No. 23-477

IN THE
Supreme Court of the United States

UNITED STATES, *Petitioner*,
v.
JONATHAN SKRMETTI, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE, *ET AL.*, *Respondents*.

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

Brief of *Amici Curiae* America's Future, Public Advocate of the United States, Eagle Forum, Eagle Forum Foundation, U.S. Constitutional Rights Legal Defense Fund, Fitzgerald Griffin Foundation, LONANG Institute, Restoring Liberty Action Committee, and Conservative Legal Def. and Ed. Fund in Support of Respondents

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October 15, 2024

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MISCELLANEOUS

INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Public Advocate of the United States, Eagle Forum, Eagle Forum Foundation, U.S. Constitutional Rights Legal Defense Fund, Fitzgerald Griffin Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. LONANG Institute and Restoring Liberty Action Committee are nonprofit educational organizations. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

Most of these *amici* filed an *amicus* brief in a similar case now pending in the Eleventh Circuit: *Brief Amicus Curiae of America's Future, et al., Doe v. Ladapo*, U.S. Court of Appeals for the Eleventh Circuit, No. 24-11996 (Sept. 4, 2024).

STATEMENT OF THE CASE

In March 2023, Tennessee Governor Bill Lee signed SB 1 into law to prevent medical providers from utilizing three types of "treatments" for minors experiencing gender dysphoria — a condition in which an individual identifies as being something other than his or her actual biological sex. *L.W. v. Skrmetti*, 679 F. Supp. 3d 668, 677 (M.D. Tenn. 2023) ("*Skrmetti I*"). Specifically, the law bans cross-sex hormone

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

treatments, puberty-blocker drug regimens, and surgical removal or modification of breasts or genitals. *Id.* at n.2.

The law was challenged by three minors who identify as "transgender" and assert their desire to receive such procedures, as well as a physician who wished to perform such procedures for profit. *Id.* at 678. The district court allowed the United States to join as an intervenor Plaintiff. *See L.W. v. Skrmetti*, 2023 U.S. Dist. LEXIS 86406 (M.D. Tenn. 2023).

The district court enjoined SB 1 for violating parents' substantive due process right to make medical decisions for their children. *Skrmetti I* at 684-85. Applying intermediate scrutiny, the court ruled that SB 1 violated the Equal Protection Clause of the Fourteenth Amendment, because the law discriminates on the basis of "transgender status," which the court deemed a "quasi-suspect class." *Id.* at 687-90. The district court imported this Court's statutory interpretation of Title VII governing employment discrimination in *Bostock v. Clayton County*, 590 U.S. 644 (2020), to guide its constitutional interpretation. The court below believed "irreparable injury" was demonstrated by state rejection of the recommendations of a discredited transgender advocacy group, the World Professional Association for Transgender Health ("WPATH"). *Skrmetti I* at 700-08. Finally, the court saw no connection between the legislature's effort to protect minors from experimental and largely irreversible medical treatments for a psychiatric condition which is generally transitory, since the law allowed those procedures to be used to

treat genuine medical disorders such as precocious (premature) puberty. *Id.* at 710-11.

A divided panel of the Sixth Circuit stayed the injunction and granted an expedited appeal. *L.W. v. Skrmetti*, 73 F.4th 408 (6th Cir. 2023) ("*Skrmetti II*"). The Sixth Circuit concluded that the injunction was overbroad and should have been limited to plaintiffs. Citing *Washington v. Glucksberg*, 521 U.S. 702 (1997), the court ruled that a substantive due process right **to refuse** medical treatment does not equate to an equivalent constitutional right **to demand** a particular treatment. *Skrmetti II* at 418. Regarding Equal Protection, the court noted that minors of both sexes can only "transition" due to hormones that occur naturally in the opposite sex and ruled that "[t]he reality that the drugs' effects correspond to sex in these understandable ways and that Tennessee regulates them does not require skeptical scrutiny." *Id.* at 419. The court noted that neither the Sixth Circuit nor this Court has ever defined "transgender" status as constituting a "quasi-suspect class" and declined to do so. *Id.* Regarding the district court's reliance on *Bostock*, the Sixth Circuit ruled that "that reasoning applies only to Title VII, as *Bostock* itself and our subsequent cases make clear." *Id.* at 420. Since Plaintiffs had failed to demonstrate likelihood of success on the merits, the court stayed the injunction. *Id.* at 421-22. Similarly, on the merits, the Sixth Circuit reversed the district court's injunction. *L.W. v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023) ("*Skrmetti III*").

SUMMARY OF ARGUMENT

Some of the most barbaric, and most lucrative, "treatments" known to medicine currently are being employed to surgically and medically brutalize the bodies of children to replicate some of the physical attributes of the other sex. Tennessee has chosen to protect children from such "treatments," even against the demands of parents. There is no provision of the U.S. Constitution that empowers a federal court to override the judgment of the Tennessee legislature.

There is not the slightest reason to believe that the framers of the Equal Protection Clause of the Fourteenth Amendment believed that they were crafting a provision to do anything other than requiring African-Americans to be treated equally with whites. Nevertheless, the district court disagreed decreeing, for the first time, "transgender status" to be "quasi-suspect class" requiring judicial protection. The Sixth Circuit properly rejected that radical approach, as well as a claim based on substantive due process. This case demonstrates how dangerous this court's "tiers of scrutiny" analysis has been, in enabling judges to disregard the Constitution's text to further their own agendas by adopting their preferred level of scrutiny.

Plaintiff parents demand the right to irreversibly alter their children's sexuality based on the "standards of care" urged by a deeply compromised advocacy organization, WPATH. All too many courts have been willing to rely on this group funded and run by those

committed to transgender ideology rather than good medical care.

Some children suffering from "gender dysphoria" become convinced by adults or Tiktok influencers that all their problems will vanish once they change their bodies. Rather than protecting their children from such dangerous advice, some parents are so captivated by the ideology/religion of transgenderism that they are demanding the power to castrate their sons and remove healthy breasts from their daughters. Rather than refusing to provide such life-altering "treatments," some physicians are willing to be paid handsomely to create eunuchs. Tennessee has stepped in the gap to protect these children, and no court, including this Court, has the constitutional authority to insist this butchery continue.

ARGUMENT

I. THIS COURT SHOULD ADOPT A TEXTUALLY FAITHFUL READING OF THE EQUAL PROTECTION CLAUSE AND ABANDON "TIERS OF SCRUTINY."

The district court and the Sixth Circuit disagreed on what level of scrutiny applies to SB 1 for purposes of Equal Protection analysis. The district court ruled that the challenged law discriminates on the basis of "transgender status" and that "transgender individuals" should constitute a "quasi-suspect class," triggering **intermediate scrutiny**. *Skrmetti I* at 687-88; 690. The Court of Appeals correctly noted that neither the Sixth Circuit nor this Court had ever

deemed "transgender" status to constitute a "suspect class," and it declined to do so here. *Skrmetti II* at 419. Accordingly, the court of appeals, applying rational basis analysis, ruled that Tennessee's interest in preventing likely harm from irreversible and experimental drug and surgical procedures for an often-temporary condition was grounded soundly in protecting minors.

Even though it did conduct its own interest-balancing analysis, the Sixth Circuit was not unmindful of the primacy of the text. It noted that "the plaintiffs never engage with, or explain how they meet, the 'crucial' historical inquiry to establish this right [to consent to irreversible 'transitioning' treatments for their children].... *Glucksberg*, 521 U.S. at 721. There is, to repeat, no such history or tradition." *Skrmetti III* at 477. The Sixth Circuit exposed why judges love interest balancing when it cautioned:

> [g]rounding new substantive due process rights in historically rooted customs is the only way to **prevent life-tenured federal judges** from seeing every heart-felt **policy dispute** as an emerging **constitutional right**. [*Id.* (emphasis added).]

Here, the Sixth Circuit offered wise counsel. Perhaps the greatest abuses of power engaged in by federal judges comes through their willful refusal to be limited

by the Framers' understanding of the Constitution's text.[2]

To provide the public with the illusion of a judicial decision based on the Constitution, the district court employed what Justice Scalia termed "judge-empowering" interest balancing. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008). Here, by deeming "strict scrutiny" to be the test to apply — rather than searching out the meaning of the text as understood by the framers and ratifiers — the district court usurped the power vested in federal and state legislatures to resolve sensitive political disputes by constitutionalizing one judge's preferred policy.

If courts actually conducted a proper, lawful, textual, and "historically rooted" analysis of the constitutionality of the Tennessee law designed to protect minors, it would be abundantly obvious that transgender status was never the subject of the Equal Protection Clause when ratified — and no court has the constitutional power to amend the Constitution to make it so. Indeed, if this Court were to engage in a proper textual analysis, it would be compelled not only to deem transgender people unprotected in this case, but also to re-examine its past atextual decisions and declare, once and for all, that only discrimination based on race or prior condition of servitude can provide a predicate for an equal protection challenge.

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[2] *See* E.D. Hirsch, Validity in Interpretation, at vii, 1, 5, 212-23 (Yale Univ. Press: 1973).

A. This Court's "Tiers of Scrutiny" Framework Is a Dangerous Departure from the Constitutional Text.

This Court can — and with the opportunity presented by this case, should — do away with its "tiers of scrutiny" analysis, and require that from now onward all federal courts analyze Equal Protection claims strictly on the basis of the Fourteenth Amendment's history and tradition. This Court has done precisely that in the Second Amendment context, noting that "[l]ike the First, it is the very *product* of an interest balancing by the people." *Heller* at 634. The Fourteenth Amendment is no different and should be interpreted the same way.

In 2016, Justice Thomas wrote an eloquent critique of the judicially created, extra-textual "tiers of scrutiny" this Court has created over the decades, and demonstrated their utter lack of grounding in the text. "The Constitution does not prescribe tiers of scrutiny," Justice Thomas wrote. "The three basic tiers — 'rational basis,' intermediate, and strict scrutiny — are no more scientific than their names suggest, and a further element of randomness is added by the fact that it is largely up to us which test will be applied in each case." *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 639 (2016) (Thomas, J., dissenting) (quoting *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

This Court's original two tiers of "strict scrutiny" and "rational basis" review soon "proliferated into ever more gradations," including "intermediate scrutiny,"

"[a] more searching form of rational basis review," "closest scrutiny," and "undue burden." *Id.* at 639 (Thomas, J., dissenting) (internal quotation omitted). The new gradations had no more basis in the text of the Fourteenth Amendment than the first two. And "the label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right ... is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat." *Id.* at 638 (Thomas, J., dissenting). "These labels now mean little," Justice Thomas charges. *Id*. at 640.

> Whatever the Court claims to be doing, in practice it is treating its doctrine referring to tiers of scrutiny as guidelines informing our approach to the case at hand, not tests to be mechanically applied. The Court should **abandon the pretense** that anything other than **policy preferences** underlies its balancing of constitutional rights and interests in any given case. [*Id*. at 640-41 (Thomas, J., dissenting) (internal quotation omitted) (emphasis added).]

The Sixth Circuit echoed the problem below, noting that for issues of such medical procedures, along with allowing biological males into women's bathrooms and sports teams:

> the U.S. Constitution does not offer a principled way to judge these lines. Removing these trying policy choices from fifty state

> legislatures to one Supreme Court will not solve them and in truth runs the risk of making them harder to solve. Instead of the vigorous, sometimes frustrating, arena of public debate and legislative action across the country and instead of other options provided by fifty governors and fifty state courts, we would look to one [federal] judiciary, suddenly delegated with authority to announce just one set of rules. *Glucksberg*, 521 U.S. at 720. That is not how a constitutional democracy is supposed to work. [*Skrmetti III* at 486-87.]

Tiers of scrutiny enable judges to hide arbitrary decisions behind a facade of high-sounding judicial language and determine the scope of a particular constitutional right based on little more than "judges' assessments of its usefulness." *Heller* at 634. As Professor Richard H. Fallon, Jr. has correctly noted, "The words 'strict judicial scrutiny' appear nowhere in the U.S. Constitution. Neither is there ... any foundation in the Constitution's original understanding, for the modern test under which legislation will be upheld ... only if ... 'narrowly tailored' to promote a 'compelling' governmental interest."[3] Then-Judge Kavanaugh explained: "Strict and intermediate scrutiny tests are not employed in the Court's ... application of many other individual rights provisions of the Constitution." *Heller v. Dist. of Col.*, 670 F.3d 1244, 1283 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). He then laid out a

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[3] R. Fallon, "Strict Judicial Scrutiny," 54 UCLA L. REV. 1267, 1268 (2006-2007).

plethora of rights which this Court has never subjected to balancing tests, including rights to jury trial and against self-incrimination and cruel and unusual punishment. *Id.*

In the Equal Protection context, courts have taken an amendment designed to ensure racial equality and tortured it into a device to create "rights" to all sorts of behaviors that the Framers of the Fourteenth Amendment would never have recognized as rights at all. This Court should use this case to reconsider its "tiers of scrutiny" jurisprudence, and return to an interpretation of the Equal Protection Clause anchored in text, context, history, and tradition.

B. The Text and History of the Equal Protection Clause Leave No Room for Imposing Radical Sexual Social Constructs on States.

A century and a half ago, this Court made clear that the Fourteenth Amendment (including its Equal Protection Clause) was drafted to mandate equal treatment for African Americans *vis a vis* white citizens. The Court found it "necessary to look to **the purpose** which we have said was the pervading spirit of them all, **the evil which they were designed to remedy**...." *Slaughter-House Cases*, 83 U.S. 36, 72 (1873) (emphasis added). Regarding the Equal Protection Clause, this Court said:

> In the light of the history of these amendments, and the pervading purpose of them, ... it is not difficult to give a meaning to

> this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was **the evil to be remedied** by this clause.... [*Id.* at 81 (emphasis added).]

A serious review of the debates over the Fourteenth Amendment and its forerunner, the Civil Rights Act of 1866, makes crystal clear that equal treatment of the races was the purpose of its Framers. Radical Republican leader Congressman Thaddeus Stevens enunciated the Amendment's purpose: "Whatever law protects the white man shall afford 'equal' protection to the black man."[4]

As Justice Thomas has explained:

> [s]imilar statements appeared in other cases decided around this time [following the Slaughterhouse Cases]. *See Virginia v. Rives*, 100 U. S. 313, 318 (1880) ("The plain object of these statutes [enacted to enforce the Fourteenth Amendment], as of the Constitution which authorized them, was to place the colored race, in respect of civil rights, upon a level with whites...."). [*Students for Fair Admissions*, *Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 245 (2023) (Thomas, J., concurring).]

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[4] A. Kelly, "Fourteenth Amendment Reconsidered," 54 MICH. L. REV. 1049, 1078 (1955-1956).

Notably, laws passed pursuant to the Equal Protection Clause in the years following its ratification involved countermanding state laws that imposed discrimination by race, not other creatively concocted "classes" such as "transgender" or "sexual orientation." This is on all fours with the teaching in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), that common practice contemporaneous with the framing provides the most illumination into the Framers' understanding of the meaning of the Amendment.

> In the period closely following the Fourteenth Amendment's ratification, Congress passed several statutes designed to enforce its terms, eliminating government-based Black Codes ... and criminalizing racially motivated violence. The marquee legislation was the Civil Rights Act of 1875 ... and the justifications offered by proponents ... are further evidence for the colorblind view of the Fourteenth Amendment. [*Students for Fair Admissions* at 243 (Thomas, J., concurring).]

Viewed independently of and preexisting to this Court's "tiers of scrutiny" cases, the purpose, history, and tradition of the Clause demonstrably does not protect a "right" to receive sex change surgeries or puberty blockers. If suffrage was not believed to be implicit in "life, liberty, or property" for Equal Protection purposes, it is absurd to argue that the "right" to sex-change surgery or puberty blockers is. This Court did not forbid segregated schools until the 1950's in *Brown v. Board of Education*, 344 U.S. 1 (1952), or state interracial marriage bans until the

1960's in *Loving v. Virginia*, 388 U.S. 1 (1967). Both of these decisions, however, were grounded in the Fourteenth Amendment's purpose of eliminating racial discrimination under color of law. They provide no support in "text and history" for invalidating state police power statutes against damaging and irreversible "transgender treatments."

The concept of "transgender rights" and a "transgender class" fails the test stated in *Bruen* — being "consistent with this Nation's historical tradition." Only by decades of "tiers of scrutiny" obscuring the Fourteenth Amendment's history and tradition can the courts invent such novel, judicially created "rights." Indeed, as Justice Alito reminded us in his *Bostock* dissent, more than 100 years after the Fourteenth Amendment was ratified, sodomy was still a crime in 49 states — all but Illinois. *Bostock* at 710 (Alito, J., dissenting). Until 1975, federal agencies could deny federal employment on the basis of homosexual behavior. Until 2010, homosexuality could lead to dismissal from the armed services. *Id.* at 713. No "right" to contraception was judicially recognized until *Griswold v. Connecticut*, 381 U.S. 479 (1965). Same-sex "marriage" was not recognized until *Obergefell v. Hodges*, 576 U.S. 644 (2015). This Court's first case dealing with the claim of "transgender rights" issue was heard just five years ago in *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, which would eventually be decided together with *Bostock*.

The "tiers of scrutiny" approach is, as Professor Fallon charges, without "any textual basis, nor any foundation in the Constitution's original

understanding."[5] If allowed to persist, it has and will continue to allow judges to manufacture sham "rights" such as those argued for here, undermining the public's confidence as well as the foundations of law itself. This Court should use this opportunity to course correct by banning use of "judge-empowering" "tiers of scrutiny" — at least for Equal Protection cases. Having done so, this Court should affirm Tennessee's entirely rational determination that SB 1 is required to protect immature and vulnerable minors.

II. THIS COURT SHOULD REJECT THE DISCREDITED, POLITICIZED PSEUDOSCIENCE OF "WPATH," RELIED ON IN THE DISSENT BELOW AS WELL AS BY MANY LOWER COURTS.

Even in the absence of a much-needed revision of this Court's "tiers of scrutiny" jurisprudence, the statute in question in this case still passes muster.

First, "transgender" cannot be a protected class if the law is to have any objective meaning whatsoever. Race and sex are utterly immutable characteristics, affording courts an objective basis to determine if an individual even comes within the class. On the other hand, "transgender" is a concept so "fluid," according to its own advocates, that it cannot be the basis for any rational classification.

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[5] R. Fallon at 1268.

According to transgender ideology, "gender fluidity" is just as real as "gender identity": "[f]or some people, gender identity and expression isn't fixed — rather, it can change daily."[6] According to "gender-fluid" psychologist Liz Powell, "gender fluidity enables people to take their identity and expression one day at [a] time, instead of feeling tied to a single, overarching gender label." *Id.* According to Powell, gender "is not a fixed point," but rather "flexible and able to shift depending on various factors, both within a person's internal self as well as their external surroundings." *Id.*

One of the earliest spokespersons for transgenderism, transgender author and lawyer Martine Rothblatt, explained that gender can change at will:

> [T]ransgenderism developed during the 1980s. The guiding principle ... is that people should be free to **change**, either **temporarily or permanently**, the sex type to which they were assigned since infancy ... even if a sex type was real at birth, it **can now be changed at will**.... [M. Rothblatt, The Apartheid of Sex: A Manifesto on the Freedom of Gender (Crown Pub.: 1995) at 16 (emphasis added).]

Thus, a woman one day can be a "transgender man" the next, and a "detransitioner" on the third day. Attempting to rationally apply strict or intermediate

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[6] J. Klein, "'Gender fluidity': The ever-shifting shape of identity," *BBC* (Sept. 14, 2022).

scrutiny to such an inherently undefinable "class" is a fool's errand. Accordingly, rational basis scrutiny should apply, and Tennessee's asserted interest in protecting children from experimental and irreversible procedures with potentially severe consequences is certainly rational.

But even were "intermediate scrutiny" to apply, SB 1 survives. This Court has been clear that "there is a compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications of Cal. v. FCC*, 492 U.S. 115, 126 (1989). Thus, Tennessee has demonstrated a compelling interest. And it has narrowly tailored SB 1 by applying it only to minors, leaving adults, who are capable of informed consent, free to engage in these self-destructive procedures.

The importance of Tennessee's interest is only heightened by a cursory review of the deeply flawed, biased, and financially self-interested political propaganda masquerading as "gender-affirming care."

The "Standards of Care" promulgated by WPATH have been accepted as authoritative — even unquestionable — by numerous courts. WPATH creates what it markets as "internationally accepted Standards of Care (SOC) ... to promote the health and welfare of transgender, transsexual and gender variant persons...."[7] WPATH released its previous version of the SOC guidelines, SOC-7, in 2012, and

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[7] WPATH, "Mission and Vision," *WPATH.org*.

was updated with SOC-8 in 2022.[8] Again and again, lower courts have viewed the SOC as the authoritative scientific standard. *See, e.g.*, *Skrmetti I* at 700-01.

These courts are repeating the mistake this Court made in *Roe v. Wade,* 410 U.S. 113 (1973), which made a legal ruling based on politicized "experts." When *Roe* was overturned in 2022, this Court appropriately faulted its previous decision for relying on the "expertise" of activists with a politicized stake in the game. "**Relying on two discredited articles** by an **abortion advocate**, the Court erroneously suggested — contrary to Bracton, Coke, Hale, Blackstone, and a wealth of other authority — that the common law had probably never really treated post-quickening abortion as a crime." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 272 (2022) (emphasis added). Again and again, the lower federal courts have repeated the mistake, relying on desperately flawed and biased "standards" promulgated by one side in a hotly disputed cultural and spiritual struggle.

A. WPATH Subordinates Medicine and Science to Politics and Litigation Priorities.

Like the "advocate" erroneously relied on in *Roe*, WPATH is not a neutral scientific organization. It is an active combatant in the culture wars. WPATH has been well described as "a hybrid professional and

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[8] M. Cooper, "The WPATH guidelines for treatment of adolescents with gender dysphoria have changed," *MDEdge.com* (Oct. 17, 2022).

activist organization, where activists have become voting members."[9] As James Esses of the British "Thoughtful Therapists Network" wrote:

> [t]here have long been concerns that the organisation acts more as a partisan lobby group underpinned by gender ideology, instead of a body driven by medical evidence. Many of the senior members of WPATH identify as "trans" or "non-binary" themselves or are gender activists.[10]

WPATH reportedly receives a large percentage of its funding from donations from progressive billionaires who have invested tremendous sums toward a radical program of eliminating distinctions between the sexes. One major funder of WPATH is the Tawani Foundation, founded by the former James Pritzker, who now identifies as Jennifer Pritzker.[11] Pritzker, known as the "first transgender billionaire," is the cousin of Illinois Governor J.B. Pritzker. The

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[9] L. MacRichards, "Bias, not evidence dominates WPATH transgender standard of care," *Canadian Gender Report* (Oct. 1, 2019).

[10] J. Esses, "What's wrong with WPATH version 8?" *Sex-Matters.org* (Sept. 20, 2022).

[11] D. Larson, "The billionaire Duke trustee behind the remaking of gender," *Carolina Journal* (Sept. 22, 2022).

Pritzker family is some of the biggest financiers of the transgender movement.[12]

> Over the past decade, the Pritzkers of Illinois, who helped put Barack Obama in the White House and include among their number former U.S. Secretary of Commerce Penny Pritzker, current Illinois Gov. J.B. Pritzker, and philanthropist Jennifer Pritzker, appear to have used a family philanthropic apparatus to drive an ideology and practice of disembodiment into our medical, legal, cultural, and educational institutions. [*Id.*]

For more than a decade, "Pritzker has used the Tawani Foundation to help fund various institutions that support the concept of a spectrum of human sexes." *Id.* In 2018, WPATH credited Tawani for its financial support in producing its previous standards, SOC-7.[13]

The WPATH committee that produced the current SOC-8 guidelines is a jumble of conflicts of interest:

> All of them either receive income based on recommendations in the guidelines, work at clinics or universities who receive funds from advocacy groups, foundations, or

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[12] J. Bilek, "The Billionaire Family Pushing Synthetic Sex Identities (SSI)," *TabletMag.com* (June 14, 2022).

[13] "Col. Jennifer Pritzker and TAWANI Foundation Win WPATH Philanthropy Award," *Tawani Foundation* (Nov. 6, 2018).

> pharmaceutical companies who heavily favour a certain treatment paradigm, or have received grants and published papers or research in transgender care. The majority of the members are from the US, and six of them have affiliations with the same university – the University of Minnesota Program in Sexuality, which is primarily funded by ... [Pritzker's] Tawani Foundation....[14]

B. Numerous Scientific Entities Have Critiqued the Politicization of WPATH.

WPATH's Standards have been vigorously assailed by others working with transgender persons. "Beyond WPATH," an organization of "concerned medical and mental health professionals" including numerous physicians, psychiatrists, counselors, and mental health professionals, shredded WPATH's new SOC-8 for numerous "errors and ethical failures":

> WPATH endorses early medicalization as fundamental while **[European] countries now promote psychosocial support as the first line of treatment** [of gender dysphoria], delaying drugs and surgery until the age of majority is reached in all but the most exceptional cases. A **chapter on ethics** that had appeared in earlier drafts was

[14] L. MacRichards, *supra*.

> **eliminated** in the final release — a further abdication of ethical responsibility.[15]

In fact, "a very short time after [WPATH's SOC-8] went public, a major unexpected 'correction' was issued. However this wasn't a 'correction' this was an ideological turnaround. This change of heart was reported all over the world as it **removed all minimum age requirements** for 'gender affirmative' surgeries," including "14+ years old for cross-sex hormones [and] 15+ years old for double mastectomies."[16] In the final version, WPATH opted not to recommend any age minimums at all for these drastic procedures, opening the door to a medicalized assault on young children's bodies, for profit.

Further, as Beyond WPATH notes, "[w]hile presented as evidence-based, the Standards of Care fail to acknowledge that independent systematic reviews have deemed the evidence for gender-affirming treatments in youth to be of very low quality and subject to confounding and bias, rendering any conclusions uncertain." It adds, "[f]or these and other reasons, we believe **WPATH can no longer be viewed as a trustworthy source** of clinical guidance in this field." *Id.* (emphasis added).

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[15] "WPATH Has Discredited Itself," *BeyondWPATH.org* (emphasis added).

[16] "WPATH Explained," *Genspect.org* (Oct. 1, 2022) (emphasis added).

C. Discovery Elsewhere Has Revealed WPATH'S Politicization and Conflicts of Interest.

Evidence discovered in ongoing litigation in federal court in Alabama demonstrates that the engine of WPATH is about politics, not science. The report of Dr. James Cantor, Ph.D., exposes internal WPATH communications revealing that WPATH **changed its recommendations** in SOC-8, under arm-twisting from the Biden administration. It was also changed **at the behest of attorneys hoping to use the SOC as part of their legal strategy in courts** against states like Tennessee that seek to protect children from being used as guinea pigs in experimental and irreversible procedures.

WPATH presents a carefully guarded facade of scholarly unanimity behind these dangerous procedures and covers up grave doubts harbored by some WPATH stakeholders about the safety and efficacy of surgical and puberty blocker procedures, and whether young children are even capable of giving informed consent.

Dr. Cantor states that "[m]embers of the Guideline Development Group acknowledged that there is no consensus among treatment providers regarding the use of puberty blockers."[17] One wrote, "I think *there is no agreement on this within pediatric endocrinologists*,

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[17] Appendix A to supplemental expert report of James Cantor, Ph.D., *Boe v. Marshall*, Case No. 2:22-cv-00184, Dkt. 591-24, p. ii (M.D. Ala. 2024).

what is **significant risk** especially balanced against the benefits of e.g. **thinking time which can be very important for a 14 year old.**" *Id.* (bold added). Another member conceded, "I'm not clear on which 'agreement regarding the value of blockers' is required to be espoused by a WPATH member/mentor. My understanding is that *a global consensus on 'puberty blockers' does not exist.*" *Id.*

Other members "of the WPATH Guideline Development Group repeatedly and explicitly lobbied to **tailor language of the guidelines for the purposes of influencing courts** and legislatures, and to strengthen their own testimony as expert witnesses." *Id.* at vi (emphasis added). Names were redacted from the communications provided, but one SOC guideline developer stated:

> *I am concerned about language such as '**insufficient evidence**,' 'limited data,' etc… I say this from the perspective of current **legal challenges** in the US.* Groups in the US are trying to claim that gender-affirming interventions are experimental and should only be performed under research protocols (*this is based on two recent federal cases in which I am an expert witness*). In addition, these groups already assert that research in this field is low quality (ie [sic] small series, retrospective, no controls, etc.…). My specific concern is that this type of language (insufficient evidence, limited data, etc...) will empower these groups.... [*Id.* (bold added).]

Another member wrote, "I think we need a more detailed defense that we can use that can respond to academic critics and that *can be used in the many court cases that will be coming up*." *Id.*

One contributor offered, "Here are a number of my thoughts which may be *helpful for Chase and the legal team*." *Id.* (Chase Strangio is Deputy Director for Transgender Justice with the ACLU's LGBT & HIV Project and one of the attorneys supporting Plaintiffs in this case). Another wrote, "*There are* ***important lawsuits happening*** *right now in the US, one or more of which* ***could go to the Supreme Court****, on whether trans care is medically necessary vs experimental or cosmetic. I cannot overstate the importance of SOC 8 getting this right at this important time*." *Id.* at vii (bold added).

Cantor's Report explains, "Members of the WPATH Guideline Development Group went so far as to explicitly advocate that SOC 8 be written to maximize impact on litigation and policy *even at the expense of scientific accuracy*." *Id.* One wrote, "*My hope with these SoC is that they* ***land in such a way as to have serious effect in the law*** *and policy settings* that have affected us so much recently; *even if the wording isn't quite correct* for people who have the background you and I have." *Id.* (bold added).

D. The Federal Government Has Pressured WPATH.

The released communications reveal that Biden administration officials exerted immense pressure on WPATH to change its SOC-8 recommendations to align with administration policy objectives. One WPATH contributor wrote, "I am meeting with Rachel Levine[18] and her team next week, as the US Department of Health is very keen to bring the trans health agenda forward." *Id.* at viii. Another stated, "I have just spoken to Admiral Levine today, who — as always is extremely supportive of the SOC 8, but also very eager for its release — so to ensure integration in the US health policies of the Biden government." *Id.* at viii.[19] Another stated, "[T]his should be taken as a charge from the United States government to do what is required to complete the project immediately." *Id.* Dr. Cantor reports, "Specifically, **Assistant Secretary Levine**, though a staff member, **pressured WPATH** to **remove recommended minimum ages** for medical transition treatments from SOC-8." *Id.* at viii (emphasis added).

> The issue of ages and treatment has been quite controversial (mainly for surgery) and it has come up again. We sent the document to

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[18] Admiral Rachel Levine, born Richard Levine and the father of two grown children, "transitioned" in 2011, and then divorced his wife Martha Levine in 2013.

[19] Levine is an Admiral in the U.S. Public Health Service Commissioned Corps, not in the armed services.

> Admiral Levine.... She like [sic] the SOC-8 very much but **she was very concerned that having ages (mainly for surgery)** will affect access to health care for trans youth and maybe adults too. Apparently the situation in the USA is terrible and she and the Biden administration worried that having ages in the document will make matters worse. **She asked us to remove them**. [*Id*. at viii-ix (emphasis added).]

Just as it did for the LGBTQ legal team, WPATH molded its "scientific" recommendations to fit Biden administration policy aims. "WPATH capitulated and removed the text in violation of its own process despite the preference of its own committee members to retain the age limits." *Id*. at x. "One committee member objected to the after-the-last-minute removal of the age minimums as a violation of WPATH's formal process, but acknowledged that 'it's all about the messaging and marketing.'" *Id*. at ix. "Another committee member said it was 'the most strange experience' to see the changes (elimination, really) to the minimum age recommendations made at the 'last minute' after internal discussion made clear that 'nobody [on the committee] wanted to make them, and personally not agreeing with the change.'" *Id*. at x.

To ensure the SOC's "science" fit the administration's politics, WPATH eliminated its initial recommendations to wait until age 15 before surgically **removing breasts**, and age 17 before performing **castrations**. *Id*. at viii, x.

E. WPATH's SOC-8 Has Been Discredited as an Impartial Medical Document.

In 2020, the British National Health Service ("NHS") commissioned a study led by Dr. Hilary Cass. Released in 2024, the study concluded that WPATH's (public) assurances that puberty blockers and radical surgeries are a necessary and effective **suicide prevention** among "transgender" youth are grounded in **at best shaky evidence**. *See* B. Ryan, "Major U.K. Report Finds Pediatric Gender Medicine Is Based on 'Remarkably Weak Evidence,'" *New York Sun* (Apr. 10, 2024).

The Cass review was almost equally inconclusive for cross-sex hormone treatments for adolescents. "[I]nvestigators reviewed 53 studies and reported: 'Moderate-quality evidence suggests mental health may be improved during treatment, but robust study is still required. For other outcomes, no conclusions can be drawn.'" *Id.* The report actually "suggested that **these drugs may in effect lock in a trans identity that otherwise might have dissipated** without the drugs." *Id.* (emphasis added).

Notably, "Dr. Cass' team could find **no evidence** that cross-sex hormone treatment in particular **reduces the elevated rate of suicide** deaths among gender-distressed youths." *Id.* (emphasis added).

The Cass Report eviscerates the credibility of WPATH and its SOC. "Between them, the new review papers and the Cass report serve as a stinging rebuke to ... WPATH.... [T]he Cass Review found that

WPATH's guidelines for minors 'lack developmental rigor' and that the document 'overstates the strength of the evidence.'" *Id.*

F. The Sex-Change Surgical and Pharmaceutical Market Is Worth Billions.

The sex-change market was a nearly $2 billion industry in 2021 and is projected to reach $5 billion a year within 10 years.[20] When the Affordable Care Act began to cover sex change surgeries in 2016, the number skyrocketed by 150 percent the next year.

The Philadelphia Center for Transgender Surgery posts these cost estimates: $140,450 to transition from male to female, and $124,400 to transition from female to male.[21] Astronomical as these numbers are, they are just the prices of the initial operations. Vanderbilt University Medical Center's Dr. Shayne Sebold Taylor told an audience that "just on routine hormone treatment, who I'm only seeing a few times a year, can bring in several thousand dollars … and actually makes money for the hospital."[22]

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[20] D. Housman, "Surgeons Are Going To Make Bank On Sex Change Operations In The Next Decade, Market Report Finds," *Daily Caller* (Oct. 5, 2022).

[21] A. Jackson, "The high cost of being transgender," *CNN* (July 31, 2015).

[22] A. Prestigiacomo, "'Huge Money Maker': Video Reveals Vanderbilt's Shocking Gender 'Care,' Threats Against Dissenting Doctors," *Daily Wire* (Sept. 20, 2022).

Given such conflicts, it is perhaps not surprising that the transgender/medical complex has turned to **pressure tactics to silence dissenting practitioners**, even demanding that they repress their ethical and religious objections to genital mutilation of minors for profit. Vanderbilt health law expert Ellen Wright Clayton threatened staff at Vanderbilt "that any 'conscientious objection' will be met with 'consequences,' and ... told [them] they probably shouldn't be working at VUMC if they don't want to participate in the trans surgeries, which include minor patients." *Id.*

Nor is it just the surgeons and hospitals raking in the windfall. Massive pharmaceutical companies make billions marketing "puberty blocker" drugs on adults and, horrifyingly, pushing them on children too. "Medroxyprogesterone acetate, a common drug in 'gender-affirming therapy,' has long been used to chemically castrate sex offenders."[23] But it is the bread and butter of the "transgender-medical complex."

> Another widely used medication is Lupron, a controversial hormone blocker. Lupron was initially developed to lower testosterone levels in men with prostate cancer, effectively chemically castrating them. It's now used as a puberty blocker in the booming business of "transitioning" children. Lupron

[23] P. Gonzalez, "Gender ideology is a boon to Big Pharma and threat to parental rights," *New York Post* (Aug. 20, 2021).

> manufacturer AbbVie made $726 million on the drug alone in 2018. [*Id.*]

Over 80 years ago, this Court rose in defense of "one of the basic civil rights of man," the right to procreate. "Marriage and procreation," this Court said:

> are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. **In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear**. There is **no redemption for the individual whom the law touches**. Any **experiment which the State conducts** is to his irreparable injury. He is forever deprived of a basic liberty. [*Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (emphasis added).]

Accordingly, this Court found, the state could not impose castration as a punishment for a non-sexual crime, even on a habitual criminal. Now, in a twist both horrible and shocking, the transgender-affirming profiteers demand the right to castrate and otherwise do irreversible damage to innocent children.

The Big Pharma barons readily fund "studies" that assure vulnerable children and confused parents that their drugs will improve the child's mental health. "Stanford University published a ... study on childhood hormone therapy funded by the American Academy of

Child & Adolescent Psychiatry (AACAP), which, according to a Stanford press release, is supported financially by pharmaceutical giants Arbor and Pfizer. Both companies produce hormonal medications used in gender transitions."[24]

According to California physician Dr. Diana Blum, "[i]f Pfizer is producing hormone therapies then of course there's incentives to promote studies that push those. Even though things get published in academic journals, a lot of the funding comes from the pharmaceutical industry." *Id.*

Unlike traditional medical care, which aims to cure illnesses and return patients to their prior healthy state, transgender hormone therapies are necessarily lifelong, as the victim must be drugged for the rest of his or her life, to make sure the body does not return to normal functioning. As Duke University's "Gender Affirming Hormone Therapy" website concedes, "Taking hormone therapy is a lifelong commitment to maintain the changes you seek."[25] Of course, "pharmaceutical companies are more than happy to cater to life-long customers. People who take cross-sex hormones have to set up a regular hormone regimen to maintain the physical characteristics developed by the estrogen or

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[24] L. Duggan, "Trans Activists Funded By Big Pharma Push Biased Research Promoting Medical Transitions For Children," *Daily Caller* (Mar. 6, 2022).

[25] "Gender Affirming Hormone Therapy," *DukeHealth.org*.

testosterone. So when it comes to transgenderism, cash is king."[26]

Dr. William Malone, an endocrinologist with the Society for Evidence-based Gender Medicine, points out that the transgender-medical complex is a witch's brew of "Big Pharma, a vulnerable patient population, and physicians misled by medical organisations or tempted by wealth and prestige." "Questioning America's approach to transgender health care," *The Economist* (July 28, 2022); *see also* "Trans substantiation," *The Economist* (Apr. 5, 2023). "We are completely saturated with corporate influences and lobby groups," Malone said. *Id*. "The only way they will be halted is if a massive number of people are harmed and they get together to sue the people who harmed them." *Id*.

The Circuit Court wisely declined to rely on WPATH positions for multiple reasons, including "the risks of placing the subjects of regulation in charge of regulation," and the risk that WPATH will again "change course in the future." *Skrmetti III* at 478-79. It concluded "expert consensus ... is not the North Star of substantive due process, lest judges become spectators rather than referees in construing our Constitution." *Id*. at 479. Indeed, there are many reasons not to trust pronouncements from the medical community. A new book by physician and Johns Hopkins professor Dr. "Marty" Makary, Blind Spots:

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[26] M. Myler, "Blood Money: The Rise of the Gender Reassignment Industry," *Spectator.org* (Oct. 7, 2023).

When Medicine Gets It Wrong and What it Means (Bloomsbury Publishing: 2024), provides 11 case studies detailing where modern medicine gave Americans the wrong medical advice. He concludes, "when we wing it and issue recommendations based on opinion, we have a lousy track record. Sometimes you'll see that consensus is not driven by science, but by peer pressure." He adds that medicine's "track record of getting big health recommendations wrong begs the question: What else are we doing today that could be wrong?"

Tennessee has an interest in preventing "a massive number of people," in particular minors, from being irreversibly scarred in the interest of the Big Pharma profiteers. SB 1 is a completely rational means of preventing that harm and something well within Tennessee's constitutional police powers to enact. As demonstrated in Section I, *supra*, there is no Equal Protection infirmity with SB 1, and this Court should affirm.

CONCLUSION

For the foregoing reasons, the decision of the Sixth Circuit should be affirmed.

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