

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 Advancing American Freedom;
America First Policy Institute; American Encore;
American Values; Association of Mature American
Citizens; Catholics Count; Center for Political
Renewal (CPR); *et al.*
in Support of Respondents
(*List of Amici Continued on Inside Cover*)**

J. Marc Wheat

Counsel of Record

Timothy Harper (Admitted in DC)

Advancing American Freedom, Inc.

801 Pennsylvania Avenue, N.W.

Suite 930

Washington, D.C. 20004

(202) 780-4848

October 15, 2024 MWheat@advancingamericanfreedom.com

Counsel for Amici Curiae

**Coalition for Jewish Values; Delaware Family Policy Council; Family Institute of Connecticut Action; JCCWatch.org; Tim Jones, Former Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Kansas Family Voice; Men and Women for a Representative Democracy in America; Minnesota Family Council; New Jersey Family Policy Center; North Carolina Values Coalition; Project 21 Black Leadership Network; Stand for Georgia Values; Setting Things Right; Students for Life of America; Texas Values; The Justice Foundation; The National Apostolic Christian Leadership Conference; Tradition, Family, Property, Inc.; Women for Democracy in America; Young America's Foundation; and Young Conservatives of Texas
in Support of Respondents**

QUESTION PRESENTED

1. Whether Tennessee Senate Bill 1 (SB1), Tenn. Code Ann. §68-33-101 et seq., violates the Equal Protection Clause of the Fourteenth Amendment.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF INTEREST OF AMICI CURIAE	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT	2
ARGUMENT.....	3
I. The Federal Government’s Argument in this Case Would Undermine the Federalism that is Essential to the Health of the American Experiment.....	3
II. The Use of Puberty Blockers and Surgical Interventions to Address Gender Dysphoria in Young People Will Rightly be Remembered Alongside Other Forms of Harm to Children.....	6
A. Throughout history, children’s bodies have been subjected to various horrors	7
B. The administration of puberty blockers to healthy minors to prevent or interrupt natural and normal puberty is an unproven practice with the potential to seriously harm children	10
C. Surgical interventions for gender dysphoria intentionally cause irreversible physical destruction of the healthy function of minor’s bodies	16

D. Neither Kids nor their Parents Can Consent to the Mutilation of their Otherwise Healthy Bodies Leading to Permanent Destruction of Natural Function	19
III.The Federal Government’s Interpretation of the Equal Protection Clause in this Case Misunderstands the Relevant Distinction Made by Tennessee’s Law	21
CONCLUSION	24

TABLE OF CITED AUTHORITIES

	Page(s)
Cases:	
<i>Buck v. Bell</i> , 274 U.S. 200 (1927)	23
<i>City of Cleburne v. Cleburne Living Center, Inc.</i> , 473 U.S. 432 (1985)	21
<i>Cunningham v. Beavers</i> , 858 F.2d 269 (5th Cir. 1988)	22
<i>Dobbs v. Jackson Women’s Health</i> , 142 S. Ct. 2228 (2022)	4
<i>Hedgepeth ex rel. Hedgepeth v. Washington Metro. Area Transit Auth.</i> , 386 F.3d 1148 (D.C. Cir. 2004)	21
<i>Kimel v. Fla. Bd. of Regents</i> , 528 U.S. 62 (2000)	22
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923)	20
<i>Moore v. East Cleveland</i> , 431 U.S. 494 (1977)	20
<i>New York v. Ferber</i> , 458 U.S. 747 (1982)	22
<i>Obergefell v. Hodges</i> , 576 U.S. 644 (2015)	3, 4, 6
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	20
<i>Roe v. Wade</i> , 410 U.S. 113 (1973)	4

<i>Skinner v. Oklahoma</i> , 316 U.S. 535 (1942)	19, 23, 24
<i>Smith v. Organization of Foster Families</i> , 431 U.S. 816 (1977)	20
<i>United States v. Virginia</i> , 518 U.S. 515 (1996)	4, 5
<i>Vacco v. Quill</i> , 521 U.S. 793 (1997)	23
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997)	5, 20
 Statutes & Other Authorities:	
U.S. Const. art. I, § 2	21
U.S. Const. art. I, § 3	21
U.S. Const. art. II, § 1	21
18 U.S.C. § 116	9
E. Abbruzzese, Stephen B. Levine, Julia W. Mason, <i>The Myth of “Reliable Research” in Pediatric Gender Medicine: A Critical Evaluation of the Dutch Studies—and Research That Has Followed</i> , 49 Journal of Sex and Marital Therapy 673 (2023).....	13
<i>Ancient Carthaginians Really Did Sacrifice Their Children</i> , University of Oxford (Jan 23, 2014) https://www.ox.ac.uk/news/ 2014-01-23-ancient-carthaginians-really-did- sacrifice-their-children	7, 9, 10
Patrick Barbier, <i>The World of the Castrati</i> 236 (Margaret Crosland trans. 1996).....	8

Baumgartner Restoration, <i>Torn Portrait Conservation: Restoring The Child</i> , June 3, 2024, https://www.youtube.com/watch?v=CuO8v1kR_VU	18
Brief of Amici Curiae Advancing American Freedom et al., <i>M.C. v. Indiana Dep't of Child Servs.</i> , No. 23-450	20
Dr. Hillary Cass, <i>Independent Review of Gender Identity Services for Children and Young People</i> 174, https://cass.independent-review.uk/home/publications/final-report/	11, 12, 13, 14, 15, 16
Lindsey Dawson and Jennifer Kates, <i>Policy Tracker: Access to Gender Affirming Care and State Policy Restrictions</i> , Kaiser Family Foundation (Aug. 27, 2024) https://www.kff.org/other/dashboard/gender-affirming-care-policy-tracker/	5
Fact Sheet on Female Genital Mutilation or Cutting, Office of Women's Health, Department of Health and Human Services, https://owh-wh-d9-dev.s3.amazonaws.com/s3fs-public/documents/fact-sheet-fgmc.pdf	9
The Federalist No. 10 (James Madison) (George W. Carey and James McClellan, eds., <i>The Liberty Fund</i> 2001).....	6
Edwin J. Feulner, Jr., <i>Conservatives Stalk the House: The Story of the Republican Study Committee</i> , 212 (Green Hill Publishers, Inc. 1983)	1

Amanda Foreman, <i>Why Footbinding Persisted in China for a Millennium</i> , Smithsonian Magazine (Feb. 2015) https://www.smithsonianmag.com/history/why-footbinding-persisted-china-millennium-180953971/	8
Moti Gorin, <i>What is the Aim of Pediatric “Gender-Affirming” Care?</i> , 54 Hastings Center Report 15 (2024).....	16
Hannah Grossman, <i>Influential Trans Care Doctor Once Warned Puberty Blockers Could Cause Permanent Sexual Dysfunction</i> , Fox News (May 23, 2022 4:24 AM) https://www.foxnews.com/media/influential-trans-care-doctor-once-warned-puberty-blockers-could-cause-permanent-sexual-dysfunction	14
Yinghua Jia, <i>The Last Eunuch of China: The Life of Sun Yaoting</i> 12 (Sun Haichen trans. 2008) https://archive.org/details/lasteunuchofchin0000jiay/mode/2up	7
Jewel Llamas, <i>Female Circumcision: The History, the Current Prevalence, and the Approach to a Patient</i> at 1 (April 2017) https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Llamas-Paper.pdf	9
<i>M.C. v. Indiana Dep’t of Child Servs.</i> , No. 23-450 (Petition for Certiorari denied Mar. 18, 2024)	20

- Eliza Mondgreen, *NYT Columnist Refuses to Accept Cass Review Findings*, UnHerd (Aug. 14, 2024 1:00 PM) <https://unherd.com/newsroom/nyt-columnist-refuses-to-accept-cass-review-findings/>12
- Office of Population Affairs,
Gender-Affirming Care and Young People,
Department of Health and Human Services
<https://www.opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf>.....17, 18
- Lydia Polgreen, *The Strange Report Fueling the War on Trans Kids*,
The New York Times (Aug. 13, 2024)
<https://www.nytimes.com/2024/08/13/opinion/cass-report-trans-kids.html>12
- Research Into Trans Medicine has Been Manipulated*, The Economist (July 27, 2024)
<https://tinyurl.com/46esdsr6>11
- Leor Sapir, *What Does the DOJ Not Want Americans to Know?*,
City Journal (July 12, 2024) <https://www.city-journal.org/article/what-does-the-doj-not-want-americans-to-know>11
- Alanna Skuse, *Surgery and Selfhood in Early Modern England* 17
(Cambridge University Press 2021)7
- Stop the Harm Database,
<https://stoptheharmdatabase.com/about/>
.....16, 17, 18

STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law.¹ AAF “will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,”² and believes that States have the authority and responsibility to protect children from intentional permanent physical harm and that so-called gender transition is a danger to any child to whom it is presented as an option. AAF files this brief on behalf of its 15,145 members in the Sixth Circuit including 2,844 members in the state of Tennessee.

Amici America First Policy Institute; American Encore; American Values; Association of Mature American Citizens; Catholics Count; Center for Political Renewal (CPR); Coalition for Jewish Values; Delaware Family Policy Council; Family Institute of Connecticut Action; JCCWatch.org; Tim Jones, Former Speaker, Missouri House, Chairman, Missouri Center-Right Coalition; Kansas Family Voice; Men and Women for a Representative Democracy in America; Minnesota Family Council; New Jersey Family Policy Center; North Carolina

¹ No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

² Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

Values Coalition; Project 21 Black Leadership Network; Stand for Georgia Values; Setting Things Right; Students for Life of America; Texas Values; The Justice Foundation; The National Apostolic Christian Leadership Conference; Tradition, Family, Property, Inc.; Women for Democracy in America; Young America's Foundation; and Young Conservatives of Texas believe that the States must be allowed to protect children from ideologically driven chemical and surgical interventions.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Children have the right not to have their bodies chemically or surgically altered in a way that interferes with natural development or destroys natural function, when not medically necessary. Further, children not only have present rights to bodily integrity. They have the right not to have their development interfered with in a way that would prevent them from exercising their rights fully as adults. Tennessee sought to protect that right when it adopted as law SB1, the law at issue in this case. The Court should rule for Respondents for several reasons.

First, with the increasing concentration of power in the Federal Government and the concomitant conquest in the last several decades of areas of law traditionally regulated by the States, America has moved further and further from the federalist system established by the Constitution and the states that ratified it. The desire to impose a one-size-fits-all policy for the entire nation may be politically popular on any number of issues, but it flies

in the face of the Constitution. Caution and restraint are called for.

Second, the Constitution was ratified by the People through their states with an understanding that the vast majority of government work that impacts the daily life of the people would be carried out by state governments. With the ratification of the Reconstruction Amendments, the Federal Government was empowered to take a more active role in protecting the fundamental rights of the people against State abuses. However, the general relationship between the States and the Federal Government was not altered. The Federal Government remained a government of limited and enumerated powers and States retained their general power to protect the basic rights of their citizens.

Finally, the Federal Government's argument in this case that Tennessee is violating the Equal Protection rights of minors in the State experiencing gender dysphoria, if adopted, would turn the Equal Protection Clause on its head. For all these reasons, the Court should rule for Respondents.

ARGUMENT

I. The Federal Government's Argument in this Case Would Undermine the Federalism that is Essential to the Health of the American Experiment.

In this case, the Federal Government has intervened to ask the Supreme Court to nationalize the policy preference of one side of a highly contentious political issue. If the Court did so, it would not be the first time. In *Obergefell v. Hodges*, the

Court found that the Constitution protected a right of same sex couples to marry. 576 U.S. 644 (2015). At the time of the Court’s decision, “the American people were engaged in a debate about whether their States should recognize same-sex marriage.” *Id.* at 736 (Alito, J., dissenting). With this decision, the Court “wip[ed] out with a stroke of the keyboard the political process in over 30 States.” *Id.* at 722 (Thomas, J., dissenting).

Similarly, in *Roe v. Wade*, 410 U.S. 113 (1973), the Court “imposed the same highly restrictive [abortion] regime on the entire Nation, and it effectively struck down the abortion laws of every single State,” 30 of which at the time “prohibited abortion at all stages.” *Dobbs v. Jackson Women’s Health*, 142 S. Ct. 2228, 2241 (2022). The Court was right to reverse that decision, returning regulation of this contentious issue to the States.

When the Court found that that Equal Protection Clause prohibited the restriction of admissions to the Virginia Military Institute to men, Justice Scalia called the decision “politics-smuggled-into-law.” *United States v. Virginia*, 518 U.S. 515, 569 (1996) (Scalia, J., dissenting). The Court, he wrote, despite “bemoaning the sorry, bygone days of ‘fixed notions’ concerning women’s education,” nonetheless “favors current notions so fixedly that it is willing to write them into the Constitution of the United States.” *Id.* at 570.

The idea that a boy can become a girl or that a girl can become a boy is the most current of notions, and one that is likely transitory. Evidence shows that we know neither the source of the rise in gender

dysphoria among youth in the West nor the consequences of the hormonal and surgical interventions outlawed by Tennessee. Instead, evidence increasingly suggests what common sense makes utterly clear: mutilating the bodies of children because of their current psychological state is a cruel and absurd response that treats them not as young individuals with a developing sense of identity who deserve to have their futures open, but as the guineapigs of the nascent gender movement.

Recognizing that fact, at least 26 states have restricted or banned what its advocates call “gender affirming care” for minors.³ The Court should not impose as national policy the “current notions” of one ideology, as the Federal Government is asking it to do. America’s federal “system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution.” *United States v. Virginia*, 518 U.S. at 567 (Scalia, J., dissenting).

The Court’s principle, articulated in *Washington v. Glucksberg*, 521 U.S. 702 (1997), that “liberty’ under the Due Process Clause should be understood to protect only those rights that are ‘deeply rooted in this Nation’s history and tradition,’” is intended “[t]o prevent five unelected Justices from imposing their personal vision of liberty upon the American people.”

³ Lindsey Dawson and Jennifer Kates, *Policy Tracker: Youth Access to Gender Affirming Care and State Policy Restrictions*, Kaiser Family Foundation (Aug. 27, 2024) <https://www.kff.org/other/dashboard/gender-affirming-care-policy-tracker/>.

Obergefell, 576 U.S. at 737 (Alito, J., dissenting). The same principle should guide this Court’s application of the Equal Protection Clause. Novel and contentious interpretations of “equality” should not be imposed on the nation by judicial fiat.

Political tensions are running ever higher in American politics, with people across the political spectrum claiming that each new presidential election is the most important in our lifetimes. At least one cause for this tension is likely the effort of interest groups to nationalize their preferred agendas. James Madison expressed his expectation that the size of America would prevent factions from taking control of the national government and bending it to their whims.⁴ What he did not anticipate is that the branch of the federal government Alexander Hamilton thought was the “least dangerous” might be used as a tool for nearly irreversible factional control. The Court should resist the invitation to be so used here.

II. The Use of Puberty Blockers and Surgical Interventions to Address Gender Dysphoria in Young People Will Rightly be Remembered Alongside Other Forms of Harm to Children.

Causing children physical harm is an evil that has doubtless existed in every society throughout human history. Even more tragically, different forms of harm have been considered socially acceptable and even obligatory in many societies at different times in history. In America, such harm is, rightly, nearly universally criminalized. However, one form of such

⁴ The Federalist No. 10 at 47-48 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001)

harm, the chemical or surgical mutilation of children in response to alleged gender dysphoria, is advocated for by many as a form of care. That children in this country are being subjected to this sort of bodily mutilation based on their self-impression is an outrage. But it is not surprising in the context of history.

A. Throughout history, children's bodies have been subjected to various horrors.

Throughout human history, for a variety of reasons, many different peoples have treated children and their bodies with brutality. For example, past civilizations have engaged in child sacrifice and child abandonment.⁵ Other societies have also engaged in many forms of non-lethal, physical child abuse. Some of these practices continued into the relatively recent past. A Chinese man named Sun Yaoting who died in 1996, known as the last eunuch of China after the book that documents his story, suffered the procedure as a child at the hands of his father.⁶ Yaoting convinced his father to perform the procedure with the hope of ultimately gaining influence in the emperor's palace and then using that influence to exact revenge on a local landlord who had wronged his family.⁷

⁵ See, e.g., *Ancient Carthaginians Really Did Sacrifice Their Children*, University of Oxford (Jan 23, 2014) <https://www.ox.ac.uk/news/2014-01-23-ancient-carthaginians-really-did-sacrifice-their-children>.

⁶ Yinghua Jia, *The Last Eunuch of China: The Life of Sun Yaoting* 12, 14 (Sun Haichen trans. 2008) <https://archive.org/details/lasteunuchofchin0000jiay/mode/2up>.

⁷ *Id.* at 10-12.

Castrati were singers who had been castrated before puberty, and thus who had unique and sought-after voices. Poor Italian families would choose this path as both an immediate financial relief—the boys were sent away from the family and thus no longer needed to be fed—and as a path to future financial success.⁸ In the late nineteenth century, “violent diatribes were uttered against a custom which had ‘dishonored’, it was thought, the two previous centuries . . . In future no anathema was too strong for the condemnation of this ‘barbarous’ custom which outraged ‘morality, humanity, and nature.’”⁹ Finally, in 1902, Pope Leo XIII “banished castrati from the Sistine Chapel for ever.”¹⁰

For a thousand years in China, girls had their feet bound, a brutal process that forced their feet to be as small as possible and into the desired shape.¹¹ “Once the foot had been crushed and bound, the shape could not be reversed without a woman undergoing the same pain all over again.”¹²

Female genital mutilation (“FGM”), or female circumcision, remains a common practice in some countries today as well as among some migrant groups in the west, and “[o]ver 100 million women and

⁸ Alanna Skuse, *Surgery and Selfhood in Early Modern England* 17 (Cambridge University Press 2021).

⁹ Patrick Barbier, *The World of the Castrati* 236 (Margaret Crosland trans. 1996).

¹⁰ *Id.* at 126.

¹¹ Amanda Foreman, *Why Footbinding Persisted in China for a Millennium*, *Smithsonian Magazine* (Feb. 2015) <https://www.smithsonianmag.com/history/why-footbinding-persisted-china-millennium-180953971/>.

¹² *Id.*

young girls living today have experienced some form of FGM with millions more being affected annually.”¹³ According to the Office of Women’s Health within the U.S. Department of Health and Human Services, FGM poses serious medical risks in both the short and long terms.¹⁴ Congress has found that “[FGM] is recognized internationally as a human rights violation and a form of child abuse, gender discrimination, and violence against women and girls.”¹⁵

What people in a society find acceptable changes over time and from place to place, sometimes for the better but also sometimes for the worse. Carthage was a city-state in modern Tunisia that existed from about 800 BC until 146 BC.¹⁶ An article published in the journal *Antiquity* in 2013 argued that, despite claims in the preceding decades, the Carthaginians really had engaged in child sacrifice, just as the Romans and Greeks had alleged.¹⁷

Dr. Josephine Quinn of Oxford University, one of the study’s authors, explained that the view that was increasingly common in the 20th century—that

¹³ Jewel Llamas, *Female Circumcision: The History, the Current Prevalence, and the Approach to a Patient* at 1 (April 2017) <https://med.virginia.edu/family-medicine/wp-content/uploads/sites/285/2017/01/Llamas-Paper.pdf>.

¹⁴ Fact Sheet on Female Genital Mutilation or Cutting, Office of Women’s Health, Department of Health and Human Services, <https://owh-wh-d9-dev.s3.amazonaws.com/s3fs-public/documents/fact-sheet-fgmc.pdf>.

¹⁵ 18 U.S.C. § 116 note.

¹⁶ *Ancient Carthaginians Really Did Sacrifice Their Children* *supra* note 5.

¹⁷ *Id.*

the Greek and Roman claims about Carthaginian child sacrifice were “racist propaganda”—is an anachronistic judgment.¹⁸ Dr. Quinn said, “We think of it as a slander because we view it in our own terms. But people looked at it differently 2,500 years ago . . . We should not imagine that ancient people thought like us and were horrified by the same things.”¹⁹ The history of the twentieth century should disabuse us of the assumption that human nature has changed such that these ancient horrors are no longer possible.

In fact, certain horrors of the past are resurfacing today under the guise of care.

B. The administration of puberty blockers to healthy minors to prevent or interrupt natural and normal puberty is an unproven practice with the potential to seriously harm children.

Puberty blockers have been approved by the FDA for treating precocious puberty, the condition in which children begin puberty earlier than is normal or healthy. They are used in such cases to delay puberty until the normal age at which puberty should begin. However, they are being prescribed to arrest the natural pubertal process, not because that process has begun too early or to address some other physical malady, but to address gender dysphoria in young people.

As explained in the Cass Review, a review of gender medicine commissioned by the British government and chaired by Dr. Hilary Cass, the safety of puberty blockers as a temporary fix for

¹⁸ *Id.*

¹⁹ *Id.*

gender dysphoria cannot be extrapolated from their safety as a treatment for precocious puberty.²⁰ When used to delay natural puberty, puberty blockers “are blocking the normal rise in hormones that should be occurring into teenage years, and which is essential for psychosexual and other developmental processes.”²¹

Several justifications have been offered for administering puberty blockers to physically healthy children.²² As the information reviewed by the Cass

²⁰ Dr. Hillary Cass, *Independent Review of Gender Identity Services for Children and Young People* 174. The full report is available for download at <https://cass.independent-review.uk/home/publications/final-report/>. The evidence that the science behind “trans medicine” is unreliable has continued to come in. *Research Into Trans Medicine has Been Manipulated*, *The Economist* (July 27, 2024) <https://tinyurl.com/46esdsr6>. Yet the Federal Government may be acting to cover up the data that would expose that lack of evidence in America. As Leor Sapir explains, the Department of Justice (DOJ) may be trying “to halt release of more information in the Alabama case, as that material could further expose [the World Professional Association for Transgender Health (WPATH)] and shed more light on how [the Department of Health and Human Services] and other executive-branch officials misled the American public about youth gender transition.” Leor Sapir, *What Does the DOJ Not Want Americans to Know?*, *City Journal* (July 12, 2024) <https://www.city-journal.org/article/what-does-the-doj-not-want-americans-to-know>.

²¹ *Id.*

²² If doctors who prescribe puberty blockers to address gender incongruence are confident that there are no unreasonable dangers associated with administering puberty blockers to physically healthy children and adolescents, would such doctors be willing to sign a waiver of the statute of limitations, giving themselves some skin in the game for the risk of future harm to

report shows, the data supporting these justifications ranges from inconclusive to nonexistent.

First, puberty blockers may be intended to help those taking them “pass” as the opposite sex when they are adults. The Cass Review notes that “since most young people are not starting puberty blockers until the age of 15 and above, it is unclear how helpful they might be” for allowing those on them to “pass” later on in life.²³ Further, since a desire to “pass” depends on the continued experience of gender dysphoria, and because the prevalence of its persistence appears to be greatly increased by the administration of puberty blockers, even if puberty blockers did help adults with gender dysphoria “pass,” that would not indicate that the administration of puberty blockers had been or would be acceptable.

Second, puberty blockers are presented as giving children more time to consider whether they want to continue gender transition. That claim grows

the young people they profess to help? After all, as even one critic of the Cass Review has noted, so-called “gender-affirming medical care for adolescents” is “a particularly fraught and contested area of medicine.” Lydia Polgreen, *The Strange Report Fueling the War on Trans Kids*, *The New York Times* (Aug. 13, 2024) <https://www.nytimes.com/2024/08/13/opinion/cass-report-trans-kids.html>. Polgreen’s *New York Times* article has been criticized for “studiously avoid[ing] handling any uncomfortable realities, like what the medical ‘autonomy’ she advocates actually entails or what patients are being asked to consent to: sterility, the loss of sexual pleasure, and life as a guinea pig in an unregulated medical experiment.” Eliza Mondgreen, *NYT Columnist Refuses to Accept Cass Review Findings*, *UnHerd* (Aug. 14, 2024 1:00 PM) <https://unherd.com/newsroom/nyt-columnist-refuses-to-accept-cass-review-findings/>.

²³ Cass *supra* note 20 at 177.

out of Dutch research, the reliability of which has been seriously challenged.²⁴ Some studies have found that over 90% of those who begin taking puberty blockers will eventually take cross-sex hormones.²⁵ While advocates of this approach may suggest that this merely indicates accuracy in the initial diagnosis of gender dysphoria, they have the burden to show that that is in fact the best explanation for the high rate of persistence.

As the Cass Review explains, “A formal diagnosis of gender dysphoria is frequently cited as a prerequisite for accessing hormone treatment. However, it is not reliably predictive of whether that young person will have longstanding gender incongruence in the future, or whether medical intervention will be the best option for them.”²⁶ It is at least as plausible, if not significantly more so, that suppressing natural puberty locks in discomfort with gender that may have otherwise subsided with time. As the Cass Review concludes, the “data suggest that puberty blockers are not buying time to think, given that the vast majority of those who start puberty suppression continue to masculinising/feminising hormones, particularly if they start earlier in puberty.”²⁷ The question, of course, is whether

²⁴ E. Abbruzzese, Stephen B. Levine, Julia W. Mason, *The Myth of “Reliable Research” in Pediatric Gender Medicine: A Critical Evaluation of the Dutch Studies—and Research That Has Followed*, 49 *Journal of Sex and Marital Therapy* 673 (2023).

²⁵ *Id.* at 176.

²⁶ *Id.* at 193.

²⁷ *Id.*

without this intervention, the person's gender dysphoria would have persisted after natural puberty.

Third, puberty blockers are supposed to provide psychological and mental health benefits. However, the Cass Review found that the data to support this supposition are mixed and inconclusive.²⁸ The results may also have been impacted by the lack of a randomized control and a "strong belief that the treatment is effective."²⁹

These supposed benefits are offset by several risks. First, as the Cass Review notes, the administration of puberty blockers may alter "the trajectory of development of sexual and gender identity."³⁰ Sadly, puberty blockers may well prevent a natural resolution of young people's gender identity issues. By preventing the natural pubertal process, young people may well be locked into their mental state rather than developing out of it. Further, even if used as intended, cross-sex hormones may lead to sexual dysfunction and, by biological necessity, to sterility.³¹ It is increasingly clear that starting kids on puberty blockers constitutes not a singular

²⁸ See *id.* at 176-77.

²⁹ *Id.* at 177.

³⁰ *Id.* at 178.

³¹ And, as Dr. Marci Bowers, president of WPATH said, the administration of puberty blockers before a certain stage of pubertal development leads to sexual dysfunction. Hannah Grossman, *Influential Trans Care Doctor Once Warned Puberty Blockers Could Cause Permanent Sexual Dysfunction*, Fox News (May 23, 2022 4:24 AM) <https://www.foxnews.com/media/influential-trans-care-doctor-once-warned-puberty-blockers-could-cause-permanent-sexual-dysfunction>.

intervention, but rather starting them down an unproven path with a high risk of harm.

Second, puberty blockers may well hinder neurocognitive development. As the Cass Review explains:

[A]dolescent sex hormone surges may trigger the opening of a critical period for experience-dependent rewiring of neural circuits underlying executive function (i.e. maturation of the part of the brain concerned with planning, decision making and judgement). If this is the case, *brain maturation may be temporarily or permanently disrupted by the use of puberty blockers, which could have a significant impact on the young person's ability to make complex risk-laden decisions, as well as having possible longer-term neuropsychological consequences.*³²

The research on this issue is, at best, inconclusive. One study found no cognitive difference between those adolescents given puberty blockers for less than a year and those not given puberty blockers at all, “but found worse executive functioning in those treated for more than one year compared to those not treated.”³³ Common sense suggests that delaying puberty, one of the most important physiological and psychological developmental milestones in a person’s life, would have lifelong impacts.

³² Cass, *supra* note 20 at 178 (emphasis added).

³³ *Id.*

Next, the Cass Review argues that, “[i]f puberty suppression is started too early in birth-registered males it can make subsequent vaginoplasty (creation of a vagina and vulva) more difficult due to *inadequate penile development*.”³⁴ Puberty blockers can prevent a child’s sexual development such that, as an adult, he will not have properly developed genitalia.³⁵ Such destruction of young bodies is not unlike those mutilations discussed above of young boys’ and girls’ bodies now rightly seen as barbaric relics.

C. Surgical interventions for gender dysphoria intentionally cause irreversible physical destruction of the healthy function of minor’s bodies.

At least 5,747 minors in the United States have received surgeries of some kind to address their gender dysphoria.³⁶ According to the Department of Health and Human Services (HHS), “[g]ender-[a]ffirming [s]urgeries” include “[t]op’ surgery – to create male-typical chest shape or enhance breasts,” “[b]ottom’ surgery – surgery on genitals or reproductive organs,” and “[f]acial feminization or

³⁴ *Id.* (emphasis added).

³⁵ That these interventions could permanently close doors the importance of which the child or adolescent in question could not possibly understand at his age is not the exercise of autonomy, but its destruction. *See, generally*, Moti Gorin, *What is the Aim of Pediatric “Gender-Affirming” Care?*, 54 *Hastings Center Report* 15 (2024).

³⁶ Stop the Harm Database, <https://stoptheharmdatabase.com/about/> (last visited Oct. 11, 2024).

other procedures.”³⁷ These surgeries are “[t]ypically used in adulthood or case-by-case in adolescence.”³⁸

Described without obfuscation, the utter savagery of these procedures becomes clear. Top surgery, which HHS refers to in this document as creating a “male-typical chest shape or enhanced breasts,”³⁹ “[t]ypically involves bilateral mastectomy (removal of both breasts), followed by contouring of the remaining chest tissue to appear like a male chest,” or for boys, “[e]nlargement of breasts using breast implants.”⁴⁰

Bottom surgery, which HHS simply describes as “surgery on genitals or reproductive organs,”⁴¹ is, “[a] surgery where a healthy penis and testes are removed, and remaining tissue from the penis is used to construct an artificial (pseudo) vagina, clitoris, and labia,” “[a] surgery that uses existing genital tissue, such as an enlarged clitoris following the use of testosterone, to form an artificial/pseudo penis,” or:

The construction of an artificial penis from donor skin, usually from the patient’s own thigh, and an artificial scrotum using tissue from the labia. This

³⁷ Office of Population Affairs, *Gender-Affirming Care and Young People* at 2, Department of Health and Human Services <https://www.opa.hhs.gov/sites/default/files/2022-03/gender-affirming-care-young-people-march-2022.pdf> (last visited Oct. 11, 2024).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Stop the Harm Database, Glossary, <https://stoptheharmdatabase.com/method/> (last visited Oct. 11, 2024).

⁴¹ Office of Population Affairs, *supra* note 37 at 2.

surgery also requires lengthening of the urethra to pass through the artificially created penis, so the patient can urinate normally. A penile implant is also inserted to allow for erection.⁴²

According to HHS, “Gender-Affirming Surgeries” are “Not reversible.”⁴³ Victor Frankenstein would blush at the barbarity.

Tennessee and other states have outlawed these procedures not when they are demanded by objective medical necessity arising from physical ailment but, rather, only when they are performed at the behest of a young person’s subjective feelings about him or herself. However strong those feelings may be, they are no more guaranteed to last into adulthood than the innumerable other strong but fleeting emotional experiences of youth. States are more than justified in ensuring that young people reach adulthood before making these irreversible and life altering decisions for themselves, just as states do in myriad other contexts. That the Constitution or any of its amendments were understood at the time of their ratification as preventing states from taking this sort of action is as absurd as this whole discussion

⁴² Stop the Harm Database, *supra* note 40.

⁴³ Office of Population Affairs, *supra* note 37 at 2. While some government officials take a cavalier attitude towards allowing minors to undergo medically unnecessary irreversible surgical or hormonal interventions, reversibility is a core tenet of ethical art conservation. See, e.g., Baumgartner Restoration, *Torn Portrait Conservation: Restoring The Child*, June 3, 2024, https://www.youtube.com/watch?v=CuO8v1kR_VU. True art is of great value, but people are more valuable and should thus be treated with even greater care and support.

would have been to most Americans prior to the last decade.

D. Neither Kids nor their Parents Can Consent to the Mutilation of their Otherwise Healthy Bodies Leading to Permanent Destruction of Natural Function.

Neither minors nor their parents can consent to medically unnecessary surgical or hormonal interventions that halt natural development or destroy the health and natural bodily function or structures. If the Court adopted the Federal Government's claim that the Equal Protection Clause prohibits States from outlawing surgical and hormonal interventions for minors experiencing gender dysphoria, it would immediately threaten the rights of children and parents around the country and open the floodgates to further dangerous abuses of law.

Just as States set age minimums for consequential activities like drinking, smoking, sex, and making contracts—all things that have both immediate and long-term consequences—States have a compelling interest in ensuring that only properly informed and consenting adults receive unproven elective chemical or surgical procedures.

Minors have the right not to be treated as adults—especially against unreasonable violations of bodily integrity. The procedures Tennessee has outlawed here have the potential to harm minors not only immediately, but permanently, by limiting their decisions into adulthood and thus depriving them of rights like the “right to have offspring.” *Skinner v. Oklahoma*, 316 U.S. 535, 536 (1942). For that reason,

even parental consent cannot justify these interventions.

The Court has rightly held that parents have the right “to direct the education and upbringing of [their] children” *Glucksberg*, 521 U.S. at 720 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). Further, the rights of parents “are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in ‘this Nation’s history and tradition.’” *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977) (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)). In a case where parents are forced to choose between one harm and another out of medical necessity, parents of course have the authority to choose the option that will best preserve as much of their child’s health and future freedom as possible. Nonetheless, this broad right of parents does not include the authority to consent to the non-essential halting of their child’s natural development or destruction of the normal and healthy function of their child’s body.

Finally, a ruling for the Federal Government in this case would open the floodgates to abuse of both children’s and parents’ rights. Around the country, natural families have been ripped apart by overweening state actors.⁴⁴ If the Federal

⁴⁴ *M.C. v. Indiana Dep’t of Child Servs.*, No. 23-450 (Petition for Certiorari denied Mar. 18, 2024). See Brief of Amici Curiae Advancing American Freedom et al., *M.C. v. Indiana Dep’t of Child Servs.*, No. 23-450, at 11-15 (describing numerous instances of families harmed by State intervention on the basis of parental hesitance in the face of a child’s gender dysphoria).

Government were correct in its interpretation of the Equal Protection Clause, the question in the next case will be whether, if children have the right under the Equal Protection Clause not to have the State prohibit them from accessing the interventions at issue in this case, why should that right not also be protected against parents who object? If the rights of parents and children are to be secure against that sort of abuse of the law, the Court must rule now to protect those interests.

III. The Federal Government's Interpretation of the Equal Protection Clause in this Case Misunderstands the Relevant Distinction Made by Tennessee's Law.

The Federal Government's claim that Tennessee's law discriminates against transgender individuals in violation of the Equal Protection Clause fundamentally mischaracterizes the law's scope and thus should be rejected. SB1 has no effect on adults but is instead directed exclusively at minors. This distinction is significant: children are not recognized as a protected class under the Fourteenth amendment, and laws discriminating based on age face only rational-basis review. *See Hedgepeth ex rel. Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148, 1154 (D.C. Cir. 2004) (quoting *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985); citing U.S. Const. art. I, § 2, § 3; U.S. Const. art II, § 1) ("Heightened scrutiny is reserved for classifications based on factors that 'are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.' Youth is

not such a factor—young age is quite often relevant to valid state concerns, as the Constitution itself attests.”).

This Court has said that “[i]t is evident beyond the need for elaboration that a State's interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’” *New York v. Ferber*, 458 U.S. 747, 756–57 (1982). Tennessee's law is a targeted measure aimed at protecting minors and readily meets the rational-basis test.

Moreover, the essence of the Equal Protection Clause mandates that “all persons similarly circumstanced shall be treated alike; it does not require classes of people different in fact or opinion to be treated in law as though they were the same.” *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988). Minors are not similarly situated to adults. Tennessee’s law explicitly acknowledges the inherent vulnerabilities of minors—their limited experience and mental immaturity—as reasons for restricting access to medical procedures the long-term consequences of which they cannot fully comprehend. SB1 does not prohibit adults from seeking or receiving the surgical or hormonal interventions it addresses. Age is thus the distinguishing feature, and age is not a suspect class under the Equal Protection Clause. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000). And, among children (regardless of sex), the law applies evenly: no child can receive the life-altering procedures as an intervention for a diagnosis of gender dysphoria.

Further, SB1, rather than violating the Equal Protection Clause, advances the principle that is

central to that Clause. The principle at the heart of the Equal Protection Clause is that governments should treat those they govern without distinction based on arbitrary or irrelevant characteristics. The Court has explained that the Equal Protection Clause is active when a government distinguished between individuals either based on their membership in a suspect class or when that distinction bears on a fundamental right. *See Vacco v. Quill*, 521 U.S. 793, 799 (1997).

At issue here is “legislation which involves one of the basic civil rights of man,” namely “procreation.” *Skinner*, 316 U.S. at 541. Considering Oklahoma’s criminal sterilization law at issue in that case, the Court explained, “[t]here 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.”⁴⁵ *Id.* at 541.

The Court went on to explain that “[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment.” *Id.* The same is true here if a State government would prohibit the sterilizing mutilation of the bodies of some minors but not others, merely because those not protected suffer from gender

⁴⁵ Certain government officials today, however, seem to take an approach reminiscent to that of Justice Holmes, writing for the majority in *Buck v. Bell*, 274 U.S. 200, 207 (1927) (a case that has not yet been officially overruled), that “Three generations of imbeciles are enough.”

dysphoria. “The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.” *Id.* Every minor in the country deserves to have their fundamental right of bodily integrity protected by the State in which he or she resides. States that fail to do so along the arbitrary line of whether a child experiences or does not experience gender dysphoria violate that right and undermine the principle at the heart of the Equal Protection Clause.

CONCLUSION

The Court should rule for Respondents.

Respectfully submitted,

J. Marc Wheat

Counsel of Record

Advancing American Freedom, Inc.

801 Pennsylvania Avenue, N.W. Suite 930

Washington, D.C. 20004

(202) 780-4848

mwheat@advancingamericanfreedom.com

Counsel for Amici Curiae