No. 23-477

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JONATHAN SKRMETTI, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE GOVERNOR OF TEXAS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Greg Abbott is the Governor of Texas.[1] In his capacity as Chief Executive Officer of the State, the Governor is authorized to recommend, execute, and defend Texas's laws. *See* TEX. CONST. art. IV, §§ 1, 9, 10. And Texas, like Tennessee, has enacted legislation to protect minors from the demonstrated and permanent harms of so-called "gender affirming" procedures and services that push children further into dysphoria rather than rescuing them from it. *See* S.B. 14, 88th Leg., R.S. (Tex. 2023). In June 2023, Governor Abbott signed Senate Bill 14 into law.

The Supreme Court of Texas recently upheld this law against state constitutional challenges. *See Texas v. Loe*, 692 S.W.3d 215, 223 (Tex. 2024). Whatever this Court says on the merits about this federal constitutional challenge to Tennessee's law may have important implications for Texas's law. Just as important, however, whatever this Court says about the United States's ability to seek relief on behalf of its citizens *should likewise* have implications for Texas's authority to do the same thing on behalf of Texans.

SUMMARY OF ARGUMENT

The federal government cannot have vaginoplasty surgery to obtain a neovagina. But it nevertheless appears before this Court as the party pressing an Equal Protection Clause challenge to a Tennessee statute that restricts availability of such procedures for minors. "[The United States] has no equal

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than *amicus* or his counsel made a monetary contribution to its preparation or submission.

protection rights of its own." *Haaland v. Brackeen*, 599 U.S. 255, 294 (2023). So, it appears here as *parens patriae*, insisting children in Tennessee *must* be able to have their penises removed and inverted. That may seem substantively perverse, but it is not procedurally unsound.

Historically, this Court has permitted sovereign governments to press claims on behalf of citizens seeking their aggregate well-being in the face of statutes that conflict with the Constitution. Despite recent statements by this Court cutting back on *States'* ability to seek *parens patriae* relief, there is no basis to treat federal and state sovereigns differently. Such dissimilar treatment would not only be inconsistent with countless other doctrines that apply equally to federal and state sovereigns. It would also pervert the premise of *parens patriae* standing—where the federal government is not even seeking the well-being of its citizens in the first place.

This Court cannot duck the question. At least one party invoking the Court's jurisdiction must have standing for the relief sought. And because this Court granted only the United States's petition—and not the petition filed by the private parties in this case—the federal government is the only party seeking relief here. The Court should therefore take this opportunity to clarify that federal and state governments alike may stand in the shoes of their citizens.

ARGUMENT

I. If the Federal Government Has Standing to Pursue Constitutional Claims on Behalf of Its Citizens, then So Do State Governments.

A. The same rules must apply to both sets of sovereigns when standing in the shoes of their citizens.

Historically, sovereign governments, including the States that make up our Union, have had the authority to assert claims on behalf of their citizens—even against *other* sovereigns. *See, e.g.*, *Missouri v. Illinois*, 180 U.S. 208 (1901); *New York v. New Jersey*, 256 U.S. 296 (1921); *Pennsylvania v. West Virginia*, 263 U.S. 350 (1923); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992). Indeed, this Court has observed that "[a]s the representative of all its citizens, the State is the logical and proper party to assert the invasion of the constitutional rights" of its citizens. *Georgia v. McCollum*, 505 U.S. 42, 56 (1992).

Just last year, however, this Court appeared to reverse course. In *Haaland v. Brackeen*, this Court refused to entertain: (1) a sovereign government's (2) equal protection challenge (3) to a statute (4) on behalf of its citizens. 599 U.S. at 294–95. This Court briefly concluded that Texas did not have *parens patriae* standing to claim that a federal statute violated the Constitution. Why? Because Texas "has no equal protection rights of its own." *Id.* at 294. Consider, however, what the Court has before it today: (1) a sovereign government's (2) equal protection challenge (3) to a statute (4) on behalf of its citizens. Under *Brackeen*, that would seem to be a problem

because the United States, too, "has no equal protection rights of its own." *Id.* at 294.

What could possibly justify treating this case differently? The *Brackeen* Court did not say, though it suggested States might be subject to an asymmetrical *parens patriae* rule when suing the federal government. *Id.* at 295 n.11. But that would make little sense. After all, standing doctrine at its core aims to assess whether *the plaintiff—i.e.*, the party invoking the federal court's jurisdiction—has the requisite "personal stake" in the dispute. *See, e.g.*, *Murthy v. Missouri*, 144 S. Ct. 1972, 1985–86 (2024); *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 379–80 (2024); *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021); *Gill v. Whitford*, 585 U.S. 48, 54 (2018). There is simply no basis to carve out a good-for-me-but-not-for-thee rule of standing that turns on who *the defendant* is.

Inventing such an asymmetrical rule would not only distort the doctrine of standing and its focus on plaintiffs. It would also distort countless other doctrines that treat federal and state governments similarly when acting *as* sovereigns. For example, federal and state governments alike are entitled to sovereign immunity in federal court. *Compare The Siren*, 74 U.S. 152 (1868) (federal), *with Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230 (2019) (state).

If all this doctrinal disruption were not enough, a healthy dose of common sense is in order. Obviously, the United States and the States arrayed behind Tennessee have differing views of where the public good lies here. Texas, like Tennessee, believes that subjecting children to experimental surgical and hormonal treatments that increase suicidal ideation and

put them on pathways of care that could make them infertile for the rest of their lives is *not* in the public interest. The federal government should not be able to invoke the *parens patriae* doctrine like a talisman, at least not where its own position so manifestly harms the public interest.

At the end of the day, if the Constitution really does eschew "ideological plaintiffs" who "cannot ride on someone else's injury," *Biden v. Nebraska*, 143 S. Ct. 2355, 2385, 2386 (2023) (Kagan, J., dissenting), that objection must apply to *both* federal and state governments or to *neither* of them.

B. This Court must address the issue because the United States is the only litigant before this Court on writ of certiorari.

In other cases, this Court has granted and consolidated petitions from both public and private litigants—as it did in the student-loan cases. *See, e.g.*, *Dep't of Educ. v. Brown*, 600 U.S. 551 (2023). Doing so allows one party, who may not otherwise have standing, to benefit from the standing enjoyed by another. *Biden*, 143 S. Ct. at 2365 (citing *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 52 n.2 (2006)). For whatever reason, this Court has not done that here. That has important consequences for this case.

Following the Sixth Circuit's decision vacating the district court's preliminary injunction, the private petitioners and the United States as intervenor filed separate certiorari petitions with this Court. *L.W. v. Skrmetti*, petition for cert. pending, No. 23-466 (filed Nov. 1, 2023); *United States v. Skrmetti*, petition for cert. granted, No. 23-477 (filed Nov. 6,

2023). This Court subsequently granted the United States's petition in the instant case but, critically, the private petitioners' petition remains pending. *Id*.

This procedural posture leaves the United States as the only party that seeks to invoke the Court's appellate jurisdiction. And, as this Court has routinely recognized, that places the burden on the United States to show that it has Article III standing. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance."); *see also Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.").

Because that showing is contingent upon the United States's role as a representative of its citizens, this Court must address why the United States enjoys that power while the States do not.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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