No. 22-942

In The Supreme Court of the United States

BRIAN TINGLEY,

Petitioner,

v.

ROBERT W. FERGUSON, in his official capacity as Attorney General for State of Washington; UMAIR A. SHAH, in his official capacity as Secretary of Health for State of Washington; and SASHA DE LEON, in her official capacity as Assistant Secretary of the Health Systems Quality Assurance Division of the Washington State Department of Health,

Respondents,

and

EQUAL RIGHTS WASHINGTON,

Respondent-Intervenor.

On Petition For Writ Of Certiorari To The United States Courts Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN COLLEGE OF PEDIATRICIANS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae The American College of Pediatricians is a national organization of pediatricians and other health care professionals dedicated to the health and well-being of children. Formed in 2002, the College is committed to producing policy recommendations based on the best available research. The College strives to ensure that all children reach their optimal physical and emotional health and well-being.

Amicus is concerned with the exploding number of gender-dysphoric children around the world. And while the international medical community is coalescing around "watchful waiting" treatment—*i.e.*, ensuring the patient has psychological support but withholding any affirmative treatment until at least puberty—many U.S. advocates are pushing to silence debate around their preferred aggressive experimental medical interventions.[2] This includes hormone replacement therapy and radically invasive surgical treatments for minors experiencing what was previously understood to be a temporary issue in young people.

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[1] Rule 37 Statement: No attorney for any party authored any part of this brief, and no one apart from *amicus curiae* and its counsel made any financial contribution toward the preparation or submission of this brief. Timely notice was provided to the parties.

[2] Diane Ehrensaft, *Gender nonconforming youth: current perspectives*, Adolescent Health, Medicine and Therapeutics (May 25, 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5448699/.

As the growing number of detransitioners testify, their permanent scars from these unproven interventions cannot be undone, no matter how great their regret. *Amicus* believes that counselors should be able to engage in conversations that alert both minor clients and their parents to the real harms associated with medical intervention for children suffering from gender dysphoria. Silencing a reasonable voice of dissent has no place in politics and even less of a place in medicine. *Amicus* thus has a direct interest in the outcome of this case because it affects the vulnerable population served by the American College of Pediatricians.

SUMMARY OF ARGUMENT

Contrary to what Respondents have represented to the public and the courts, Gender Transition Procedures ("GTPs")—such as those advocated for by Respondents in this case—have not been proven effective, have not been proven safe, do not reduce suicides, and are not the standard of care for gender dysphoria. Comprehensive literature reviews are driving an international pushback against GTPs in favor of intensive psychological evaluation and support, and the lawsuits over the harms of transition-affirming interventions have begun. GTPs are out of step with evidence-based care for gender dysphoric youth.

As the innovative clinical practice of "gender affirming" care withers under objective systematic

review, and with global public health authorities "doing a U-turn" on pediatric gender transitions, certain U.S. organizations claiming to represent a wider medical consensus continue to insist that the science is settled in this highly politicized area.[3] These pro-censure organizations include the American Medical Society ("AMA"), the American Academy of Pediatrics ("AAP"), and the World Association for Transgender Health ("WPATH") (collectively, the "GTP Advocates"). These organizations are partisan activists pushing a highly politicized and false narrative that "gender affirming" medical and surgical interventions for youth are benign, well studied, and essential. *Id.*

The now common practice of performing gender transitions on youth through counseling, puberty blockers, cross-sex hormones, and surgery is sometimes referred to as "the Dutch Protocol," because the two seminal studies giving rise to this approach originated in the Netherlands. *See id.* Recent and rigorous research, however, has shown that the Dutch studies are "methodologically flawed" and cannot justify scaling the "innovative clinical practice" of "gender affirming" transitioning of minors. *Id.* Unsurprisingly, the growing international consensus (based on systematic reviews of the evidence) is that the practice of pediatric gender transition is based on "low to very low quality

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[3] E. Abbruzzese, et al., *The Myth of "Reliable Research" in Pediatric Gender Medicine: A critical evaluation of the Dutch Studies—and research that has followed*, Journal of Sex & Marital Therapy (Jan. 2, 2023), https://www.tandfonline.com/doi/full/10.1080/0092623X.2022.2150346.

evidence." *Id.* In other words, "the benefits reported by the existing studies are unlikely to be true due to profound problems in the study designs." *Id.*

Yet today's gender-dysphoric youth continue to be put at risk by politicized organizations demanding silent allegiance to unproven, drastic, and irreversible medical interventions. Advocacy organizations such as WPATH and AAP cite discredited research to silence debate on their published "Standards of Care" and "Guidelines" for transgender youth. Moreover, history is replete with the dangers that stem from the uncritical acceptance of experimental medicines and recommendations—such as those favored by the AMA here—not based on reliable scientific evidence.

What is worse, the most reliable evidence available shows that these extreme interventions are a permanent cure for a temporary disease, often inflicting a lifetime of medicalization on children whose gender dysphoria would otherwise naturally resolve. Considerations such as these are leading governments and medical groups from around the world—many of them erstwhile pioneers for the interventionist camp—to pull back in favor of watchful waiting.[4] Given the risks and unknowns from these experimental treatments, confirmed by the exploding number of detransitioners

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[4] *See, e.g.*, *Public Consultation: Interim service specification for specialist gender dysphoria services for children and young people*, NHS England (Oct. 20, 2022), https://www.engage.england.nhs.uk/specialised-commissioning/gender-dysphoria-services/user_uploads/b1937-ii-interim-service-specification-for-specialist-gender-dysphoria-services-for-children-and-young-people-22.pdf.

and the non-U.S. medical community, doctors and counselors—such as members of the American College of Pediatricians—should be allowed to warn their patients of the risks and unknowns these procedures pose.

In the face of this evidence, however, stands Washington State's Counseling Censorship Law. It prohibits any counselor-client conversations that might encourage "change [of] an individual's sexual orientation or gender identity," while allowing conversations that "support * * * identity exploration" and "do not seek to change sexual orientation or gender identity." Wash. Rev. Code § 18.130.020(4). The unfortunate result is that counselors in Washington are currently being stymied from revealing the truth about GTPs to their clients and families because of the sheer political activism of the GTP Advocates. These Orwellian tactics are unscientific, hostile to free speech, and harmful to clients.

In addition to the common-sense notions that silencing dissent is objectively unhelpful and that counselors should be able to speak with their clients about all available information, the push for censorship from the GTP Advocates should be rejected for two additional reasons. First, the pro-censorship plea comes from discredited sources pushing political viewpoints above scientific evidence. Second, the Censorship Law lays the groundwork for a repetition of history whereby unproven medical treatments cause great harm to patients—especially treatments cloaked in secrecy.

The Petition should be granted.

ARGUMENT

I. The Push For Uncritical Acceptance Of Unproven "Gender Affirming" Therapies Should Be Rejected, Especially In Light Of The Discredited Foundations Of The Organizations Advocating Against Free Speech Here.

The GTP Advocates currently use low- to very low-quality evidence underlying the Dutch Protocol in an effort to expand the number of children subjected to the highly invasive and often irreversible interventions of "gender affirming" care.[5] Indeed, the rapid rise of "affirmative" treatment with hormones and surgery based on unacceptably low standards of evidence has been described as "runaway diffusion"—"the phenomenon whereby the medical community mistakes a small innovative experiment as a proven practice, and a potentially nonbeneficial or harmful practice 'escapes the lab,' rapidly spreading into general clinical settings." Abbruzzese, *supra*.

[5] *See*, *e.g.*, James. L. Madara, Correspondence to Bill McBride, Executive Director of the National Governors Association (Apr. 26, 2021), https://searchlf.ama-assn.org/letter/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2021-4-26-Bill-McBride-opposing-anti-trans-bills-Final.pdf.

While claiming to "go where the science leads,"[6] *science* is hardly the driving force behind the GTP Advocates' support for Washington's censorship regime. Consider that the Censorship Law seeks to ban certain conversations between a client and his counselor, even when such conversations are specifically sought out by the client. These types of conversations are traditionally sacrosanct—and the GTP Advocates know that. Indeed, the AMA and the AAP both recently expressed forceful opposition to "any" interference between doctors and their patients. For example, in a 2019 interview with The Wall Street Journal, then AMA President Patrice A. Harris, MD, MA, stated: "The AMA always has and always will condemn any interference into the patient-physician relationship, because we believe that that would negatively impact care." *Id.* More recently, the AAP made it very clear that it has "consistently opposed any legislation or regulation that interferes in the confidential relationship between a patient and their physician and the provision of evidence-based patient care for any patient."[7]

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[6] Kevin B. O'Reilly, *How AMA follows science to be powerful voice on today's top issues*, American Medical Association (Aug. 13, 2019), https://www.ama-assn.org/about/leadership/how-ama-follows-science-be-powerful-voice-today-s-top-issues.

[7] News Release, *Physicians: SCOTUS Decision Jeopardizes Patient-Physician Relationship, Penalizes Evidence-Based Care*, American Academy of Pediatrics (June 24, 2022), https://www.aap.org/en/news-room/news-releases/aap/2022/physicians-scotus-decision-jeopardizes-patient-physician-relationship-penalizes-evidence-based-care/.

Fast-forward to 2023. Those same groups are now calling for the censorship of counselors who fail to bow to the politically correct view that children with gender dysphoria must be "affirmed" no matter what. The AMA and AAP's about face on the free speech rights of professionals underscores the partisan role the GTP Advocates play in the roiling political debates over gender dysphoria. As outlined below, the GTP Advocates are not following the science, but rather the political dictates of certain leaders or donors. Indeed, their support of the speech censorship law at the heart of this case betrays the science as it attempts to stack the deck in favor of the new political orthodoxy.

A. WPATH—A Political Organization Precommitted to Advocating "Gender Affirming" Care—Relied on Flawed Studies to Advance an Agenda that Other Countries are Now Rejecting.

It is now understood that WPATH is "a controversial private organization with a declared point of view" in which "alternate views are not well tolerated." *Edmo* v. *Corizon, Inc.*, 949 F.3d 489, 497 (9th Cir. 2020) (O'Scannlain, J.,) (respecting denial of rehearing en banc). WPATH's intolerance is on regular display through its public relations campaigns against any who question its pro-GTP approach.[8] Its recent spat

[8] *See*, *e.g.*, USPATH Board and WPATH Executive Committee, *USPATH and WPATH Respond to NY Times Article "They Paused Puberty, But Is There a Cost?"*, WPATH (Nov. 14, 2022), https://www.wpath.org/media/cms/Documents/Public%20Policies/

with England's National Health Service ("NHS") shows that WPATH and groups like it are reflexively committed to GTPs, no matter the cost or the evidence.

In October 2022, NHS published draft guidance based on a February report by Dr. Hilary Cass, former president of the Royal College of Pediatrics and Child Health.[9] NHS previously appointed Dr. Cass to chair the Independent Review of Gender Identity Services for children and young people. In her report, Dr. Cass noted the "affirmative" model, which "originated in the USA," was likely responsible for insufficient child "safeguarding" at the now-discontinued Tavistock clinic gender service. *Id.* At Tavistock, both the primary and secondary care staff admitted that they "fe[lt] pressure to adopt an unquestioning affirmative approach * * * at odds with the standard process of clinical assessment and diagnosis that they ha[d] been trained to undertake in all other clinical encounters." *Id.* The NHS report went on to call for a restoration of careful and lengthy mental-health assessments before prescribing drugs.[10]

2022/USPATHWPATH%20Statement%20re%20Nov%2014%202022%20NYT%20Article%20Nov%2022%202022.pdf?_t=1669173834.

[9] Hilary Cass, *Independent review of gender identity services for children and young people: Interim report*, The Cass Review (Feb. 2022), https://cass.independent-review.uk/publications/interim-report/.

[10] *Public Consultation: Interim service specification for specialist gender dysphoria services for children and young people*, NHS England (Oct. 20, 2022), https://www.engage.england.nhs.uk/specialised-commissioning/gender-dysphoria-services/user_uploads/

But WPATH was having none of it. It condemned the NHS for emphasizing "careful exploration of a child or young person's co-existing mental health, neuro-developmental and/or family or social complexities," as "inequitable, discriminatory, and misguided," which WPATH deemed an "alarming" practice of "outdated gatekeeping."[11] WPATH also countered the NHS's guidance regarding expectations from parents and caregivers by arguing that while it is important for health professionals to work inclusively with the family and parent/carer," the "needs of the child/young person must be paramount." *Id.*

Despite its intolerance and a priori commitment to swift interventionism, WPATH's "Standards of Care" ("SOC") served as *the* internationally recognized guidelines for those who medicalized gender dysphoric youth since the publication of the Dutch studies. Abbruzzese, *supra*. Not surprisingly, rather than rely on reliable science, those guidelines cite only the discredited Dutch studies as support for their drugs-and-surgery recommendations.[12]

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b1937-ii-interim-service-specification-for-specialist-gender-dysphoria-services-for-children-and-young-people-22.pdf.

[11] *WPATH, ASIAPATH, EPATH, PATHA, and USPATH Response to NHS England in the United Kingdom (UK)*, listloop.com (Nov. 25, 2022), https://listloop.com/wpath/mail.cgi/archive/adhoc/20221125183220.

[12] *See Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People*, v.7, WPATH, https://www.wpath.org/media/cms/Documents/SOC%20v7/SOC%20V7_English.pdf.

Proof that WPATH's SOCs are motivated by non-scientific considerations is extensive and growing. For example, in 2021, researchers at the Department of Global Health & Social Medicine, King's College, London, conducted a systematic review to assess all international clinical practice guidelines addressing gender minority/trans health.[13] They found that WPATH SOCv7 is based on "lower-quality primary research, the opinions of experts, and lacks grading of evidence"—it was determined that SOCv7 "cannot be considered the 'gold standard.'" *Id.* at 2, 8.

WPATH's recent changes to their guidelines, documented in SOCv8, confirm that the organization is not following reliable methodology. Tellingly, "[t]rans and nonbinary practitioners are helping to write and oversee the new [WPATH] guidelines."[14] In particular, in SOCv8 WPATH removed the minimum age limits for medical and surgical treatments, and eliminated the "distress" requirement from its recommended diagnostic criteria. Abbruzzese, *supra*. WPATH's changes push "affirmative" care in a "truly extraordinary" direction, making any body modification desired by a child or a young person automatically "medically necessary." *Id.*

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[13] Sara Dahlen, et al., *International clinical practice guidelines for gender minority/trans people: systematic review and quality assessment*, BMJ Open (Apr. 29, 2021), https://bmjopen.bmj.com/content/bmjopen/11/4/e048943.full.pdf.

[14] Emily Bazelon, *The Battle Over Gender Therapy*, New York Times (June 15, 2022), https://www.nytimes.com/2022/06/15/magazine/gender-therapy.html.

One of WPATH's main public relations strategies is to insist that treatment offered by American clinics is substantially similar to that offered in Europe. But public health authorities from Finland, Sweden, England, and Norway recognize this radical shift for what it is—a political agenda—and are pulling back from WPATH's poorly evidenced recommendations.[15] These countries have drastically restricted the availability of gender transition drugs and procedures to minors. *Id.* For example, NHS England recently closed GIDS/Tavistock—the world's largest pediatric gender clinic—and began placing gender-distressed youth in established clinical settings that begin with psychological treatment instead of rushing to medicalize children under their care.[16] These changes signal a strong rejection of WPATH's SOCv8 by the non-U.S. medical community in favor of a renewed commitment to evidence-based care.

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[15] *Id.*; *see also* Tine Dommerud, *Want safer treatment for children who want to change sex.—Insufficient knowledge of the risk*, Aftenpften (Mar. 9, 2023), https://www.aftenposten.no/norge/i/jlwl19/vil-ha-tryggere-behandling-for-barn-som-vil-skifte-kjoenn-mangelfull-kunnskap-om-risikoen?fbclid=IwAR0pzl4np-jyTaPS-JrtuFqM2U3KxFgvc-4CHTtJ1_RJf2LJH-O-T7yQ9F4.

[16] *See* Jasmine Andersson & Andre Rhoden-Paul, *NHS to close Tavistock child gender identity clinic*, BBC News (July 28, 2022), https://www.bbc.com/news/uk-62335665; *Regional model for gender care announced for children and young people*, The Tavistock and Portman NHS Foundation Trust (July 28, 2022), https://tavistockandportman.nhs.uk/about-us/news/stories/regional-model-for-gender-care-announced-for-children-and-young-people/.

B. The American Academy of Pediatrics—Known to Promote Recommendations Lacking Scientific Support—Partnered with Activists to Create Guidelines for Gender-Distressed Children.

As seen throughout its history, the AAP is known for making definitive policy recommendations without the support of medical evidence. One example took place in 2000 when the AAP released guidelines on reducing a child's risk for developing food allergies. They recommended that mothers eliminate peanuts and other tree nuts from their diets while nursing, and consider also eliminating eggs, cow's milk, fish, and perhaps other foods.[17] This advice (unsurprisingly) turned out to be wrong.[18] In fact, the AAP's recommendations likely contributed to the rise of peanut allergy over the last few decades, as it was later found that children who were exposed to peanuts and tree nuts at an earlier age had a lower risk of developing allergies to these foods. *Id.* The AAP would later reverse its guidance regarding peanut allergies, stating that the introduction of allergenic foods should not be delayed. *Id.*

As another example, in 2016 the AAP and the American College of Osteopathic Pediatricians

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[17] Aaron E. Carroll, *Avoiding Peanuts to Avoid an Allergy Is a Bad Strategy for Most*, New York Times (Apr. 25, 2016), https://www.nytimes.com/2016/04/26/upshot/avoiding-peanuts-to-avoid-an-allergy-is-a-bad-strategy-for-most.html.

[18] *See* Edmond S. Chan, et al., *Early Introduction of Foods to Prevent Food Allergy*, Allergy, Asthma & Clinical Immunology (Sep. 12, 2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6157280/.

partnered with the Human Rights Campaign ("HRC")—an activist organization, not a medical body—to publish a guide for care for gender dysphoric children.[19] Notably, these guidelines were written by mostly non-physicians. Only five out of the twelve authors were doctors, and the lead author was a researcher from the HRC advocacy group. The drafters predictably focused on "gender affirming" treatments consisting of medical intervention.

Many of the recommendations from that 2016 guide aligned with a 2018 policy statement from the AAP.[20] Soon after it was published, University of Toronto psychologist Dr. James Cantor reviewed the AAP's 2018 policy and largely discredited its findings.[21] Dr. Cantor described the AAP's approach as "a systematic exclusion and misrepresentation of entire literatures." *Id.* Among other serious flaws, Dr. Cantor found the AAP misrepresented references that actually contradicted its pro-transition policy and omitted the critical fact that desistance over puberty was the

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[19] *See* Gabe Murchison, et al., *Supporting & Caring for Transgender Children*, Human Rights Campaign (Sept. 2016), http://hrc.im/supportingtranschildren.

[20] *See* Jason Rafferty, et al., *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, American Academy of Pediatrics (Oct. 2018), https://publications.aap.org/pediatrics/article/142/4/e20182162/37381/Ensuring-Comprehensive-Care-and-Support-for?autologincheck=redirected.

[21] James M. Cantor, *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy*, Journal of Sex & Marital Therapy (Dec. 14, 2019), DOI:10.1080/0092623X.2019.1698481.

norm for gender dysphoria in minors. *Id.* According to Dr. Cantor, the references the AAP cited as the basis of its policy not only contradicted a policy of affirmative care but repeatedly endorsing watchful waiting. *Id.* The AAP's statement was also "remarkable in what it left out," namely, that every follow-up study of gender dysphoric children, without exception, found the same thing: over puberty, the majority of gender dysphoric children ceased to want to transition. *Id.* Dr. Cantor's conclusion was that the AAP not only failed to provide evidence in support of its recommendations, but that the recommendations were made *despite* the existing evidence. *Id.*

In addition to omitting key scientific findings, the AAP also deliberately suppresses debate and prevents review of its drugs-and-hormones-first approach to treatment, as documents recently leaked by a whistle-blower show.[22] Leaked papers expose that rank-and-file AAP members recognize the organization's drugs-and-hormones first policy is based on scant evidence and shoddy science. *Id.* Members also claim the AAP used strong-arm tactics to change its rules and block a member-drafted resolution to review that policy.[23]

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[22] Julia Mason and Leor Sapir, *The American Academy of Pediatrics' Dubious Transgender Science*, The Wall Street Journal (Aug. 17, 2022), https://www.wsj.com/articles/the-american-academy-of-pediatrics-dubious-transgender-science-jack-turban-research-social-contagion-gender-dysphoria-puberty-blockers-uk-11660732791.

[23] James Reinl, *EXCLUSIVE: Leaked files expose how U.S. pediatricians accuse their own professional body of pushing a 'harmful' drugs-first approach on trans teens—and of deliberately*

When organizations ostensibly committed to public health rely on unsettled expert opinion or advocacy groups to drive their policy recommendations—as opposed to clinical trials and actual science—it will inevitably result in poor outcomes for both patients and the public at large. Such policy recommendations are suspect, at the least, and thus it is understandable why the AAP advocates against the free speech of those with views contrary to its politicized "guidelines." This is yet another reason to reject the AAP's position here.

II. History Likewise Shows The Consequences Of An Uncritical Acceptance Of Unproven Medical Treatments And Practices.

The history of medicine is replete with examples of why health-care professionals should not and cannot be forced into silent acquiescence of a "settled" treatment regime, and the AMA's own history is no exception. These episodes show the dark side of experimental treatments, and underscore why the GTP Advocates anti-debate position should be rejected.

BLOCKING moves to change the rules, Daily Mail (Aug. 11, 2022), https://www.dailymail.co.uk/news/article-11099561/Leaked-internal-files-pediatricians-angry-professional-bodys-transgender-policy.html.

A. The American Medical Association Has Repeatedly Shown the Dangers of Endorsing Misguided Policies and Treatments that Harm Patients.

One of the leading GTP Advocates—the AMA—has historically been at the front of promoting policies later determined to severely harm patients. Several ready examples include:

Hormone Replacement Therapy. The AMA's endorsement of hormone replacement therapy ("HRT") exposed many women to serious health risks, as the AMA now recognizes. For many years, the American Medical Association recommended HRT to postmenopausal women as a way to alleviate symptoms such as hot flashes and reduce the risk of heart disease and osteoporosis.[24] But in the late 1980s, medical studies showed that HRT was linked to serious health risks, including cardiovascular disease and breast cancer.[25] Despite this, the AMA did not revise its guidelines for HRT use until the early 2000s. Cagnacci *supra*.

Cigarettes. For decades, the AMA profited from advertisements promoting cigarettes as approved safe by doctors, despite years of research showing the

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[24] *See* Agnelo Cagnacci and Martina Venier, *The Controversial History of Hormone Replacement Therapy*, Medicina (Kaunas) (Sep. 18, 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6780820/.

[25] *See*, *e.g.*, PW Wilson, et al., *Postmenopausal estrogen use, cigarette smoking, and cardiovascular morbidity in women over 50. The Framingham Study*, New England Journal of Medicine (Oct. 24, 1985), https://pubmed.ncbi.nlm.nih.gov/2995808/.

serious harms of smoking. Smoking became the norm for American men and women in the 1930s and 1940s. As Americans became concerned about the health risks of smoking, tobacco companies responded with advertising referring directly to physicians and using the doctor image to assure the consumer that the advertisers' respective brands were safe.[26] These advertisements became a ready source of income for numerous medical organizations and journals, including the AMA's own Journal of the American Medical Association ("JAMA"). *Id.* In fact, the AMA profited from cigarette ads placed in JAMA up until 1953, despite years of research showing the serious harms of smoking. *Id.*

It wasn't until 1978 that the AMA finally publicly addressed the dangers of cigarette smoking, remaining silent at several key junctures in the public debate over cigarettes, including: (1) in 1964, when the U.S. Surgeon General issued the first report on how cigarette smoking causes lung cancer; (2) in 1965 when Congress passed the Federal Cigarette Labeling and Advertising Act; and (3) in 1969 when Congress passed the Public Health Cigarette Smoking Act, putting warning labels on cigarette packages and banning cigarette advertising from television.[27]

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[26] Martha N. Gardner and Allan M. Brandt, "*The Doctors' Choice Is America's Choice*," American Journal of Public Health (Feb. 2006), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1470496/.

[27] *History of the Surgeon General's Reports on Smoking and Health*, Centers for Disease control and Prevention (last reviewed: Oct. 19, 2021), https://www.cdc.gov/tobacco/sgr/history/index.

The treatment of African-American doctors as inferior. From its earliest days, the AMA persistently excluded Black doctors from practicing medicine or joining medical organizations, even working to close down African-American medical schools.[28] In response, Black physicians created their own organization called the National Medical Association ("NMA").[29] The AMA continued its discrimination up through the Civil Rights era, remaining silent in debates over the Civil Rights Act of 1964 and putting off repeated NMA requests for support. *Id.* It was not until 2008 that the AMA formally apologized for its discriminatory history.[30]

Opioid Crisis. The AMA's push for pain management enabled the pharmaceutical companies aggressively marketing prescription opioids and contributed to the opioid crisis in the U.S. In the 1990s, pharmaceutical companies began to zealously market and sell prescription opioids as a safe and effective treatment

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htm?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Ftobacco%2Fdata_statistics%2Fsgr%2Fhistory%2Findex.htm.

[28] Jonathan Sidhu, *Exploring the AMA's History of Discrimination*, ProPublica (July 16, 2008), https://www.propublica.org/article/exploring-the-amas-history-of-discrimination-716.

[29] Robert B. Baker, *The American Medical Association and Race*, AMA Journal of Ethics (June 2014), https://journalofethics.ama-assn.org/article/american-medical-association-and-race/2014-06.

[30] Ronald M. Davis, *Comments to the National Medical Association Annual Meeting*, American Medical Association (July 30, 2008), https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/public/ama-history/ama-apology-african-americans.pdf.

for pain.[31] Many doctors began to prescribe these drugs more frequently, leading to a surge in opioid addiction and overdose deaths.[32] Despite efforts to combat the opioid epidemic, it continues to be a major public health crisis in the United States, with roughly a million opioid-related American deaths to date.[33]

As pharmaceutical companies were ramping up their opioid marketing efforts, the AMA began promoting the use of opioid painkillers as a treatment for chronic pain. In particular, the AMA supported the use of pain as a "fifth vital sign" and encouraged physicians to use pain as a routine metric for evaluating patient care along with temperature, pulse, respiration, and blood pressure.[34] This decision by the AMA contributed to the over-prescription of opioid painkillers, which has been identified as a key factor in the opioid epidemic. Van Zee *supra*.

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[31] Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, American Journal of Public Health (Feb. 2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2622774/.

[32] Urmimala Sarkar and Kaveh Shojania, *Patient Safety and Opioid Medications*, Patient Safety Network (Jan. 1, 2016), https://psnet.ahrq.gov/perspective/patient-safety-and-opioid-medications.

[33] Brian Mann, *More than a million Americans have died from overdoses during the opioid epidemic*, NPR (Dec. 30, 2021), https://www.npr.org/2021/12/30/1069062738/more-than-a-million-americans-have-died-from-overdoses-during-the-opioid-epidemi.

[34] Pat Anson, *AMA Drops Pain as Vital Sign*, Pain News Network (June 16, 2016), https://www.painnewsnetwork.org/stories/2016/6/16/ama-drops-pain-as-vital-sign.

To be sure, no one is arguing that medical organizations cannot take positions (based on scientific evidence, not political advocacy) that later turn out to be incorrect—that is part of the scientific method. But what those organizations, lawmakers, and courts should recognize is that cutting off debate on a topic the AMA pronounces as "settled" is exceedingly dangerous.

B. Experimental Medical Approaches Often Prove Harmful and Thus Require Higher Justifications, Explanations, and Transparency.

The history of medicine is replete with tragic examples of "cures" that turned out to be far more harmful that the "disease." The dark episodes described below emphasize that the burden of proof—demonstrating that a treatment does more good than harm—is on those promoting intervention, not those raising concern about the relative harms of that intervention. And these examples further demonstrate why transparency and free discussion should be championed by all—not buried by misguided censorship.

Tuskegee Syphilis Study. In 1932, the U.S. Public Health Service, working with the Tuskegee Institute, began a study to record the natural history of syphilis.[35] From 1932 to 1972, federal and university

[35] *The Syphilis Study at Tuskegee Timeline*, Centers for Disease Control and Prevention (last reviewed: Dec. 5, 2022), https://www.cdc.gov/tuskegee/timeline.htm.

medical workers withheld treatment for unsuspecting Black men infected with the disease so that doctors could track the ravages of the illness.[36] And this in spite of the fact that, by 1943, penicillin was the treatment of choice for syphilis and becoming widely available.[37] The study was initially intended to last six months, but was extended for 40 years—during which time many of the men developed serious health issues, including blindness, dementia, and death. *See Syphilis Study supra*. It was not until a whistleblower leaked information about the study to the *New York Times* in 1972 that the Centers for Disease Control finally ended the Tuskegee Study.[38] By this time, 128 patients had died of syphilis or its complications, forty of their wives had been infected, and nineteen of their children had acquired congenital syphilis. *Id.*

Puerto Rico Birth Control Trials. Starting in the 1950s, two Harvard-trained medical researchers, Dr. Gregory Pincus and Dr. John Rock, began a human

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[36] Jean Heller, *AP WAS THERE: Black men untreated in Tuskegee Syphilis Study*, AP News (May 10, 2017), https://apnews.com/article/business-science-health-race-and-ethnicity-syphilis-e9dd07eaa4e74052878a68132cd3803a.

[37] Robert Gaynes, *The Discovery of Penicillin—New Insights After More Than 75 Years of Clinical Use*, Centers for Disease Control and Prevention (May 2017), https://wwwnc.cdc.gov/eid/article/23/5/16-1556_article.

[38] Ada McVean, *40 Years of Human Experimentation in America: The Tuskegee Study*, McGill University: Officer for Science and Society (Jan. 25, 2019), https://www.mcgill.ca/oss/article/history/40-years-human-experimentation-america-tuskegee-study.

birth control experiment on the island of Puerto Rico.[39] The study involved thousands of Puerto Rican women who were not informed of the potential risks associated with the pill, and who were often coerced or misled into participating in the study.[40] These women were not informed that the pill was experimental and not approved by the FDA, that they were participating in a clinical trial, and that side effects could be severe. *Id.* Many of the women experienced severe side effects, including nausea, headaches, severe cramping, depression, and blood clots. *Id.* When women came forward with concerns, they were dismissed, and when three women taking the early formulation of the pill died, their deaths were ignored. *Id.*

Philadelphia Prison Experiments. From the early 1950s through the mid-1970s, University of Pennsylvania researcher Dr. Albert Kligman conducted experiments on inmates at Philadelphia's Holmesburg Prison.[41] The experiments involved exposing around 300 prisoners to a range of harmful substances, including viruses, fungi, asbestos, and other

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[39] *The Puerto Rico Pill Trials*, PBS (Feb. 24, 2003), https://www.pbs.org/wgbh/americanexperience/features/pill-puerto-rico-pill-trials/.

[40] Gabriela Salas, *The History Behind Your Birth Control*, National Women's Health Network (Nov. 13, 2019), https://nwhn.org/thxbirthcontrol/.

[41] Associated Press, *Philadelphia apologizes for decades of medical experiments on Black inmates that involved a component of Agent Orange*, NBC News (Oct. 7, 2022), https://www.nbcnews.com/news/nbcblk/philadelphia-apologizes-decades-medical-experiments-black-inmates-invo-rcna51187.

potentially lethal substances such as radioactive isotopes, dioxin, and chemical warfare agents. *Id.* Kligman received permission from the city of Philadelphia and assistance from an array of doctors and prison personnel. The experiments were conducted without the prisoners' informed consent, and many of the inmates suffered long-term health problems as a result. *Id.* Some argue that Dr. Kligman was allowed to continue his experiments in part because the U.S. government, the University of Pennsylvania, various companies, and Dr. Kligman himself were motivated by financial gains made possible by these experiments.[42]

Cerebral Palsy at Sonoma State Hospital. At the Sonoma State Hospital in the 1950s, doctors subjected institutionalized children with cerebral palsy to a range of experimental procedures.[43] Some of these procedures were extremely painful and invasive, such as the pneumoencephalogram. This procedure involved injecting air into the fluid-filled space surrounding the brain and spinal cord, thereby displacing cerebrospinal fluid in order to produce a clearer image of the brain tissue.[44] The procedure was known to

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[42] A M Hornblum, *Acres of Skin: Human Experiments at Holmesburg Prison*, U.S. DOJ: Office of Justice Programs (1998), https://www.ojp.gov/ncjrs/virtual-library/abstracts/acres-skin-human-experiments-holmesburg-prison.

[43] Rebecca Leung, *A Dark Chapter in Medical History*, CBS News (Feb. 9, 2005), https://www.cbsnews.com/news/a-dark-chapter-in-medical-history-09-02-2005/.

[44] The Editors of Encyclopaedia Britannica, *pneumoencephalography*, Encyclopedia Britannica (Feb. 9, 2009), https://www.britannica.com/science/pneumoencephalography.

cause excruciating pain, nausea, and vomiting, and was later found to be unnecessary and potentially harmful.[45] Using captive populations, such as institutionalized children, sometimes translated into significant funding for medical researchers. *See* Leung *supra*.

University of Iowa 'Monster Study.' In 1939, Dr. Wendell Johnson, a nationally renowned pioneer in the field of speech pathology, set out to prove his theory that stuttering is a learned behavior that can be induced in children.[46] To test his theory, Johnson recruited twenty-two orphaned children from the Iowa Soldiers' Orphans Home. The children were placed into two groups, one the control group, the other the test group.[47] Children in the test group were subjected to prolonged harassment, badgering, and other negative therapy, including telling them repeatedly that they were stutterers, in an attempt to get them to

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[45] Y.S. White, et al., *Sequelae to pneumoencephalography*, Journal of Neurology, Neurosurgery and Psychiatry (Feb. 1973), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC494289/.

[46] '*Monster Study' Still Stings*, CBS News (Aug. 6, 2033), https://www.cbsnews.com/news/monster-study-still-stings/.

[47] Mary Tudor, *An experimental study of the effect of evaluative labeling of speech fluency*, University of Iowa (1939), https://iro.uiowa.edu/esploro/outputs/graduate/9983777385602771.

stutter.[48] Orphans in the test group suffered negative consequences of this study for the rest of their lives.[49]

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The known scientific evidence contraindicating medical transitions, the partisan motivations and histories of the GTP Advocates, as well as the sordid history of experimental medical treatments more generally all demonstrate that transparency and free debate are essential to protect children during this time of unprecedented growth in the number of gender dysphoric youth.

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[48] Jim Dyer, *Ethics and Orphans: the 'Monster Study,'* San Jose Mercury News (June 10, 2001), https://web.archive.org/web/20110927051740/http://www-psych.stanford.edu/~bigopp/stutter2.html.

[49] *Huge Payout in US Stuttering Case*, BBC News (last updated: Aug. 17, 2007), http://news.bbc.co.uk/1/hi/world/americas/6952446.stm.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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