Nos. 23-5600, 23-5609

In the United States Court of Appeals for the Sixth Circuit

L.W., by and through her parents and next friends, SAMANTHA WILLIAMS and BRIAN WILLIAMS, *et al.*,
Plaintiffs-Appellees,

UNITED STATES OF AMERICA,
Intervenor-Appellee,

v.

JONATHAN THOMAS SKRMETTI, in his official capacity as the Tennessee Attorney General and Reporter, *et al.*,
Defendants-Appellants.

JANE DOE 1, *et al.*,
Plaintiffs-Appellees,

v.

WILLIAM C. THORNBURY, JR., M.D., in his official capacity as the President of the Kentucky Board of Medical Licensure, *et al.*,
Defendants,

COMMONWEALTH OF KENTUCKY EX REL. ATTORNEY GENERAL DANIEL CAMERON,
Intervenor-Appellant

Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division, and the Western District of Kentucky, Louisville Division
Case Nos. 3:23-cv-00376 and 3:23-cv-00230

BRIEF OF SIXTEEN FAMILY LAW AND CONSTITUTIONAL LAW SCHOLARS AS *AMICI CURIAE* URGING AFFIRMANCE IN SUPPORT OF PLAINTIFFS-APPELLEES

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 23-5609 Case Name: Doe v. Thornbury

Name of counsel: Tricia R. Herzfeld

Pursuant to 6th Cir. R. 26.1, Family Law and Constitutional Law Scholars
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on August 10, 2023 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Tricia R. Herzfeld
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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

6th Cir. R. 26.1
DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

(a) **Parties Required to Make Disclosure**. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants.

(b) **Financial Interest to Be Disclosed**.

(1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation.

(2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation.

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this Court, whichever first occurs.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are legal scholars whose scholarship and teaching focus on family law and the Due Process Clause of the Fourteenth Amendment. These scholars have an interest in ensuring that the Fourteenth Amendment is interpreted to protect parents' fundamental right to direct their children's medical care. *Amici* include (in alphabetical order): Barbara A. Atwood, Mary Anne Richey Professor of Law Emerita, The University of Arizona; Kevin M. Barry, Professor of Law, Quinnipiac University School of Law; Khiara M. Bridges, Professor of Law, University of California, Berkeley, School of Law; Erwin Chemerinsky, Dean & Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley, School of Law; Naomi R. Cahn, Justice Anthony M. Kennedy Distinguished Professor of Law & Armistead M. Dobie Professor of Law, University of Virginia School of Law; June Carbone, Professor of Law, University of Minnesota Law School; Maxine Eichner, Graham Kenan Distinguished Professor of Law, University of North Carolina School of Law; Clare Huntington, Professor of Law, Columbia Law School; Frederick Mark Gedicks, Guy Anderson Chair & Professor of Law, Brigham Young University Law School; Ira C. Lupu, F. Elwood and Eleanor Davis Professor Emeritus of Law, The George Washington University Law School; Martha L. Minow, 300th Anniversary University Professor, Harvard Law School; Nancy D. Polikoff, Professor Emerita of Law, American University Washington College of

Law; Solangel Maldonado, Eleanor Bontecou Professor of Law, Seton Hall University School of Law; Dorothy E. Roberts, George A. Weiss University Professor of Law and Sociology & Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights, University of Pennsylvania Carey Law School; Katharine B. Silbaugh, Professor of Law, Boston University School of Law; and Jane M. Spinak, Edward Ross Aranow Clinical Professor Emerita of Law, Columbia Law School.

The institutional affiliations of *Amici* are supplied for the purpose of identification only and the positions set forth below are solely those of *Amici*.[1]

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amici curiae* or their counsel—contributed money that was intended to fund preparing or submitting this brief. All parties consented to the filing of this brief.

INTRODUCTION*

In its decision granting an emergency stay of the district court's order in *L.W. ex rel. Williams v. Skrmetti*, this Court expressed its "initial" view that Tennessee's ban on transition care for transgender adolescents—namely, puberty blockers and hormone therapy—does not violate, *inter alia*, the Due Process Clause.[1] Specifically, this Court concluded that Tennessee's ban does not infringe what the Sixth Circuit and the district court and Plaintiffs-Appellees have characterized as the fundamental right to direct their children's medical care.[2] According to this Court, the claimed right reduces to "a general right to receive new medical or experimental drug treatments" and is not entitled to protection under the Due Process Clause.[3]

The right of parents to direct the upbringing of their children is one of the oldest and most unassailable fundamental rights protected by the Constitution. This fundamental right unequivocally includes parents' right to direct their children's medical care. For over a century, the Supreme Court has vigorously defended this right as promoting the best interests of children and of society more generally, including the traditional values of limited government and the sanctity of the family.

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* Counsel acknowledges the assistance of Winston & Strawn LLP lawyers, Aldo A. Badini, Bryan Goldstein, Michelle D. Tuma, and Jara R. Y. Jacobson in finalizing, formatting, and cite-checking this brief.

[1] 73 F.4th 408, 419 (6th Cir. 2023).

[2] *See id.* at 414, 416-17; *Kanuszewski v. Mich. Dep't of Health and Hum. Servs.*, 927 F.3d 396, 419 (6th Cir. 2019).

[3] *L.W.*, 73 F.4th at 417.

By prohibiting parents from accessing established medical care for their children, Tennessee's and Kentucky's bans infringe parents' fundamental right to direct their children's medical care and grant unprecedented power to the State to disrupt families and jeopardize the health of children. For these reasons, *Amici* urge this Court to find that the bans infringe Plaintiffs-Appellees' fundamental rights under the Due Process Clause and are subject to strict scrutiny.[4]

ARGUMENT

I. THE RIGHT OF PARENTS TO DIRECT THEIR CHILDREN'S MEDICAL CARE IS A FUNDAMENTAL RIGHT PROTECTED BY THE FOURTEENTH AMENDMENT

The Supreme Court has "long recognized" that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests,"[5] including those "deeply rooted in this Nation's history and tradition."[6] According to the Supreme Court, "the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court."[7] In a long line of cases dating back a century, the Court has repeatedly confirmed that "[t]he child is not the

[4] *Amici* agree with Plaintiffs-Appellees that Tennessee's and Kentucky's transition care bans do not survive heightened scrutiny. This brief does not address the arguments supporting that conclusion.
[5] *Troxel v. Granville*, 530 U.S. 57, 65 (2000).
[6] *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).
[7] *Troxel*, 530 U.S. at 65.

mere creature of the State," and that parents "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations."[8] This duty is predicated on the "presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions," and that "natural bonds of affection lead parents to act in the best interests of their children."[9]

Laws that infringe parents' right to direct the upbringing of their children are subject to strict scrutiny; to pass constitutional muster, they must be narrowly tailored to achieve a compelling state interest.[10] This is a demanding burden. Absent threats to the "physical or mental health" of a child, such as "abuse and neglect," the

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[8] *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 535 (1925); *see also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing fundamental right of parents to "establish a home and bring up children"); *accord Troxel*, 530 U.S. at 66 (recognizing "fundamental right of parents to make decisions concerning the care, custody, and control of their children"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.").

[9] *Parham v. J. R.*, 442 U.S. 584, 602 (1979); *accord Troxel*, 530 U.S. at 68.

[10] *See, e.g.*, *Glucksberg*, 521 U.S. at 720 (stating that Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests"); *Troxel*, 530 U.S. at 80 (Thomas, J., concurring) (stating that "strict scrutiny [applies] to infringements of fundamental rights" of parents to direct the upbringing of their children); *Kanuszewski*, 927 F.3d at 419 (applying strict scrutiny to state's infringement of right of parents to direct medical care of their children).

Constitution forbids the State from infringing on parents' "broad . . . authority over [their] minor children."[11] As the Supreme Court has reaffirmed in numerous cases, "so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[12]

It is well-established, in the Supreme Court, in this Court, and in numerous other lower courts, that the century-old right of parents to direct the upbringing of their children includes the more specific right "to direct their children's medical care."[13] Where parents seek medically necessary care for their children, parental

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[11] *Parham*, 442 U.S. at 602-03.

[12] *Troxel*, 530 U.S. at 68-69.

[13] *Kanuszewski*, 927 F.3d at 419 ("[P]arents' substantive due process right 'to make decisions concerning the care, custody, and control' of their children includes the right to direct their children's medical care.") (quoting *Troxel,* 530 U.S. at 72); *see, e.g.*, *Parham*, 442 U.S. at 602 ("[O]ur constitutional system long ago . . . asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.' Surely, this includes a 'high duty' to recognize symptoms of illness and to seek and follow medical advice.") (citation omitted); *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010) (recognizing that "a parent's general right to make decisions concerning the care of her child includes, to some extent, a more specific right to make decisions about the child's medical care."); *Bendiburg v. Dempsey*, 909 F.2d 463, 470 (11th Cir. 1990) (recognizing "the right of parents to generally make decisions concerning the treatment to be given to their children" and prohibiting a state, "concerned for the medical needs of a child," from "willfully disregard[ing] th[at] right"); *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2023 WL 4073727, at *36 (E.D. Ark. June 20, 2023) (recognizing parents' fundamental right to direct their children's medical

autonomy is at its apex.[14] According to the Supreme Court, "as long as parents choose from professionally accepted treatment options the choice is rarely reviewed in court and even less frequently supervened. . . . The decision to provide or withhold medically indicated treatment is, except in highly unusual circumstances, made by the parents or legal guardian."[15] *Amici* are aware of no decision holding that a state may prohibit parents from protecting their children from harm by preventing parents from obtaining professionally accepted treatments for their children.[16]

II. RECOGNITION OF THE FUNDAMENTAL RIGHT OF PARENTS TO DIRECT THEIR CHILDREN'S MEDICAL CARE FURTHERS THE BEST INTERESTS OF CHILDREN AND SOCIETY MORE GENERALLY

The Court's deeply-rooted deference to parents' right to direct the upbringing of their children, including the right to direct their children's medical care, reflects two normative judgements. The first is that this fundamental right is necessary to

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care); *accord Doe v. Ladapo*, No. 4:23cv114-RH-MAF, 2023 WL 3833848, at *11 (N.D. Fla. June 6, 2023) (same); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1144 (2022) (same); *R.J.D. v. Vaughan Clinic, P.C.*, 572 So. 2d 1225, 1227-28 (Ala. 1990) (same).

[14] *Parham*, 442 U.S. at 604 ("[Parents], of course, retain plenary authority to seek…care for their children.").

[15] *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 627 n.13 (1986) (plurality) (quotation marks omitted).

[16] *Cf. Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1317 (11th Cir. 2017) (holding that state's asserted interest in protecting public health by prohibiting doctors from asking patients about firearm ownership could not satisfy heightened scrutiny under the First Amendment where "the applicable standard of care encourages doctors to ask questions about firearms").

protect the interests of children.[17] Generally speaking, children, by dint of their age, must rely on others to make important decisions for them.[18] Because parents—not the State or other adults—are generally in the best position to know what is best for their children, and because "natural bonds of affection" generally "lead parents to act in the best interests of their children," recognition of parental rights benefits children.[19] A contrary approach—one soundly rejected by the Supreme Court—in which the child is the mere "creature of the State" would undermine the interests of the child by delegating child-rearing rights to those least familiar with the child's needs.[20]

Importantly, parents have more than a natural incentive to provide for their children: as the Supreme Court has stated, parents have a *legal duty* to do so.[21] If they fail in this duty, the State may criminally prosecute and incarcerate them for child neglect or abandonment, or it may terminate their parental rights altogether.[22] Recognition of parental rights is therefore the logical corollary to the substantial duties imposed on parents: in order to meet their obligation to provide for their

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[17] *See, e.g.*, Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529, 2529 (2022).
[18] *See Troxel*, 530 U.S. 57 at 68; *accord Schall v. Martin*, 467 U.S. 253, 265 (1984).
[19] *Parham*, 442 U.S. at 602.
[20] *See Pierce*, 268 U.S. at 535.
[21] *See id.* (discussing parents' "high duty . . . to recognize and prepare [their children] for additional obligations").
[22] *See generally Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 32 (1981).

children, the State must not prevent parents from fulfilling this obligation.[23] Without parental rights to provide care for their children, the State could take over all decisions related to children's development, both extinguishing fundamental liberty and thrusting government actors and resources into care-giving roles for which they are ill-equipped and likely inadequate. Such an Orwellian world would deny children the love and care of those most proximate and most likely able to advance each child's interests.[24] The prospect of continually facing state interference with parental decisions and care could lead many adults to forgo parenthood altogether.

The Supreme Court's parental rights jurisprudence also reflects the legal judgment—backed by centuries of tradition and practices across this continent and indeed the world—that parental rights serve society's interests more generally. Societies with good reason have elevated the sanctity of the family and the United States has committed to limited government with the care and support of each new generation as central goals.[25] Whether drawn from consistent lines of judicial precedent or from conceptions of history and tradition informing constitutional

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[23] *See Meyer*, 262 U.S. at 400 ("Corresponding to the right of control . . . is the natural duty of the parent to give his children education suitable to their station in life . . . ."); *see also Lehr v. Robertson*, 463 U.S. 248, 257 (1983) ("[T]he rights of the parents are a counterpart of the responsibilities they have assumed.").

[24] *See* Huntington & Scott, *supra* note 17, 90 FORDHAM L. REV. at 2532-33.

[25] *See, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition.").

interpretation, legal protection for parental decisions stands as an enduring commitment revered across communities and generations in this country.

As the Supreme Court has repeated in various formulations over the years, "[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."[26] Because "[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural,"[27] many consider this deeply rooted tradition of parental authority to be necessary to the

[26] *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *see, e.g.*, *Parham*, 442 U.S. at 602 ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course[.]"); *Ginsberg v. New York,* 390 U.S. 629, 639 (1968) ("[C]onstitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."); *Trimble v. Gordon,* 430 U.S. 762, 769 (1977) (characterizing "[t]he family unit" as "perhaps the most fundamental social institution of our society"); *In re Bernard T.*, 319 S.W.3d 586, 597 (Tenn. 2010) ("The concept of 'family' is one of the fundamental building blocks of American society. Parental autonomy is the cornerstone of this concept.").

[27] *Moore*, 431 U.S. at 503–04 (plurality); *see also People v. Bennett*, 501 N.W.2d 106, 121 n.2 (Mich. 1993) (Riley, J., concurring in part and dissenting in part) ("[T]he cultural patterns of American family life have contributed enormously to the ultimate purposes of a democratic society by providing the stability and the structure that are essential to sustaining individual liberty over the long term. . . . Only in the master-apprentice relationship of parent and child, committed to one another by the bonds of kinship, can the skills, normative standards, and virtues that maintain our cultural bedrock be transmitted.") (quoting Prof. Bruce Hafen).

maintenance of a free society and "a strong hedge against tyranny."[28] Denying state control over childrearing is essential to maintaining a system of limited government, for "[e]ven if the system remains democratic, massive state involvement with childrearing would invest the government 'with the capacity to influence powerfully, through socialization, the future outcomes of democratic political processes.'"[29]

The connection between parental rights and a free society is not academic. As demonstrated by centuries of disruption of Black and Indigenous families through slavery, forced apprenticeship, and placement in government-run boarding schools and White adoptive homes,

> [f]amily destruction has historically functioned as a chief instrument of group oppression in the United States. The family is a critical social institution that serves as a caring shield around its members to protect them from the totalitarian dictates of government officials. Families pass on the cultural norms, moral values, and political commitments of groups within a society. Families prepare children for participating in the economic, political, and social life of the various communities they will be part of as adults. . . . Rupturing families within a group is a means of repressing the entire group.[30]

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[28] *Bennett*, 501 N.W.2d at 122 n.3 (Riley, J., concurring and dissenting); *see also Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality) ("Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.").

[29] *Bennett*, 501 N.W.2d at 122 n.3 (Riley, J., concurring and dissenting) (quoting Hafen).

[30] Dorothy Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families – and How Abolition Can Build a Safer World* 87-88 (2022) (quotation marks omitted).

In this way, state disruption of the family—society's "value transmission system"—is "a hallmark of totalitarianism."[31]

Beginning a century ago with the invalidation of compulsory public school attendance laws and laws regulating language of instruction in private schools[32] and continuing to the present, the Supreme Court has vigorously protected parents' child-rearing decisions—religious and otherwise—from substitution by State decision-makers. *Wisconsin v. Yoder* is emblematic of the deference accorded to parental rights and the skeptical inquiry that awaits state infringements of those rights.[33] In *Yoder*, the Court invalidated Pennsylvania's compulsory school attendance law that would have exposed Amish children, at "a crucial adolescent stage of development," to worldly influences considered detrimental by their parents and the Amish faith community.[34] By forcing children to accept instruction from public teachers only, the law undermined the "diversity [society] profess[es] to admire and encourage," leaving Amish parents with an impossible choice: "abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region."[35] According to the Court, "[t]he fundamental theory of liberty upon

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[31] *Bennett*, 501 N.W.2d at 122 n.3 (Riley, J., concurring and dissenting) (quoting Hafen).
[32] *See Pierce*, 268 U.S. at 536; *Meyer*, 262 U.S. at 403.
[33] 406 U.S. 205 (1972).
[34] *Id.* at 217-18.
[35] *Id.* at 218, 226.

which all governments in this Union repose excludes any general power of the State to standardize its children" and must yield to the traditional right of parents to control the upbringing of their children.[36]

III. TRANSITION CARE BANS INFRINGE PARENTS' FUNDAMENTAL RIGHT TO DIRECT THE MEDICAL CARE OF THEIR CHILDREN

Legal respect for parental decision-making is especially warranted when parents provide consent to the medical treatment recommended by their children's physicians and, indeed, by the medical profession's standards of care. As every district court to have confronted the issue has concluded, laws that prevent parents from obtaining professionally accepted treatments for children with gender dysphoria infringe parents' fundamental right to direct their children's medical care.[37] In exceptional situations where the evidence shows that parental choice

[36] *Id.* at 233; *see also Meyer*, 262 U.S. at 402 (invalidating legislation that attempted "to foster a homogeneous people" by standardizing instruction in schools).

[37] *See, e.g.*, *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2023 WL 4073727, at *36 (E.D. Ark. June 20, 2023) (holding that transition care ban infringed parents' "fundamental right to seek medical care for their children and, in conjunction with their adolescent child's consent and their doctor's recommendation, make a judgment that medical care is necessary"); *accord L.W. ex rel. Williams v. Skrmetti*, No. 3:23-cv-00376, 2023 WL 4232308, at *8 (M.D. Tenn. June 28, 2023) ("[parents'] fundamental right to direct the medical care of their children, which naturally includes the right of parents to request certain medical treatments on behalf of their children"); *Doe v. Thornbury*, No. 3:23-cv-230-DJH, 2023 WL 4230481, at *6 (W.D. Ky. June 28, 2023) ("[parents'] right to obtain established medical treatments to protect their children's health and well-being"); *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1144 (2022) ("[parents'] fundamental right to treat

counters medical advice and jeopardizes the child's health and well-being, the State may validly preempt parental choice pursuant to its police power. Such exceptional situations include where a parent seeks treatment for their child that is deemed "experimental"[38] or harmful by the mainstream medical community,[39] or that was once deemed standard by the mainstream medical community and is subsequently shown to be harmful in light of new evidence. Such exceptional situations also include a parent's refusal to obtain necessary medical care for a child.[40]

None of these exceptional situations applies here. The right asserted by Plaintiffs-Appellees goes to the heart of parental decision-making: a parent's right

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their children with transitioning medications subject to medically accepted standards"); *Doe v. Ladapo*, No. 4:23cv114-RH-MAF, 2023 WL 3833848, at *11 (N.D. Fla. June 6, 2023) ("[parents'] right to control a child's medical treatment . . . that is [not] properly prohibited on other grounds").

[38] *See, e.g.*, *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 711 (D.C. Cir. 2007) (en banc) (no fundamental right to access "experimental" drugs not yet approved by the FDA for public use for any purpose); *see also Washington v. Glucksberg*, 521 U.S. 702, 723, 731 (1997) (no fundamental "right to commit suicide" and noting that "the American Medical Association, like many other medical and physicians' groups, has concluded that '[p]hysician-assisted suicide is fundamentally incompatible with the physician's role as healer'").

[39] *See Pickup v. Brown*, 740 F.3d 1208, 1232 (9th Cir. 2014) (no fundamental right to access treatment that State has "*reasonably* deemed harmful" based on the "well-documented, prevailing opinion of the medical and psychological community," and noting that "[a]lthough the legislature . . . had before it some evidence that [LGBT conversion practices are] safe and effective, the *overwhelming consensus* was that [such practices were] harmful and ineffective") (emphasis added).

[40] *See, e.g.*, *Kanuszewski v. Mich. Dep't of Health and Hum. Servs.*, 927 F.3d 396, 419 (6th Cir. 2019); *Pickup*, 740 F.3d at 1235.

to direct their children's medical care by accessing professionally accepted treatment that the State has not demonstrated, by any measure, jeopardizes children's health. As numerous district courts have concluded after hearing evidence, transition care is supported by the research and expertise of specialists in the field and every leading medical and mental health organization in the country.[41] Indeed, transition care is the *only* effective, medically necessary, and safe treatment for gender dysphoria.[42]

Certainly, transition care carries with it some risks, "[b]ut this is true of almost every medical treatment regimen. Risk alone does not make a medication experimental."[43] As the Supreme Court stated in *Parham v. J.R.*,

> Simply because the decision of a parent . . . involves risks does not automatically transfer the power to make that decision from the parents to

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[41] *See, e.g.*, *Brandt v. Rutledge*, 47 F.4th 661, 670-71 (2022) (finding "substantial evidence in the record" to support the district court's factual findings that transition care ban "prohibits medical treatment that conforms with 'the recognized standard of care for adolescent gender dysphoria,' [and] that such treatment is supported by medical evidence that has been subject to rigorous study"); *id.* at 671 ("[S]everal studies have shown statistically significant positive effects of hormone treatment on the mental health, suicidality, and quality of life of adolescents with gender dysphoria. None has shown negative effects."); *accord Brandt*, 2023 WL 4073727, at *36; *Ladapo*, 2023 WL 3833848, at *11; *Eknes-Tucker*, 603 F. Supp. 3d at 1145.

[42] *See Brandt*, 2023 WL 4073727, at *17.

[43] *Eknes-Tucker*, 603 F. Supp. 3d at 1145; *see also Brandt*, 2023 WL 4073727, at *18 ("The evidence showed that the risks associated with the treatments prohibited by [Arkansas' ban] are comparable to the risks associated with many other medical treatments that parents are free to choose for their adolescent children after weighing the risks and benefits."); *accord Ladapo*, 2023 WL 3833848, at *13; *see generally United States v. Rutherford*, 442 U.S. 544, 555–56 (1979) ("Few if any drugs are completely safe in the sense that they may be taken by all persons in all circumstances without risk. . . . [A] drug is unsafe if its potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit.").

> some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure. . . . Parents can and must make those judgments [concerning their children's treatment].[44]

The fact that the FDA has not specifically approved the use of puberty blockers and hormone therapy to treat adolescents with gender dysphoria does not alter this conclusion. Many established medical treatments, and particularly those for children, involve off-label uses of FDA-approved medications.[45]

Whether children themselves have a fundamental right to medical treatment is not the question; parents by law are required to meet their children's needs. For this reason as well as longstanding recognition of the centrality of family formation and guidance to human liberty, parents have an obligation and the corresponding right to determine their child's medical care regardless of whether the child has a fundamental right to medical treatment. The same can be said for parents' other obligations: although the Supreme Court has not recognized children's fundamental

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[44] *Parham*, 442 U.S. at 603; *see Eknes-Tucker*, 603 F. Supp. 3d at 1146, 1151 ("[E]njoining the [ban] upholds and reaffirms the 'enduring American tradition' that parents—not the States or federal courts—play the primary role in nurturing and caring for their children") (quoting *Yoder*).

[45] *See* Am. Acad. Pediatrics Comm. Drugs, *Policy Statement*, *Off-Label Use of Drugs in Children*, 133 PEDIATRICS 563-67 (2014) (stating that off-label use of FDA-approved medications "does not imply an improper, illegal, contraindicated, or investigational use"; *see also Ladapo*, 2023 WL 3833848, at *15 (characterizing the argument that off-label use connotes a lack of safety as "divorced from reality"); *accord Brandt*, 2023 WL 4073727, at *18.

right to education, shelter, or subsistence,[46] parents have an obligation and the corresponding right to determine what kind of education their child receives, where they live, and what they eat.[47]

As the district court stated in *Doe v. Ladapo*, "a parent's right to control a child's medical treatment does not give the parent a right to insist on treatment that is properly prohibited on other grounds," but here, there simply are no proper grounds "for prohibiting these treatments in appropriate circumstances."[48] To hold that parents have a fundamental right to direct their children's medical care by accessing professionally accepted treatment *unless* the State, without evidence, says that such care is experimental or harmful would reduce the fundamental right to a nullity. As demonstrated by the cases before this Court, such a determination would also jeopardize children's health and leave parents with an impossible choice: remain in their home state as their child's health deteriorates, or, assuming they have the resources to do so, "migrate to some other and more tolerant region"—precisely the type of harm that the Supreme Court condemned in *Yoder*.[49] This awesome power to force parents to either risk their children's lives or uproot their families is

[46] *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (rejecting argument that "education is a fundamental right or liberty" and observing that there is likewise no fundamental right to "decent food and shelter").
[47] *See, e.g.*, *In re Adoption of C.D.M.*, 39 P.3d 802, 809 (Okla. 2001) (discussing parental obligation to provide education, food, and adequate domicile to child).
[48] 2023 WL 3833848, at *11.
[49] *Yoder*, 406 U.S. at 218.

antithetical to a free society, Western civilization concepts of the family, and "the diversity we profess to admire and encourage."[50]

CONCLUSION

For the foregoing reasons, this Court should affirm the judgments of the district courts.

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[50] *Id*. at 226; *see also Ladapo*, 2023 WL 3833848, at *10 (characterizing Florida's transition care ban as a "remarkable intrusion into parental prerogatives").

CERTIFICATE OF COMPLIANCE

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Dated: August 10, 2023

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 10, 2023, an electronic copy of the Brief of *Amicus Curiae* was filed with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. The undersigned also certifies that all participants are registered CM/ECF users and will be served via the CM/ECF system.

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