No. 23-477

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

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

Respondents,

and

L.W., BY AND THROUGH HER PARENTS AND NEXT FRIENDS, SAMANTHA WILLIAMS AND BRIAN WILLIAMS, ET AL.,

Respondents in Support of Petitioner.

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

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER AND RESPONDENTS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in the scope of the Fourteenth Amendment's protections and in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The text of the Equal Protection Clause of the Fourteenth Amendment is sweeping and universal: "No State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1 (emphasis added). Drafted in 1866 and ratified in 1868, the Clause wrote into the Constitution the ideal of equality first laid out in the Declaration of Independence, establishing a broad guarantee of equality for all persons and demanding "the extension of constitutional rights and protections to people once ignored or excluded." *United States v. Virginia*, 518 U.S. 515, 557 (1996).

In writing the Declaration's principle of equality into the Constitution, the Framers of the Fourteenth Amendment consciously broadened it to create a

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission.

universal guarantee of equality that would protect every individual residing in America. While the Declaration of Independence insisted that "all men are created equal," the text of the Fourteenth Amendment expressly promises the equal protection of the laws to all "person[s]." The Amendment's universal language settles that "every body—man, woman, and child—without regard to color, should have equal rights before the law," *Speech of Hon. John Sherman at Mozert Hall*, Cincinnati Commercial, Sept. 29, 1866, at 1, and enshrines into our national charter this "foundation[al] principle" of "absolute equality of all citizens of the United States politically and civilly before their own laws," Cong. Globe, 39th Cong., 1st Sess. 431 (1866) (Rep. Bingham).

One part of the Amendment, unfortunately, sanctioned sex-based discrimination. Section 2 of the Fourteenth Amendment imposed a penalty of reduced congressional representation on states that disenfranchised any of its "male inhabitants," implicitly sanctioning sex-based laws that denied women the right to vote. U.S. Const. amend. XIV, § 2. Women's rights activists celebrated Section 1's universal embrace of equality, but they detested the fact that Section 2 had written the word "male" into our national charter. Over the next half-century, women waged a long struggle to write the principle of sex equality into the Constitution, which finally succeeded in 1920 with the ratification of the Nineteenth Amendment, U.S. Const. amend. XIX. Rejecting stereotypical notions about women's proper roles that had served to exclude them from our democracy, the Nineteenth Amendment deepened our constitutional commitment to equality under the law for all persons regardless of sex. The Amendment, as

the debates reflect, "put women on equal constitutional footing with men." Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1, 93 (2011).

In a long line of cases, this Court has enforced the constitutional guarantee of equal protection by insisting that laws that classify based on sex must be subjected to heightened judicial scrutiny. *See, e.g.*, *Sessions v. Morales-Santana*, 582 U.S. 47, 57-58 (2017); *Virginia*, 518 U.S. at 531-33; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723-26 (1982). This heightened judicial scrutiny requires the government to establish an "exceedingly persuasive justification" for "official action denying rights or opportunities based on sex," *Virginia*, 518 U.S. at 531, to ensure that state laws do not demean "the equal dignity of men and women," *Obergefell v. Hodges*, 576 U.S. 644, 673-74 (2015), or perpetuate "fixed notions concerning the roles and abilities of males and females," *Hogan*, 458 U.S. at 725.

The court below failed to heed this unbroken line of precedent. Applying rational basis review, a lenient and deferential standard inconsistent with the "'strong presumption that gender classifications are invalid,'" *Virginia,* 518 U.S. at 532 (quoting *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring)), the court below upheld SB1, a Tennessee statute that categorically bans gender-affirming medical care for transgender adolescents. In so doing, it turned a blind eye to the statute's explicit sex-based character.

SB1 outlaws medical care if it is prescribed "for the purpose" of "[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's

sex" or "[t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity." Tenn. Code Ann. § 68-33-103(a)(1). Thus, the availability of medical treatment turns explicitly on sex. For example, a person identified as male at birth could receive testosterone therapy to affirm a male gender identity, but a person identified as female at birth could not receive such care to affirm their male gender identity. Likewise, a person identified as female at birth could receive estrogen therapy to affirm a female gender identity, but a person identified as male at birth could not receive such care to affirm their female gender identity. Rather than regulate access to hormone therapies on a neutral basis, the legislature employed a facial sex-based classification to enforce state-sponsored "generalizations about the way men and women are." *Morales-Santana*, 582 U.S. at 57. The court below should have subjected SB1 to heightened scrutiny.

Instead of applying this Court's long-established equal protection framework, the court below applied an ad hoc analysis, concluding that rational basis review was proper because the challenged statute "does not trigger any traditional equal-protection concerns." Pet. App. 35a. In using this watered-down equal protection analysis to dispense with heightened scrutiny, the court below lost sight of the danger posed by the use of sex-based classifications. As this Court has long recognized, such classifications, by their very nature, reduce individuals to their sex and "carry the inherent risk of reinforcing . . . stereotypes," *Orr v. Orr*, 440 U.S. 268, 283 (1979), and "overbroad generalizations about the different talents, capacities, or preferences of males and females," *Virginia*, 518 U.S. at 533. In upholding a law that classifies based

on sex under rational basis review, the court below went badly astray. Its judgment should be reversed.

ARGUMENT

I. The Text and History of the Fourteenth Amendment Guarantee Equality Under the Law.

The Fourteenth Amendment prohibits a state from denying to "any person" the "equal protection of the laws." As the Amendment's text and history make clear, it establishes a broad guarantee of equality for all persons, securing the same rights and protection under the law for all persons, of any race, sex, or class. *See Yick Wo. v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *Civil Rights Cases*, 109 U.S. 3, 24 (1883) ("The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws.").

As history shows, the equal protection guarantee "establishes equality before the law," Cong. Globe, 39th Cong., 1st Sess. 2766 (1866) (Sen. Howard), "abolish[ing] all class legislation in the States[,] and do[ing] away with the injustice of subjecting one caste of persons to a code not applicable to another." *Id.* The meaning of equal protection, as the debates over the Fourteenth Amendment show, was that the "law which operated upon one man shall operate *equally* upon all," *id.* at 2459 (Rep. Stevens) (emphasis in original), thereby "securing an equality of rights to all citizens of the United States, and of all persons within their jurisdiction," *id.* at 2502 (Rep. Raymond).

The Equal Protection Clause protects marginalized persons from state-sponsored discrimination at the hands of majorities, "withdraw[ing] from Government the power to degrade or demean," *United States v. Windsor*, 570 U.S. 744, 774 (2013), through the democratic process. *See Civil Rights Cases*, 109 U.S. at 24 ("[C]lass legislation . . . [is] obnoxious to the prohibitions of the Fourteenth Amendment . . . ."); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (No. 6,456) (Field, C.J.) ("[H]ostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form . . . is forbidden by the fourteenth amendment . . . ."). The constitutional guarantee of equal protection reflected the Framers' conviction that "[a] true republic rests on the absolute equality of rights of the whole people, high and low, rich and poor, white and black." Cong. Globe, 39th Cong., 1st Sess. 1159 (1866) (Rep. Windom).

The broad wording of the Fourteenth Amendment's promise of equal protection for all persons was no accident. When the 39th Congress drafted the Fourteenth Amendment, it consciously chose universal language intended to secure equal rights for *all*. While the Amendment was written and ratified against the backdrop of a bloody Civil War fought over slavery, it deliberately protects all persons. "[S]ection 1 pointedly spoke not of race but of more general liberty and equality." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 260-61 n.* (1998). Indeed, the Reconstruction-Era Framers specifically considered and rejected proposed constitutional language that would have outlawed racial discrimination and nothing else, s*ee* Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867*,

at 46, 50, 83 (1914), preferring a universal guarantee of equality that secured equal rights to all persons. Whether the proposals were broad in scope or were narrowly drafted to prohibit racial discrimination in civil rights, the Framers of the Fourteenth Amendment consistently rejected proposals that would have limited the Amendment's equality guarantee to racial discrimination. *See J.E.B.*, 511 U.S. at 151 (Kennedy, J., concurring) ("Though in some initial drafts the Fourteenth Amendment was written to prohibit discrimination against 'persons because of race, color or previous condition of servitude,' the Amendment submitted for consideration and later ratified contained more comprehensive terms . . . ."). The Fourteenth Amendment's "neutral phrasing," "extending its guarantee to 'any person,'" *id.* at 152 (Kennedy, J., concurring), was intended to secure equal rights for all and enforce "a commitment to the law's neutrality where the rights of persons are at stake," *Romer v. Evans*, 517 U.S. 620, 623 (1996).

This idea that all persons should be guaranteed equal protection of the laws has deep roots in our constitutional heritage. The idea of equality under the law was reflected in the 17th century writings of John Locke that profoundly influenced the Founding generation, *see* John Locke, *Second Treatise of Government*, § 142, at 75 (C.B. Macpherson ed., Hackett Publishing 1980) (1690) ("They are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the country man at plough."). It formed the centerpiece of the Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the

pursuit of Happiness."), and reflected the "self-evident" legal principle that "protection by his Government is the right of every citizen." Cong. Globe, 39th Cong., 1st Sess. 1293 (1866) (Rep. Shellabarger); Steven J. Heyman, *The First Duty of Government: Protection, Liberty, and the Fourteenth Amendment*, 41 Duke L.J. 507, 510 (1991) (explaining that "the right to protection in life, liberty, and property became a central principle of American constitutional thought by the time of the Revolution").

The Fourteenth Amendment's Framers incorporated this broad guarantee of equality for all persons into the Fourteenth Amendment to bring the Constitution back into line with these fundamental principles of American equality, which had been betrayed and stunted by the institution of slavery. *See McDonald v. City of Chicago*, 561 U.S. 742, 807 (2010) (Thomas, J., concurring) ("[S]lavery, and the measures designed to protect it, were irreconcilable with the principles of equality . . . and inalienable rights proclaimed by the Declaration of Independence and embedded in our constitutional structure."). As the Amendment's Framers explained time and again, the guarantee of the equal protection of the laws was "essentially declared in the Declaration of Independence," Cong. Globe, 39th Cong., 1st Sess. 2961 (1866) (Sen. Poland), and was necessary to secure the promise of liberty for all persons. "How can he have and enjoy equal rights of 'life, liberty, and the pursuit of happiness' without 'equal protection of the laws?' This is so self-evident and just that no man . . . can fail to see and appreciate it." *Id.* at 2539 (Rep. Farnsworth).

The Framers of the Fourteenth Amendment acted from experience as well. They had seen firsthand that states could not be trusted to respect fundamental

liberties or basic notions of equality under the law for all persons. *See Report of the Joint Committee on Reconstruction*, 39th Cong., 1st Sess. at xvii (1866) (detailing findings that, in the aftermath of the war, Southern people refused "to place the colored race . . . upon terms even of civil equality" or "tolerat[e] . . . any class of people friendly to the Union, be they white or black"). White Unionists, as well as formerly enslaved Black Americans, needed the equal protection of the laws to ensure that Southern state governments respected their fundamental rights. *See McDonald*, 561 U.S. at 779 (discussing the "plight of whites in the South who opposed the Black Codes"); Cong. Globe, 39th Cong., 1st Sess. 1093 (1866) ("The adoption of this amendment is essential to the protection of the Union men" who "will have no security in the future except by force of national laws giving them protection against those who have been in arms against them.") (Rep. Bingham); *id.* at 1263 ("[W]hite men . . . have been driven from their homes, and have had their lands confiscated in State courts, under State laws, for the crime of loyalty to their country . . . .") (Rep. Broomall).

In addition, the Framers recognized that immigrants, who faced pervasive discrimination in the western United States, needed the equal protection of the laws as well. Congressman John Bingham, one of the principal drafters of the Fourteenth Amendment, demanded that "all persons, whether citizens or strangers, within this land . . . have equal protection in every State in this Union in the rights of life and liberty and property." *Id.* at 1090. Indeed, in 1870, two years after the Fourteenth Amendment's ratification, Congress used its express constitutional power to enforce the Amendment's guarantee of equality under the law to all persons by passing the

Enforcement Act of 1870. This Act secured to "all persons within the jurisdiction of the United States" the "same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens," and protected against the "deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien." Enforcement Act of 1870, 16 Stat. 140, 144 (1870); Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870) ("[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . . ; let them be protected by all the laws and the same laws that other men are.") (Sen. Stewart); *id.* at 3871 (observing that "immigrants" were "persons within the express words" of the Fourteenth Amendment "entitled to the equal protection of the laws") (Rep. Bingham).

In order to prevent these sorts of past abuses, and new ones arising after the Civil War, the Fourteenth Amendment "put in the fundamental law the declaration that all citizens were entitled to equal rights in this Republic," Chi. Trib., Aug. 2, 1866, at 2, placing all "throughout the land upon the same footing of equality before the law, in order to prevent unequal legislation," Cincinnati Com., Aug. 20, 1866, at 2. "With this section engrafted upon the Constitution, it will be impossible for any Legislature to enact special codes for one class of its citizens . . . ." Cincinnati Com., June 21, 1866, at 4. As Representative John Bingham argued, the equal protection guarantee was a "sublime example of a great and powerful people" writing into their foundational charter that "the humblest human being anywhere within their limits shall have the same protection under the law as the

President himself." *See Mr. Bingham's Speech*, Wheeling Daily Intelligencer, Sept. 5, 1866.

In short, the Fourteenth Amendment established equality under the law and equality of rights for all persons as a constitutional mandate. Under the Amendment's plain text and original meaning, this sweeping, universal guarantee of equality applies to all, and states may not impose invidious class-based discrimination that denies individuals' access to medical care based on their sex.

II. The Nineteenth Amendment Buttressed the Fourteenth Amendment's Promise of Equality.

Section 1 of the Fourteenth Amendment guarantees the equal protection of the laws to all persons, regardless of sex. *See Virginia*, 518 U.S. at 540 (observing that a state university's males-only admission policy that "serves the Commonwealth's sons" but "makes no provision for her daughters" is "not *equal* protection").

Another part of the Fourteenth Amendment's text, however, seemed to permit sex discrimination. Section 2 of the Fourteenth Amendment imposed a penalty of reduced congressional representation on states that denied or abridged the right to vote to any of the state's "male inhabitants," U.S. Const. amend. XIV, § 2, implicitly sanctioning the disenfranchisement of women. Section 2 reflected the view that voting was a privilege that could be given to men and denied to women, who were deemed to be ruled and virtually represented by men. *See* Cong. Globe, 39th Cong., 2nd Sess. 40 (1866) (arguing that extending the right to vote to women would "subvert the fundamental principles of family government in which the husband is, by all usage and law, human and divine, the

representative head" and "assign[] her duties revolting to her nature and constitution, and wholly incompatible with those which spring from womanhood") (Sen. Morrill).

Women's rights activists celebrated the Fourteenth Amendment's universal embrace of equality. They well understood that "there is . . . but one safe principle of government—equal rights to all. And any and every discrimination against any class . . . can but imbitter and disaffect that class and thereby endanger the safety of the whole people." *See* Susan B. Anthony, "Constitutional Argument," 1872, *in The Elizabeth Cady Stanton-Susan B. Anthony Reader* 161 (Ellen C. Dubois ed., 1981). But they vociferously rejected the idea that our foundational promises of democracy, freedom, and equality were real if half the population could be excluded from voting based on sex. Demanding fundamental constitutional change, women engaged in "fifty-two years of pauseless campaign" to "get the word male . . . out of the constitution," Carrie Chapman Catt & Nettie Rogers Shuler, *Woman Suffrage and Politics* 107 (1923), which finally succeeded with the ratification of the Nineteenth Amendment in 1920, U.S. Const. amend. XIX.

The Nineteenth Amendment deepened the Fourteenth Amendment's promise of equality, effectively striking the word "male" from the Constitution and unequivocally guaranteeing equal citizenship to all regardless of sex. *See* Calabresi & Rickert, *supra*, at 2, 66-67 ("The Nineteenth Amendment struck out the Constitution's only explicit privileging of the male sex" and "made it implausible to read the Fourteenth Amendment's equality guarantee as inapplicable to women, because a guarantee of political rights implicitly guarantees full

civil rights."); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 948, 1045 (2002) ("The Nineteenth Amendment grew out of struggles over the Fourteenth Amendment and was a long-resisted, fully-deliberated, collective commitment to include women as equal members of the constitutional community.").

The ratification of the Nineteenth Amendment did more than revolutionize American democracy, it decisively rejected state-sponsored discrimination that was rooted in sex-based stereotypes "about the way men and women are," *Morales-Santana*, 582 U.S. at 57, and that denied individuals "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities," *Virginia*, 518 U.S. at 532; *see* Calabresi & Rickert, *supra*, at 67 ("Outdated assumptions about gender were rejected by the Nineteenth Amendment's supporters, and its detractors objected to the Amendment precisely because it emancipated women.").

The Nineteenth Amendment guaranteed equal citizenship to all regardless of sex, including at the polls, rejecting the narrow conceptions about women's roles and bodies that had saddled them with second-class citizenship status, *see Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring) ("The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother."); *Muller v. Oregon*, 208 U.S. 412, 422 (1908) (holding that women's "physical structure and a proper discharge of her maternal functions" justify sex-based labor laws). In other words, the Nineteenth Amendment rejected the notion that sex was destiny. These outmoded and discriminatory views about the

proper roles and behavior appropriate for men and women are, thanks to the Nineteenth Amendment, part of "the history that the Constitution left behind," *United States v. Rahimi*, 144 S. Ct. 1889, 1915 (2024) (Kavanaugh, J., concurring).

As the debates over the Nineteenth Amendment demonstrate, the American people rejected "[t]he old conception of the place of woman," demanding that a woman was no longer to be "ruled by a male head" and have "her place in the world . . . determined by the place held by this head." 56 Cong. Rec. 788 (1918) (Rep. Lehlbach). Congress urged passage of the Nineteenth Amendment to ensure that women would be "accorded the same opportunity to take part in life that men have always had." 58 Cong. Rec. 80 (1919) (Rep. Little). To the Framers of the Nineteenth Amendment, "it is a gross injustice amounting to nothing less than an outrage to deny them the right of suffrage, or any other right that man may be entitled to or permitted to enjoy." 56 Cong. Rec. 8345 (1918) (Sen. Thompson).

With the ratification of the Nineteenth Amendment, "our Constitution finally guaranteed that a person's sex will not determine his or her rights." Calabresi & Rickert, *supra*, at 99.

III. SB1 Classifies Based on Sex and Is Subject to Heightened Judicial Scrutiny.

Consistent with the text and history of the Fourteenth and Nineteenth Amendments, this Court has long held that "all gender-based classifications . . . require 'an exceedingly persuasive justification' in order to survive constitutional scrutiny." *J.E.B.*, 511 U.S. at 136 (quoting *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 273 (1979)); *Morales-Santana*, 582 U.S. at 57-58; *Virginia,* 518 U.S. at 531-33. This

Court's insistence on "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history," *id.* at 531, and reflects the fact that sex-based laws "carry the inherent risk of reinforcing . . . stereotypes," *Orr*, 440 U.S. at 283, and "generalizations about the way men and women are," *Morales-Santana*, 582 U.S. at 57.

The "heightened standard" demanded by this Court's longstanding precedents "does not make sex a proscribed classification," *Virginia*, 518 U.S. at 533, but it does require judges to hold the government to its "demanding" burden of justifying sex-based discrimination and to ensure it does not indulge in "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* "Overbroad generalizations . . . , the Court has come to comprehend, have a constraining impact, descriptive though they may be of the way many people still order their lives." *Morales-Santana*, 582 U.S. at 63.

SB 1 classifies based on sex and should have been subjected to heightened scrutiny. SB1 makes it illegal for healthcare providers to prescribe puberty blockers or hormones to an adolescent patient only if the treatment is "for the purpose" of "[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or for "[t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity." Tenn. Code. Ann. § 68-33-103(a)(1). The statute defines "sex" as the "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).

Thus, on its face, SB1 uses a person's sex to determine whether certain types of medical care are prohibited or not. Sex, and sex alone, determines

when a healthcare provider may dispense puberty blockers and hormones. Under SB1, a person identified as male at birth could receive testosterone therapy to affirm a male gender identity, but a person identified at female at birth could not receive such care to affirm their male gender identity. Likewise, a person identified as female at birth could receive estrogen therapy to affirm a female gender identity, but a person identified as male at birth could not receive such care to affirm their female gender identity. Rather than regulating access to these forms of treatment on a neutral basis, Tennessee's legal regime is sex-based to the core. *See* U.S. Br. 2, 21-22; L.W. Br. 17-18, 22-23.

Indeed, as the legislative findings recite, Tennessee enacted this sex-based limitation to outlaw medically appropriate treatment that conflicts with the state-sanctioned view of "the way men and women are," *Morales-Santana*, 582 U.S. at 57. The Tennessee legislature insisted that the state has a "compelling interest in encouraging minors to appreciate their sex, particularly as they undergo puberty" and in outlawing medical treatment "that might encourage minors to become disdainful of their sex." Tenn. Code. Ann. § 68-33-101(m). In short, the statute uses a person's sex to deny available, medically appropriate treatment to transgender adolescents, illustrating that "transgender status" is "inextricably bound up with sex." *Bostock v. Clayton County*, 590 U.S. 644, 660-61 (2020).

As *Bostock* recognized, "sex plays an unmistakable . . . role" where, as here, a law "penalizes a person identified as male at birth for traits or actions that it tolerates in an [individual] identified as female at birth." *Id.* at 660. That describes SB1 to a tee. SB1 treats individuals "differently because of their sex"

and therefore creates a sex-based classification subject to heightened scrutiny. *Id.* at 661; U.S. Br. 22, 28; L.W. Br. 24-25.

The court below concluded otherwise by disregarding this Court's repeated instructions that sex-based classifications must be subjected to heightened scrutiny and insisting that SB1's "across-the-board" prohibition "lacks any of the hallmarks of sex discrimination" and "treat[s] both sexes equally." Pet. App. 35a, 40a. But this fundamentally ignores the fact that, as just discussed, the statute indisputably classifies based on sex, making some medical treatments that are available to persons identified as male at birth unavailable to persons identified as female at birth and vice versa.

And as this Court has repeatedly recognized, a law that classifies on the basis of sex threatens serious constitutional harm. "'[A]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.'" *Students for Fair Admissions v. President & Fellows of Harvard College*, 600 U.S. 181, 223 (2023) (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)). Indeed, that is why this Court has repeatedly insisted that all sex-based classifications must be subjected to heightened scrutiny. Sex-based classifications, like racial classifications, "do not become legitimate on the assumption that all persons suffer them in equal degree." *Powers v. Ohio*, 499 U.S. 400, 410 (1991).

In *J.E.B.*, for example, this Court applied heightened scrutiny to a sex-based peremptory challenge, rejecting the dissent's view that "the system as a whole is evenhanded" because "for every man struck by the government petitioner's own lawyer

struck a woman." 511 U.S. at 159, 159-60 (Scalia, J., dissenting). That bottom line did not matter, because, as the majority explained, "this Court consistently has subjected gender-based classifications to heightened scrutiny in recognition of the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender." *Id.* at 135; *see also Hogan*, 458 U.S. at 730 (noting that a state's sex-based admissions policy "lends credibility to the old view that women, not men, should become nurses, and makes the assumption that nursing is a field for women a self-fulfilling prophecy"). Classifications based on sex "denigrate[] the dignity" of the individual and cannot be upheld without the hard look mandated by heightened scrutiny. *J.E.B.*, 511 U.S. at 142. Indeed, the whole point of heightened scrutiny is to smoke out laws and policies that deny men and women "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities" or perpetuate "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 532, 533. The court below made a fundamental error in applying a highly deferential form of review to a sex-based classification. *Id.* at 555 (describing "deferential review" as a "brand of review inconsistent with the more exacting standard our precedent requires" when a state classifies based on sex).

The court below also suggested that sex-based classifications that are justified based on "'enduring' differences between men and women do not trigger heightened review." Pet. App. 42a. This too is wrong. The lower court's suggestion that sex-based classifications rooted in biological differences deserve

only the most minimal form of judicial review is at odds with long-settled equal protection principles that safeguard equal citizenship stature for all persons regardless of sex.

This Court's precedents require heightened scrutiny for all sex-based classifications, *see J.E.B.*, 511 U.S. at 136; *Virginia,* 518 U.S. at 555, including those justified based on biological differences between men and women. This Court's "skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history," *Virginia*, 518 U.S. at 531, including the fact that our nation's "long and unfortunate history of sex discrimination," *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (plurality opinion), is, in large respects, a story of state-sponsored discrimination against women rooted in stereotypes about women's bodies and roles. "[O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes," *id.* at 685, based on the now-outmoded notion that, in "the general constitution of things," the "paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother" and that her "natural and proper timidity and delicacy . . . evidently unfits it for many of the occupations of civil life." *Bradwell*, 83 U.S. at 141-42 (Bradley, J., concurring); *see also Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986) ("[W]omen's biology and ability to bear children have been used as a basis for discrimination against them . . . . This discrimination has had a devastating effect on women.").

These stereotypical notions led the authors of the Fourteenth Amendment to sanction sex-based voting laws on the theory that voting would "assign[] her duties revolting to her nature and constitution, and wholly incompatible with those which spring from

womanhood." Cong. Globe, 39th Cong., 2nd Sess. 40 (1866) (Sen. Morrill). The Nineteenth Amendment firmly rejected these stereotypical notions purportedly rooted in women's biology, demanding equal citizenship, including at the polls, for all regardless of sex. *See supra* Part II. The lower court's suggestion that states have free rein to write into law sex classifications rooted in biological differences has no basis in the Constitution, its history, or this Court's precedents.

To be sure, under this Court's precedents, sex is not a "proscribed classification," and in certain limited circumstances, "[p]hysical differences between men and women" may be relevant to the question whether a sex-based law meets the demanding requirements of heightened scrutiny. *Virginia*, 518 U.S. at 533; *Nguyen v. INS*, 533 U.S. 53, 64 (2001) (upholding "the use of gender specific terms" in citizenship statute as a tailored effort to "take[] into account a biological difference between the parents," "given the unique relationship of the mother to the event of birth"). Under this precedent, biological differences between the sexes may be relevant at the back end of heightened scrutiny review, but they do not give a court the power to dispense with the demanding scrutiny that must be applied to all sex-based classifications under this Court's equal protection precedents. *See* U.S. Br. 25-26; L.W. Br. 35-36. The decision below is manifestly inconsistent with this Court's long-established equal protection framework.

SB1 classifies based on sex. The court below was wrong to uphold it without holding the state to the demanding burden required by heightened scrutiny.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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