere in that case did the Court suggest that these sex-based practices would *themselves* trigger heightened review even if implemented in a fashion that treats the sexes equally. The Court

understandably assumed that the Equal Protection Clause does not impose searching review on every policy that separates the sexes to the extent the sexes are different.

The Court has repeatedly embraced that long-incontestable point. *See, e.g.*, *Nguyen v. I.N.S.*, 533 U.S. 53, 63 (2001) ("Fathers and mothers are not similarly situated with regard to the proof of biological parenthood."). For example, in *Michael M. v. Superior Court of Sonoma County*, this Court explained that it "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." 450 U.S. 464, 469 (1981) (plurality). That is because "the Equal Protection Clause does not . . . require 'things which are different in fact . . . to be treated in law as though they were the same.'" *Id.* (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966)).

As the Government explained in the colloquy discussed above, "[i]f the bathrooms are actually unequal, if the dress and grooming standards, you know, trade on sex stereotypes or are themselves, you know, more—more difficult to comply with for one sex than the other, then I think that you would be maybe outside of that kind of innocuous area" in which there is no statutory or constitutional basis to impose heightened review. Transcript of Oral Argument at 62, *Muldrow v. City of St. Louis*, 601 U.S. 346 (2024) (No. 22-193). That is why the Government had no trouble conceding that "there are some circumstances in which those distinctions are permissible." *Id.*

Bostock supports these commonsense points. Even if an employer was discriminating against women who are attracted to women as part of a general policy of discriminating against homosexual employees, liability arose because the employer was "intentionally treat[ing] an employee worse based in part on that individual's sex." 590 U.S. at 662. This mode of analysis does not implicate policies that treat men and women differently-but-equivalently in accord with their biological differences.

III. Interpreting the Equal Protection Clause to Impose Intermediate Scrutiny on Every Separation of Men and Women Would Upend Longstanding Societal Conventions, Particularly in Athletics.

The unbroken public understanding of equal protection from the Fourteenth Amendment's ratification to today has allowed the separation of men and women in contexts where men and women are biologically different in a relevant way. The Government seeks to cast that long-settled public meaning overboard—a constitutional pivot that would have calamitous results for the law and innumerable longstanding societal practices. Just consider what the Government's rule would do to girls' sports.

Separate athletic leagues for men and women have been a central feature of athletic competition for as long as women have competed in sport. One of the cardinal purposes of Title IX of the Educational Amendments of 1972 was to ensure equal opportunities in athletics for women. That statute and its longstanding implementing regulations achieve this goal by blessing, rather than proscribing, women-only sports teams. *See* 34 C.F.R. § 106.41(b) ("a recipient may operate or sponsor separate teams for members of each sex"). The Government's upside-down interpretation of equal protection would destroy that fundamental promise, open the doors to men regaining the very monopoly on athletics that Title IX eradicated, and put constitutional handcuffs on any governmental entity that tries to provide separate athletic opportunities to women.

There is no serious question that men have significant biological advantages over women in most athletics—an advantage some measure at 10-50% depending on the sport. *See* Emma N. Hilton & Tommy R. Lundberg, *Transgender Women in the Female Category of Sport: Perspectives on Testosterone Suppression and Performance Advantage*, Sports Med. vol. 51, no. 2, 2021, at 199–214, https://perma.cc/ 7N5M-P5D2 ("Hilton & Lundberg"). *See also Competition: Title IX, Male-Bodied Athletes, and the Threat to Women's Sports*, Independent Women's Forum (2d ed. 2023), https://perma.cc/985G-K5CD. This male-female athletic gap is not the result of unequal opportunity, socialization, or lack of funding for women's sports. *Id.* Rather, the difference is the result of biology. *Id.*

"[M]easurable physical differences between males and females develop during puberty that significantly impact athletic performance." *Adams v. Sch. Bd. of St. Johns Cty.*, 57 F.4th 791, 819 (11th Cir. 2022) (Lagoa, J., specially concurring) (citing Hilton & Lundberg at 200–01). "Indeed, during puberty, 'testosterone levels increase 20-fold in males, but remain low in females, resulting in circulating testosterone concentrations at least 15 times higher in males than in females of any age.'" *Id.* (quoting Hilton & Lundberg at 201). "[T]he biological effects of elevated pubertal testosterone are primarily responsible for driving the divergence of athletic performances between males and females." *Id.* (quoting Hilton & Lundberg at 201).

"[I]n comparison to biological females, biological males have: 'greater lean body mass,' i.e., 'more skeletal muscle and less fat'; 'larger hearts,' 'both in absolute terms and scaled to lean body mass'; 'higher cardiac outputs'; 'larger hemoglobin mass'; larger maximal oxygen consumption (VO2 max), 'both in absolute terms and scaled to lean body mass'; 'greater glycogen utilization'; 'higher anaerobic capacity'; and 'different economy of motion.'" *Adams*, 57 F.4th at 819 (quoting Benjamin D. Levine, et al., *The Role of Testosterone in Athletic Performance*, Duke Ctr. for Sports L. & Pol'y 1 (Jan. 2019) ("Levine")). "These physical differences cut directly to the 'main physical attributes that contribute to elite athletic performance,' as recognized by sports science and sports medicine experts. *Id.* at 819–20 (quoting Levine at 1).

"In tangible performance terms, studies have shown that these physical differences allow post-pubescent males to 'jump (25%) higher than females, throw (25%) further than females, run (11%) faster than females, and accelerate (20%) faster than females' on average." *Adams*, 57 F.4th at 820 (quoting Jennifer C. Braceras, et al., *Competition: Title IX, Male-Bodied Athletes, and the Threat to Women's Sports*, Independent Women's Forum (1st ed. 2021), at 20 ("2021 Competition Report")). "The largest performance gap may be seen 'in the area of strength.'" *Id.* (quoting 2021 Competition Report at 20). "Studies also have shown that males 'are able to lift 30% more than females of equivalent stature and mass,' as well as punch with significantly greater force than females." *Id.* (quoting 2021 Competition Report at 20).

An example brings these figures to life. Katie Ledecky is one of the greatest woman athletes in the world—the fastest female swimmer in recorded history and the most accomplished female swimmer in Olympic history. Yet her recent world record in her best event—the 800-meter freestyle—would qualify her as only "No. 26 among the best American *15- to 16-year-old boys*." Doriane Lambelet Coleman, *Why Elite Women's Sports Need to Be Based on Sex, Not Gender*, Wash. Post (Aug. 16, 2024), https://perma.cc/Y7K3-ZA4K (emphasis added). If one of the greatest female athletes of all time cannot prevail over teenage boys in her marquee event, it is not difficult to guess how the average teenage-girl athlete would fare if forced to go head-to-head against a teenage boy.

The Government's view that every separation of the sexes must survive intermediate scrutiny would entitle men to bring constitutional discrimination claims against any team limited to women—including men who have not undergone any surgeries or hormone treatments.[3] And the harms of letting boys compete in girls' sports are obvious. In head-to-head competitions, allowing male athletes into the women's division would limit opportunities for women. On teams with limited roster spots, allowing even one male to participate takes a spot, playing time, and potentially a scholarship from a female athlete. And in many sports, allowing men to compete against women increases the risk of injury to female athletes—unaccustomed to competing against larger and stronger men.[4] As the number of men seeking to play women's sports grows—an expansion the Government's constitutional rule would turbocharge—these harms will

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[3] Not that hormone treatments necessarily close the biological gap. Studies indicate that biological males, "even those who have undergone testosterone suppression to lower their testosterone levels to within that of an average biological female, retain most of the puberty-related advantages of muscle mass and strength seen in biological males." *Adams*, 57 F.4th at 820 (citing Hilton & Lundberg at 199).

[4] *See, e.g.*, Alec Schemmel, *Injured Volleyball Player Speaks Out After Alleged Transgender Opponent Spikes Ball at Her*, ABC 13 News (April 21, 2023), https://perma.cc/NR9P-NDU5; Abby Patkin, *Injuries Involving Trans Basketball Player at Mass. School Spark Controversy*, Boston.com (March 4, 2024), https://perma.cc/48H2-5EZR; Wayne Flower, *Fed Up Parents Erupt Over Trans Woman Football Player Who is the League's Top Goal Scorer: 'Totally Unfair'*, Daily Mail Online (April 4, 2023), https://perma.cc/E8XH-NJ86.

only compound. This risk of harm even prompted the United Nations Special Rapporteur on violence against women and girls to issue a report concluding that, "[t]o avoid the loss of a fair opportunity, males must not compete in the female categories of sport." *Violence Against Women and Girls, Its Causes and Consequences*, U.N. General Assembly (Aug. 27, 2024), at 5, https://perma.cc/AE3C-QCV7.

It is no response to shrug that many women's teams may well survive the tsunami of constitutional challenges the Government's rule would release. From the outset, the Government's proposal would tar all women's teams with the epithet of "discrimination," would force any team facing litigation to divert substantial resources away from funding athletics and toward paying outside counsel, and would subject women's teams to the risk of fee-shifting for any constitutional loss. That would be a daunting prospect for the largest and wealthiest government entities. It will be an insuperable one for the average girls' softball team.

And on the merits, it is entirely unclear how the innumerable separate spaces currently afforded to women would survive intermediate scrutiny. Would the women's team in every sport be able to exclude men, or only in some sports? To survive constitutional "tailoring" requirements, must certain teams in certain sports allow men under a certain height or weight? Could a women's locker room remain women-only or must the school principal demonstrate to the satisfaction of a district judge the infeasibility of installing privacy stalls or similar devices? Would a

sixth-grade girls' volleyball team face a different inquiry than a high-school girls' volleyball team on the rationale that many children in sixth grade have not yet undergone puberty? These issues and countless others will require costly, complex, and unpredictable litigation. And courts will surely err on the side of stopping "discrimination"—invalidating more separate spheres for women than they permit to remain—with the immediate losers being the girls whose coaches will have to spend more time in deposition prep than at the gym.

Should this Court adopt the Government's constitutional rule, it would install the federal judiciary as national sports commissioner, dean of residential life, arbiter of bathroom policy, and prison warden. That is untenable. When the Constitution is silent—as it is here—the legislature holds the floor. *See, e.g.*, *Dobbs*, 597 U.S. at 231 ("[W]ielding nothing but 'raw judicial power,' the Court usurped the power to address a question of profound moral and social importance that the Constitution unequivocally leaves for the people." (quoting *Doe v. Bolton*, 410 U.S. 179, 222 (1973) (White, J., dissenting))).

CONCLUSION

The nineteenth-century reconstruction amendments do not require the provision of surgeries and related procedures to alter a child's healthy sex traits, demand that women share their dorms and bathrooms with men, or constitutionally codify male dominance in athletics under the banner of equal protection. The Equal Protection Clause, in other words,

does not override legislative policy judgments about what medical procedures are appropriate for children or contain the seeds of its own demise as an engine for promoting equality between the sexes. Contrary to the Government's tortured reading of *Bostock*, that decision fully supports applying rational basis review to Tennessee's law. This Court should affirm the decision below.

Respectfully submitted,

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