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**

## *AMICI CURIAE* BRIEF OF YALE PHILOSOPHERS IN SUPPORT OF 1) PETITIONER AND 2) RESPONDENTS IN SUPPORT OF PETITIONER


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The undersigned respectfully submit this *amici curiae* brief in support of 1) petitioner and 2) the respondents in support of petitioner ("plaintiffs").[1]

## INTERESTS OF THE *AMICI CURIAE*

*Amici* are professors of philosophy who are trained to identify flaws in arguments. Philosophers assess arguments in a variety of ways, but most relevant here is by examining the logical structure of arguments. This requires identifying the premises underlying arguments as well as the ways that arguments can attempt to hide those premises.

This process is particularly useful in this case, because a central issue is whether Tennessee's statute classifies on the basis of sex. Both sides submit competing explanations of how the statute operates with regard to sex, and dispute what level of abstraction the Court should use to assess the law. *Amici* submit this brief to assist the Court in analyzing the logical structure of Tennessee's arguments on these points.

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[1] No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity, other than the *amicus curiae* or its counsel, made a monetary contribution to the preparation or submission of this brief.

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## SUMMARY OF ARGUMENT

Tennessee asserts that its law does not classify based on sex, but that claim requires considering the law at a high level of abstraction. Abstracting the premises of arguments can result in inaccurate conclusions. In more concrete legal terms, accepting Tennessee's proposed level of abstraction would mean that no law would ever classify based on sex. This Court has previously rejected attempts to consider laws at the level of abstraction Tennessee proposes, and it should do so here as well.

Tennessee tries to argue that its statute is not sex-based, but its arguments contain a fallacy. More specifically, Tennessee's arguments contain the question-begging fallacy—that is, the arguments assume the truth of the conclusions within their premises. In addition, by prohibiting treatment "inconsistent" with a minor's sex, Tennessee enforces sex-specific stereotypes, which again demonstrates that its law does classify by sex.

Analyzing argument structure and identifying fallacies can distill the legal questions this Court faces in determining whether Tennessee's statute classifies based on sex. When trimmed of fallacies and seen in its basic structure, Tennessee's position is no different than the arguments employed to defend Virginia's anti-miscegenation laws in *Loving v. Virginia*, 388 U.S. 1 (1967). There, Virginia argued that people were treated "equally" on the basis of race because *everyone* was prohibited from marrying people whose race was inconsistent with their own. Tennessee's argument here is the same: All minors are treated

equally, it contends, because all are prohibited from receiving treatments "inconsistent" with their "sex." But the State cannot take race or sex out of its classification by referring to "consistency" with race or sex. This Court rejected that flawed reasoning in *Loving*, and it should reject that flawed reasoning now.

Note that Tennessee's arguments that its statute does not classify based on sex are, for the most part, the same as its arguments that the law passes heightened scrutiny. Br. in Opp. 22-23. To the extent that Tennessee's arguments that the statute passes heightened scrutiny are identical with its arguments that the statute does not warrant heightened scrutiny, those arguments are likewise flawed.

## ARGUMENT

### I. Tennessee's statute is subject to heightened scrutiny because Tennessee must classify minors by sex in order to enforce its law.

Tennessee concedes that the text of the relevant statute "refers" to sex. Br. in Opp. 24. But it claims that the statute is not subject to heightened scrutiny because it prohibits a particular class of "medical interventions," regardless of the minor's sex: "Certain medical interventions may not be administered to minors for certain purposes, but boys and girls are treated equally. *Nobody* under 18 in Tennessee can obtain puberty blockers, hormones, or surgery for the prohibited purposes." Br. in Opp. 21.

Pointing to this characterization of its law, Tennessee claims that the law "mere[ly] reference[s]" and does not, in the legally relevant sense, "classif[y]" on

the basis of sex. Br. in Opp. 24. But Tennessee's law is sex-based for the simple reason that the State cannot apply or enforce its law without first classifying a minor as "male" or "female" under the statutory definition. Tennessee's law bans medical interventions if and only if they are done for certain "purpose[s]." Tenn. Code Ann. § 68-33-103(a)(1).

The prohibited purposes are defined as the following: "[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." *Id.* Because the prohibited purposes are defined in the statute by reference to a minor's sex, one cannot determine whether a minor is seeking a medical procedure for the prohibited purpose in a way that is *not* dependent on that minor's sex classification.[3]

For instance, Tennessee's law would permit a minor classified as male under the statute's definition to receive testosterone treatments to prevent gynecomastia, the growth of breast tissue. But a minor classified under that statute as female may not receive the same treatment to prevent breast tissue growth because she does not want her body to develop feminine features. The minor's "sex" as defined by the

[3] Tenn. Code Ann. § 68-33-102(9) defines "sex" to mean "a person's 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." We use this definition for the purposes of this brief but do not take a position on its coherence or accuracy.

statute is critical to the analysis of whether the medical procedure is permissible. Tennessee cannot enforce its statute without first classifying a minor by sex.[4]

Tennessee attempts to obscure this embedded classification by sex by arguing that the statute should be considered at a high level of abstraction, asserting that the following characterization of its law is most appropriate:

> **Characterization 1 (Tennessee's):** Minors may not have any "sex-inconsistent" treatments, regardless of the minor's sex. *See* Br. in Opp. 22.

But Tennessee's law could be rewritten in the following way while keeping the same substance:

> **Characterization 2:** Female minors may not access medical interventions to masculinize their features, even though male minors can use those same treatments. Male minors may not access medical interventions to feminize their features, even though female minors can use those same treatments.

This second characterization highlights that what medical procedures a minor can access depends on that minor's sex. We can illustrate this with a strike-through visualization. These visualization tools are commonly used in logical analysis and, indeed, were

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[4] Amanda Shanor, *Sex Discrimination Behind the Veil Is Still Sex Discrimination*, Take Care (Oct. 11, 2019), https://takecareblog.com/blog/sex-discrimination-behind-the-veil-is-still-sex-discrimination.

used by Justice Alito in his dissent in *Bostock v. Clayton County*, 590 U.S. 644, 698 (2020). Taking the State's assumption of a strict gender binary, there are four relevant scenarios, and the strike-throughs below show which activities the statute prohibits for male minors, and which for female minors:

- ~~Female minor accessing medical interventions to masculinize features~~
- Female minor accessing medical interventions to feminize features
- ~~Male minor accessing medical interventions to feminize features~~
- Male minor accessing medical interventions to masculinize features

That characterization is the same as Characterization 1 on a substantive level. The characterizations differ only insofar as Tennessee (a) raises the level of abstraction and (b) emphasizes the State's judgment as to the relational "inconsistency" between a minor's sex and the medical procedures. That is, Tennessee's characterization gives the appearance that the law is sex-neutral, but it continues to require classification by sex in its assessment of "inconsistency," giving different sets of permissions based on sex.

Several millennia ago, Aristotle explained that, to determine which of two definitions of an object is more apt, the definitions' terms should be examined for their (a) priority and (b) clarity.[5] For example, the definition of "odd number" as "not divisible by 2" is

[5] Aristotle, *Topics* bk. VI, ch. 4.

more apt than "one more than an even number," because its terms are prior to and more intelligible than the terms of the second definition.

In this case, Characterization 2 uses terms that are prior to those of Tennessee's Characterization 1, because it describes the circumstances that Tennessee judges to be "sex-inconsistent." It also uses terms that are more intelligible. Characterization 2 directly describes prohibited procedures in terms of which medical interventions are prohibited for minors of each sex. Tennessee's Characterization 1, by contrast, relies on the inherently obscure language of "sex-inconsistent identities." Which identities are these, and what constitutes their "inconsistency" with a minor's sex? For example, is a "wrestler" identity inconsistent with a female minor's sex—and why? Is a "ballet dancer" identity inconsistent with a male minor's sex—and why? Tennessee does not answer these questions, making its description of its own law inherently unclear.

Given that the prohibited purposes are defined by reference to a minor's sex, one cannot determine whether a minor is seeking a prohibited medical procedure without Tennessee *first* classifying the minor by sex. This is confirmed by the fact that without the statute's limiting "sex-purposed" principle, the language would ban *all* medical procedures on *all* minors. Reading the first paragraph of the "Prohibitions" section without the prohibited purposes section makes this clear:

> A healthcare provider shall not knowingly perform or offer to perform on a minor, or administer or offer to administer to a minor, a medical procedure . . .

Tenn. Code Ann. § 68-33-103(a)(1).

The "purpose" clause establishes the minor's sex as essential to distinguishing between prohibited and permissible medical procedures.

Consider also an analogy. Suppose that Tennessee passed a law that forbade minors from attending "any services, rituals, or assemblies if done for the purpose of allowing the minor to identify with a purported identity *inconsistent* with the minor's religion." Does this law classify on the basis of religion? For example, does it give different sets of permissions to minors based on whether they are Christian or Jewish? Tennessee could offer an abstract characterization of its hypothetical law that emphasizes the State's judgment about the relational "inconsistency" between a religious service and a minor's religion.

> **Hypothetical Characterization 1* (Tennessee's):** Tennessee forbids all minors from attending religion-inconsistent services, regardless of a minor's religion.

Or alternatively, the law could be characterized in more concrete, specific terms:

> **Hypothetical Characterization 2*:** Tennessee forbids Christian minors from attending synagogue services, even though Jewish minors can attend synagogue services. The law also forbids Jewish minors from attending

> church services, even though Christian minors can attend church services.

Characterized the second way, we can see that unless Tennessee first identifies a minor's religion, it cannot say *which* religious services the minor is or is not allowed to attend. This is not a "mere reference" to religion. *See* Br. in Opp. 24. Acting based upon a minor's religion is essential to limiting the law's sweep. Without the limiting "religion-purposed" principle, the plain language of this hypothetical law would forbid attendance at *all* religious services for *all* minors.

Under Tennessee's hypothetical formalization, all minors are treated the "same" because they all are prohibited from attending "religion-inconsistent" services. In this formalization, religion *appears* to be "merely referenced." But this characterization thinly papers over the reality that this law does not treat minors the "same" in the sense that it prohibits attendance at different services for minors of different religions. Religion is not "merely referenced"; a minor's religious classification is the crux of determining the scope of the law.

So too in this case. Tennessee insists that the characterization of its law as prohibiting "sex-inconsistent" procedures for all minors is the only characterization relevant to equal protection analysis. But Tennessee's law does not "merely reference" sex. Tennessee's law bans medical interventions *if and only if* they are done for "prohibited purposes" that can *only* be determined by reference to a minor's sex. Without reference to a minor's sex, one cannot determine whether that minor is seeking a medical procedure for

the prohibited purpose. The statute accordingly classifies based on sex and is thus subject to heightened scrutiny.

## II. Tennessee's arguments that its law does not classify by sex are riddled with flaws.

Perhaps in recognition of the weakness of its formalistic argument, Tennessee provides three different rationalizations for why its statute should be subject to rational basis review. First, it slips evaluative language into a multi-part rule for whether the statute must receive heightened constitutional scrutiny. Second, it argues that all minors who are "similarly situated" are treated equally. Third, it emphasizes that the law prohibits those medical procedures that it deems excessively risky. Each of these arguments is flawed.

### A. Tennessee's argument that the law imposes "equal" burdens on male and female minors is circular.

Tennessee argues that its law does not "prefer" or "exclude" based on sex; instead, its law treats minors "equally" on the basis of sex. Echoing the Sixth Circuit's majority, Tennessee states that its law "lacks any of the hallmarks of sex discrimination," because it "does not bestow benefits or burdens based on sex." Br. in Opp. 21-22 (quoting Pet. App. 35a). If a law

imposes the same burden on both sexes, the argument goes, it does not classify on the basis of sex.[6]

Tennessee's argument assumes the very conclusion that it claims to show. To demonstrate that its law treats minors "equally" on the basis of sex, Tennessee offers—yet again—a characterization of its law as imposing the "same" burden on both male and female minors. Br. in Opp. 21 ("[B]oys and girls are treated equally. *Nobody* under 18 in Tennessee can obtain puberty blockers, hormones, or surgery for the prohibited purposes.").

In philosophical analysis, this move is called question-begging. "Begging the question" (*petitio principii*) is perhaps the best-known fallacy. Begging the question occurs when an argument assumes the truth of its conclusion.[7] An argument that begs the question rests on faulty reasoning because its premises

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[6] Under Tennessee's own argument, whether a law is subject to heightened constitutional scrutiny turns on whether it discriminates in some substantive, legal sense on the basis of sex. This is because Tennessee advances the Sixth Circuit's "test" for the "threshold question of whether the law *classifies* based on sex," which requires asking if the law bears the "hallmarks of sex discrimination." Br. in Opp. 21-22 (citations omitted). Such a "test" is not an argument for avoiding searching review of this statute. Rather, the very logic of such a "test" requires that the statute would need to pass something like heightened constitutional scrutiny in order to show that it does not "classify" on the basis of sex. *See* U.S. Pet. Br. 23-27 (demonstrating that this logic is counter to established precedent); *see also Nguyen v. INS*, 533 U.S. 53, 60 (2001) (sex classification triggers heightened scrutiny); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (same).

[7] Hans Hansen, "Fallacies," in *The Stanford Encyclopedia of Philosophy* (Edward N. Zalta & Uri Nodelman eds., Spring

rest on its conclusion, rather than supporting it from below. One type of question-begging argument just restates its conclusion as a premise. For example, "it is advantageous for you to learn philosophy, because it is in your interest to learn philosophy" is question begging. Its premise ("it is in your interest to learn philosophy") is a restatement of its conclusion ("it is advantageous for you to learn philosophy") using different words. Another type of question-begging argument assumes its conclusion within a (sometimes hidden) premise that is essential to the argument.

The legal question at issue in this case is whether Tennessee's law is aptly characterized as one that places unequal burdens on male and female minors (e.g., Characterization 2) or as one that places equal burdens on male and female minors (e.g., Characterization 1 – Tennessee's characterization). Tennessee supports its claim that its law treats male and female minors equally by claiming the law's burdens are "equal" between the sexes. This is not an argument; it is a circle.

To illustrate, imagine how this argument might have played out in other cases. In *United States v. Virginia*, Virginia could have tried to argue that even though it excluded women from the Virginia Military Institute, it was imposing "equal" burdens on two sex-defined groups because men were excluded from the Virginia Women's Institute for Leadership. 518 U.S. 515 (1996). Men are forbidden from entering the Virginia Women's Institute for Leadership—a "sex-in-

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2023), Metaphysics Rsch. Lab, Stanford Univ., https://plato.stanford.edu/archives/spr2023/entries/fallacies/.

consistent" institute; women are forbidden from entering the Virginia Military Institute—also a "sex-inconsistent" institute.[8] Both men and women are forbidden from entering "sex-inconsistent" institutes, ergo, the law places "equal" burdens on both men and women.

This example illustrates the same question-begging move at work in Tennessee's argument. Virginia's characterization of its law would have *presupposed* that men and women are not legally entitled to enter the same educational institutes: Men can be legally prohibited from women's institutes, and women can be legally prohibited from men's institutes, because the institutions are each, respectively, "sex-inconsistent." That argument begs the question of the case, which is whether men and women are legally entitled to enter the same educational institutes.

Tennessee's argument similarly presupposes, without argument, that male and female minors are not legally entitled to the same medical interventions: Male minors can be legally prohibited from feminizing interventions or those that slow masculinization, and female minors can be legally prohibited from masculinizing interventions or those that slow feminization, because they each are, respectively "sex-inconsistent" interventions.

Terms like "equal burdens" or "same benefits" are legal terms of art that pick out whether the legal rule disadvantages someone *relative to a legal entitlement*.

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[8] In reality, Virginia did not contest that its law amounted to "sex-based discrimination" to which intermediate scrutiny applied; it argued that the law survived this level of scrutiny. *United States v. Virginia*, 852 F. Supp. 471, 473 (W.D. Va. 1994).

Such evaluative terms require a normative baseline against which the treatment is compared. As Justice Thomas pointed out in the context of Voting Rights Act cases: "[T]he critical question in all vote-dilution cases is: 'Diluted relative to what benchmark?' " *Allen v. Milligan*, 599 U.S. 1, 50 (2023) (Thomas, J., dissenting) (citing *Gonzalez v. Aurora*, 535 F.3d 594, 598 (7th Cir. 2008) (Easterbrook, C.J.)). That is, whether the law "prefers" or "burdens" based on sex turns on what you take to be permissible treatment in light of sex designated at birth. The scope of that permissible treatment is the legal question that must be answered in this case; Tennessee purports to justify its answer to this question by simply stipulating that answer in different words.

This same form of fallacy was deployed by the defendant in one of this Court's most famous equal protection cases: *Loving v. Virginia*, 388 U.S. 1 (1967). In *Loving*, Virginia argued that its so-called "anti-miscegenation" laws were not subject to heightened constitutional scrutiny because its law treated people "equally" on the basis of race. Virginia cited with approval the logic of Senator Lyman Trumbull of Illinois from a congressional debate over the Civil Rights Act of 1866, who claimed "anti-miscegenation" laws did not impose disadvantageous treatment on the basis of race:

> "Does not the law make it just as much a crime for a white man to marry a black woman as for a black woman to marry a white man, and *vice versa?* I presume there is no discrimination in this respect, and therefore your law forbidding marriages between whites and blacks operates alike on both races . . . . I see no discrimination

> against either in this respect that does not apply to both."

Brief and Appendix on Behalf of Appellee, *Loving*, 388 U.S. 1 (No. 66-395), 1967 WL 113931, at *17.

Senator Trumbull's argument relies on the same question-begging reasoning as Tennessee's. Trumbull provides a description of the law that masks its dependence on racial classification and assumes without argument that a description of the law that reveals this dependence must be irrelevant. That is, he assumes his conclusion. Similarly, Tennessee provides a description of its law that masks its dependence on sex classification and assumes without argument that a description of the law that reveals this dependence must be irrelevant. We might say, in the voice of the State of Tennessee:

> "Does not the law make it just as much a crime for a male minor to access sex-inconsistent medical procedures as for a female minor to access sex-inconsistent procedures? We presume there is no discrimination in this respect, and therefore our law forbidding sex-inconsistent medical procedures operates alike on both sexes . . . . We see no discrimination against either in this respect that does not apply to both."

The application of this fallacy in *Loving* proved to be a losing argument. There, Virginia argued that its laws were exempt from heightened constitutional review because the laws "punish[ed] equally both the white and the Negro participants in an interracial marriage" and thus did "not constitute an invidious discrimination based upon race." *Loving v. Virginia*,

388 U.S. at 8. This Court rejected that argument, explaining "we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove" the statute from being subject to the appropriate level of heightened scrutiny. *Id.*

Tennessee argues that its law is exempt from heightened constitutional review in the same way: it maintains a characterization of its statute as "equally" applying to both sexes, and claims that the law thereby is not subject to heightened review. This argument failed in *Loving*, and it should fail here as well.

### B. Tennessee's argument that its law treats equally minors who are "similarly situated" is also circular.

Tennessee argues that its law does not classify on the basis of sex because "the Act does not treat *similarly situated* individuals differently based on their sex." Br. in Opp. 23. Tennessee's defense of this claim is circular. In its view, what it takes for minors to be similarly situated such that they are entitled to access the same medical interventions is for them to be classified as the same sex.

The State is only forbidden from treating two individuals differently based on sex *if* those individuals are similarly situated in the respects relevant to the Equal Protection Clause. In this case, Tennessee asserts that what it takes for two minors to be "similarly situated" in the relevant respects *is for those minors to have the same sex* as one another. For instance, Tennessee argues that a male minor seeking testosterone is not similarly situated to a female minor

seeking testosterone. If the minor seeks the medical intervention to achieve something that, according to the State of Tennessee, is not "consistent" with the minor's sex, it is prohibited as being a sex-inconsistent purpose. Br. in Opp. 22-23. To be similarly situated under the State's formulation, the minor would need to have the *same sex-relative* purpose for seeking the *same treatment*.

This argument eats itself. By this logic, there is *no way* to apply the equal protection test to the category of sex. Individuals who differ in sex are guaranteed to not be similarly situated. Were this true, it would be impossible to locate two individuals who differ in sex who *are* similarly situated.

It is important to recognize the absurdity of this logic. For example, were the State of Kansas to have applied this same logic in *Brown v. Board of Education,* it would look like this:

> We are not classifying on the basis of race because we practice "separate *but equal*." When children are similarly situated, we treat them equally. White children are similarly situated to other White children, so we send them to "White schools," and Black children are similarly situated to other Black children, so we send them to "Black schools." Thus, once we compare children to kids of their own race, they are all being treated equally!

If the Court accepted Kansas's logic in *Brown*, it would have meant that for children to be similarly situated for purposes of the Equal Protection Clause in the context of education, they would have to be of the

same ascribed race. There would be no such thing as equal protection on the basis of race, because you must always condition on race *prior* to applying the equal protection test. Similarly here: If you accept Tennessee's logic, there is no such thing as equal protection on the basis of sex, because you must always classify on the basis of sex *prior* to applying the equal protection test.

Possibly in recognition of this absurd implication, Tennessee suggests that sex is not *always* relevant for determining whether two individuals are relevantly similarly situated. Tennessee instead claims that there are "certain circumstances" under which sex is an inherent aspect of determining relevantly similar situatedness: "This Court has repeatedly acknowledged that '[p]hysical differences between men and women . . . are enduring,' and it is a simple reality that 'the sexes are not similarly situated in certain circumstances.' " Br. in Opp. 24 (internal citations omitted).

Tennessee does not explain what these "certain circumstances" are, offer a test for these circumstances, or defend what makes these circumstances special. Rather, it simply asserts that the "circumstances" of the prohibited medical procedures are those special kind of circumstances. Referencing puberty blockers, hormones, and certain surgeries, the State simply declares that "[t]hey are not the same treatment even though the same physical act is involved" *because of* the sex of the minor. Br. in Opp. 23.

Tennessee's only "defense" of this claim comes through its reassertion of its very conclusion in other

words. Tennessee writes, "using testosterone or estrogen to treat a deficiency and restore naturally occurring levels is in no way similar to using those drugs to elevate hormonal levels far above the naturally occurring baseline to induce or prevent certain physical changes." Br. in Opp. 27. In other words, Tennessee suggests that similar situatedness depends on sex under circumstances where a medical treatment is used to either "restore naturally occurring" physical traits or modify "naturally occurring" physical traits. But in that case, the scope of these special circumstances entirely depends on what Tennessee refers to when it refers to procedures that restore or modify "naturally occurring traits."

Upon closer examination of what Tennessee might mean by a procedure that restores or modifies "naturally occurring traits," it becomes apparent that Tennessee's argument is, yet again, a mere restatement of its conclusion. First, by "naturally occurring traits," Tennessee does *not* mean "traits occurring without medical intervention" in the individual seeking the treatment. A minor classified as male who receives testosterone therapy will thereby increase testosterone levels beyond the levels that occur in the minor without medical intervention. Such a minor is clearly "elevat[ing] hormonal levels" above his body's naturally occurring baseline.

Tennessee could attempt to resolve this problem by defining "naturally occurring traits," not in terms of a specific individual, but rather in terms of the sex-specific population to which the minor is assigned. Read this way, "naturally occurring traits" are "traits occurring on/in a male human minor's body that are

statistically typical *in the population of male human minors*" and "traits occurring on/in a female human minor's body that are statistically typical in *the population of female human minors*." Read this way, Tennessee defines the traits that are "naturally occurring" for a given minor as the traits that are "statistically typical" *based on the minor's assigned sex category*.

In that case, Tennessee's argument is fallacious. This amounts to the position that male and female minors cannot be "similarly situated" under conditions where males and females are already stipulated as not similarly situated. Tennessee here reasons that, under circumstances *dependent on sex*, being similarly situated is *dependent on sex*. That reasoning is dizzyingly circular, and so does not provide substantive reason for accepting Tennessee's conclusion.

### C. Tennessee's argument that its law classifies based on the risk of the medical procedure depends on the State's judgment that minors should conform to sex-specific stereotypes.

Tennessee argues that its law should not be characterized as classifying on the basis of sex because its primary purpose is to classify on the basis of excessively risky medical procedures. "Patients receiving a procedure for different medical conditions present *a different risk-benefit proposition* and are in no way similarly situated." Br. in Opp. 23 (emphasis added). However, Tennessee's determination that some procedures present a different risk-benefit calculus than others depends entirely on its judgments that minors

should conform to sex-specific stereotypes, revealing yet again that Tennessee's law classifies on the basis of sex.

Recall that whether a medical procedure is banned by Tennessee's law depends on the procedure's *purpose*. Tennessee bans any medical intervention "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. § 68-33-103(a)(1).

If procedures done for these purposes "present a different risk-benefit proposition" than procedures done for other purposes, then determination of risk-benefit depends on answering a threshold question: *When is an identity, or way of life, "inconsistent" or "discordant" with a minor's sex?* Given Tennessee's definition of "sex," an identity or way of life "inconsistent" with sex can only mean one thing: an identity or way of life that does not conform to the State's normative judgment of what a boy's or girl's identity or way of life *should* be.[9]

We can show this by the following reasoning:

*First,* according to Tennessee, "sex" is defined as a person's "immutable characteristics of the reproduc-

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[9] Section 1 argued that by conditioning prohibitions on whether a procedure is "sex-inconsistent," Tennessee's law inherently classifies on the basis of sex. This section provides independent support for the same conclusion by focusing on how Tennessee's judgments of "inconsistency" depend on sex-specific stereotyping.

tive system that define the individual as male or female, as determined by anatomy and genetics existing at the time of birth." Tenn. Code Ann. § 68-33-102(9). So, according to Tennessee, "sex" is just like blood type, eye color, or number of toes. In the State's view, "sex" is fixed by anatomical features that exist in isolation of associated social information, norms, or stereotypes.

*Second,* observe that the idea of an identity or way of life that is *inconsistent* with a minor's blood type, eye color, or number of toes would be incoherent, unless social information, norms, or stereotypes dictated that people with a particular blood type, eye color, or number of toes should—normatively speaking—have a particular way of life. Anatomical features of human bodies, in and of themselves, do not dictate "consistent" ways of life. Anatomy is simply anatomy. In isolation of attendant social norms, body parts cannot prescribe "consistent" ways of life.[10]

*Third,* this shows that it is only by appeal to sex *stereotypes* that Tennessee can determine which identities are "inconsistent" or "discordant" with the anatomical features that, the State says, define sex. Having a particular set of chromosomes cannot prescribe a way of life any more than brown-colored eyes can.

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[10] "If gender is just reproductive features and *nothing more*, it makes no more sense to insist that people must look, love or act in particular ways on the basis of gender than it would to demand that people modify their behavior on the basis of eye color or height." Robin Dembroff, *Why Be Nonbinary?*, Aeon, Oct. 30, 2018, https://aeon.co/essays/nonbinary-identity-is-a-radical-stance-against-gender-segregation.

Indeed, Tennessee's law particularly targets medical procedures intended to address a "gender dysphoria" diagnosis. Br. in Opp. 1. Notably, this diagnosis is not given to all minors who experience dysphoria due to physical traits that Tennessee would categorize as sex-related. For example, a minor designated at birth as male who experiences dysphoria because of his large breasts or lack of facial hair is not given a "gender dysphoria" diagnosis. Neither is a minor designated at birth as female who experiences dysphoria because of her small breasts or the presence of facial hair.[11] "Gender dysphoria" is a technical medical term that is reserved only for minors who experience dysphoria because they *do not and do not wish to* conform with the stereotypes that attend their sex classification.[12] By admitting that its law targets minors based on this diagnosis, Tennessee admits that its law targets minors based on their nonconformity with the

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[11] *See* Emma Inch, *Changing Minds: The Psycho-Pathologization of Trans People*, 45 Int'l J. Mental Health 3, 199-200 (2016).

[12] *E.g.*, Shannon L. Sennott, *Gender Disorder as Gender Oppression: A Transfeminist Approach to Rethinking the Pathologization of Gender Non-Conformity*, Women & Therapy (2011), https://static1.squarespace.com/static/56816269841abaa3c9238c29/t/5790f691e4fcb51acf3b855c/1469118098649/sennott.pdf; Jas Heaton, *Gender Dysphoria and Why Wanting Is Enough*, Blog of the Am. Philosophical Ass'n (July 26, 2023), https://blog.apaonline.org/2023/07/26/gender-dysphoria-and-why-wanting-is-enough/ ("Cis[gender] people often become depressed if they are unable to affirm their gender, and will engage in risky behaviors to get the gender affirmation they want—both notable signs of someone suffering from gender[-related] dysphoria.").

stereotypes that attend their specific sex classification.

The fact that Tennessee's risk determination depends on sex stereotypes is further confirmed by the fact that Tennessee permits medical procedures that enable minors to identify in ways that *do* conform with sex stereotypes, and to do so with the help of medical interventions that carry medical risks. For example, under Tennessee's law, a male teenage minor who experiences late-onset puberty is permitted to receive testosterone therapy to induce masculine secondary sex characteristics, which align with male sex stereotypes. He is also, at least by this law, permitted to take steroids (which have documented risks of leading to "impotence, reduced sperm production in the testicles, and even smaller testicle size"[13]) if the purpose is to conform to sex stereotypes. The law also allows medical interventions intended to make a minor with an intersex variation conform to ideas of a "normal" male or female body: for example, medically unnecessary genital surgery intended to alter an infant's so-called "ambiguous genitalia" so as to conform to cultural ideas of a "normal" clitoris.[14]

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[13] Nemours Teen Health, *What Are the Risks of Steroid Use?*, https://kidshealth.org/en/teens/steroids.html#:~:text=Although%20they%20might%20help%20build,and%20even%20smaller%20testicle%20size.

[14] "[T]he primary justifications for intersex management [as a disorder] remains social rather than based on clinical evidence about human biological function." Catherine Clune-Taylor, *Securing Cisgendered Futures: Intersex Management Under the "Disorders of Sex Development" Treatment Model*, 34 Hypatia 4, 691 (2019); *see also* Katrina Alicia Karkazis, *Fixing Sex: Intersex,*

By contrast, under Tennessee's law, a teenage minor sexed female at birth who experiences gender dysphoria is *prohibited* from receiving testosterone therapy to induce masculine secondary sex characteristics, which do not align with female sex stereotypes.[15] This minor is also prohibited from taking steroids if the purpose is to *not* conform to sex stereotypes. These examples confirm that the State's "risk-benefit" analysis entirely collapses into whether the procedure is, or is not, done with the purpose of conforming to sex-specific stereotypes.

The State of Tennessee may well assign vanishingly small benefits to a procedure done for the purpose of enabling nonconformity with sex stereotypes. In making such a calculation, however, the State conditions its risk-benefit analysis on whether a procedure advances, or contradicts, the social norms that Tennessee believes should attend each sex.

Far from offering a non-sex-based justification for its law based on medical risk, Tennessee's arguments *depend* on sex classification. Its statute must face heightened scrutiny.

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*Medical Authority, and Lived Experience* 9 (2008) ("[I]ntersex is unique only because it makes explicit the cultural rules of gender. Put another way, because the treatment for intersexuality exemplifies attempts to codify normality and abnormality, the frequency of intersexuality is less important than ideas about how to make intersex infants 'normal' boys or girls . . . .").

[15] But even this line is blurry, in the case of a minor sexed as female at birth who takes steroids to build muscle or who uses medical weight-loss interventions to eliminate "curves."

## CONCLUSION

For all the reasons set out above and in the briefs submitted by petitioner and plaintiffs, we respectfully suggest that this Court reverse the decision of the Sixth Circuit.

Respectfully submitted,

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September 2024