No. 23-477

In the Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHNATHAN THOMAS SKRMETTI, ET AL.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF THE KENTUCKY PLAINTIFFS, GLAD, AND LGBTQ+ ADVOCATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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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INTEREST OF *AMICI CURIAE*[1]

Amici respectfully ask the Court to reverse the Sixth Circuit's erroneous decision and hold that laws that forbid medical treatments only for transgender adolescents are subject to heightened scrutiny and violate the Equal Protection Clause. *Amici* include plaintiffs with a pending action challenging the constitutionality of Kentucky's similar treatment ban, as well as LGBTQ+ civil rights advocacy and community organizations.

The **Kentucky Plaintiffs** are six transgender minors and their parents who are challenging Kentucky's complete ban on medical treatments for transgender adolescents. Ky. Rev. Stat. § 311.372. The Sixth Circuit decision at issue is a consolidated disposition of two appeals—one concerning Petitioner and private plaintiffs' challenge to the Tennessee ban, and the other concerning the Kentucky Plaintiffs' challenge to the Kentucky ban. The Kentucky Plaintiffs' petition for a writ of certiorari remains pending. See *Doe 1* v. *Kentucky ex rel. Coleman*, No. 23-492 (U.S.); Pet. Br. 13 n.6. The Court's holding on the question presented here will, in all likelihood, be dispositive of the Kentucky Plaintiffs' petition.

GLBTQ Legal Advocates & Defenders ("GLAD") works through litigation, public policy advocacy, and education to create a just society free from discrimination based on gender identity and

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[1] Counsel for *amici* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution.

expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is dedicated to protecting the right of individuals and religious communities to worship as they see fit and to preserving the separation of church and state as a vital component of democratic government. Americans United regularly opposes discrimination against transgender people as part of its legal and advocacy work in defense of these principles.

Bay Area Lawyers for Individual Freedom ("BALIF") is the nation's oldest and largest bar association of lesbian, gay, bisexual and transgender ("LGBTQI") persons, including hundreds of members in the San Francisco Bay Area. BALIF promotes the professional interests and social justice goals of its members and the legal interests of the LGBTQI community at large. For over 40 years, BALIF has actively participated in public policy debates concerning the rights of LGBTQI people and has authored and joined amicus efforts concerning matters of broad public importance.

The LGBT Bar Association of Greater New York ("LGBT Bar of New York") is one of the nation's first bar associations of the LGBT+ legal community and remains one of the largest and most active organizations of its kind in the country. Serving New York State and the New York City metropolitan

area, the LGBT Bar of New York is dedicated to improving the administration of the law, ensuring full equality for members of the LGBT+ community, and promoting the expertise and advancement of LGBT+ legal professionals. In collaboration with its associated foundation, the LGBT Bar of New York and its members staff a clinic that provides free legal services to the LGBT+ community, especially including transgender youth. Through its advocacy and direct services, the LGBT Bar of New York knows first-hand the medical and legal challenges that the transgender community faces.

Mazzoni Center is a Philadelphia-based multi-service non-profit entity whose mission is provide quality comprehensive health and wellness services in an LGBTQ-focused environment, while preserving the dignity and improving the quality of life of the individuals we serve. Founded in 1979, Mazzoni Center's services have expanded over time to meet the unique needs of people who are lesbian, gay, bisexual, transgender, and queer, now offering a full array of primary health care services, behavioral health services, and direct legal services.

The National Trans Bar Association ("NTBA") is a national bar association by and for transgender and gender non-conforming legal professionals and law school students and allies who care about transgender rights. The National Trans Bar Association's core mission is to support transgender and gender non-conforming people in the legal profession and to increase the community's access to affordable and culturally competent legal services. NTBA also strives to secure formal legal

protections for transgender and gender non-conforming people to meaningfully address issues of equity.

Services and Advocacy for Gay, Lesbian, Bisexual, and Transgender Elders, Inc. ("SAGE") is the country's oldest and largest organization dedicated to improving the lives of lesbian, gay, bisexual, transgender, and queer older people. Founded in 1978 and headquartered in New York City, SAGE is a national organization that offers supportive services and resources to LGBTQ+ older people and their caregivers, advocates for public policy changes that address the needs of LGBTQ+ older people, and provides training for organizations that serve LGBTQ+ older people. As part of its mission, SAGE builds ties with LGBTQ+ youth and advocates for policies that support medically necessary gender-affirming care for all generations.

SUMMARY OF ARGUMENT

Kentucky, Tennessee, and 20 other states have recently enacted measures that target transgender youth in a variety of contexts, including schools, sports, healthcare, and child custody. These measures include laws—like the Tennessee ban challenged here—that categorically prohibit certain medications when required by transgender adolescents for the purpose of gender transition, while permitting their use by other youth for any other purpose. Such laws violate the Equal Protection Clause, and the Sixth Circuit's contrary holding should be reversed.

Both Kentucky's and Tennessee's laws trigger heightened scrutiny. Just four years ago, this Court held that "[i]t is impossible to discriminate against a person for being * * * transgender without discriminating against that individual based on sex." *Bostock* v. *Clayton Cnty.*, 590 U.S. 644, 660 (2020). The Court reached that conclusion applying principles of but-for causation. That conclusion applies equally to claims brought under the Equal Protection Clause. The Sixth Circuit's characterization of the transgender healthcare bans as sex-neutral cannot be squared with *Bostock* or this Court's equal protection case law. Sex-based discrimination is sex-based discrimination, regardless of whether the discrimination comes from a private employer or the State.

Disparate treatment of transgender persons warrants heightened scrutiny for another reason. Transgender people are a small and discrete group defined by the immutable characteristic of having a sex that differs from their sex at birth. Historically,

they have experienced discrimination for reasons unrelated to their ability to contribute to society. And they lack relative political power still today, as the extraordinary number of anti-transgender laws—including the transgender medical bans challenged in this case—demonstrate.

Either way, heightened scrutiny applies. Neither Kentucky nor Tennessee has offered anything remotely resembling the exceedingly persuasive justification necessary to withstand heightened scrutiny.

In addition, these bans would fail any level of review because they reflect an improper discriminatory purpose. There can be no reasonable dispute that the impact of the bans falls exclusively on transgender youth. The Kentucky and Tennessee laws permit the very same medications—puberty blockers and hormone therapy—to be provided to minors who are not transgender, prohibiting them only when transgender adolescents need them. The same medications have been prescribed and used safely for decades. The selective nature of these bans, whose burdens fall solely on an extraordinarily small and politically vulnerable group, gives rise to an "inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). The bans therefore fail equal protection review regardless of whether they discriminate based on sex.

By depriving transgender adolescents of essential medical care recommended by their treating professionals based on decades of research, these bans inflict irreparable harm on transgender youth and

their families. For all of these reasons, the Sixth Circuit's decision should be reversed and remanded with instructions to reinstate the preliminary injunctions.

ARGUMENT

I. Kentucky's Transgender Healthcare Ban, Like Tennessee's, Facially Targets Transgender Youth And Subjects Them To Serious Harms.

In 2023, the Kentucky legislature enacted a ban on the use of puberty blockers and hormones to treat transgender adolescents—and only transgender adolescents. Ky. Rev. Stat. § 311.372. These therapies are prohibited if administered "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). If an adolescent is currently receiving a prohibited medication, Kentucky's ban mandates that treatment be terminated. Ky. Rev. Stat. § 311.372(6).

Kentucky does not ban the provision of these same medications to minors who are not transgender. Some uses, such as to treat early puberty, are unaddressed (and thus not prohibited) by the statute at all. Others are expressly permitted. Ky. Rev. Stat. § 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 be treated with puberty

blockers or hormone therapy to align their body with a male or female identity. *Ibid.*

Kentucky's healthcare ban is part of a package of measures targeting transgender youth—all included within Senate Bill 150.[2] Another provision of the bill prohibits schools from requiring or recommending that teachers or other students refer to a transgender student with "pronouns that do not conform to a student's biological sex as indicated on the student's original, unedited birth certificate issued at the time of birth." SB 150 § 1. Another provision prohibits classroom instruction that has a "goal or purpose of students studying or exploring" "gender identity" or "gender expression." *Id.* § 2. And yet another bars transgender youth from using restrooms or locker rooms "reserved for students of a different biological sex," which is defined as the sex indicated on the student's original birth certificate. *Id.* § 3.

The Kentucky Plaintiffs are suffering irreparable harm because of the healthcare ban. Six minor plaintiffs received the prohibited treatments before the ban—all with the informed consent of their parents. Without access to medically necessary care, the Kentucky Plaintiffs are at risk of escalating distress, anxiety, and suicidality.

For Plaintiff John Minor Doe 1, the now-banned treatments had been "lifesaving and life changing." *Doe 1* v. *Thornbury*, No. 3:23-cv-00230, ECF No. 17-4 ¶¶ 5–6 (W.D. Ky. May 22, 2023). He received treatment only after extensive consultation with

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

health care professionals. His parents "saw an immediate improvement in his emotional and mental health," and described the treatment as "lifesaving and life changing." *Id.* ¶¶ 8–9.

Parents of the other plaintiffs observed similar benefits when their children received the now-banned treatments. John Minor Doe 2's father had "never seen [John Minor] Doe 2 as happy as he" was when he was "receiving the treatment." *Doe 1* v. *Thornbury*, No. 3:23-cv-00230, ECF No. 17-5 (W.D. Ky. May 22, 2023). John Minor Doe 5's mental health dramatically improved when he was prescribed hormone therapy. See *Doe 1* v. *Thornbury*, No. 3:23-cv-00230, ECF No. 17-7 (W.D. Ky. May 22, 2023).

Based on a fulsome record including substantial medical evidence, the Western District of Kentucky correctly concluded that "the puberty-blockers and hormones barred by SB 150 are *** essential to the well-being of many transgender children." *Doe 1* v. *Thornbury*, 679 F. Supp. 3d 576, 585–86 (W.D. Ky. 2023). Therefore, the district court concluded, the Kentucky ban irreparably harms the Kentucky Plaintiffs and other transgender adolescents because it "eliminate[s] treatments that have already significantly benefited six of the [then-]seven minor plaintiffs and prevent[s] other transgender children from accessing these beneficial treatments in the future." *Ibid.* In the decision below, the court of appeals vacated the preliminary injunction the district court had entered. Now in effect, the Kentucky ban, like the Tennessee ban, leaves parents with an impossible choice: to forgo this necessary treatment or to uproot their families and move out of state.

II. Transgender Healthcare Bans Are Subject To Heightened Scrutiny.

A. The Tennessee And Kentucky Treatment Bans Are Sex-Based Classifications.

Whether described as discrimination on the basis of "sex" or "gender," this Court has held that *all* such classifications trigger heightened scrutiny. *Sessions* v. *Morales-Santa*, 582 U.S. 47, 57 (2017); *United States* v. *Virginia*, 518 U.S. 515, 555 (1996). Without exception, laws that discriminate on the basis of sex are unconstitutional absent an "exceedingly persuasive justification." *Virginia*, 518 U.S. at 532–33. That "demanding" standard, *id.* at 533, applies to the transgender healthcare bans imposed by Tennessee and Kentucky.

The Court recently addressed what constitutes discrimination on the basis of sex for purposes of Title VII of the Civil Rights Act in *Bostock* v. *Clayton County*, 590 U.S. 644 (2020). Applying the "simple and traditional standard of but-for causation," *id.* at 656 (cleaned up), the Court found "[i]t is *impossible* to discriminate against a person for being *** transgender without discriminating against that individual based on sex," *id.* at 660 (emphasis added). As the Court illustrated: by firing a "transgender person who was identified as a male at birth but who now identifies as a female," while retaining "an otherwise identical employee who was identified as female at birth," the "employer intentionally penalizes a person identified as male at birth for traits that it tolerates in an employee identified as female at birth." *Ibid.*

There is no reasoned basis for a different understanding of what constitutes facial sex discrimination under the Equal Protection Clause, which similarly prohibits differential treatment based on a person's sex. See, *e.g.*, *Orr* v. *Orr*, 440 U.S. 268, 278 (1979) ("In authorizing the imposition of alimony obligations on husbands, but not on wives, the Alabama statutory scheme 'provides that different treatment be accorded on the basis of sex; it thus establishes a classification subject to scrutiny under the Equal Protection Clause.") (quoting *Reed* v. *Reed*, 404 U.S. 71, 75 (1971)) (cleaned up); *Califano* v. *Wescott*, 443 U.S. 76, 84 (1979) ("[T]his Court has not hesitated to strike down gender classifications that result in benefits being granted or denied to family units on the basis of the sex of the qualifying parent."); *Miss. Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982) ("Our decisions *** establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an exceedingly persuasive justification for the classification.") (cleaned up); *Morales-Santana*, 582 U.S. at 58 ("Laws granting or denying benefits on the basis of the sex of the qualifying parent, our post-1970 decisions affirm, differentiate on the basis of gender, and therefore attract heightened review under the Constitution's equal protection guarantee.") (cleaned up).

In these and every other post-1970s equal protection case addressing a law that treats individuals differently based on their sex, this Court has consistently applied the same analysis of what constitutes a facial classification based on sex as in statutory discrimination cases and held that such differential treatment warrants heightened scrutiny. In no case has

this Court held that the Equal Protection Clause employs a different definition of facial sex discrimination than Title VII. It should not do so for the first time here.

Nothing in Justice Gorsuch's concurring opinion in *Students for Fair Admission, Inc.* v. *President & Fellows of Harvard College*, 600 U.S. 181 (2023), supports a contrary view. In fact, Justice Gorsuch made the opposite point and explained that, despite other differences not relevant here, Title VI and the Equal Protection Clause both prohibit "classifications based on race." *Id.* at 309 (Gorsuch, J., concurring). If a law or policy facially classifies based on race under Title VI, then it facially classifies based on race under the Equal Protection Clause and vice-versa. *Ibid.* (noting that while the Equal Protection Clause "addresses all manner of distinctions between persons," both the Equal Protection Clause and Title VI target "classifications *** based on race, color, or national origin"). And as Justice Gorsuch noted, Title VI and Title VII define discrimination using "materially identical language," *id.* at 302, understood "to invoke the simple and traditional standard of but-for causation," *id.* at 289 (cleaned up). It follows that if a law or policy facially classifies based on sex under Title VII, then it does so under the Equal Protection Clause as well.[3]

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[3] As the Sixth Circuit notes, Title VII permits disparate impact claims while the Equal Protection Clause does not, see Pet. App. 40a; however, contrary to the panel majority's holding, that difference has no bearing on what constitutes facially disparate treatment based on sex. Consistent with Justice Gorsuch's concurrence in *Students for Fair Admissions*, what constitutes

That same but-for understanding of discrimination also governs the Equal Protection Clause, just as it does 42 U.S.C. §§ 1981 and 1983, given those provisions' shared historical and legal foundations. The but-for standard applies to 42 U.S.C. § 1981, *Comcast Corp.* v. *Nat'l Ass'n of African Am.-Owned Media*, 589 U.S. 327, 332 (2020), a law enacted contemporaneously with the Fourteenth Amendment and reenacted as an exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment. See Civil Rights Act of 1866, 14 Stat. 27, § 1; Civil Rights Act of 1870, 16 Stat. 144, § 16. Contrary to the Sixth Circuit's view, see Pet. App. 40a ("Title VII focuses on but-for discrimination. *** The Equal Protection Clause focuses on the denial of equal protection."), there is no principled basis for applying a different standard of what constitutes sex discrimination to the Equal Protection Clause of the Fourteenth Amendment itself or to actions, like these, under 42 U.S.C. § 1983—which was also enacted contemporaneously with the Fourteenth Amendment and pursuant to Congress's enforcement power under Section 5. See Civil Rights Act of 1871, 17 Stat. 13, § 1. In fact, the Court has made clear that 42 U.S.C. § 1983 is "to be construed in the light of common-law principles that were well settled at the time of its enactment." *Kalina* v. *Fletcher*, 522 U.S. 118, 123 (1997). That should include the "ancient and

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facially disparate treatment based on sex under Title VII is the same as what constitutes facially disparate treatment based on sex under the Equal Protection Clause. Under either provision, a plaintiff may show disparate treatment based on sex by proving but-for causation.

simple 'but for' common law causation" standard. *Comcast Corp.*, 589 U.S. at 332.

As this Court made clear in *Bostock*, sex is always a but-for cause of discrimination for being transgender. *Bostock*, 590 U.S. at 660. That conclusion is controlling here, where Kentucky and Tennessee ban certain medications only when prescribed for transgender youth. Were there any doubt, the plain text of the statutes makes the sex-based foundation of this discrimination unmistakable. Neither law bans particular medications for all persons regardless of sex. Instead, their application depends directly on the person's sex. To know whether the medication is prohibited, one must know the individual's sex.

- Tennessee forbids medications only if prescribed "for the purpose of: (A) Enabling a minor to identify with, or live as, a purported identity *inconsistent with the minor's sex*; or (B) Treating purported discomfort or distress from a discordance between *the minor's sex* and asserted identity." Tenn. Code Ann. § 68-33-10(3)(a)(1) (emphases added). "Sex" is defined as "immutable characteristics of the reproductive system that define the individual *as male or female*, as determined by anatomy and genetics existing at the time of birth." *Id.* § 68-33-102(9) (emphasis added).
- Kentucky forbids medications only when prescribed 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*," with "sex" defined as "the biological indication of male and female as

> evidenced by sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth." Ky. Rev. Stat. § 311.372 (emphasis added). It is impossible to determine the applicability of the ban to any person without knowing their sex assigned at birth, and whether that sex is inconsistent with their gender identity.

These prohibitions cannot be applied without express reference to "sex" to determine when treatment is permissible or forbidden. That confirms the obvious: both laws are sex-based classifications and are therefore subject to heightened scrutiny.

The Sixth Circuit nevertheless determined that the bans are not sex-based classifications and thus applied rational-basis review. Specifically, the court of appeals highlighted that the laws prohibit "all minors, regardless of sex" from receiving puberty blockers or hormones "in order to transition from one sex to another." Pet. App. 32a. This, according to the court of appeals, "lacks any of the hallmarks of sex discrimination" because it "does not prefer one sex over the other" or "include one sex and exclude the other," "bestow benefits or burdens based on sex," or "apply one rule for males and another for females." *Ibid.* That logic is plainly inconsistent with this Court's precedent.

The court of appeals' characterizations of the supposed "hallmarks of sex discrimination," Pet. App. 32a, assess whether a classification is sex-based at the group level. It is settled, however, that "the Fifth and Fourteenth Amendments of the Constitution

protect *persons*, not *groups*." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 227 (1995) (emphases in original); see U.S. CONST. amend. XIV, § 1 ("[N]or shall any state *** deny to *any person* within its jurisdiction the equal protection of the laws.") (emphasis added). Similarly, under Title VII, the "focus" of the causation analysis is "on individuals, not groups" because the law prohibits "discrimination against any *individual*" because of sex. *Bostock*, 590 U.S. at 658 (emphasis in original). "The consequences of the law's focus on individuals rather than groups are anything but academic." *Id.* at 659. Discrimination against a woman "because she is insufficiently feminine" and a man for being "insufficiently masculine may treat men and women as groups more or less equally, but as to each individual, it is still discrimination 'because of sex.'" *Ibid.* The same is true here and mandates recognition that Kentucky's and Tennessee's laws discriminate based on sex and thus demand heightened scrutiny.

B. Discrimination Against Transgender People Warrants Heightened Scrutiny Independently.

Laws that treat people differently because they are transgender warrant heightened scrutiny in their own right. Such laws share the traits of other classifications this Court has long held warrant heightened scrutiny because: (i) they reflect historical discrimination, see *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986); (ii) perpetuate arbitrary discrimination, see *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985); (iii) target obvious, immutable characteristics, see *Bowen* v. *Gilliard*, 483 U.S. 587,

602 (1987); and (iv) disadvantage groups that lack relative political power, *ibid.*

First, transgender people have long been subjected to discrimination, harassment, and violence. They "frequently experience harassment in places such as schools (78%), medical settings (28%), and retail stores (37%), and they also experience physical assault in places such as schools (35%) and places of public accommodation (8%)," and they "are more likely to be the victim of violent crimes" than non-transgender people. *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 612 (4th Cir. 2020); see, *e.g.*, *Whitaker by Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017)[4] ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.").

Second, being transgender has nothing to do with a person's ability to contribute to society. Medical experts "agree that being transgender implies no impairment in judgment, stability, reliability, or general social or vocational abilities." *Grimm*, 972 F.3d at 612 (cleaned up). Transgender people are spouses and parents; they work in all occupations; they serve in our nation's military; they hold public office; and they have contributed significantly to the accomplishments and welfare of our nation.

Third, transgender people are a discrete and identifiable group, defined by the obvious, immutable, and distinguishing characteristic of

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[4] *Abrogated on other grounds by Ill. Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020).

having a sex that differs from their sex at birth. Contrary to the Sixth Circuit's opinion, this Court has never held that a characteristic warranting heightened scrutiny must be "definitively ascertainable at the moment of birth." Pet. App. 46a. Nor is there any valid reason to impose such a rigid requirement, which would defeat the underlying purpose of identifying characteristics over which a person has no control and are not a valid basis for differential treatment. As medical experts overwhelmingly agree, transgender identity has a biological foundation, is not the product of voluntary intention or choice, and—like sexual orientation—cannot be changed through external pressure. See, *e.g.*, *Grimm*, 972 F.3d at 612–13 (noting "gender identity is formulated for most people at a very early age, and, as our medical amici explain, being transgender is not a choice").

Finally, transgender persons' relative lack of political power is plain. Many states, including Tennessee and Kentucky, have enacted laws that single out transgender people for adverse treatment in a wide variety of areas, including healthcare, schools, restrooms, employment, and government identity documents. See Maggie Astor, *G.O.P. State Lawmakers Push a Growing Wave of Anti-Transgender Bills*, N.Y. TIMES (Jan. 25, 2023). In 2023 alone, state legislatures proposed more than 150 bills targeting transgender people for negative treatment. *Ibid.* The Sixth Circuit held that transgender people do not meet this criterion because they are protected from workplace discrimination by Title VII and have gained support from the President, the Department of Justice, some

states, and medical organizations. See Pet. App. 46a. But if that were the test, discrimination based on race would not warrant heightened scrutiny, which it plainly does. See *Alexander* v. *NAACP*, 144 S. Ct. 1221, 1233 (2024); *Students for Fair Admissions, Inc*, 600 U.S. at 214; *Morales-Santana*, 582 U.S. at 58. The test of a group's relative political power is not whether they have gained *any* significant degree of political support, but whether they can secure equal treatment through the political process.[5] In this case, the disparity between the extremely small number of transgender people and the extraordinary number of laws singling them out for disfavored treatment speaks for itself. By any reasonable measure, transgender people are a textbook example of a small, discrete, and insular minority that lacks adequate political power to fend off discriminatory treatment. See, *e.g.*, *Grimm*, 972 F.3d at 613.

For these reasons, the Fourth and Ninth Circuits have recognized that discrimination based on transgender status warrants heightened scrutiny. See *Grimm*, 972 F.3d at 611; *Karnoski* v. *Trump*,

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[5] The Kentucky legislature also demonstrated its ability to exercise extraordinary power against transgender youth by acting in an accelerated and unorthodox manner to pass the Kentucky ban. The bill was initially presented during a "surprise" committee meeting and then put up for a vote before the full House just one hour later; things moved so quickly that "not even the House clerk had a digital copy to share after the vote, let alone have the bill available to the general public at the time." Olivia Krauth, *At 11th hour, Ky. Republicans resurrect, expand and pass anti-trans bill*, LOUISVILLE COURIER JOURNAL (Mar. 16, 2023), http://www.courier-journal.com/story/news/politics/2023/03/16/at-11th-hour-kentucky-republicans-resurrect-and-rush-anti-trans-bill/70016887007/.

926 F.3d 1180, 1200–01 (9th Cir. 2019). This Court should do the same.

C. As The District Courts Concluded, It Is Highly Unlikely That The Bans Survive Heightened Scrutiny.

The district courts assessing the Kentucky and Tennessee bans correctly concluded that it is highly unlikely that a law banning medications only for transgender adolescents will survive heightened scrutiny. As both district courts concluded, the extensive factual records presented in both cases do not show that the challenged laws are substantially related to an important state interest. Rather than protecting the health and welfare of transgender adolescents, these laws discriminatorily deny them needed medical care and cause significant harm. Pet. App. 206a–211a; *Doe 1*, 679 F. Supp. 3d at 586–87.

III. There Is Strong Evidence That The Bans Are Based On An Improper Discriminatory Purpose And Thus Fail Any Level Of Review.

This Court has recognized that "laws singling out a certain class of citizens for disfavored legal status or general hardships are rare" and thus warrant careful consideration regardless of whether they classify on a suspect or quasi-suspect basis. *Romer* v. *Evans*, 517 U.S. 620, 633 (1996). The need for careful review is heightened where, as here, such laws impose "a broad and undifferentiated disability on a single named group." *Ibid.* Laws like these "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected"

and thus fail any level of scrutiny. *Id.* at 634; see also *City of Cleburne*, 473 U.S. at 450 (government action rested on "irrational prejudice" against the affected class).

Here, the Tennessee and Kentucky bans single out transgender persons in order to deprive them of medical care: the same medications—puberty blockers and hormones—may, consistent with these laws, be administered to minors who are not transgender. The impact of this prohibition is sweeping, depriving transgender adolescents of the only medical care that has been shown to be effective in treating the severe distress of gender dysphoria. As in *Romer*, the resulting harms are so "far removed from [their] particular justifications" that it is "impossible to credit them." *Romer*, 517 U.S. at 635; see also *City of Cleburne*, 473 U.S. at 448–51; *U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 537–38 (1973).

Kentucky and Tennessee have sought to justify the bans as measures to protect transgender adolescents' health and welfare. But as the Western District of Kentucky found based on a fulsome record, "the puberty-blockers and hormones barred by [the Kentucky ban] are established medical treatments essential to the well-being of many transgender children: every major medical organization in the United States agrees that these treatments are safe, effective, and appropriate when used in accordance with clinical guidelines." *Doe 1*, 679 F. Supp. 3d at 585–86. The Middle District of Tennessee reached the same conclusion, agreeing that the treatment guidelines promulgated by the World Professional Association for Transgender Health (aka "WPATH")

and the Endocrine Society "are widely accepted *** based on scientific research and clinical experience," endorsed by major medical professional organizations, and "comparable" in their reliability "to other clinical practice guidelines." Pet. App. 178a–179a.

On appeal, Judge White recognized in her dissent that, "[i]f untreated, gender dysphoria may result in severe anxiety and depression, eating disorders, substance-use issues, self-harm, and suicidality," and that plaintiffs' "injuries are all the more irreparable because progressing through adolescence untreated leads to daily anguish and makes adult treatment more complicated." Pet. App. 57a, 98a. Other courts have reached the same conclusion. In fact, it bears emphasis that nearly every district court to hear this direct evidence has found these medications are medically necessary for some transgender adolescents and that banning them causes severe harm. Pet. App. 206a–211a; *Doe 1*, 679 F. Supp. 3d at 586–87; *Poe ex rel. Poe* v. *Labrador*, — F. Supp. 3d — , 2023 WL 8935065, at *4–5, 18 (D. Idaho 2023); *Doe* v. *Ladapo*, 676 F. Supp. 3d 1205, 1213–14, 1225–26 (N.D. Fla. 2023); *Koe* v. *Noggle*, 688 F. Supp. 3d 1321, 1333–34, 1357 (N.D. Ga. 2023); *Brandt* v. *Rutledge*, 551 F. Supp. 3d 882, 890–92 (E.D. Ark. 2021); accord *Kadel* v. *Folwell*, 100 F.4th 122, 136 (4th Cir. 2024) (quoting the American Medical Association's conclusion that, "[i]f untreated, gender dysphoria can cause debilitating distress, depression, impairment of function, self-mutilation to alter one's genitals or secondary sex characteristics, other self-injurious behaviors, and suicide").

In sum, the evidence in the record shows that the Tennessee and Kentucky bans do not further—but, to the contrary, undermine—the purported justification of protecting transgender adolescents' health and welfare. A law that harms the very persons it purports to protect is so "disconnected from its proffered justifications" that it "raise[s] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected" and thus violates the Equal Protection Clause. *Romer*, 517 U.S. at 634; see also *City of Cleburne*, 473 U.S. at 448–51; *Moreno*, 413 U.S. at 537–38.

The legislative contexts in which both the Kentucky and Tennessee bans were enacted reinforce that inference of animus. In both states the legislatures passed the bans along with other measures targeting transgender adolescents, including in schools and other areas. See supra p. 8; see also Tenn. Code Ann. § 49-6-5102.

The animus inference is further reinforced by the Tennessee Legislature's stark admission that one of the law's purposes is to discourage minors from being transgender—*i.e.*, to "encourage[e] minors to appreciate their [birth] sex" and to discourage them from becoming "disdainful of their [birth] sex." Tenn. Code Ann. § 68-33-101(m).

For all of these reasons, even if the Tennessee and Kentucky bans were not subject to heightened scrutiny, it was still an abuse of discretion and clear error for the Sixth Circuit to conclude that these laws did not violate the Equal Protection clause, and this is a separate and independent basis on which the Sixth Circuit's decision may be reversed.

CONCLUSION

The Court should reverse the Sixth Circuit's erroneous decision and make clear that bans on medications for transgender adolescents violate the Equal Protection Clause.

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