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., RESPONDENTS

and

L.W., BY AND THROUGH HER PARENTS AND NEXT FRIENDS, SAMANTHA WILLIAMS AND BRIAN WILLIAMS, ET AL., RESPONDENTS IN SUPPORT OF PETITIONER

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

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER AND RESPONDENTS IN SUPPORT OF PETITIONER

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Lead Senate Amicus on Brief

SEN. JEFFREY A. MERKLEY
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REP. MARK POCAN
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REP. FRANK PALLONE, JR.
Ranking Member, House Energy & Commerce Committee

Co-Lead House Amici on Brief

REP. KATHERINE CLARK
House Democratic Whip

SEN. RICHARD J. DURBIN
Senate Majority Whip and Chair, Senate Judiciary Committee

REP. PETE AGUILAR
Chairman, House Democratic Caucus

REP. NANCY PELOSI
Speaker Emerita of the House of Representatives

QUESTION PRESENTED

Whether Tennessee Senate Bill 1 (SB1), which prohibits all medical treatments intended to allow "a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to treat "purported discomfort or distress from a discordance between the minor's sex and asserted identity," Tenn. Code Ann. § 68-33-103(a)(1), violates the Equal Protection Clause of the Fourteenth Amendment.

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SUMMARY OF THE ARGUMENT AND STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are 11 United States Senators and 153 Members of the United States House of Representatives (together, "Members of Congress"). A complete list of *amici* appears in the appendix of this brief.

As legislators themselves, *amici* are uniquely situated to provide insight on the legislative process of producing the bills and laws implicated by this case. It is the role of Congress to represent the American people through the legislative process. While Congress legislates on the health care system, it is highly unusual for legislators to dictate medical decisions for individuals who seek care. Congress does not go one-by-one, approving or disapproving doctors' prescription of drugs to their patients.

Unfortunately, certain state elected officials—and even some members of Congress—stoke fear and target hatred towards transgender people. Indeed, public statements by many legislators foment discrimination and spread misinformation that translates into restrictive laws threatening the health, safety, and wellbeing of patients, their families, and their providers. These public statements suggest that these laws are driven by prejudice, and not by science or the responsibility to represent, and protect the freedom, liberty, and equality of, their constituents—which include transgender people. Banning gender-affirming

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their counsel, and their members made a financial contribution to its preparation or submission.

care ignores medical science and squarely contradicts the standard of care for the treatment of gender dysphoria. This unscientific approach needlessly (and paternalistically) intrudes on an individual's decisions about their own medical care, made in partnership with their medical providers. And it can also be dangerous.

Even beyond the specific issue of gender-affirming care, Tennessee's actions here are problematic. Anyone would be skeptical of a decision to suddenly ban the use of an effective, long-standing treatment for, *e.g.*, cancer. And banning a disfavored group from choosing such a treatment while allowing others to receive it should be heavily scrutinized—both as a matter of policy and of constitutional law.

State legislatures across the country—including in Tennessee—are singling out marginalized children and excluding them from medically-necessary treatment. They ignore science and put adolescents' lives at risk. Before this flurry of bills targeting transgender people goes any further, *amici* urge the Court to intervene and reverse.

ARGUMENT

I. The Court should be highly skeptical of legislation banning safe and effective therapies that comport with the standard of care.

As an institution, the legislature is intended to represent constituents in the lawmaking process, not to exert medical expertise to treat individual patients. Health care legislation must be approached with that recognition and with enough humility to give due weight to the expert input of medical professionals, the experiences of patients, and the scientific data.

Otherwise, laws risk interfering with the effective administration of necessary medical care—or worse, harming patients.

This Court has previously expressed skepticism of political actors inserting themselves into medical decisionmaking. In *Gonzales* v. *Oregon*, 546 U.S. 243, 266 (2006), the Court recognized Congress's wisdom in refusing "to cede medical judgments to an executive official who lacks medical expertise." There, the Court rebuffed the Attorney General's attempt to forbid physicians from prescribing certain drugs for use in physician-assisted suicide. *Id.* at 248–249. Congress had (rightly) denied the Attorney General the "authority to make quintessentially medical judgments." *Id.* at 267. Rather, whether "any particular drug may be used for any particular purpose" is a question best left to medical experts. See *id.* at 268.

The Court should afford the same skepticism to legislation banning a politically marginalized group from choosing to undergo certain treatments—particularly where a law has been passed in spite of the available science. Every major medical association agrees that gender-affirming care—including hormone therapy—is safe, effective, and necessary to treat certain conditions. These therapies are backed by "[a] substantial body of evidence—including cross-sectional and longitudinal studies as well as decades of clinical experience" showing "that these medical interventions work." Pet.App. 59a (White, J., dissenting) (summarizing evidentiary submissions). And every major professional association of medical providers in the United States has "endorsed the guidelines" recommending gender-affirming hormone therapy use.

Id. 60a. Yet despite knowing this, Tennessee has banned it.

That puts the government exactly where it should hesitate to be: between a patient seeking critical care and the health care providers seeking to treat that patient. Concerning adolescents, the people best situated to make decisions about gender-affirming care are the patients, their parents, and their health care providers—not politicians. Governors on both sides of the aisle have recognized this core dynamic and vetoed laws similar to Tennessee's. The Governor of Kentucky explained that a bill banning gender-affirming care for transgender youth in Kentucky, among other things, would "allow[] too much government interference in personal healthcare issues." *Veto Message from the Governor of the Commonwealth of Kentucky Regarding Senate Bill 150 of the 2023 Regular Session* (Mar. 24, 2023).[2]

Ohio's Governor recognized the same: "Were I to sign Substitute House Bill 68 * * * Ohio would be saying that the State, that the government, knows what is best medically for a child * * * . I can think of no example where this is done not only against the decision of the parents, but also against the medical judgment of the treating physician and the treating team of medical experts." *Statement of the Reasons for the Veto of Substitute House Bill 68* (Dec. 29, 2023).[3] And the Governor of Arkansas concluded that the similar law there would "creat[e] new standards of legislative interference with physicians and parents" by "overriding parents, patients and health care experts." *Vetoes*

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[2] https://perma.cc/65XJ-V8WQ

[3] https://perma.cc/3XK5-WZ4V

as Utilized by Arkansas' Governors for Biennial Periods 1973-2023, at 77 (Ark. Dept. of Fin. and Admin., Office of Budget 2023).[4] "[T]he state should not presume to jump into the middle of every medical, human, and ethical issue." *Ibid.*

Here, Tennessee intentionally discriminates in the provision of health care on the basis of sex by denying transgender adolescents (and not cisgender adolescents) access to certain therapies. On these facts, *amici* agree with the United States and the respondents in support of petitioner that such discrimination warrants heightened scrutiny. In fact, heightened scrutiny is particularly important here because this law is diametrically opposed to scientific consensus. Courts should look carefully at such laws, not give them a pass. Tennessee's justifications (thin as they are) deserve close scrutiny, as does the fit between the law and the interest Tennessee purportedly advances. The safety—and in some instances the lives—of young people are at stake. *E.g.*, Pet.App. 270a–272a (lack of access to care endangers patients' lives); accord *Veto Message supra* n.3 (veto message from the Governor of Ohio stressing that vetoing anti-transgender legislation "is about protecting human life").

Patients, their parents, and their health-care providers are best situated to decide about any given treatment for gender dysphoria. Nothing in the record justifies Tennessee intervening in such medical decisionmaking. To the contrary, banning these therapies for gender dysphoria poses significant risk of harm to adolescents.

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[4] https://perma.cc/V7FE-QPM9

II. The Court should carefully examine the deeply troubling role that animosity towards transgender people has played in state legislation.

The Supreme Court has a storied history of scrutinizing state legislation to protect maligned minorities from discrimination. This Court has long been suspicious of "disadvantage[s] imposed" by legislation "born of animosity toward the class of persons affected." *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). And it has recognized that where, "for centuries there have been powerful voices to condemn" a vulnerable minority, the "Court's obligation is to define the liberty of all, not to mandate its own moral code." *Lawrence* v. *Texas*, 539 U.S. 558, 571 (2003) (quotation omitted). Thus, the Court has not hesitated to invalidate Legislative actions taken "not to further a proper legislative end but to make [a politically unpopular group] unequal to everyone else." *Romer*, 517 U.S. at 635.

Disturbingly, several signs suggest that laws like SB1 were passed with the purpose to make transgender adolescents "unequal to everyone else" for no "proper legislative end." Cf. *ibid.* There has been a national push to pass laws targeting the transgender community. These efforts appear part of the "slew of anti-LGBT laws [that] have been passed in some parts of the country," which members of this Court have warned "rais[e] the specter of a 'bare . . . desire to harm a politically unpopular group.'" *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 638 (2023) (Sotomayor, J., dissenting) (quoting *Romer*, 517 U.S. at 634) (citations omitted).

Tennessee is a hotbed of such legislation. There, lawmakers "are on the verge of enacting more than

twice as many anti-LGBTQ+ laws as any other state." Kimberlee Kruesi, *Tennessee Legislators Approve Criminalization of Adults Who Help Minors Obtain Gender-Affirming Care*, PBS (Apr. 25, 2024) (quoting Cathryn Oakley, Senior Director of Legal Policy, Human Rights Campaign).[5] In the 2023–2024 legislative session alone, Tennessee has introduced 40 such anti-LGBTQ+ bills. See *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, Am. Civil Liberties Union (last visited Sept. 3, 2024).[6] Some directly restrict medical care. Others would block Tennessee's Medicaid managed care plans from covering any gender-affirming treatments—even for adults and even where federal law requires coverage. See Melissa Brown, *Tennessee Senate Passes Youth Gender Transition Ban as Legal Fight Looms*, Tennessean (Feb. 13, 2023).[7] Still others would forbid consideration of whether an adoptive parent would support and accept a youth's sexual orientation or gender identity. *Ibid.*; Tenn. Code Ann. §§ 37-6-101 *et seq*. The net result not only discriminates against transgender people, but forces them into the shadows.

Tennessee is not alone. As of June 28, 2024, more than five hundred anti-LGBTQ+ bills have been introduced in States nationwide. See *Mapping Attacks*, *supra* n. 6. A number of States have banned some form of gender-affirming care.[8]

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[5] https://perma.cc/HN3G-PKV8

[6] https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024

[7] https://perma.cc/8MHA-GR48

[8] See, *e.g.*, Ala. Code Ann. § 26-26-4 (all treatment); Ark. Code Ann. § 20-9-1502(a) (same); Fla. Stat. § 456.52(1) (same);

A litany of disturbing statements have accompanied this legislation. Politicians have labeled "transgenderism" as "filth." Megan Lebowitz, *Anti-LGBTQ Rhetoric Plays a Prominent Role in First Night of RNC*, NBC News (July 15, 2024).[9] Members of Congress have called providing necessary care "barbarism." *The Dangers and Due Process Violations of "Gender-Affirming Care" for Children: Hearing Before the H. Judiciary Subcomm. on Constitution and Limited Gov't*, 118 Cong. 2–3 (July 27, 2023). Despite long-standing recognition as the appropriate care for gender dysphoria, others label gender-affirming hormone treatment "medical experimentation." Letter from the Committee on Energy and Commerce to the Honorable Xavier Becerra (May 22, 2024).[10] And despite the medical consensus supporting the use of gender-affirming care, politicians suggest it is "child abuse." *E.g.*, Letter from Governor Greg Abbott to Jaime Masters (Feb. 22, 2022);[11] Daniel Trotta, *DeSantis Signs Florida Ban on Transgender Treatment*

Ga. Code Ann. § 31-7-3.5 (same); Idaho Code Ann. § 18-1506C (same); Ind. Code § 25-1-22-13 (same); Iowa Code § 147.164 (same); Ky. Rev. Stat. Ann. § 311.372 (same); La. Rev. Stat. Ann. § 40:1098.2 (same); Miss. Code Ann. §§ 41-141-1 *et seq.* (same); Mo. Rev. Stat. Ann. § 191.1720 (same); Mont. Code Ann. §§ 50-4-1001 *et seq.* (same); N.C. Gen. Stat. §§ 90-21.150 *et seq.* (same); N.D. Cent. Code § 12.1-36.1-02 (same); Neb. Rev. Stat §§ 71-7301 *et seq.* (same); Ohio Rev. Code Ann. §§ 3129.01 *et seq.* (same); Okla. Stat. tit. 63, § 2607.1 (same); S.C. Code Ann. §§ 44-42-310 *et seq.* (same); S.D. Codified Laws §§ 34-24-33 *et seq.* (same); Tex. Health & Safety Code §§ 161.701 *et seq.* (same); Wyo. Stat. Ann. §§ 35-4-1001 *et seq.* (same).

[9] https://perma.cc/S6A7-ZPP4

[10] https://perma.cc/J95P-7H8J

[11] https://perma.cc/86NX-NXLM

for Minors, Reuters (May 18, 2023);[12] Megan Henry, *Lawmaker Behind Bill Blocking Gender-Affirming Care Believes Care is 'Child Abuse,'* Ohio Cap. J. (Nov. 16, 2023).[13]

Even in the halls of Congress, *amici* have witnessed efforts to vilify transgender youth, their parents, and their health care providers. *Amici* watch with growing concern as fellow members suggest that gender-affirming care equates to "heinous and evil ideology that is grooming kids" and that parents are "monsters and groomers." 169 Cong. Rec. H1119–1120 (daily ed. Mar. 7, 2023). The lead sponsor of a federal bill criminalizing gender-affirming care not only ignores the science, but has essentially denied the existence of transgender people and gender dysphoria by arguing "you cannot change your gender." *Ibid.* Another Member called a transgender military servicemember a "delusional man thinking he is a woman." H.R. 4365, 169 Cong. Rec. H4601 (Sept 27, 2023). Alarmingly, the House of Representatives itself has voted on eight bills that target or include provisions targeting LGBTQ+ people in 2024 alone—including provisions, adopted via standalone amendments, whose only purpose was to deny care to transgender people. See H.R.J. Res. 165, 118th Cong. (2024) (roll call no. 354); H.R. 8070, 118th Cong. (2024) (roll call no. 279); H.R. 8580, 118th Cong. (2024) (roll call no. 247); H.R. 8752, 118th Cong. (2024) (roll call no. 333); H.R. 8771, 118th Cong. (2024) (roll call no.

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[12] https://www.reuters.com/world/us/desantis-signs-florida-ban-gender-affirming-treatment-transgender-minors-2023-05-17/

[13] https://perma.cc/QYE2-JLXS

335); H.R. 8772, 118th Cong. (2024) (roll call no. 352); H.R. 8774, 118th Cong. (2024) (roll call no. 331); and H.R. 8998, 118th Cong. (2024) (roll call no. 399). Fortunately, none have passed both chambers of Congress.

This dehumanizing language is aimed squarely at transgender people. Hormone therapies that are used to treat gender dysphoria are also used to treat medical conditions (*e.g.*, precocious puberty) in cisgender patients. Yet legislators do not describe those parents as "filth" or "child abusers" or "monsters" when they help their cisgender children access such therapies. That rhetoric appears to be reserved for the families of transgender children alone.

In addition to the rhetoric, Tennessee's hollow justifications point to pretext in this case. Tennessee says that its law protects youth against medical side-effects. *E.g.*, Br. in Opp. 1. But those side effects would be a risk to any individual prescribed a course of treatment, yet Tennessee has not seen fit to entirely ban the use of such therapies. Rather, the therapies remain available to *cisgender* individuals if prescribed by their doctors. Tennessee also suggests that mental health counseling would suffice to treat gender dysphoria. *E.g.*, Br. in Opp. 6, 9. But the state legislature separately pushed a bill that could prevent transgender adolescents from accessing such counseling at all. See H.B. 1378, 113th Gen. Assemb., Reg. Sess. (Tenn. 2023).[14]

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[14] Although that bill failed for now, it would be naïve to think that a legislature emboldened by a ruling in favor of SB1 would not further restrict transgender people's access to health care.

Where, as here, there is a "disconnect between the decision made and the explanation given," this Court is "'not required to exhibit a naiveté from which ordinary citizens are free.'" *Dep't of Com.* v. *New York*, 588 U.S. 752, 785 (2019) (quoting *United States* v. *Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)). The rhetorical fracas surrounding these bills bears no relation to the medical realities of treating gender dysphoria. No one is tricking people into gender dysphoria. Diagnoses require showing an incongruence between sex assigned at birth and gender identity which persists for at least six months and which is accompanied by clinically significant distress or impairment in occupational, social, or other important areas of functioning. *E.g.*, American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 452 (5th ed. 2013). Nor is gender-affirming hormone therapy being forced upon patients seeking care for gender dysphoria. The standard of care requires the patient *and* their parents *and* their health care providers to agree on gender-affirming hormone therapy. The guidelines can be quite specific on this point: the provider must confirm the diagnosis and require that "the adolescent * * * has given informed consent and * * * the parents or other caretakers have consented to the treatment and are involved in supporting the adolescent throughout the treatment process." Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline, Endocrine Society*, 102 J. Clinical Endocrinology & Metabolism 3869, 3878, Table 5 (2017).

Yet state legislatures have chosen to expend an astonishing amount of legislative resources targeting a politically marginalized population that represents

roughly one percent of the U.S. population. See *What Percentage of the U.S. Population is Transgender?*, USA-Facts (June 3, 2024) (collecting US Census Bureau Household Pulse Survey data).[15] This, too, is quite suspect. Cf. *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 613 (4th Cir. 2020), cert. denied, 141 S.Ct. 2878 (2021).

Across the United States, proponents of these bills have made their animosity toward transgender people clear. They have done so in interviews, in strategy presentations, in letters, in committee hearings, in floor speeches, and elsewhere—many more times than can be discussed in one brief. Although inferences of improper or pretextual legislative purpose should be rare, the public record here supports one. It is clear to *amici* that these bills are pressed not for legitimate governing purposes. The bills target a small, marginalized minority and deny its members necessary health care that remains available to others. The bills contradict not only medical science, but long-established standard of care for patients seeking treatment. And rhetoric of the proponents bears no relation to the reality experienced by patients and their families. For that reason, among many others, this Court should heavily scrutinize SB1—and hold it unconstitutional.

CONCLUSION

The current rash of bills targeting transgender people is merely the latest round of discrimination faced by transgender individuals. Lower courts have cataloged the "widespread private opprobrium and governmental discrimination" faced by transgender

[15] https://perma.cc/J3SC-W9XW

individuals. *Doe* v. *Ladapo*, 676 F.Supp.3d 1205, 1218–1219 (N.D. Fla. 2023), appeal pending, No. 24-11996 (11th Cir. filed June 18, 2024), and appeal pending, No. 24-12100 (11th Cir. filed June 27, 2024). Transgender individuals have faced bans from openly serving in the armed forces. *Karnoski* v. *Trump*, 926 F.3d 1180, 1188–1189 (9th Cir. 2019). And, recently, the Fourth Circuit noted that transgender individuals were purposefully excluded from the Americans with Disabilities Act of 1990 and experience frequent harassment in schools, medical settings, and retail stores. *Grimm*, 972 F.3d at 611–612. "The list surely"—and sadly—"goes on." *Id.* at 612.

But *amici* believe enough is enough. Tennessee has no "proper legislative end but to make [transgender adolescents] unequal to everyone else." *Romer*, 517 U.S. at 635. "This [Tennessee] cannot do" (*ibid.*)—so the Court should reverse.

Respectfully Submitted,

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APPENDIX

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APPENDIX A

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Chris Deluzio
Mark DeSaulnier
Debbie Dingell
Lloyd Doggett
Veronica Escobar
Anna Eshoo
Adriano Espaillat
Dwight Evans
Lizzie Fletcher
Bill Foster
Valerie P. Foushee
Lois Frankel
Maxwell Alejandro Frost
Ruben Gallego
John Garamendi
Robert Garcia
Sylvia R. Garcia
Jesús G. "Chuy" García
Jimmy Gomez
Al Green
Raúl M. Grijalva
Jahana Hayes
Steven Horsford
Chrissy Houlahan
Jared Huffman
Jonathan L. Jackson
Sara Jacobs
Pramila Jayapal
Hakeem Jeffries
Henry C. "Hank" Johnson, Jr.
William R. Keating
Timothy M. Kennedy
Ro Khanna
Daniel T. Kildee
Derek Kilmer
Andy Kim
Raja Krishnamoorthi
Greg Landsman
John B. Larson

Barbara Lee
Summer L. Lee
Teresa Leger Fernández
Mike Levin
Ted W. Lieu
Stephen F. Lynch
Doris Matsui
Jennifer L. McClellan
Betty McCollum
Morgan McGarvey
James P. McGovern
Gregory Meeks
Robert J. Menendez
Grace Meng
Gwen S. Moore
Kevin Mullin
Jerrold Nadler
Richard E. Neal
Joe Neguse
Donald Norcross
Eleanor Holmes Norton
Ilhan Omar
Frank Pallone, Jr.
Chris Pappas
Nancy Pelosi
Scott H. Peters
Dean Phillips
Chellie Pingree
Mark Pocan
Katie Porter
Ayanna Pressley
Mike Quigley
Delia C. Ramirez
Jamie Raskin
Deborah K. Ross
Raul Ruiz, M.D.
Patrick K. Ryan
Andrea Salinas
Linda T. Sánchez
John P. Sarbanes
Mary Gay Scanlon
Jan Schakowsky
Adam B. Schiff
Bradley S. Schneider
Kim Schrier, M.D.
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Brad Sherman

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Eric Sorensen
Darren Soto
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Melanie A. Stansbury
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