

**No. 23-477**

**In The  
Supreme Court of the  
United States**

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UNITED STATES, *Petitioner*,  
*v.*

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

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

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**Brief of Amicus Curiae Governor Gianforte  
Supporting Respondents**

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(i)  
**QUESTIONS PRESENTED**

Whether Tennessee Senate Bill 1 (SB1), which prohibits 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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## 1 STATEMENT OF INTEREST<sup>1</sup>

Amicus the Honorable Greg Gianforte is the Governor of Montana. As Governor, he is “vested with [t]he executive power” and “shall see that the laws are faithfully executed.” Mont. Const., art. VI, § 4(1). He is “the chief executive of the state,” tasked with “formulat[ing] and administer[ing] the policies of the executive branch of state government.” Mont. Code Ann. § 2-15-103. He “has full power [to] supervis[e], approv[e], direct[ ], and appoint” all unelected departments and their units, *id.*, and “shall ... supervise the official conduct of all executive and ministerial officers,” *id.* at § 2-15-201(a).

As the Chief Executive Officer of the State of Montana, Governor Gianforte is committed to promoting opportunity for the next generation by ensuring Montana’s children have the freedom to grow up unhampered by improper interests and agendas and with access to appropriate tools and resources to promote both their development and ultimate success in society. To that end, in 2023, he signed legislation investing \$300 million in community-based behavioral health care and developmental disabilities services across Montana.<sup>2</sup> Most recently, he sent a letter to Montana schools, urging them to adopt policies to

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<sup>1</sup> No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person made a monetary contribution to its preparation or submission.

<sup>2</sup> See Mont. House Bill 872 (2023), <https://leg.mt.gov/bills/2023/billpdf/HB0872.pdf>.

make the schools “cell phone-free” in an effort to minimize negative social media impacts on children.<sup>3</sup>

Because Tennessee’s law, like Montana’s 2023 law, pursues this lawful and important objective, the Governor respectfully urges the Court to affirm the Sixth Circuit decision below.

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<sup>3</sup> See Ltr. to Dist. Superintendents and Tr. (Aug. 22, 2024), [https://governor.mt.gov/\\_files/24.08.22\\_Ltr\\_to\\_District\\_Superintendents\\_Trustees\\_24-25\\_School\\_Year.pdf](https://governor.mt.gov/_files/24.08.22_Ltr_to_District_Superintendents_Trustees_24-25_School_Year.pdf).

## SUMMARY OF ARGUMENT

Tennessee, like Montana and many other states, prohibits the use of certain medical treatments for children with gender dysphoria. Tenn. Code Ann. § 68-33-103(a)(1). *See* Mont. Code Ann. § 50-4-1001 to -1006 (2023). This prohibition targets neither transgender nor biological sex and allows adults to choose these treatments. These medical treatments are permanent, invasive, and life-altering. Because the DSM-V mental health definition of gender dysphoria, adopted in 2013, may allow for its diagnosis where no true pathology exists, and because financially incentivized industries have emerged for such treatments, legislatures like Tennessee's and Montana's have chosen to prohibit these treatments on the healthy bodies of still-developing young children.

## ARGUMENT

### **I. The medical treatments provisions are tailored to protect minors with gender dysphoria.**

The human mind is powerful. It has created and built great civilizations. It has solved complex problems with ingenious solutions. It has imagined things of beauty. It has cured disease.

Conversely, the mind can overcome great obstacles. It can persevere through great suffering. And, as the recent Olympics reminds us yet again, it can push the human body to incredible feats.

But science increasingly confirms that the mind is the result of a complex process that takes years of

cognitive and mental development.<sup>5</sup> And in the twenty-first century, the minds of children have been exposed with unprecedented access to new information and technologies that can affect the mental and physical development of their minds and bodies.<sup>6</sup>

In recent years, countries across the globe have seen a considerable and rapid increase in the number of diagnosed cases of “gender dysphoria.”<sup>7</sup> Gender dysphoria is defined by the Diagnostic and Statistical Manual of Mental Disorders (DSM-V-TR) as “[a]

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<sup>5</sup> *The Teen Brain: 7 Things to Know*, Nat'l Inst. of Mental Health, <https://www.nimh.nih.gov/health/publications/the-teen-brain-7-things-to-know#:~:text=Adolescence%20is%20an%20important%20time%20for%20brain%20development.&text=The%20brain%20finishes%20developing%20and,the%20last%20parts%20to%20mature> (last visited Oct. 8, 2024).

<sup>6</sup> See generally Haidt, Jonathan, *The Anxious Generation: How the Great Rewiring of Childhood is Causing an Epidemic of Mental Illness*, Penguin Press (Mar. 26, 2024).

<sup>7</sup> *The Gender Dysphoria Diagnosis in Young People Has a “Low Diagnostic Stability,” Finds a New German Study*, Soc'y for Evidence Based Gender Med. (July 19, 2024), <https://segm.org/gender-dysphoria-diagnosis-desistance-germany#:~:text=July%2019%2C%202024-,The%20Gender%20Dysphoria%20Diagnosis%20in%20Young%20People%20Has%20a%20E2%80%9CLow,Finds%20a%20New%20German%20Study&text=Disagreement%20about%20the%20permanence%20of,practice%20of%20youth%20gender%20transition> (“There has been an overall 8-fold *increase* in the prevalence of gender-identity-related diagnoses (F64), overrepresented among adolescent females over the last decade. Like other international data, the German data reveal a marked increase in gender-identity-related diagnoses (F64) in youth in the past decade.”).

marked incongruence between a person's expressed or experienced gender and their assigned gender at birth.”<sup>8</sup> It is marked by “a strong desire to change or get rid of one’s primary or secondary sex characteristics” and “a strong desire to have the sex characteristics of another gender.”<sup>9</sup>

In response to some cases involving minor children, doctors and medical providers have administered so-called “gender affirming care.” “Gender affirming care” for children is Orwellian Newspeak, a seemingly innocuous, even solicitous phrase that masks its true nature of permanent, invasive, life-altering medical and surgical procedures performed on children whose young minds and bodies are still developing. The science around these treatments, which may include puberty blockers, hormone shots, and sex-reassignment surgeries, is unsettled and continues to evolve.<sup>10</sup>

Children who struggle with gender identity deserve love, compassion, and respect. They deserve no ridicule, animus, or seclusion. They are entitled to protection, not exploitation. While their young minds and bodies are still developing, they should not be

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<sup>8</sup> *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.), Am. Psychiatric Ass’n 512 (2013).

<sup>9</sup> *Id.*

<sup>10</sup> Davis, Lisa Selin, *Gender-distress youth deserve the truth about the science*, The Hill (July 11, 2024), <https://thehill.com/opinion/healthcare/4764222-youth-gender-care-censorship/> (“...there is no expert consensus about how to treat gender-dysphoric youth.”).

subjected to experimental and permanent, life-altering medical and surgical procedures.

It is within this framework that Tennessee, like Montana and other states, has adopted laws that prohibit certain medical treatments for minors as a response to gender dysphoria. *See* Tenn. Code Ann. § 68-33-103(a)(1); *see also* Mont. Code Ann. § 50-4-1001 to -1006 (2023). In doing so, they join numerous European countries, like Norway, Finland, Sweden, the Netherlands, the United Kingdom, and Denmark, which have likewise prohibited or restricted such treatments for children through either law or medical policy.<sup>11</sup>

**A. The medical treatments provisions do not target an individual’s transgender or biological status.**

As the federal government expressly acknowledged in its petition for certiorari, the challenged laws are not tied to an individual’s transgender status. (Pet. at 4.) This makes sense. While it may be that those with gender dysphoria identify as transgender, not all transgender individuals suffer from gender dysphoria:

The term “transgender” refers to a person whose sex assigned at birth (i.e. the sex assigned at birth, usually based on external genitalia) does

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<sup>11</sup> Cohen, Joshua P., *Increasing Number of European Nations Adopt A More Cautious Approach to Gender-Affirming Care Among Minors*, Forbes (Jun. 6 2023), <https://www.forbes.com/sites/joshuacohen/2023/06/06/increasing-number-of-european-nations-adopt-a-more-cautious-approach-to-gender-affirming-care-among-minors/>.

not align with their gender identity (i.e., one's psychological sense of their gender). Some people who are transgender will experience "gender dysphoria," which refers to psychological distress that results from an incongruence between one's sex assigned at birth and one's gender identity.<sup>12</sup>

In principle, there are several means by which transgender individuals, irrespective of their sex, may address their unaligned gender, including:

social affirmation (e.g., changing one's name and pronouns), legal affirmation (e.g., changing gender markers on one's government-issued documents), medical affirmation (e.g., pubertal suppression or gender-affirming hormones), and/or surgical affirmation (e.g., vaginoplasty, facial feminization surgery, breast augmentation, masculine chest reconstruction, etc.).<sup>13</sup>

Not all of these categories are pursued by every transgender individual, and no one category is exclusive to one biological sex or the other.<sup>14</sup>

The medical treatments provisions only address the availability of medical and surgical responses. Neither transgender individuals, nor their sex, are the target of such legislation.

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<sup>12</sup> *What is Gender Dysphoria?*, Am. Psychiatric Ass'n, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited October 2, 2024).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

**B. The medical treatments provisions do not apply to adults with gender dysphoria.**

Instead, the medical treatments provisions are carefully crafted to be responsive to a specific concern: treating gender dysphoria in children.

The phrase “gender dysphoria” is a relatively new term for a mental disorder recognized by the American Psychiatric Association (“APA”). The APA historically recognized a DSM category of “gender identity disorders,” which were defined as disorders “characterized by strong and persistent cross-gender identification accompanied by persistent discomfort with one’s assigned sex.”<sup>15</sup>

The onset of these disorders historically was recognized to occur as early as four years of age, but its diagnosis could not be made until adolescence or adulthood.<sup>16</sup> Children with the disorder often had co-existing mental conditions of separation anxiety, generalized anxiety, and depression; adolescents were at risk of depression, suicidal ideation, and suicide attempts; and adults often also presented with anxiety and

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<sup>15</sup> *Diagnostic and Statistical Manual of Mental Disorders (4<sup>th</sup> ed.)*, Am. Psychiatric Ass’n, 493 (1994).

<sup>16</sup> See generally Shafer, Linda C., M.D., *Chapter 36: Sexual Disorders and Sexual Dysfunction*, Mass. Gen. Hospital Comp. Clinical Psychiatry 487-497 (2008).

depression.<sup>17</sup> Gender identity disorders were relatively rare as compared to other psychiatric disorders.<sup>18</sup>

In 2013, this category was renamed “gender dysphoria,” and today is defined as “[a] marked incongruence between a person’s expressed or experienced gender and their assigned gender at birth.”<sup>19</sup> It is marked by “a strong desire to change or get rid of one’s primary or secondary sex characteristics,” “a strong desire to have the sex characteristics of another gender,” and “a strong desire to be treated as or be another gender.”<sup>20</sup> The impetus for the change was to destigmatize the disorder both by adopting a culturally acceptable term and by tying the disorder to “distress” and “desire” rather than to gender identity itself.<sup>21</sup> Gender non-conformity is not in itself a mental disorder.<sup>22</sup>

The APA has approved as a response to a gender dysphoria diagnosis hormone therapy and/or surgery.<sup>23</sup> This type of response to a mental condition is

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.), Am. Psychiatric Ass’n 512 (2013).

<sup>20</sup> *Id.*

<sup>21</sup> Davey, Zowie and Michael Toze, *What is Gender Dysphoria: A Critical Systematic Narrative Review*, 3 Transgender Health 159 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6225591/>.

<sup>22</sup> *Diagnostic and Statistical Manual of Mental Disorders* (5th ed.), Am. Psychiatric Ass’n 458 (2013).

<sup>23</sup> *What is Gender Dysphoria?*, Am. Psychiatric Ass’n,

extraordinary. In other mental health contexts, any medical or surgical response targets correcting brain function, whether through medication, psychotherapy, psychosocial therapy, or brain stimulation therapy.<sup>24</sup> For example, medical responses to depression are anti-depressant medications that adjust the chemical makeup of the brain, and a surgical response is brain stimulation through transcranial magnetic stimulation.<sup>25</sup> Medical treatments for gender dysphoria, in contrast, seek to medically or surgically modify an individual's biological reality to reconcile it with that individual's mental state.<sup>26</sup>

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<https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (last visited October 8, 2024).

<sup>24</sup> *Treatments*, Nat'l Alliance on Mental Illness, <https://www.nami.org/about-mental-illness/treatments/> (last visited October 8, 2024).

<sup>25</sup> *TMS v. Traditional Antidepressants: Which Works Best for You?*, Mindful Health Solutions (Dec. 18, 2023), <https://mindfulhealthsolutions.com/tms-vs-traditional-antidepressants-which-works-best-for-you/#:~:text=TMS: %20In%20contrast%2C%20TMS%20typically,or%20concerned%20about%20such%20issues>.

<sup>26</sup> Notably, both Tennessee's and Montana's laws exclude from their scope those with biological sex-related conditions, as the appropriate response to such biological conditions may well be biological in nature, including hormone therapy or surgery. *See* Tenn. Code Ann. § 68-33-103(b)(1)(A); Mont. Code Ann. § 50-4-1004(1)(c) ("The medical treatments listed in subsections (1)(a) and (1)(b) are prohibited only when knowingly provided to address a female minor's perception that her gender or sex is not female or a male minor's perception that his gender or sex is not male. Subsections (1)(a) and (1)(b) do not apply for other

Nevertheless, legislative bodies like Tennessee's and Montana's have chosen to leave untouched the ability for adults to determine whether they would like to pursue such medical treatments in consultation with their mental health provider. Having had an opportunity to experience and conclude their biological development, adults are presumably capable to make such a life changing decision for themselves.

**C. The government has a compelling interest in protecting children.**

Society has an interest in protecting its children because family is the building block of a free society.<sup>27</sup> This interest is made legally tangible in the recognition of the States' policy power to protect health and safety of its citizens, which necessarily includes children. U.S. Const., art. X. And it is evident in the many, many federal and state statutes and regulations that impose protective measures for children, such as alcohol consumption, *see, e.g.*, National Minimum Drinking Age Act (1984), Pub. L. 18-363 § 6, 98 Stat. 437; tobacco marketing, *see, e.g.*, The Family Smoking Prevention and Tobacco Control Act (2009), Pub. L. 111-31, 123 Stat. 1776; medication dosage information, *see* 21 C.F.R. § 341.90; social media usage, *see e.g.*, Ark. Code § 4-88-1101 *et seq.*, and Protecting Georgia's Children on Social Media Act (2024), Senate Bill 351.

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purposes ....").

<sup>27</sup> See Aristotle, *The Politics of Aristotle* 9 (Earnest Barker, trans. Oxford Univ. Press 1997).

With the adoption of a new “gender dysphoria” diagnosis, *see supra* Part I.B., the risk of unwarranted harm to physically healthy children is significant. Because the diagnosis focuses simply on “distress” and “strong desires,” significant risk of over-diagnosing the disorder exists.<sup>28</sup> Children properly diagnosed with a disorder are making life-altering, invasive and permanent decisions before they’ve fully developed. And children who ought not be so diagnosed are nevertheless eligible for these irreversible medical interventions.<sup>29</sup>

This effect is only aggravated by the pharmaceutical and medical industries that have grown up around these medical treatments. The sex-reassignment surgery market is estimated to have been \$4.1 billion in 2022, with an 8.4% annual growth expected from 2023

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<sup>28</sup> Davey, Zowie and Michael Toze, *What is Gender Dysphoria: A Critical Systematic Narrative Review*, 3 Transgender Health 159 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6225591/>.

<sup>29</sup> For this reason, Tennessee, like Montana, does not limit its medical treatments provisions to those in “discomfort or distress from a discordance between the minor’s sex and asserted identity,” but more broadly to minors who “identify with, or live as, a purported identity inconsistent with the minor’s sex.” Tenn. Code Ann. § 68-33-103(a)(1). *See also* Mont. Code Ann. § 50-4-1004(1)(a) & (b) (“...a person may not knowingly provide the following medical treatments to a female minor to address the minor’s perception that her gender or sex is not female.... a person may not knowingly provide the following medical treatments to a male minor to address the minor’s perception that his gender or sex is not male...”).

to 2030.<sup>30</sup> The cost of transitioning, including 60 years of hormones, can be as much as \$410,600 for males and \$605,500 for females.<sup>31</sup>

These circumstances are not dissimilar to those of tobacco use in America. Despite a 1964 Surgeon General Report concluding that cigarette smoking was causally related to lung cancer, and 15 states restricting the sale, advertising, possession, or use of cigarettes, the American Medical Association took two decades to take a clear stand on the issue, influenced in significant part by the power of the tobacco industry.<sup>32</sup> The medical profession's failure to support government's policy decisions did not preclude government from acting on those policy positions then. They should not now, either.

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<sup>30</sup> Smith, Wesley J., *The 'Gender Industrial Complex' Makes Billions Annually*, Nat'l Rev. (Aug. 28, 2024), <https://www.nationalreview.com/corner/the-gender-industrial-complex-makes-billions-annually/#:~:text=It%20also%20examined%20how%20some,%5BEmphasis%20added.%5D> (citing *The Gender Industrial Complex*, Am. Principles Project (June 2024), <https://americanprinciplesproject.org/wp-content/uploads/2024/06/Gender-Industrial-Complex-Full-Report.pdf>).

<sup>31</sup> *The Gender Industrial Complex*, Am. Principles Project (June 2024), <https://americanprinciplesproject.org/wp-content/uploads/2024/06/Gender-Industrial-Complex-Full-Report.pdf>.

<sup>32</sup> *The Health Consequences of Smoking—50 Years of Progress: A Report of the Surgeon General*, Nat'l Ctr. for Chronic Disease Prevention and Health Promotion (US) Office on Smoking and Health (2014), <https://www.ncbi.nlm.nih.gov/books/NBK294310/>.

Montana joins Tennessee (and other states who have similar laws) in its effort to ensure the next generation has the ability to perform great feats, solve thorny problems, create things of great beauty, and persevere through any struggle.

## **CONCLUSION**

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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