No. _____

IN THE
Supreme Court of the United States

JANE DOE 1, ET AL.,
Petitioners,
v.
COMMONWEALTH OF KENTUCKY EX REL. DANIEL CAMERON, ATTORNEY GENERAL OF THE COMMONWEALTH OF KENTUCKY,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

SHANNON MINTER
CHRISTOPHER F. STOLL
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market St., Suite 370
San Francisco, CA 94102

COREY SHAPIRO
CRYSTAL FRYMAN
KEVIN MUENCH
ACLU OF KENTUCKY FOUNDATION
325 West Main St.
Louisville, KY 40202

BENJAMIN M. EIDELSON
1525 Massachusetts Ave.
Cambridge, MA 02138

DAVID D. COLE
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th St. NW
Washington, DC 20005

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

STEPHANIE SCHUSTER
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004

LAURIE EDELSTEIN
JENNER & BLOCK LLP
455 Market St.
Suite 2100
San Francisco, CA 94105

JOCELYN A. SITTON
LILLIAN MCGUIRE
JENNER & BLOCK LLP
353 North Clark St.
Chicago, IL 60654

QUESTIONS PRESENTED

In 2023, the Kentucky Legislature enacted a blanket ban on the use of certain medical treatments for transgender minors. The ban applies when the treatments are used "for the purpose of attempting to alter the appearance of, or to validate a minor's perception of, the minor's sex, if that appearance or perception is inconsistent with the minor's sex." Ky. Rev. Stat. § 311.372(2) (the "Treatment Ban"). A federal district court preliminarily enjoined the Treatment Ban, but the Sixth Circuit reversed the injunction, upholding the Treatment Ban under rational basis review. The questions presented are:

1. Whether, under the Due Process Clause, the Treatment Ban should be subjected to heightened scrutiny because it burdens parents' right to direct the medical treatment of their children.

2. Whether, under the Equal Protection Clause, the Treatment Ban should be subjected to heightened scrutiny because it classifies on the basis of sex and transgender status.

3. Whether Petitioners are likely to show that the Treatment Ban does not satisfy heightened scrutiny.

LIST OF PARTIES AND PROCEEDINGS

Petitioners are seven transgender minors and their parents. All Petitioners proceeded under pseudonyms in the district court and in the Sixth Circuit. They are: John Minor Doe 1 and his parents, Jane Doe 1 and John Doe 1; John Minor Doe 2 and his father, John Doe 2; Jane Minor Doe 3 and her parents, Jane Doe 3 and John Doe 3; Jane Minor Doe 4 and her parents, Jane Doe 4 and John Doe 4; John Minor Doe 5 and his parents, Jane Doe 5 and John Doe 5; Jane Minor Doe 6 and her parents, Jane Doe 6 and John Doe 6; Jane Minor Doe 7 and her parents, Jane Doe 7 and John Doe 7.

Respondent is Daniel Cameron, the Attorney General of Kentucky. Respondent was not named as a defendant but intervened in the district court and was the sole appellant in the Sixth Circuit.

Defendants in the District Court were William C. Thornbury and Audria Denker, Presidents of the Kentucky Board of Medical Licensure and Kentucky Board of Nursing, respectively. Those individuals did not participate in the Sixth Circuit and are not respondents in this Court.

The proceedings below are:

Jane Doe 1, et al. v. Thornbury, No. 23-5609 (6th Cir.)

Jane Doe 1, et al. v. Thornbury, No. 3:23-cv-00230 (W.D. Ky.)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Jane Doe 1 et al., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of the Sixth Circuit (Pet. App. 1a-110a) is reported at 83 F.4th 460. The decision of the district court (Pet. App. 111a-129a) is reported at 2023 WL 4230481.

JURISDICTION

The judgment of the Sixth Circuit was entered on September 28, 2023. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED:

Ky. Rev. Stat. § 311.372(2), in relevant part, provides:

> [A] health care provider shall not, for the purpose of attempting to alter the appearance of, or to validate a minor's perception of, the minor's sex, if that appearance or perception is inconsistent with the minor's sex, knowingly:
>
> > (a) Prescribe or administer any drug to delay or stop normal puberty; [or]
> >
> > (b) Prescribe or administer testosterone, estrogen, or progesterone, in amounts greater than would normally be produced endogenously in a healthy person of the same age and sex[.]

Ky. Rev. Stat. § 311.372(1)(b) provides:

> "Sex" means the biological indication of male and female as evidenced by sex chromosomes, naturally occurring sex hormones, gonads, and non-ambiguous internal and external genitalia present at birth.

Ky. Rev. Stat. § 311.372(3), in relevant part, provides:

> (3) The prohibitions of subsection (2) [of] this section shall not limit or restrict the provision of services to:
>
> > (a) A minor born with a medically verifiable disorder of sex development, including external biological sex characteristics that are irresolvably ambiguous;
> >
> > (b) A minor diagnosed with a disorder of sexual development, if a health care provider has determined, through genetic or biochemical testing, that the minor does not have a sex chromosome structure, sex steroid hormone production, or sex steroid hormone action, that is normal for a biological male or biological female ….

INTRODUCTION

In 2023, the Kentucky legislature enacted a total ban on the use of puberty blockers and hormones to treat transgender people under the age of eighteen. Ky. Rev. Stat. § 311.372 (the "Treatment Ban"). Specifically, the law bans any use of these therapies "to alter the appearance of, or to validate a minor's perception of, the minor's sex, if that appearance or perception is inconsistent with

the minor's sex"—while expressly exempting treatments for non-transgender minors who present with other conditions. *Id.* § 311.372(2), (3). Even if a transgender adolescent, their parents, and their doctor all agree that the treatment is vital to the adolescent's health and well-being, and even if the treatment represents the accepted standard of care among medical authorities, the Treatment Ban makes it illegal.

This extraordinary law puts young people in Kentucky at well-documented risks of depression, anxiety, and in some cases, suicidality. It usurps parents' traditional authority over important decisions regarding their children's health. It singles out transgender minors, a historically powerless, misunderstood, and vulnerable group. Yet the Sixth Circuit held that the Treatment Ban should be assessed under rational basis review—the same standard that would apply if it regulated optometrists or banned filled milk.

The Sixth Circuit's holding is wrong. The Treatment Ban calls for the application of heightened scrutiny. In the modern era, this Court has *never* applied ordinary rational basis review to a law that so departed from our country's traditional respect for parents' rights and responsibilities, that expressly classified on the basis of sex, or that singled out a vulnerable and politically unpopular group for disfavored treatment. And—as every court to consider the question has held, including the district court in this case—the Treatment Ban cannot withstand review under heightened scrutiny.

This case warrants this Court's review. The Sixth Circuit's decision squarely conflicts with *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022), which

upheld a preliminary injunction against a similar Arkansas law. It is also irreconcilable with decisions from other circuits requiring heightened scrutiny of laws that discriminate against transgender people and laws that ban parents from making health care decisions for their children. And it conflicts with a raft of district court decisions invalidating similar laws based on extensive evidentiary records.

Finally, this case is exceptionally important. In addition to the immediate stakes for transgender adolescents in Kentucky, this case has nationwide ramifications. In the past three years, twenty-one states have banned adolescents from obtaining medical care for gender dysphoria, throwing the lives of young people in these states into disarray. This Court should decide whether these statutes infringe the constitutional rights of transgender adolescents and their families.

STATEMENT OF THE CASE

Petitioners are seven minors and their parents who reside in Kentucky. The minor Petitioners are transgender—that is, their gender identity does not align with their birth sex. Petitioners are harmed by Kentucky's Treatment Ban and filed this suit challenging its constitutionality. The United States District Court for the Western District of Kentucky applied heightened scrutiny and enjoined the Treatment Ban. The Sixth Circuit reversed, ruling that the Treatment Ban should be upheld under rational basis review.

A. Treatment for Gender Dysphoria

"Gender dysphoria" refers to clinically significant distress resulting from the incongruity between a

transgender person's assigned sex and their gender identity. Pet. App. 63a. Gender dysphoria affects less than 1% of minors. Those who do experience it face substantially increased risks of substance abuse, eating disorders, depression, anxiety, and self-harm. *Id.*

Abundant research establishes that the way to treat gender dysphoria is to allow a person to transition—that is, to live congruently with their gender identity. Although psychotherapy may be beneficial, there is no evidence that psychotherapy alone can alleviate gender dysphoria. Moreover, some psychotherapy—that which discourages adolescents from living in alignment with their gender identity—is extremely harmful.

Treatment for gender dysphoria is highly individualized. Typically, transgender people start their transition with a social transition, which may include changing their name, using different pronouns, and wearing clothing typically associated with their gender identity. Pet. App. 64a.

In some cases, resolving gender dysphoria may require medical treatment. No medications are considered before the onset of puberty. *Id.* Because the physical changes associated with puberty are often a source of acute distress for adolescents suffering from gender dysphoria—and because those physical changes cannot be fully reversed—some adolescents and parents opt for "puberty blockers" (gonadotropin-releasing hormone agonists) that pause this process. Later in adolescence, a clinician may prescribe hormone therapy to enable the

development of sex characteristics that align with an individual's gender identity.[1]

The district court made the factual finding that these treatments "are medically appropriate and necessary for some transgender children under the evidence-based standard of care accepted by all major medical organizations in the United States." Pet. App. 115a. That finding is consistent with significant medical research showing that medical treatment for gender dysphoria improves short- and long-term health and quality-of-life outcomes for transgender people, including significantly reducing risks of suicide and self-harm. *See*, *e.g.*, D. Ct. Dkt. #17-2, ¶¶ 29-33; *Id.* # 17-3, ¶ 60.

Prevailing clinical standards adopted by the nation's leading medical organizations recommend a conservative approach to medical treatment.[2] Before any medical

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[1] As the district court noted, "surgical procedures are not at issue in this case." Pet. App. 121a.

[2] The major professional medical and mental health associations in the United States—including the American Medical Association, American Academy of Pediatrics, American Psychiatric Association, and American Psychological Association—have adopted the standards developed by the World Professional Association for Transgender Health ("WPATH") as the prevailing standard of care. The first WPATH standards were published in 1979 and are now in their eighth edition. The current WPATH standards are based on evidence and professional consensus and were developed in the same way as treatment guidelines for other medical conditions. *See* WPATH, *Standards of Care for the Health of Transgender and Gender Diverse People*, 23 Int'l J. Transgender Health S1, S60-S61 (Statement 6.12.b) (8th Version 2022), https://www.wpath.org/publications/soc; *see also* D. Ct. Dkt. # 17-1, ¶¶ 45-54; *Id.* # 17-2, ¶ 8; *Id.* # 17-3, ¶¶ 33-40.

interventions are considered, these standards require an extensive, individualized assessment and medical findings that the patient's condition has been marked and sustained over time. The patient and the patient's family receive detailed information about treatment options and outcomes, as well as the risks, benefits, and effects of any medications under consideration. Adolescents are treated only if the patient agrees and the patient's parents give written consent, and they receive extensive follow-up care, including continuing monitoring of their symptoms and their satisfaction with the direction of treatment.

Medical treatment for gender dysphoria is safe. As the district court found, "[t]hese drugs have a long history of safe use in minors for various conditions." Pet. App. 115a. Indeed, the medications that figure in this protocol have been prescribed to transgender adolescent patients for more than twenty years. D. Ct. Dkt. # 17-3, ¶ 55. Puberty blockers are reversible, and decades of research on the use of puberty blockers as treatment for precocious puberty demonstrate that they do not have long-term implications for fertility. *Id.* # 17-1, ¶ 64; *Id.* # 17-3, ¶ 58. Similarly, hormone treatment poses a low risk of side effects, and withdrawal of hormone therapy generally enables patients to achieve fertility if they so choose. *Id.* # 17-1, ¶¶ 78, 82.

B. The Treatment Ban

In 2023, Kentucky enacted the Treatment Ban, which prohibits adolescents from using puberty blockers and hormones to treat their gender dysphoria while permitting other adolescents to obtain these treatments for other purposes. *See* Ky. Rev. Stat. § 311.372.

The law first defines "[s]ex" as "the biological indication of male and female as evidenced by" various physical features "at birth." *Id.* § 311.372(1)(b). It then provides:

> [A] health care provider shall not, for the purpose of attempting to alter the appearance of, or to validate a minor's perception of, the minor's sex, if that appearance or perception is inconsistent with the minor's sex, knowingly:
>
> (a) Prescribe or administer any drug to delay or stop normal puberty; [or]
>
> (b) Prescribe or administer testosterone, estrogen, or progesterone, in amounts greater than would normally be produced endogenously in a healthy person of the same age and sex[.]

Id. § 311.372(2). If an adolescent is currently receiving a prohibited therapy, the law requires them to terminate it or phase it out. *Id.* § 311.372(6).

Notwithstanding this prohibition on using puberty blockers and hormones to treat gender dysphoria, Kentucky permits physicians to prescribe the same medications in numerous other circumstances. Some of these (such as early puberty) would not be covered by the statute at all. Others are expressly singled out for more favorable treatment in an exception clause. *Id.* § 311.372(3). For example, a minor who was born with "external biological sex characteristics that are irresolvably ambiguous," or who does not exhibit various physical features that are "normal for a biological male or biological female," may use puberty blockers or hormone

therapy to align their body with their felt gender identity. *Id.*

The Treatment Ban was enacted as part of an omnibus statute, Senate Bill 150,[3] targeting transgender youths in multiple respects. For example, one portion of the bill bans the Kentucky Board of Education from even recommending that teachers or students use pronouns for transgender students that correspond to their gender identities. *See* SB 150, § 1. Another portion bans transgender students from using restrooms consistent with their gender identity. *Id.* § 3. Closing off these avenues for social transition and peer acceptance is apt to exacerbate the gender dysphoria suffered by Petitioners and others at the very moment that the State has also banned them and their parents from securing effective treatment for it.

C. This Suit

Petitioners are seven transgender minors and their parents. Six of the minors received the prohibited treatments before the Treatment Ban was enacted with the informed consent of their parents, while one intended to do so.

Extensive record evidence establishes that the minor Petitioners benefited from medical treatment for their gender dysphoria. Petitioner John Minor Doe 1, for example, came out as transgender when he was about eleven years old, and later became suicidal as a result of his gender dysphoria. D. Ct. Dkt. #17-4, ¶¶ 5-6. Follow-

[3] S.B. 150, 2023 Reg. Sess. (Ky. 2023), https://apps.legislature.ky.gov/recorddocuments/bill/23RS/sb150/bill.pdf.

ing extensive consultation with health care professionals, he began receiving medical treatment. His parents "saw an immediate improvement in his emotional and mental health," and described the treatment as "lifesaving and life changing." *Id.* ¶¶ 8-9.

Similarly, Petitioner John Minor Doe 2 came out as transgender in seventh or eighth grade and "felt depressed and distressed by the mismatch between his body and gender identity." D. Ct. Dkt. #17-5, ¶ 6. His father attested that he had "never seen [John Minor] Doe 2 as happy as he is now that he is receiving the treatment," and that John Minor Doe 2 "cannot imagine his life without this medical treatment." *Id.* ¶¶ 8-9; *see also* D. Ct. Dkt. # 17-7, ¶¶ 10-11 (explaining that medical treatment for John Minor Doe 5's gender dysphoria made him "happier, more confident, and more outgoing" and brought about a "profoundly positive change in his life").

Petitioners filed this lawsuit in the Western District of Kentucky challenging the Treatment Ban under the Equal Protection and Due Process Clauses. They named as defendants William Thornbury and Audria Denker, presidents of the Kentucky medical and nursing boards, who were charged with enforcing the Treatment Ban. After the named defendants refused to defend the Treatment Ban, Daniel Cameron, Kentucky's Attorney General, intervened as a defendant.

On June 28, 2023, the district court granted Petitioners' motion for a preliminary injunction. The court held that Petitioners had a strong likelihood of success as to both Equal Protection and Due Process. As to Equal Protection, the court first found that "the minor's sex at

birth determines whether or not the minor can receive certain types of medical care under the law." Pet. App. 117a (citation omitted). The Treatment Ban "therefore discriminates on the basis of sex, and heightened scrutiny is required." *Id.* (internal quotation marks and citations omitted). The court further explained that "barring access to certain medical treatment only to those for whom the treatment is intended to result in non-stereotypical appearance" is "impermissible discrimination for purposes of the Equal Protection Clause." Pet. App. 119a (citation omitted).

The court then held the Treatment Ban failed heightened scrutiny. In the court's view, "the protection of children" was not a "sufficiently persuasive justification given that the statute allows the same treatments" for minors who are not transgender. Pet. App. 120a. As the court explained, "[d]octors currently decide, based on the widely accepted standard of care, whether puberty-blockers or hormones are appropriate for a particular patient." Pet. App. 122a. Rejecting Kentucky's insistence that the Treatment Ban would "protect[] the integrity and ethics of the medical profession," the court concluded that the Treatment Ban "would prevent doctors from acting in accordance with the applicable standard of care." *Id.* (internal quotation marks and citations omitted).

The district court held that Petitioners had established a strong likelihood of success on their Due Process claim as well, because the Treatment Ban infringed parents' "fundamental right under the Due Process Clause to choose [the covered] treatments for their children."

Pet. App. 124a. The court rejected Kentucky's argument that the parent-plaintiffs were seeking a right to "obtain for a child whatever drugs the parent … desires," *id.*, explaining that "every major medical organization in the United States agrees that these treatments are safe, effective, and appropriate when used in accordance with clinical guidelines." Pet. App. 125a. The court therefore held that the Treatment Ban was subject to strict scrutiny and could not satisfy that stringent standard. Pet. App. 125a–126a.

Finally, the district court found that Petitioners would be irreparably harmed by the Treatment Ban and that an injunction would be in the public interest. Pet. App. 126a–127a (citation omitted). It therefore enjoined enforcement of the Treatment Ban. Pet. App. 129a.

The Sixth Circuit consolidated an appeal of the Kentucky injunction with an appeal of a similar injunction from Tennessee and reversed both injunctions. Pet. App. 5a, 6a, 61a. The court did not question either district court's factual findings regarding the safety and efficacy of the medications, but instead concluded that the Treatment Ban (and Tennessee's similar ban) should be upheld under rational basis review. Although only the preliminary injunctions were before the court, its reasoning left no doubt that it would uphold the same laws following a final judgment as well.

As to Petitioners' Due Process claim, the court pointed to the "long tradition of permitting state governments to regulate medical treatments." Pet. App. 23a. The court recognized that, "[a]t one level of generality," the Petitioner parents do "have a substantive due pro-

cess right 'to make decisions concerning the care, custody, and control of their children.'" Pet. App. 25a–26a (quoting *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion)). But the court deemed that traditional right irrelevant here because "[t]his country does not have a custom of permitting parents to obtain banned medical treatments for their children." Pet. App. 26a. "As long as it acts reasonably," the court concluded, "a state may ban even longstanding and nonexperimental treatments for children." Pet. App. 29a.

Turning to Petitioners' Equal Protection claim, the Sixth Circuit first held that the Treatment Ban does not trigger the heightened scrutiny ordinarily afforded to sex-based classifications because it "lacks any of the hallmarks of sex discrimination," such as "prefer[ring] one sex over the other." Pet. App. 37a. The court acknowledged that, under the express terms of the law, the permitted courses of action for an individual (such as using estrogen or testosterone) turn on that individual's sex. Pet. App. 38a. But the court concluded that heightened scrutiny was unwarranted because "the law does not trigger any traditional equal-protection concerns" and instead reflects "biological necessity." Pet. App. 37a, 39a. The court distinguished *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), explaining that *Bostock* addressed Title VII, which "focuses on but-for discrimination," while the Equal Protection Clause "focuses on the denial of equal protection." Pet. App. 45a.

The Sixth Circuit also rejected Petitioners' argument that transgender persons should be treated as a suspect class. The court reasoned that transgender identity is "not necessarily immutable," and that

transgender people are not "politically powerless," at least at the national level. Pet. App. 51a (emphasis omitted). Nor was the Treatment Ban "animus-driven," the court concluded, because any law "premised only on animus toward the transgender community" would have been more thoroughgoing; such a law "would not be limited to those 17 and under." Pet. App. 52a (emphasis omitted).

Finally, applying rational basis review, the court upheld the Treatment Ban, explaining that "[r]ational basis review … requires deference to legislatures, not to medical experts or trial court findings." Pet. App. 54a.

Judge White dissented. She first concluded that the Treatment Ban triggers heightened scrutiny under the Equal Protection Clause because it "facially discriminate[s] based on a minor's sex . . . and on a minor's failure to conform with societal expectations concerning that sex." Pet. App. 76a. "Since sex and gender conformity each 'play an unmistakable role,' . . . in determining the legality of a medical procedure for a minor," she explained, "these statutes should raise an open-and-shut case of facial classifications subject to intermediate scrutiny." Pet. App. 81a (alterations omitted) (quoting *Bostock*, 140 S. Ct. at 1742). Judge White rejected the majority's reliance on the fact that the Treatment Ban does not favor one sex over the other, pointing out that this Court had repeatedly "rejected the notion that a classification escapes heightened review if the classification applies 'equally' to all." Pet. App. 83a.

Applying intermediate scrutiny, Judge White then concluded that the Treatment Ban lacked the requisite connection to a genuine and substantial state interest.

First, the "statutes' texts effectively reveal that their purpose is to force boys and girls to *look* and *live* like boys and girls"— an objective premised on the "'overbroad generalizations about' how 'males and females' should appear and behave" that this Court condemned in *United States v. Virginia*, 518 U.S. 515 (1996). Pet. App. 92a–93a (quoting *Virginia*, 518 U.S. at 533). Second, the district court's "robust factual findings"—in accord with those of all other district courts confronting similar laws—refuted Kentucky's claim that banning medical treatment for gender dysphoria actually serves a health-related interest. Pet. App. 93a.

Judge White also concluded that the Treatment Ban likely violated the Due Process Clause because it "infringe[s] on [parents'] fundamental right to control medical choices for their children, a right deeply rooted in this nation's history and protected as a matter of Supreme Court . . . precedent." Pet. App. 96a. Judge White did not dispute the majority's account of "the government's power over medical treatment in general." Pet. App. 101a. But, she explained, Kentucky "did not ban treatment for adults and minors alike;" it "banned treatment for minors *only*, despite what minors or their parents wish." Pet. App. 102a. "Thus, the issue is not the *what* of medical decision-making. … [but] the *who*—who gets to decide whether a treatment otherwise available to an adult is right or wrong for a child?" *Id.* In Judge White's view, "[o]nce the issue is properly framed, the answer becomes clear: parents have, in the first instance, a fundamental right to decide whether their children should (or should not) undergo a given treatment otherwise available to adults, and the government can

take the decision-making reins from parents only if it comes forward with a sufficiently convincing reason to withstand judicial scrutiny." *Id.*

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's holding conflicts with decisions of other courts and is profoundly misguided. The Court should grant certiorari and restore the civil rights of Kentucky's transgender youth and their families.

I. THE SIXTH CIRCUIT'S DECISION CREATES A CONFLICT OF AUTHORITY.

The Sixth Circuit's holding opens up a 2-1 circuit conflict on the constitutionality of statutes banning medical treatment for transgender minors. The Sixth Circuit's approach, moreover, is irreconcilable with the approaches of other circuits that have applied heightened scrutiny to laws targeting transgender persons and laws barring parents from making health care decisions for their children. The Sixth Circuit's approach also diverges from a wall of district court decisions invalidating laws similar to the Treatment Ban. This Court's review is warranted to resolve the conflict of authority.

A. The Circuits are Divided on the Constitutionality of Laws Banning Medical Treatment for Transgender Adolescents.

The Sixth Circuit's decision aligns with *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023), but conflicts with *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022).

In *Eknes-Tucker*, the Eleventh Circuit reversed a preliminary injunction against an Alabama law similar

to the Treatment Ban. Alabama's law makes it a felony to prescribe puberty blockers and hormones to treat gender dysphoria. 80 F.4th at 1212-13. A federal district court granted a preliminary injunction on both Equal Protection and Due Process grounds. *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131 (M.D. Ala. 2022).

The Eleventh Circuit reversed the injunction. As to Due Process, the court acknowledged this Court's case law finding that parents have a deeply rooted right to make decisions regarding their children's care, custody, and control, but found that "there is no binding authority that indicates that" this "general right" includes "the right to give one's children puberty blockers and cross-sex hormone treatment." 80 F.4th at 1221-22. As to Equal Protection, the court found that Alabama's law "is best understood as a law that targets specific medical interventions for minors, not one that classifies on the basis of any suspect characteristic." *Id.* at 1227. The court also rejected the plaintiffs' argument that the law should be subject to heightened scrutiny because it discriminates based on sex stereotypes and transgender status. *Id.* at 1228-30. The court therefore found that the law was subject to rational basis review, which "it is exceedingly likely to satisfy." *Id.* at 1230.

The Sixth Circuit's decision conflicts with *Brandt*, which upheld a preliminary injunction against a similar Arkansas law. Arkansas's law prohibits health care professionals from providing "gender transition procedures" to persons under 18, including the therapies at issue here. Ark. Code Ann. §§ 20-9-1501(6), 20-9-1502(a),

(b); *Brandt*, 47 F.4th at 668. The Eastern District of Arkansas granted a preliminary injunction. *Brandt v. Rutledge*, 551 F. Supp. 3d 882 (E.D. Ark. 2021).

The Eighth Circuit unanimously affirmed, finding the plaintiffs were likely to succeed on their Equal Protection claim. The court explained that "[b]ecause the minor's sex at birth determines whether or not the minor can receive certain types of medical care under the law," Arkansas's law "discriminates on the basis of sex." *Brandt*, 47 F.4th at 669. The court rejected Arkansas's argument that the law was not discriminatory because "administering testosterone to a male should be considered a different procedure than administering it to a female," explaining that "this conflates the classifications drawn by the law with the state's justification for it." *Id.* at 669-70. The Eighth Circuit thus subjected the law to heightened scrutiny, and found that the law could not satisfy that standard. *Id.* at 670. The court deferred to the district court's factual findings that "the Act prohibits medical treatment that conforms with 'the recognized standard of care for adolescent gender dysphoria,' that such treatment 'is supported by medical evidence that has been subject to rigorous study,' and that the purpose of the Act is 'not to ban a treatment [but] to ban an outcome that the State deems undesirable.'" *Id.* at 670.[4]

[4] On remand, the Eastern District of Arkansas found Arkansas's law unconstitutional and permanently enjoined it. State officials appealed that judgment, and the Eighth Circuit granted a petition for an initial hearing en banc to consider that appeal. That appeal remains pending in the Eighth Circuit.

B. The Sixth Circuit's Decision Conflicts With Out-of-Circuit Authority that Would Require the Application of Heightened Scrutiny.

The Sixth Circuit's decision also conflicts with authority from the Fourth, Ninth, and Tenth Circuits with respect to the applicable standard of review. The Sixth Circuit held that Petitioners' Equal Protection claim and Due Process claim should each receive rational basis review. But the Fourth and Ninth Circuits would have applied heightened scrutiny to Petitioners' Equal Protection claim because the Treatment Ban singles out transgender people. And the Tenth Circuit would have applied heightened scrutiny to Petitioners' Due Process claim because the Treatment Ban prevents parents from making decisions regarding their children's medical care.

The Fourth and Ninth Circuits have held that laws that single out transgender people are subject to heightened scrutiny. In *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), the Fourth Circuit held that "heightened scrutiny applies" to a law targeting transgender people because "transgender people constitute at least a quasi-suspect class." *Id.* at 610. That court stated that "one would be hard-pressed to identify a class of people more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment, than transgender people." *Id.* at 610-11 (citation omitted). The court explained that transgender people have "historically been subject to discrimination," that they "constitute a discrete group with immutable characteristics," that they are a "minority lacking

political power," and that being transgender bears no relation to contributing to society. *Id.* at 611-13. The Fourth Circuit's analysis is diametrically opposed to the Sixth Circuit's determination that transgender people do not constitute a quasi-suspect class.

Similarly, in *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019), the Ninth Circuit held that laws singling out transgender people warrant heightened scrutiny. The *Karnoski* plaintiffs challenged a ban on military service by transgender people. The district court concluded that transgender people constitute a suspect class. *Id.* at 1192. On appeal, the Ninth Circuit held that "in concluding that a strict scrutiny standard of review applied, the district court reasonably applied the factors ordinarily used to determine whether a classification affects a suspect or quasi-suspect class." *Id.* at 1200. The Ninth Circuit reached the same conclusion again in *Hecox v. Little*, 79 F.4th 1009 (9th Cir. 2023). Following *Karnoski*, the Ninth Circuit held that "gender identity is at least a 'quasi-suspect class,'" and that "heightened scrutiny" therefore applies to laws that "classif[y] based on transgender status." *Id.* at 1026. Those holdings are irreconcilable with the Sixth Circuit's holding that rational basis review applies even in a case that does not involve the military.

The Fourth and Ninth Circuits would thus have applied heightened scrutiny in evaluating Petitioners' Equal Protection challenge. There is little doubt that the Treatment Ban singles out transgender people—it bans transgender people from accessing hormones and puberty blockers while permitting non-transgender people to use the same treatments. Indeed, even the Sixth

Circuit did not dispute that *if* transgender people are a suspect class, *then* heightened scrutiny would apply. The Sixth Circuit's analysis therefore squarely conflicts with Fourth and Ninth Circuit case law. That divergence was likely outcome-determinative—every court to have applied heightened scrutiny to such bans has held them unconstitutional, and even the Sixth Circuit did not question the district courts' determination that the bans would fail heightened scrutiny.

The Tenth Circuit would have applied heightened scrutiny to Petitioners' Due Process claim. In *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182 (10th Cir. 2010), the Tenth Circuit considered a damages suit alleging that the State had forced a minor to receive cancer treatment without parental consent. The court held that "the Due Process Clause generally provides constitutional protection for parental rights," and "a parent's general right to make decisions concerning the care of her child includes, to some extent, a more specific right to make decisions about the child's medical care." *Id.* at 1197. The Court cited *Parham v. J.R.*, 442 U.S. 584 (1979) for the proposition that "the Due Process Clause provides some level of protection for parents' decisions regarding their children's medical care." *Id.* That holding conflicts with the Sixth Circuit's opinion, which held that *Parham* resolved a purely procedural issue and that the Due Process Clause provides zero level of protection to parents' decisions regarding medical treatment. Pet. App. 28a-29a. For the reasons stated above, that conflict was likely outcome-determinative.

C. The Sixth Circuit's Decision Conflicts with a Wave of District Court Decisions Rightly Invalidating Similar Treatment Bans.

Finally, the Sixth Circuit's decision warrants review because it conflicts with decisions of numerous district courts that have invalidated similar laws based on extensive evidentiary records. In addition to the courts that issued the now-reversed injunctions in Kentucky, Tennessee, and Alabama, several other courts have issued similar injunctions as well. These decisions were based on extensive factual findings and were rendered by an ideologically diverse set of judges appointed by Presidents of both parties. Appeals in each case are pending.

As explained above, the **Eastern District of Arkansas** issued a preliminary injunction against Arkansas's treatment ban which was affirmed by the Eighth Circuit. The court has since issued a permanent injunction, finding following a full trial that the law violated the Equal Protection and Due Process Clauses. *Brandt v. Rutledge*, No. 21CV00450, 2023 WL 4073727 (E.D. Ark. June 20, 2023), *appeal docketed*, No. 23-2681 (8th Cir. July 21, 2023). The court issued 311 paragraphs of factual findings that thoroughly explained why Arkansas's law banned safe and effective medical treatments and served no legitimate purpose. *Id.* at *3-30. The court held that Arkansas's law warranted heightened scrutiny under the Equal Protection Clause because it discriminated on the basis of sex and transgender status. *Id.* at *31-32. Arkansas's law failed heightened scrutiny: "The evidence at trial showed that the prohibited medical care improves the health and well-being of many adolescents

with gender dysphoria," and "[t]he State offered no evidence to refute the decades of clinical experience demonstrating the efficacy of gender-affirming medical care." *Id.* at *32-33. As to Due Process, the court found that "the Parent Plaintiffs have a fundamental right to seek medical care for their children and, in conjunction with their adolescent child's consent and their doctor's recommendation, make a judgment that medical care is necessary." *Id.* at *36.

The **Northern District of Florida** preliminarily enjoined Florida's treatment ban on both Equal Protection and Due Process grounds. *Doe v. Ladapo*, No. 23cv114, 2023 WL 3833848, at *11 (N.D. Fla. June 6, 2023), *appeal docketed*, No. 23-12159 (11th Cir. June 27, 2023). As to Equal Protection, the court found that the law discriminated based on sex: "Consider an adolescent, perhaps age 16, that a physician wishes to treat with testosterone. Under the challenged statute, is the treatment legal or illegal? To know the answer, one must know the adolescent's sex. . . . Th[at] is a line drawn on the basis of sex, plain and simple." *Id.* at *8. The court also found that the law targeted transgender people, warranting heightened scrutiny. *Id.* at *9. As to Due Process, the court found the plaintiffs "likely to prevail on their parental-rights claim," explaining that the Due Process Clause "protects a parent's right to control a child's medical treatment." *Id.* at *11. The court conducted a detailed review of the evidentiary record and held that Florida's law could not satisfy heightened scrutiny, calling Florida's justifications for the law "largely pretextual." *Id.*

The **Southern District of Indiana** preliminarily enjoined Indiana's treatment ban. *K.C. v. Individual Members of the Med. Licensing Bd. of Ind.*, No. 23cv595, 2023 WL 4054086, at *8-9 (S.D. Ind. June 16, 2023), *appeal docketed*, No. 23-2366 (7th Cir. July 12, 2023). The court found that Indiana's law discriminated on the basis of sex: the law does "not prohibit certain medical procedures in all circumstances, but only when used for gender transition, which in turn requires sex-based classifications." *Id.* at *8. "[W]ithout sex-based classifications, it would be impossible for [the law] to define whether a puberty-blocking or hormone treatment involved transition from one's sex (prohibited) or was in accordance with one's sex (permitted)." *Id.* The court found that the law could not satisfy heightened scrutiny on the preliminary record. *Id.* at *11-12.

The **Northern District of Georgia** preliminarily enjoined Georgia's treatment ban. *Koe v. Noggle*, No. 23-CV-2904, 2023 WL 5339281 (N.D. Ga. Aug. 20, 2023). The court found a likelihood of success on the plaintiffs' Equal Protection claim. It applied heightened scrutiny for two reasons. First, the law discriminated based on sex: "a minor's sex at birth determines whether that minor can receive a given form of medical treatment." *Id.* at *15. Second, the law "places a special burden on transgender minors . . . and it does so on the basis of their gender nonconformity." *Id.* at *16. The court found that the law did not satisfy heightened scrutiny, holding that "a broad ban on the treatment is not substantially likely to serve the state's interest in protecting children." *Id.* at *19.

The sole district court to uphold a treatment ban is the **Northern District of Oklahoma**. That court, however, did not suggest that Oklahoma's similar ban could survive heightened scrutiny. Instead, it applied rational basis review, based largely on the Sixth Circuit's decision below and the Eleventh Circuit's decision in *Eknes-Tucker*. *Poe v. Drummond*, No. 23-CV-177, 2023 WL 6516449 (N.D. Okla. Oct. 5, 2023), *appeal docketed*, No. 23-5110 (10th Cir. Oct. 10, 2023).

II. THE SIXTH CIRCUIT'S RULING IS WRONG.

The Sixth Circuit erred in holding that the Treatment Ban is subject to rational basis review. Judge White's dissent below, as well as the large number of detailed district court decisions invalidating similar bans, thoroughly explain why heightened scrutiny is warranted. In short, the Treatment Ban usurps parental authority, classifies based on sex, and targets transgender people, a particularly vulnerable minority group.

The Court should hold that a State must at least advance a substantial justification for such a law: The mere fact that a law was "democratically enacted" (Pet. App. 26a) is not, in this context, enough. And whether the Court performs the ensuing analysis itself or leaves it to the Sixth Circuit on remand, the district court's factual findings make clear that the Treatment Ban cannot survive anything but the most deferential review.

Infringement on parental rights. The Treatment Ban is subject to heightened scrutiny because it strips parents of their right to make health care decisions for their children. "[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by

[the] Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion). And contrary to the Sixth Circuit's reasoning, laws pertaining to healthcare are not exempt from the heightened review that safeguards this "fundamental liberty interest[]." *Id.* In *Parham*, this Court recognized that because parents have a duty "to recognize symptoms of illness and to seek and follow medical advice," parents "retain plenary authority to seek [medical] care for their children, subject to a physician's independent examination and medical judgment." 442 U.S. at 602, 604. "Simply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Id.* at 603. Ultimately, "[p]arents can and must make those judgments." *Id.*

Contrary to the Sixth Circuit's reasoning, Petitioners are not asserting a fundamental right to *experimental* drugs—which, as the district court's findings confirm, are not at issue here. *See* Pet. App. 125a. Petitioners seek treatments for their children that, for decades, have been recognized as safe and effective by medical specialists and the nation's leading medical and mental health organizations. Pet. App. 115a–116a.

Indeed, as Judge White pointed out in her dissent, Kentucky permits transgender adults to seek these medical treatments. Pet. App. 102a. Kentucky's legislature may believe that minors are simply too young to decide on their own whether to receive such treatments. But that only underscores its departure from our national traditions: When children are too young to make important decisions on their own, our traditions pre-

sume that it is the prerogative of parents, not the government, to make those decisions. *See, e.g.*, *Troxel*, 530 U.S. at 66 (noting the "primary role of the parents in the upbringing of their children," a norm "established beyond debate as an enduring American tradition" (citation omitted)).

The practical reality of this case is that Kentucky disagrees with parents over how to treat their children's gender dysphoria. Everyone knows what puberty blockers and hormones do; Kentucky's elected lawmakers simply oppose these treatments based on their own views about how gender-nonconforming minors should lead their lives. But "in a society constitutionally committed to the ideal of individual liberty and freedom of choice," parents, not "impersonal political institutions," should decide how to "assist[] their children on the way to responsible adulthood." *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (opinion of Powell, J.). The "fundamental theory of liberty" in our society "excludes any general power of the state to standardize its children"—including transgender children. *Pierce v. Soc'y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 535 (1925).

Sex discrimination. The Treatment Ban also triggers heightened scrutiny because it facially and repeatedly classifies on the basis of sex. The statute bars the use of the covered therapies "to validate a minor's perception of[] the minor's sex, if that . . . perception is *inconsistent with the minor's sex*." Ky. Rev. Stat. § 311.372(2) (emphasis added). Likewise, the prohibited conduct is defined as "[p]rescrib[ing] or administer[ing] testosterone, estrogen, or progesterone, in amounts greater than would normally be produced endogenously

in a healthy *person of the same age and sex*." *Id.* § 311.372(2)(b) (emphasis added). And the exception clause authorizes even otherwise-prohibited conduct if, but only if, a minor's "biological sex characteristics" are not "normal" for a "biological male" or "biological female." *Id.* § 311.372(3)(a)-(b). All of this makes crystal clear that whether particular conduct is prohibited varies—not just indirectly or in practice, but as a matter of law—with the "sex" of the minor at issue. That is an express classification on the basis of sex—not, as the Sixth Circuit reasoned, merely because the statute "uses" the word "sex," (Pet. App. 40a) but because it makes the minor's sex a legally determinative fact. And the fact that the Treatment Ban applies to both transgender boys and transgender girls "doubles rather than eliminates" the discrimination. *Bostock*, 140 S. Ct. at 1742.

In rejecting this straightforward conclusion, the Sixth Circuit radically departed from hornbook Equal Protection law. The Sixth Circuit held that heightened scrutiny was unwarranted because, in its view, Kentucky's use of sex is justified by "biological necessity." Pet. App. 39a. But under this Court's cases, a court decides whether a sex classification is justified by *applying* heightened scrutiny. *See, e.g.*, *Nguyen v. INS*, 533 U.S. 53, 64 (2001). An asserted "biological necessity" is not a ground for refusing to apply heightened scrutiny in the first instance. As this Court has explained, a court "evaluates carefully" all laws that classify on a suspect ground "*in order to decide* which are constitutionally objectionable and which are not." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 228 (1995).

Likewise, the Sixth Circuit's assessment that the Treatment Ban does not "perpetuate[] invidious stereotypes" or "unfairly allocate[] benefits and burdens" (Pet. App. 44a) is no justification for denying Petitioners the protection of heightened scrutiny. Because the Equal Protection Clause "protect[s] *persons*, not *groups*," *Adarand*, 515 U.S. at 227; *accord J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring in judgment), the pivotal question is whether a person's sex is considered when the law is applied *to that person*. Under the Treatment Ban, it invariably is.

In any case, the Sixth Circuit's insistence that the Treatment Ban is unrelated to sex stereotypes is mistaken. Pet. App. 47a. The Treatment Ban prohibits treatment for minors who seek to depart from *stereotypic expectations regarding persons assigned a particular sex at birth*, but allows the same treatment for those who seek to conform to those stereotypes. Discrimination against women who do not behave in a sufficiently feminine way is plainly based on sex. *See, e.g.*, *Bostock*, 140 S. Ct. at 1749. So, as this Court asked in *Bostock*, why "roll out a new and more rigorous standard" when the government "discriminates against . . . persons identified at birth as women who later identify as men"? *Id.*

The court also erred in analogizing the Treatment Ban to a regulation of abortion. In *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2245 (2022), this Court reasoned that rational basis review applies to those laws precisely because, in the Court's view, they do *not* facially distinguish based on sex. Whether an abortion statute has been violated depends on

whether a person has performed an abortion, not on any person's sex. Here, as Judge White explained, the Treatment Ban "expressly reference[s] a minor's sex and gender conformity—and use[s] these factors to determine the legality of procedures." Pet. App. 84a.

Discrimination against transgender people. Laws that discriminate against transgender people should be subject to heightened scrutiny because transgender people constitute a suspect or quasi-suspect class. The Fourth Circuit's decision in *Grimm* thoroughly explains why this is so. Transgender people are the historical victims of discrimination, contribute to society, have an immutable characteristic, and are a small minority lacking political power. *Grimm*, 972 F.3d at 611-14.

The Sixth Circuit's contrary reasoning is not persuasive. For example, the Sixth Circuit pointed to the existence of "detransitioners" and therefore concluded that being transgender is not "immutable." Pet. App. 51a. But the vast majority of transgender people do experience their transgender identities as immutable. Being transgender is nothing like having a particular job or hobby that can be changed in response to a state law. The Sixth Circuit also stated that transgender people have political power, pointing to the Justice Department's support of Petitioners in this case. Pet. App. 51a-52a. Taking the long view, however, there is little doubt that gender-nonconforming people have historically been subject to private and public discrimination. The fact that transgender people have achieved some progress in protecting their civil rights is not a basis for making it *easier* for states to discriminate.

Application of heightened scrutiny. Because the Sixth Circuit applied rational basis review, it did not decide whether the Treatment Ban could be upheld under heightened scrutiny. In view of the district court's factual findings, however, that question is easy. The district court found that the treatments at issue are safe and effective at treating gender dysphoria. *See* Pet. App. 29a. A law banning safe and effective treatments lacks the sort of justification needed to overcome heightened scrutiny. Indeed, every court to have considered the matter has held that similar treatment bans could not survive heightened scrutiny. *Supra*, at 16, 20–22.

III. THIS COURT'S REVIEW IS WARRANTED.

The Court should grant review. The question presented is extraordinarily important and this case is an appropriate vehicle.

In the past two years, twenty-one states have enacted categorical bans on the use of medical treatments to treat gender dysphoria in adolescents. This Court's review is warranted because these laws are profoundly harmful to these young people and to their families. There is an abundant medical literature demonstrating that medical treatments for adolescents with gender dysphoria improve short- and long-term health and quality-of-life outcomes for transgender people, including significant reduction of suicidality and self-harm. Banning such treatments will severely harm adolescents with gender dysphoria. Such consequential laws warrant Supreme Court review.

Although this case arises at the preliminary-injunction stage, immediate Supreme Court review is warranted. The Sixth Circuit decided, as a matter of law,

that rational basis review applied. That court did not question the district court's factual findings, but instead held that those findings were irrelevant given the rational basis standard. That legal holding is squarely teed up for this Court's review. There is little purpose to awaiting a final judgment: the Sixth Circuit's reasoning all but predetermines the outcome of this case on remand.

Moreover, in both this case and the Tennessee case, there are extensive factual records that led to detailed findings from the federal district courts that the laws did not satisfy heightened scrutiny. If the Court finds that heightened scrutiny applies, it should have little difficulty applying that standard based on the existing evidentiary record. Alternatively, if the Court finds that heightened scrutiny applies, it could remand the case to the Sixth Circuit to apply that standard in the first instance.

Additional percolation is unnecessary. In addition to three federal appellate decisions addressing the question presented, there are numerous, extensive district court decisions, catalogued above, regarding the constitutionality of similar bans. The arguments on both sides of this issue have been fully ventilated in the lower courts, and this Court has all it needs to decide the constitutionality of the Treatment Ban.

Kentucky's law inserts the State into the parent-child relationship, discriminates against transgender people, grossly infringes on liberty, and will cause profound harm to children with gender dysphoria. This Court should step in and reverse the Sixth Circuit's errant ruling.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SHANNON MINTER
CHRISTOPHER F. STOLL
NATIONAL CENTER FOR
LESBIAN RIGHTS
870 Market St., Suite 370
San Francisco, CA 94102

COREY SHAPIRO
CRYSTAL FRYMAN
KEVIN MUENCH
ACLU OF KENTUCKY
FOUNDATION
325 West Main St.
Louisville, KY 40202

BENJAMIN M. EIDELSON
1525 Massachusetts Ave.
Cambridge, MA 02138

DAVID D. COLE
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
915 15th St. NW
Washington, DC 20005

ADAM G. UNIKOWSKY
Counsel of Record
JENNER & BLOCK LLP
1099 New York Ave., NW
Washington, DC 20001
(202) 639-6000
aunikowsky@jenner.com

STEPHANIE SCHUSTER
MORGAN, LEWIS &
BOCKIUS LLP
1111 Pennsylvania Ave., NW
Washington, DC 20004

LAURIE EDELSTEIN
JENNER & BLOCK LLP
455 Market St.
Suite 2100
San Francisco, CA 94105

JOCELYN A. SITTON
LILLIAN MCGUIRE
JENNER & BLOCK LLP
353 North Clark St.
Chicago, IL 60654