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 *AMICUS CURIAE* CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENTS SKRMETTI, *ET AL.*

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life, including the fundamental liberties protected by the Privileges or Immunities Clause of the Fourteenth Amendment. Analysis of these fundamental liberties under the Privileges or Immunities Clause helps anchor judicial analysis in the history and tradition of the nation. The Center has previously appeared before this Court as counsel of record or *amicus curiae* in several cases addressing these issues, including *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

SUMMARY OF ARGUMENT

This Court granted review on the question of whether the Tennessee law violates the Equal Protection Clause. Nonetheless, petitioner and its amici[2] have submitted briefing argui ng about the medical necessity of surgery or pharmaceuticals intended to change an individual's appearance from one gender to another.[3] But these arguments have nothing to do

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[1] In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to fund the preparation and submission of this brief.

[2] This amicus suspects that the Court will receive similar, but opposing, arguments in the briefs for respondents and supporting amici.

[3] Contrary to the United States's argument, sex is not "assigned" at birth. Sex is a biological reality that exists from conception.

with whether the Tennessee law complies with the Equal Protection Clause. They are relevant to the question of whether the Tennessee law impermissibly tramples the fundamental rights of parents regarding the care of their children. That issue, however, is not before the Court in this case.

Although the United States attempts to characterize this statute as making distinctions on account of "sex," the law applies equally to biological male children and biological female children. It applies equally to children with gender dysphoria who identify as male and children with gender dysphoria who identify as female. The classification in the law relates to the age of the individual who seeks the particular surgery or other treatment. Laws that classify individuals on the basis of age are tested under the rational basis standard of review.

ARGUMENT

I. Questions Regarding the Necessity or Danger of Surgeries and Pharmaceuticals Intended to Change the Appearance of a Child's Gender Are Not Relevant to the Equal Protection Question Before this Court.

The United States and its amici devote a lot of their argument to what they see as the necessity of offering medical intervention to change the appear-

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The so-called "gender reassignment" or "gender affirming" treatments outlawed by the Tennessee law do not actually alter the biological sex of the patient.

ance of a child's gender to a child suffering from gender dysphoria. Amicus expects that the Court will see arguments from Respondent's other amici making the case that these treatments are not necessary but instead cause permanent injury to the child.

These are important questions. But they are irrelevant to the Equal Protection question before the Court. Parents do have a fundamental right under the Privileges or Immunities Clause of the Fourteenth Amendment to direct the care and upbringing of their children. As shown below, parents can bring claims challenging the Tennessee law as a violation of the Privileges or Immunities Clause, but the success of such a claim will depend on the level of the scrutiny that the court applies and how it measures the state's asserted interest.

A. The Privileges or Immunities Clause of the Fourteenth Amendment protects fundamental rights.

This Court in *McDonald* was called to decide whether the protections of the Second Amendment protected citizens against state interference with a claimed right to keep and bear arms. The Court ruled that the protections of the Second Amendment were incorporated against the states by the "substantive" component of the Due Process Clause of the Fourteenth Amendment. *McDonald*, 561 U.S. at 778. In dissent, by contrast, Justice Stevens argued that any incorporation of the provisions of the Bill of Rights against the states could only come via the Fourteenth Amendment's protection of "liberty." *Id* at 865 (Stevens, J. dissenting). Both approaches, however, look

to interpret terms (due process) beyond their normal meaning.

Justice Thomas proposed "a more straightforward" approach that relies instead on the Privileges or Immunities Clause of the Fourteenth Amendment. *Id*. at 805-06 (Thomas, J., concurring in part and concurring in the judgment). As Justice Thomas explained: "The notion that a constitutional provision that guarantees only "process" before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." *Id*.

From before the time America was a nation, the founding generation recognized that people were endowed with preexisting natural rights; rights not dependent on a grant from the government. Declaration of Independence, para. 2, 1 Stat. 1. The founders often referred to these rights as "privileges." Noah Webster explained in 1787: "Let the people have property and they will have power that will forever be exerted to prevent the restriction of the press, the abolition of trial by jury, or the abridgment of many other *privileges*." Noah Webster, *An Examination into the Leading Principles of the Federal Constitution* (Oct. 10, 1787), *reprinted in* 1 THE FOUNDERS' CONSTITUTION (Philip B. Kurland and Ralph Lerner, eds., Univ. Chicago Press 1987) 597 (emphasis added). This Court has long understood that the rights detailed in the Bill of Rights, as well as other fundamental rights, predate the Constitution and that they limit the power of the state. *See Robertson v. Baldwin,* 165 U.S. 275, 281 (1897) ("The law is perfectly well

settled that the first 10 amendments to the constitution, commonly known as the 'Bill of Rights,' were not intended to lay down any novel principles of government, but simply to embody certain guaranties and *immunities* which we had inherited from our English ancestors…." (emphasis added)).

The Founders established a government whose purpose was to secure inalienable rights, and thus wrote the "Privileges and Immunities" clause into the fourth article of the Constitution to provide a means to accomplish these natural ends. David Skillen Bogen, PRIVILEGES AND IMMUNITIES (Praeger 2003) at 10-11 (finding that the phrases "liberties, franchises, privileges, and immunities . . . were identified with the basic principles the colonists found in English government—privileges of protection by governments of life, liberty, and property through the civil and criminal law and immunities from government found in documents like the Magna Carta."). States were presumed interested in protecting the essential liberties of their own citizens. Article IV, section 2, required protection of those same rights for citizens of other states.

As originally understood, "privileges" and "immunities" encompassed those fundamental, natural rights which the founding generation understood to be essential to the achievement of life, liberty, and the pursuit of happiness. For example, Jefferson concluded that the right to earn a living at a lawful occupation, free from unreasonable governmental intrusion, was central to individual liberty and hence fell

directly within the purview of the "Privileges and Immunities" clause. John C. Eastman, Re-evaluating the Privileges or Immunities Clause, 6 Chap. L. Rev. 123, 126-27 (2003). Similarly, this Court, in *Meyer v. Nebraska*, recognized that "the right of the individual to contract" was among "those *privileges* long recognized at common law as essential to the orderly pursuit of happiness by free men." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (emphasis added).

As Justice Thomas recognized when considering the original meaning of the Privileges or Immunities Clause of the Fourteenth Amendment,

> [t]he colonists' repeated assertions that they maintained the rights, privileges, and immunities of persons 'born within the realm of England' and 'natural born' persons suggests that, at the time of the founding, the terms 'privileges' and 'immunities' (and their counterparts) were understood to refer to those fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons.

Saenz v. Roe, 526 U.S. 489, 524 (1999) (Thomas, J., dissenting). Thus, the Framers intended the Privileges and Immunities Clause of Article IV, § 2, to include well-understood, fundamental rights essential to the preservation of life and the protection of liberty. The drafters and ratifiers of the Fourteenth Amendment intended a similar meaning for the Privileges or Immunities Clause.

Prior to the Fourteenth Amendment, the terms "privileges" and "immunities" were consistently used to include well-understood, fundamental rights. Members of this Court have recognized that this continuity of thought regarding the legal significance of the terms "privileges" and "immunities" influenced those who ratified the Fourteenth amendment. *Saenz*, 526 U.S. at 502 n.15 (1999) ("The Framers of the Fourteenth Amendment modeled this Clause upon the "Privileges and Immunities" Clause found in Article IV."); *Id*. at 526 (Thomas, J., dissenting) ("Justice Washington's opinion in Corfield indisputably influenced the Members of Congress who enacted the Fourteenth Amendment.").

Among the fundamental liberties – privileges – this Court has recognized is the right of parents to direct the care of their children without state interference.

B. Parents have a fundamental right to be free from state interference in the care for their children absent an overriding state interest for protection of the child.

While the children in this case have no fundamental right to a particular medical treatment for gender dysphoria that is rooted in the history of this nation, their parents can assert their natural rights to direct the care of their children. The parents can raise an argument that the Tennessee law interferes with this fundamental right. It is this claim to which the arguments concerning the necessity or danger of the

medical treatments that Tennessee prohibited medical professionals from performing on children are relevant.

In *Troxel v. Granville*, 530 U.S. 57 (2000), a plurality of this Court recognized that the interest of parents in dictating the "care, custody, and control" of their children is "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65 (Plurality op.). The full contours of that fundamental liberty have yet to be defined.

In a series of cases, this Court has recognized the parents' interest in controlling the education of their children. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), this Court included "the right to bring up children" as one of the recognized fundamental liberties protected against state interference by the Fourteenth Amendment. *Id.* at 399. The Court characterized the rights protected as "those *privileges* long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* (emphasis added). The parents have a right of control, which includes the right to engage instructors to teach their children. *Id.* at 400. In ruling that the state law at issue in *Meyer* violated the parents' fundamental rights, this Court held that the state failed to establish "an adequate foundation" to support a claimed purpose of protecting a "child's health."

Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), this Court ruled in favor of those challenging an Oregon law requiring all children to attend a public school (rather than a private or parochial school). *Id.* at 534. In upholding an injunction against

the law, this Court noted that children were not mere creatures of the state. Instead, parents retain the right (and duty) to direct their children's care and education. *Id*. at 535. The only standard of review mentioned was that the legislation in that case had "no reasonable relation to some purpose within the competency of the state." *Id*.

Nearly four decades later this Court seemed to place a higher weight on the state's interest in compulsory education than the parents' interest in directing the education of their children. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), this Court described the state as having a "high responsibility" for the education of its citizens and thus having undoubted power to adopt reasonable regulations to direct the control and duration of basic education. *Id*. at 213. Against that "high responsibility," this Court afforded "no weight" to secular considerations put forward by the parents of the children objecting to the regulation. *Id*. at 215-16. Instead, only parental interest that involved fundamental rights protected by the Free Exercise Clause (there, to direct the religious upbringing of the children) would suffice. *Id*. at 214. Because the rights asserted by the parents involved the Free Exercise Clause, this Court ruled that the state must prove an interest "of sufficient magnitude to override" rights protected by the First Amendment. *Id*. Since the decision was based on the failure of the state to prove a sufficient interest to overcome the Free Exercise Clause challenge, the Court did not discuss the standard of review for a challenge on the basis of the parents' fundamental right to direct the care of their children.

On the other side of the balance, this Court has recognized that the state has "a wide range of power limiting parental freedom and authority in things affecting the child's welfare." *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944). In some instances, that power is described as compelling. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982) ("We agree with appellee that the first interest—safeguarding the physical and psychological well-being of a minor—is a compelling one." (footnote omitted)). Further, the Court has recognized that the "state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J. R.*, 442 U.S. 584, 604 (1979).

The arguments raised by the United States and their amici and by Tennessee and many of its amici about whether the outlawed treatments on children are beneficial or deleterious are important. These arguments are supremely relevant to the question of whether the state law here violates the parents' fundamental right to direct the care and upbringing of their children. And they are relevant to whether Tennessee's choice to prohibit such surgeries on children is supported by its stated interest in protecting the health of those children. That question is not before this Court in this case, however.

This is an Equal Protection Clause case. Since the classification is one based on age, the United States needs to prove that the state lacked a rational basis for the classification.

II. On the Equal Protection Question, the Tennessee Law Classifies on the Basis of Age and Should be Judged Under Rational Basis Review.

The Tennessee law at issue in this case forbids the specified treatments only for minors. The law treats biological males and biological females exactly the same. As to those children suffering from gender dysphoria, the law still treats biological males and biological females (or, to put it in different terms, those children who identify as male and those who identify as female) exactly the same. The only distinction made is based on the age of the individuals seeking the treatment. The state bans certain surgeries and prescription medicines for children but not for adults. The law draws no lines on the basis of sex or gender no matter how those terms are defined.

The medical condition of gender dysphoria is not a suspect classification. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), this Court described "the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id*. at 28; *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976). The fact that the current President's Administration includes individuals who identify as "transgender" in high-profile position establishes that there can be no claim of "political powerlessness."

Nor does the law implicate a fundamental liberty. This Court has only recognized liberties as fundamental if they are "objectively, 'deeply rooted in this Nation's history and tradition.'" *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Access to surgeries or medicines that the state argues have permanent adverse consequences for children cannot be described as something deeply rooted in the history and tradition of this nation. As noted above, whether such life-altering surgeries are good or bad for the child are properly considered under the fundamental right of the parents right to direct the care of their children. But the very fact that this is a modern debate, and one in which many medical experts still consider such surgeries and medicines harmful to children, refutes the idea that access to this type of care now can be said to be "deeply rooted" in our history.

That leaves us with the classification on the basis of age. This Court has repeatedly ruled that classifications based on age are judged on the rational basis standard of review. *See*, *e.g.*, *Kimel v. Fla Bd. of Regents*, 582 U.S. 62, 84 (2000); *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991); *Vance v. Bradley*, 440 U.S. 93, 102-03 (1979); and *Murgia*, 427 U.S. at 317. Under rational basis review, the law under challenge is treated as presumptively constitutional. *Kimel*, 528 U.S. at 84. The challenger has the burden of proving "that the 'facts on which the classification is apparently based could not reasonably be conceived true by the governmental decisionmaker.'" *Id*. at 84 (quoting *Bradley*, 440 U.S. at 111. As is seen in the competing briefs of petitioners, respondents, and amici on both sides, there is an ongoing medical debate over the

safety and efficacy of the treatments that Tennessee has banned for children. That ongoing debate establishes that the Tennessee Legislature had a reasonable basis for relying on the facts presented in support of the law. As such, the measure survives rational basis review.

CONCLUSION

The debate over whether surgery or prescription drugs that alter the appearance of child's gender are necessary or are harmful to children is important. But it is not a debate relevant to the legal issues before this Court in this case. Here, the Court considers the question of whether the Tennessee law that creates a classification on the basis of age violates the Constitutional guarantee of Equal Protection. Under rational basis review, this Court should uphold the judgment of the Tennessee Legislature and reject the arguments presented by the United States.

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Respectfully submitted,

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