No. 23-477

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
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 AMICI CURIAE JODEPH BURGO, PHD, FOUNDATION AGAINST INTOLERANCE AND RACISM, AND GENSPECT IN SUPPORT OF SKRMETTI RESPONDENTS

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INTEREST OF THE AMICI CURIAE[1]

JOSEPH BURGO, PH.D. is an American clinical psychologist and psychoanalyst with more than 40 years' experience in private practice. He works primarily with gender-distressed youth, particularly men who after living as female for a time, detransitioned once they realized that they were gay. Dr. Burgo's clinical experience demonstrates that gender affirming medical care fails to address internalized homophobia in teenage boys, and he respectfully aims to assist the Court by explaining this phenomenon. Internalized homophobia and feelings of gender incongruity are mental health issues, and SB1 properly protects children from irreversible and harmful medical interventions before they come of age.

The FOUNDATION AGAINST INTOLERANCE & RACISM ("FAIR") is an American nonpartisan, nonprofit organization dedicated to advancing civil rights and liberties for all Americans and promoting a common culture of fairness, understanding, and humanity. A central principle of FAIR's vision is the belief that objective truth exists and is discoverable. To serve our mission, we engage in local and national advocacy campaigns designed to promote greater viewpoint diversity by fostering open and civil discourse. FAIR respectfully aims to assist the Court with the arguments presented

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[1] Pursuant to Rule 37, counsel for Amici affirms that no counsel for a party authored this brief in whole or in part and no entity or person, other than Amici, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

in this brief by emphasizing the importance of recognizing and distinguishing between objective and subjective identities in law. It is an objective truth that males and females are biologically distinct in many important respects. In circumstances where such biological distinctions are consequential to the protection of individual rights, judicial scrutiny must be appropriately applied. Failure to maintain and recognize this distinction inherently erodes certain sex-based rights.

GENSPECT is an international, non-partisan, interdisciplinary organization registered and based in the Republic of Ireland. The organization's mission is to promote a healthy, evidence-based approach to sex and gender. It collaborates in the United States and around the world with a diverse range of professionals, transgender individuals, detransitioners, and parent groups to advocate for non-medicalized approaches to gender dysphoria. Genspect is committed to supporting individuals in expressing their true selves without unnecessary medical interventions. Genspect emphasizes the importance of psychological and social support grounded in scientific integrity, and strives to create a world where gender non-conformity is respected and understood.

SUMMARY OF ARGUMENT

In considering the important case before it, the Amici aim to assist the Court by setting forth two arguments. The first argument demonstrates why subjective classifications such as "gender identity" are not tenable within the framework of "the rule of law" principles, and therefore should not receive heightened review of a quasi-suspect status. The second argument discusses how the current practice of "gender-affirming" medicine is discriminatory against gay and lesbian children and youth.

The deconstruction of sex defeats Petitioner's stereotyping argument due to its inconstant utilization of the distinct concepts of gender and sex in its argument. Gender is the subjective sense of self which is influenced by one's social experiences while sex is objectively defined by biology. The concept and definition of transgender status and the definition of Gender Dysphoria ("GD") conflate sex and gender, and embed stereotyping beliefs in that conflation.

Because Gender Dysphoria cannot be understood or described without reference to biological sex and social stereotypes associated with each sex, those attributes must necessarily be described in Tennessee Senate Bill 1 ("SB1").[2] The argument that such description in law is unlawful stereotyping is circular reasoning, and thus lacks clarity and coherence.

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[2] Tenn. Code Ann. § 68-33-101, *et. seq*.

"The rule of law . . . is the great mucilage that holds society together."[3] To support social stability, the principles of the rule of law require that law be clear and predictable, therefore necessitating a theoretical order in law and its application. According quasi-suspect classification to transgender status, which is the same level of scrutiny applied to the category of sex, would necessarily cause conflation of sex and gender in law with ad hoc consequences. Inconsistency and unpredictability in application of law violates the principles of the rule of law. Biological sex is not a suitable comparable for transgender status. Protections for transgender status are within the scope of liberty interests protected by the Fourteenth Amendment's Due Process Clause.

The sex stereotyping that is embedded in the oversimplified definition of Gender Dysphoria and permeates the practice of gender medicine presents a great risk of harm to gay and lesbian children who are typically gender non-conforming children and may suffer from internalized homophobia. In the past, safety protocols were in place to protect gays and lesbians from wrongful transition, but those safeguards have been removed without any empirical support, thereby exhibiting deliberate indifference toward the risk of harm to gays and lesbians.

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[3] *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972).

ARGUMENT

I. Asserting Protection on the Basis of Sex While Deconstructing Sex

Petitioner's argument that SB1 stereotypes the sexes is circular, because SB1regulates medical treatment of stereotyped beliefs about sex. SB1 does not hinder the free development of a child's personality based on sex, rather it prohibits irreversible medical alterations to the body motivated by stereotyped beliefs about sex.

A. Background: The Deconstruction of Sex

Petitioner's assertion that GD is a "medical condition" (Petr.'s Br. 3, 18-19) is unsupported by scientific evidence.[4] GD is a psychiatric condition described in the Diagnostic and Statistical Manual of Mental Disorders ("DSM") as "the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender."[5] The diagnostic criteria for GD in children includes factors such as the desire to play with the other gender, play with the toys of other gender, and rejection of games typically played by one's own gender.[6] Those factors which are

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[4] Expert Decl. of Stephen B. Levine, M.D. ¶¶ 85-88, *L.W. v. Skrmetti*, 679 F. Supp. 3d 668 (M.D. Tenn. 2023) (No. 23-cv-376). ("Levine Decl.").

[5] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2013). ("DSM-5").

[6] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 512 (5th ed. rev. 2022). ("DSM-5-TR").

included in the description of GD and considered in the assessing its presence in a patient reflect social stereotypes of the sexes.

These ideas were borne out of the theories of psychologists Robert Stoller who observed that some people felt an internal subjective sense of self - their gender identity, as he called it - that did not match their biological sex.[7] In short, gender identity reflects "subjective feelings that cannot be defined, measured, or verified by science."[8]

More recently, social theorists such as Judith Butler merged the concept of gender with sex by positing that cultural expectations shape our understanding of the material body,[9] thus starting a trend toward erosion of the distinction between sex and gender. This erosion is reflected in the disappearance of the word sex from DSM 5-TR's discussion of GD, and its definition of gender, which states that "[g]ender is used to denote the public, sociocultural (and usually legally recognized) lived role as boy or girl, man or woman, or other gender."[10] (emphasis added). Social roles are rarely, if ever, "legally recognized" or imposed; the DSM is artfully referring to biological sex recognized by law.

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[7] Robert Stoller, *Sex and Gender: The Development of Masculinity and Femininity* (1968). For a discussion of the origins of the term gender identity *see* Alex Byrne, *More on Gender Identity*, 52 ARCH. SEX BEHAV. 2719–2721 (2023).

[8] Expert Rep. of James M. Cantor, PhD. ¶ 108, *L.W. v. Skrmetti*, 679 F. Supp. 3d 668 (M.D. Tenn. 2023) (No. 00376). ("Cantor Rep.")

[9] Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* xii - xiii (Routledge 2011) (1993).

[10] DSM 5-TR, *supra* note 6, at 511.

The DSM repeats that conflation when it uses the term "assigned gender" in the definition of GD and in its description of the attributes of incongruence, described above

The DSM conflates sex and gender, and thereby elevates the subjective experience of self, derived from stereotypes, to the status of objective fact. That is the deconstruction of sex.

B. Petitioner's Argument Rests on the Deconstructed View of Sex

SB1 regulates medical treatment of gender identity which is understood as a person's deep internal feeling and experience of gender. This sense of self cannot help but be "bound up with and affected by societal gender roles and stereotypes - or, more precisely, by the affected individuals perception of societal gender roles and stereotypes and their personal idiosyncratic meanings."[11]

GD reflects a subjective sense of incongruence between the person's sex and their subjective perception of social stereotypes associated with each sex. However, without medical intervention, the dysphoria desists in most cases.[12] Scientific studies have found that most gender non-conforming children do not become transgender adults, and it is not possible to know

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[11] Levine Decl., *supra* note 4, ¶ 20.

[12] *Id.* ¶¶ 119-129.

whose gender identity remains the same from childhood through adulthood.[13]

SB1 aims to protect children who are still developing their identity from the harmful and irreversible effects of gender medicine. To achieve its objective, SB1 describes the mental health condition and the related medical interventions it aims to regulate. Because Gender Dysphoria cannot be understood or described without reference to biological sex and social stereotypes associated with each sex, those attributes must necessarily be described in SB1. It is psychiatry that is engaged in stereotyping, not the State of Tennessee.

Petitioner's argument that secondary sex characteristics are a matter of social expectation of how a boy or a girl appears (Petr.'s Br. 22) distorts the meaning of stereotyping and is divorced from biological reality. Stereotyping refers to unsupported generic beliefs about a group, but secondary sex characteristics are determined by biology and not by social beliefs. The appearance of secondary sex characteristics is not a social expectation, but a scientifically established fact. There is no medical intervention that can transform the male sex organs into female ones or vice versa.

Arguments based on sex and sex stereotyping are misplaced when the underlying subject itself actively deconstructs sex by promoting stereotyped beliefs and conflating those subjective beliefs with objective biological sex. Petitioner's argument is circular and incoherent

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[13] *Id.* ¶¶ 105-109. Cantor Rep., *supra* note 8, ¶ 113-119. Amicus Curiae Brief of the Society for Evidence Based Gender Medicine, 19-28, *L.W. v. Skrmetti* (U.S. filed Sept. 3, 2024) (No. 23-477).

and its adoption would introduce instability in the application of laws.

II. The Need for Conceptual Order in Constitutional Interpretation

Petitioner urges the Court to recognize transgender status as quasi-suspect (Petr.'s Br. 28) and thereby extend the same protections afforded on the basis of sex. Transgender status is rooted in the individual's inner sense of self and subjective belief about the meaning of sex. Inner feelings are elusive, mutable, and unverifiable, while sex is an objectively definable and verifiable fact. Therefore, according quasi-suspect status to transgender status or gender identity would create conceptual disorder and violate the principles of the rule of law in judicial interpretation.

A. The Rule of Law and the Application of the Equal Protection Clause

The designation of person in the Equal Protection Clause of the Fourteenth Amendment refers to the objective existence of a person, and protects objectively verifiable and immutable characteristics of a person, such as sex or skin color.[14] In contrast, identity refers to how a person perceives themselves, which can be influenced by personal experiences and social interactions over time, therefore making it fluid, dynamic, and unverifiable.

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[14] Alienage is also a protected status. Petitioner argues that the fluidity of transgender status is similar to the changeability of alienage. Petr.'s Br. 30. This is not a valid comparison, because the existence and alteration of alienage occurs through objective and verifiable processes and not mere wishes.

A conflation or equation of objective and subjective identities with a common root will necessarily circumvent the objective identity, and engender a conflict. According to what valid legal criteria would such conflict be then resolved consistently, predictably, and fairly? How would citizens be able to navigate the resulting ambiguity? Therefore, it is necessary to consider these consequences, and the rule of law principles provide the appropriate method for this analysis. A major purpose of the rule of law is to prevent "the Hobbesian war of all against all,"[15] and to protect against disorder.[16]

The concept of the rule of law as a method of evaluating the validity of law and its application is common to major legal systems.[17] Although, scholars debate its specific content, there is general agreement about the purpose and central principles of the rule of

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15 Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM L REV 1, 7 (1997).

16 The following examples illustrate the kind of social disorder that can potentially ensue from equating transgender status with sex based status in law. One day in June 2021, a nude man with an erect penis entered the female section of Wi Spa in Los Angeles based on self-identification as a woman. Wikipedia, *Wi Spa Controversy*. https://en.wikipedia.org/wiki/Wi_Spa_controversy Olivia Land, *Male Rikers Island Inmate Who Was 'Instructed to Claim He was Transgender' Raped Female Prisoner: Lawsuit*, N.Y. POST, Jan. 24, 2024. https://nypost.com/2024/01/24/metro/man-posing-as-trans-woman-raped-female-prisoner-at-rikers-lawsuit/

17 Council of Europe, European Commission for Democracy Through Law (Venice Commission), *Rule of Law Checklist* (2016). Geranne Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights* (2013). Frank I. Michelman, *Law's Republic*, 97 YALE L. J. 1493 (1988).

law.[18] To be valid, the law and its application should support "important general legal values" of justice, freedom, and fairness, with the aim of promoting social stability, and restraining governmental powers.[19] To that end, the rule of law principles require the law to be "clear and determinate," and its implementation be objective, predictable, and consistent.[20]

The category of sex is founded upon objectively verifiable characteristics, and it exists to identify sex-based rights and protections which include relational boundaries. Women's sex-based rights reflect historical conditions and biological differences between men and women that resulted in disadvantages to women in all spheres of life, and the legal efforts to ameliorate those conditions. A man's self-identification as a woman creates no common ground because biology, history, and lived experience will remain different. The conflation of subjective and objective identities would obfuscate the differences that necessitated sex-based protections and by implication erase those protections, thereby reviving and reinforcing the historical oppression that sex-based rights aim to correct.

The right to exclusive spaces is intended to protect women physically and psychologically. Sex segregation in prisons aims to prevent cruel and unusual punishment, by protecting female inmates against rape and physical assault by men who are on average, stronger than women. Sex segregation in competitive sports is

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[18] Fallon, *supra* note 15, at 7-9.

[19] Robert S. Summers, *Principles of the Rule of Law*, 74 NOTRE DAME L. REV. 1691, 1703-4 (1999). Fallon, at 7-9.

[20] Summers, at 1693-4, 1704.

intended to provide women a safe and equal opportunity to compete physically. Sex segregated shelters for battered women exist to minimize the risk of retraumatization. Sex-based data is intended to inform society and policy makers of changes in conditions and behaviors of women so that more suitable policies and laws can be promulgated. Sex-based legal protections were promulgated to mitigate the harms that can result in the absence of differential treatment of men and women. Therefore, conflating subjective and objective identities, and affording transgender status the same standard of judicial review as sex would necessarily erode sex-based protections. "[T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both."[21]

Similarly, spaces for same sex attracted persons exist to facilitate the group's social life against the historical background of oppression and closeted identity. Throughout history, gays and lesbians have been subjected to a range of cruel and degrading treatments from aversion therapy to forced castration, hysterectomy, and lobotomy.[22] Although it is a customary practice to add "T" to "LGB," due to similitude of being departures from cultural norms, sexual orientation and gender identity are dissimilar in quality. Sexual orientation is an objective and verifiable attribute, it does not entail harmful medicalization at any age nor do its associated rights conflict with the rights of others. Thus, sexual orientation stands in stark

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[21] *Ballard v. United States*, 329 U.S. 187, 193 (1946).

[22] Jonathan Ned Katz, *Gay American History: Lesbians & Gay Men in the USA*, 129-134 (1992).

contrast with gender identity which motivates harmful medicalization, and fans out to infringe on the rights of others. Gender identity and sexual orientation are distinct and should not be linked in law or in determination of protections.

The extension of nondiscrimination protections to transgender status is warranted where there is a question of ability or social stereotyping.[23] However, in comparative situations, biological sex would rarely provide a suitable comparable. A law or policy that would circumvent the class of sex by submerging objective sex into subjective gender identity creates an indeterminate class with unpredictable outcomes. More radically, such merger would effectively erase sex as a legal identity. There is no authority for the State to implicitly or explicitly erase an inherent identity. The rule of law principles require that classifications under the Equal Protection Clause not lead to ambiguity and unpredictability in the application of laws.

B. The Rights Asserted by Petitioner are Liberty Interests

i. Personality Rights

"At the heart of liberty is the right to define one's own concept of existence."[24] Gender role, gender expression, and gender identity are aspects of individual identity. Feelings and expressions are aspects of lifestyle, personality, and personal identity, all of which are protected by the right to free expression, the

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[23] *Bostock v. Clayton County*, 590 U.S. 644 (2020).

[24] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992).

right to privacy, the right to free development of personality, and the rights to bodily autonomy and self-determination. The goal of this cluster of rights is to protect private life choices and their public expression. The protection of transgender status is within the scope of this cluster of rights.[25] Those rights are liberty interests, and are protected by the Fourteenth Amendment's substantive Due Process Clause. Liberty rights, however, may meet limitations in the public realm. The government has the "power to regulate actions based on one's self-defined 'concept of existence,'"[26] particularly if the actions injure a person or abuse interests protected by law.[27]

ii. The Rights to Self-determination and Bodily Autonomy

The right to bodily autonomy is a fundamental right. Over a century ago, this Court pronounced that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own

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[25] *See, e.g.*, Eur. Ct. H.R., *Guide on the Case-Law of the European Convention on Human Rights: Rights of LGBTI Persons*, 17 (31 Aug. 2022). The European Court of Human Rights has found that protections for transgender status largely fall within the scope of the right to private life which also encompasses an individual's right to "physical and social identity."

[26] *Lawrence v. Texas*, 539 U.S. 558, 588 (2003). (Scalia, J. dissenting).

[27] *Id.* at 567. (Kennedy, J. majority opinion).

person . . . "[28] Transgender persons possess this right equal to and in the same manner as other persons.

Many advocates of "gender affirming care" for children argue that SB1 violates the right to bodily autonomy and the right to make medical decisions for oneself.[29] This argument overlooks and muddles several fine distinctions by conflating the right to access healthcare with the right to self-determination—by equating self-determination with harm reduction and promotion of well-being; and by viewing protective measures, such as SB1 which intend to minimize harm, as discriminatory. The right to bodily autonomy does not mean that patients can insist upon whatever medical or surgical treatment they might want without regard to medical suitability.[30] Healthcare has boundaries and Tennessee has a compelling interest to regulate medical treatments that the State legislature has found to be "experimental."[31]

III. Sex Matters in Sexual Orientation: Discrimination in Gender Medicine

When the conflation of sex and gender permeates the meaning of homosexuality, as attraction to same

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[28] *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

[29] *See, e.g.*, Amicus Curiae Brief of the American Bar Association, *L.W. v. Skrmetti* (U.S. filed Sept. 3, 2024) (No. 23-477).

[30] President's Comm'n for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Making Health Care Decisions: A Report on the Ethical and Legal Implications of Informed Consent in the Patient-Practitioner Relationship*, Vol. 1, 43-44 (Oct. 1982).

[31] Tenn. Code Ann. § 68-33-101(b).

gender, the existence and validity of homosexuality is in effect denied.

A. Gender Medicine Enables and Reinforces Internalized Homophobia

Studies have shown that confusion or questions about sexuality and sexual orientation; religious beliefs that deem homosexuality to be a sin; family pressure to be heterosexual; and fear, anxiety, and stress about the social implications of being homosexual are all factors in the development of internalized homophobia.[32] Gender medicine interacts with these factors in a way that reinforces them in the mind of the questioning person.

The unfounded blending of gender and sex in relation to sexual orientation and homosexuality can cause harmful confusion to gay and lesbian children and adolescents who are still in the process of forming their personality and understanding their own sexuality. This process of self-knowledge maybe more challenging for gay and lesbian children, if they do not have access to accurate sexuality information, and/or are in a social environment that disapproves of homosexuality.

Lack of accurate information about sexuality, and the gender stereotypes that permeate the definition of GD also animate familial homophobia. Some parents motivated by the fear of having a gay child consent to transitioning of their gender non-conforming child because they would rather have a transgender child

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[32] Am. Psychological Ass'n, *Report on Therapeutic Responses to Sexual Orientation*, 45 (2009) citing at least 12 studies finding the role of these factors in internalized homophobia.

who pretends to be heterosexual than have a gay child.[33]

Despite greater social and legal acceptance of adult homosexuals in our culture, children and adolescents who display gender-atypical behaviors continue to experience disapproval and are penalized by their peers for deviating from traditional gender norms. Primary and secondary school age children typically "police" the gendered behaviors of their fellow students, punishing violations of accepted norms with bullying, harassment, and social exclusion.[34]

The psychological implications of these experiences are not considered by gender medicine. But, such a rejecting and hostile attitude toward the boys who violate gender norms engenders internalized homophobia. A mechanical-sounding term, internalized homophobia fails to capture the devastating effect hostile peers have upon the self-esteem of these boys. Repeated bullying and rejection afflict them with an abiding sense of defect and unworthiness, best understood as an agonizing form of shame. Shame at feeling different from others in a bad way, shame for being an outcast, shame at being a loser.[35]

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[33] Hannah Barnes, *Time to Think: The Inside Story of the Collapse of the Tavistock's Gender Service for Children* 160, 182, 245-6 (2023). *See* the story of Casey Emerick in Pamela Paul, *Gender Dysphoric Kids Deserve Better Care*, N.Y. TIMES, Feb. 4, 2024, at 8.

[34] Yvonne Skipper & Claire Fox, *Boys Will Be Boys: Young People's Perceptions and Experiences of Gender Within Education*, 40:4 PASTORAL CARE IN EDUCATION 391, 391(2021).

[35] Jospeh Burgo, *Shame* 49-53 (2020).

The profound shame that these boys experience may become so unbearable that they will do anything they can to escape it. Though some adolescent boys try desperately to conform to traditional forms of masculinity and pass as heterosexual, passing for most feminine boys seems impossible. With the advent of the gender identity belief system and the propagation of the unscientific sentiment that one can be "born in the wrong body," an alternate escape route presents itself: a shame-ridden boy may now leap at the chance to modify his body through hormones and surgery, and thereby become a "normal heterosexual girl" instead of a defective boy.

The ramifications of labels cannot be underestimated when the individual has suffered parental and/or societal rejection precisely because of that identification and label. That label and its associated social disapprobation may be avoided by changing either one's sexual orientation[36] or by one's gender. The language distortions of the gender identity belief system allows the gay man to identify as a "heterosexual woman" while continuing his homosexual pattern of behavior, thereby presenting an attractive escape route. The affirmation of this falsehood by healthcare providers constitutes an exercise of undue influence through the use of distorted language to reshape reality, with the effect of reinforcing the patient's internalized homophobia.

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[36] A systemic review of psychological literature found that "enduring change to sexual orientation is uncommon" and attempts to change sexual orientation have harmful psychological consequences. Am. Psychological Ass'n, *supra* note 32, at 2-4.

At least two lawsuits have been filed in federal court alleging sex discrimination and gay conversion by gender clinics for failure to evaluate the relationship between the patient's sexual orientation and his purported gender identity and "affirmation" of a purported sexual orientation without reference to sex, prior to approving the patient for harmful and irreversible medical and surgical interventions.[37]

B. Stereotyping in Psychiatry

A large body of research indicates that "childhood cross-sex-typed behavior is strongly predictive of adult homosexual orientation for men."[38] It is also known that, prior to the unprecedented rise in cases that began in the early 2010s, nearly all the cross-sex identified children who presented for treatment at gender clinics were boys; most of them would later desist from cross-sex identification and accept themselves as homosexual.[39]

The cross-sex behaviors demonstrated by this earlier cohort of boys included a preference for the toys, games, and activities of girls; pretending to be a girl in fantasy play, a wish to dress as a girl, and so

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[37] *Carlan v. Fenway Cmty. Health Ctr, Inc.*, No. 1:23-cv-12361 (D. Mass. filed Oct. 12, 2023). *Garcia-Ryan v. Cmty. Health Project, Inc.*, No. 1:24-cv-071117 (S.D.N.Y. filed Sept. 19, 2024).

[38] J. Michael Bailey & Kenneth Zucker, *Childhood Sex-Typed Behavior and Sexual Orientation: A Conceptual Analysis and Quantitative Review*, 31 DEVELOPMENTAL PSYCHOL. 43 (1995). For a comprehensive list of studies *see* Cantor Rep., *supra* note 8 ¶ 115, Table 1.

[39] Richard Green, THE "SISSY BOY SYNDROME" AND THE DEVELOPMENT OF HOMOSEXUALITY 99-113 (1987).

on.[40] All these behaviors are featured in the DSM-5 and DSM-5-TR's diagnostic criteria of GD in children and are taken by advocates of gender affirming care to indicate a gender identity incongruent with one's "sex assigned at birth,"[41] effectively erasing the distinction between gender non-conformity and Gender Dysphoria. The recommended treatment for their dysphoria includes cross-sex hormones and "gender affirming" surgery; pre-pubescent children may also receive medications to halt the progression of normal puberty.

In short, due to the pervasive influence of gender beliefs, boys who demonstrate a preference for toys, games, and activities more typically associated with girls and who would likely have grown up to be gay are being told to embrace their feminine gender identity and begin medicalized treatments. Rather than learning to accept themselves as gender non-conforming gay men as did the earlier cohort treated at gender clinics, boys and young men today are told that hormones and surgery will help them align their body with their "true self." They are encouraged to believe the superficial and unscientific notion that they were born in the wrong body. To further illuminate this situation, a statement from a young gay man who was transitioned when he was 13 years old is provided. (APP.1).

The unscientific belief that one could be born in the wrong body has been accepted as true by the Iranian government, which denies the existence of

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[40] Bailey, *supra* note 38.

[41] *Supra* notes 5, 6.

homosexuals and has adopted a policy of encouraging gender non-conforming children and youth to transition.[42]

There are two fallacious notions at work here: one is the oversimplified portrayal of the psychiatric condition of Gender Dysphoria as being marked by gender non-conformity, and two, the pretense that Gender Dysphoria—and by conflation also gender non-conformity—is a medical condition necessitating radical physical interventions.[43] In practice, these notions in concert lead to de facto conversion of gays and lesbians (many of whom may be confused or suffer from internalized homophobia) to transgender.

The United Nations Independent Expert has reported on these types of practices as "converting" or "neutralizing" sexual orientation. The Independent Expert stated that medical or surgical gay conversion practices "can amount to cruel, inhuman or degrading treatment" under the Convention Against Torture ("CAT"), and also violate the right to non-discrimination and the right to health.[44]

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[42] *Why Iran is a Hub for Sex-Reassignment Surgery*, THE ECONOMIST, Apr. 4th, 2019, at 39.

[43] Petr.'s Br., 4-5.

[44] U.N. Human Rights Council, Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Victor Madrigal-Borloz, *Practices of So-called "Conversion Therapy,"* U.N. Doc. A/HRC/44/53 (15 June-3 July 2020) ¶¶ 49-65. The United States signed CAT in 1988, and it was ratified by the U.S. Senate in 1994.

C. The Removal of Safety Protocols in Gender Medicine and Its Disproportionate Effect on Gays & Lesbians

Not all Gender Dysphoria is the result of a definite cross-sex identity, many may be confused due to the presence of vulnerabilities or co-morbid mental health conditions.[45] Therefore, in the past, differential diagnosis was performed to distinguish between GD and conditions that mimic GD, but in fact were not, to safeguard against harm. However, over the last two decades, the "standards" for gender medicine were progressively reduced. HBIGDA[46] version 6 released in 2001 included an assessment of the patient's comfort with his sexual orientation,[47] but that protocol was removed from the later version 7 issued in 2012 by WPATH[48] (HBIGDA's new name).

The medical safeguard for gays and lesbians seeking transition was removed despite the fact that analysis of cases of regret attributed the reasons to ego-dystonic homosexuality,[49] general identity prob-

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[45] Cantor Rpt., *supra* note 8 ¶¶ 154-162. Levine Decl., *supra* note 4 ¶ 29.

[46] Harry Benjamin International Gender Dysphoria Association.

[47] HBIGDA, *Standard of Care for Gender Identity Disorders*, 13 (6th version 2001).

[48] World Professional Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th version 2012).

[49] Ego dystonic homosexuality (also referred to as ego dystonic sexual orientation) denotes the mental health condition of a person who seeks to change his/her sexual orientation. World Health Organization, *ICD-10: International Statistical Classification of Diseases and Related Health Problems* § F66.1 (10th revision,

lems, and social pressure.[50] Those studies had concluded that there is a need for greater attention to the diagnostic process and the making of differential diagnosis to identify co-morbid conditions.[51] WPATH disregarded those studies, and removed the existing safeguards without any explanation or supporting evidence that the removal would be safe.

There is evidence that the removal was motivated by a belief system that disregards the boundaries of healthcare by redefining the right to bodily autonomy as a right to demand medicine without regard to suitability, and by business objectives to grow the number of transgender patients.[52] Fenway Health, a leading pioneer of this approach, which influenced WPATH,[53] boasted about the resulting growth of its business after it removed safety protocols: "[t]he rapid and sustained growth of Fenway Health's transgender health care, ... might be succinctly summarized by

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2nd ed. 2003). This condition is motivated by internalized homophobia.

[50] Griet De Cuypere & Herman Vercruysse, *Eligibility and Readiness Criteria for Sex Reassignment Surgery: Recommendations for Revision of the WPATH Standards of Care*, 11: 3 INT'L J. OF TRANSGENDERISM 194, 196 (2009).

[51] *Id.* at 200.

[52] Fenway Health, *History of the Fenway Transgender Health Program*, Carlan, *supra* note 37, Ex. I.

[53] Fenway Health's practice is referenced in WPATH version 7, *supra* note 48, at 35.

the mantra from the movie *Field of Dreams*: If you build it, they will come."[54]

A similar dilution of standards occurred in the DSM's diagnostic criteria of GD. The DSM-IV-TR specifically excluded from the diagnosis any cases of "persistent cross-gender identification" motivated by "a desire for any perceived cultural advantages of being the other sex," but the DSM-5 removed that exclusion from its updated diagnostic criteria.[55] ICD-11[56] has gone even further to remove the element of "distress" from its description of GD and simply describes it as a feeling of incongruence and a "desire" for transition.[57]

Gender medicine's oversimplification of GD as gender non-conforming behavior and the refusal to perform differential diagnosis, despite the established evidence that gender non-conformity in childhood is a strong indicator of homosexuality in adulthood, are indicative of an attitude of deliberate indifference toward the harm that it can cause to gay and lesbian children and adolescents. The irreversible interference of gender medicine with the children's free development

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[54] Sari Reisner et. al., *Comprehensive Transgender Healthcare: The Gender Affirming Clinical and Public Health Model of Fenway Health*, 92:3 J. OF URBAN HEALTH 584, 590 (Mar. 2015).

[55] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 581 (4th ed. rev. 2000). ("DSM- IV-TR"). DSM-5, *supra* note 5, 451.

[56] International Classification of Diseases ("ICD") is published by World Health Organization.

[57] Levine Decl., *supra* note 4 ¶ 55.

is arguably a violation of their Constitutional protections.

CONCLUSION

The Amici Curiae respectfully request that the Court deny quasi-suspect classification to transgender status and affirm the ruling of the Sixth Circuit Court of Appeals.

The Amici Curiae respectfully request that the Court acknowledge, in any manner it deems proper, the precarious circumstances that engulf gay and lesbian children who are disproportionately and adversely affected by gender medicine.

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