IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

L.W. et al., *Plaintiffs*, and UNITED STATES OF AMERICA, *Intervenor-Plaintiff*, v. JONATHAN SKRMETTI et al., *Defendants*.	No. 3:23-cv-00376 Judge Richardson Judge Newbern

AMICI'S MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' OPPOSITION TO INTERVENOR'S MOTION FOR PRELIMINARY INJUNCTION

I. Introduction.

The essence of the dispute raised in this case is as plain as it is radical: the question of what a human person is, and whether a State can protect vulnerable children within its borders from medical exploitation and harm. In the motion now before the Court, Intervenor-Plaintiff United States urges that the Fourteenth Amendment's prohibition on States denying "persons… the equal protection of the laws" is a constitutional standard that disqualifies the historically and legally universal recognition across the earth through time that the human person is objectively and profoundly male or female, along with State common law authority to protect persons from injury.

In 2022, the State of Tennessee enacted Senate Bill 1/ House Bill 1, codified in Tennessee Code Annotated § 68-33-101 *et seq*. (hereinafter "Minor Persons Protection Act" or "MPPA") to

protect the uncomprehending children within its borders from the historically novel eruption of medical onslaughts foisting irreversible alterations upon their otherwise healthy bodies. In response, Intervenor argues that the Fourteenth Amendment that was ratified over a century and a half ago stripped the State of Tennessee of its then-indubitable common law authority to forbid the infliction of permanent harms upon the bodies of children, whether male or female.

Intervenor correctly notes that the text of the Equal Protection Clause entitles persons to "the equal protection of the laws." But this provision, like all constitutional provisions, must be "centered on constitutional text *and history*." *N.Y. State Rifle & Pistol Assn. v. Bruen*, 142 S.Ct. 2111, 2128-29 (2022) (emphasis added). Even as "[h]istorical inquiries of this nature are essential whenever [courts] are asked to recognize a new component of the 'liberty' protected by the Due Process Clause," *Dobbs v. Jackson Women's Health Organization*, 142 S.Ct. 2228, 2235 (2022), the same must be true when Intervenor asks this Court to reconfigure the nature of the "person" to whom equal protection of the laws applies.

Interestingly, Intervenor's argument does not actually contest the MPPA as discriminatory treatment of a child *because* that child is male or female. Intervenor's argument rather, and more radically, disputes the legal categories of male and female to begin with—and thus (ironically) denies the premise of equal protection sex-equality jurisprudence on which it purports to rely. Without discrete categories of male and female to compare, equal protection sex-based intermediate scrutiny jurisprudence is rendered inoperable. Intervenor's ambitious argument is at odds not just with history but with the very legal standard it invokes.

II. Tennessee has a duty to extend "protection of the laws" to all persons regarding bodily injuries and remedial relief for such injuries.

A. History clarifies the meaning of "equal protection of the laws."

The United States Supreme Court has spoken unequivocally regarding protection of the laws and injuries to a person: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

Marbury's fundamental conception of civil liberty (which is not personal autonomy)[2] and government's duties are in accord with that of the common law. The analysis in *Bruen* and *Dobbs* makes the common law of utmost relevance, not just because the Court analyzed the common law in rendering its judgments,[3] but for reasons beyond that: it is our "birthright and inheritance" as Americans. Joseph Story, *Commentaries on the Constitution of the United States* § 157. In fact, common law is the conception of law upon which "[t]he whole Structure of our present jurisprudence stands," *id*., and it is the legal "nomenclature of which the framers of the Constitution

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[2] Civil liberty, not personal autonomy, is the *telos* for governments like ours that are grounded in a common law system. 1 William Blackstone, *Commentaries on the Laws of England*, *6 (1765) (hereinafter "Blackstone's *Commentaries*") (stating "the singular frame and polity of that land which is governed by this system of laws" is one "in which political or civil liberty is the very end and scope of the constitution"). Thus, "every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and . . . obliges himself to conform to those laws, which the community has thought proper to establish. . . . Political, therefore, or civil liberty . . . is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public." *Id.* at *125; see also Joseph Story, *Commentaries on the Constitution of the United States*, § 356, quoting Journal of Convention, p. 367, 368 ("The convention also, which framed the constitution, declared this in the letter accompanying it. 'It is obviously impracticable in the federal government of these states,' says that letter, 'to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest.'")

[3] In the majority opinion in *Bruen*, the term "common law" is found 10 times, and Blackstone's *Commentaries* is cited twice. In the majority opinion in *Dobbs*, the term "common law" is found 26 times, and Blackstone or his *Commentaries* is referenced as an authority ten times.

were familiar." *Minor v. Happersett*, 88 U.S. 162, 167 (1875). "The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history." *Smith v. Alabama*, 124 U.S. 465, 478 (1888). As evidenced by *Bruen* and *Dobbs*, the Supreme Court continues to analyze common law in reaching decisions interpreting the Constitution's words and phrases. Blackstone has retained his influence through the adoption of the Civil War Amendments and beyond. James M. Ogden, *Lincoln's Early Impressions of the Law in Indiana*, 7 Notre Dame L. Rev. 325, 328 (1932).[4]

Looking then to Sir William Blackstone, "whose works constituted the preeminent authority on English law for the founding generation," *Alden v. Maine*, 527 U.S. 706, 715 (1999), we find "[t]he remedial part of a law is so necessary a consequence of" of the declaratory and directory elements of law "that laws must be very vague and imperfect without it. For in vain would rights be declared, in vain to be observed, if there were no method of recovering and asserting these rights, when wrongfully withheld or invaded. *This is what we mean properly, when we speak of the protection of the law*." 1 Blackstone's *Commentaries*, *55-56 (emphasis added).

This right to protection of the laws extends back to Magna Carta: "We will sell to no man, we will not deny or delay to any man right or justice." MAGNA CARTA, chap. 40. *See also*

[4] *See also, e.g., Gamble v. United* States, __ U.S. __, 139 S. Ct. 1960 (2019) (the Court's opinion, the concurrence, and one dissent citing Blackstone multiple times to determine the meaning of the phrase "the same offense" in the Fifth Amendment's double jeopardy clause); *Department of Homeland Security v. Thuraissigiam*, __ U.S. __, 140 S. Ct. 1959, 1969 (2020) (calling Blackstone's *Commentaries* a "satisfactory exposition of the common law of England"); *Ramos v. Louisiana*, __ U.S. __, 140 S. Ct. 1390, 1395 (2020) (citing Blackstone in explanation of the holding that the requirement of juror unanimity is "a vital right protected by the common law" and therefore the Constitution's jury trial guarantee); *Torres v. Madrid*, __ U.S. __, 141 S. Ct. 989, 996, 997, 998, 1000 (2021) (citing Blackstone multiple times to determine meaning of Fourth Amendment "seizure").

Blackstone's *Commentaries*, *141 (discussing this chapter of Magna Carta in explaining the "right of every Englishman . . . of applying to the courts of justice for redress of injuries . . . [which] must at all times be open to the subject, and the law be duly administered therein."). During the ratification debates over the Fourteenth Amendment and its Equal Protection Clause, several members of Congress affirmatively spoke of this provision in the Great Charter. Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, *19 Geo. Mason U. C.R.L.J. 219, 245-247 (2009*).

In sum, the right to be protected from injury is a private right belonging to all persons as against all others. No state can constitutionally exclude or deny any person access to its court from the "protection of [its] laws" for injuries sustained. Thus does the Tennessee Constitution require "[t]hat all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay." TENNESSEE CONST.; Art. 1, sec. 17. Suitably, the final words of that passage echo Magna Carta.

B. Tennessee fulfilled its duty to extend "protection of the law" to all persons who suffer bodily injuries.

Tennessee has done that which is required by *Marbury*, the text and history of "equal protection of the laws," and the Tennessee Constitution. The legislature has determined in the declaratory part of the law at issue "the boundaries of right and wrong," 1 Blackstone's *Commentaries,* *53, in accord with one of absolute rights at common law, namely, the right to "personal security" which is the "legal and uninterrupted enjoyment of" one's "life," "limbs," "body," "health," and "reputation." *Id*. at *129.

This right includes "[t]he preservation of a man's health from such practices as may prejudice or annoy it." *Id*. Thus, "[t]he least touching of another's person wilfully [sic], or in anger, is a

battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner." 3 Blackstone's *Commentaries*, *120.[5]

In this juridical context, the Supreme Court has commented that the States' historic police power authority to punish self-maiming and suicide "cannot be doubted." *New York Central R.R. Co. v. White*, 243 US 188, 207 (1917). Justice Field, in dissent in *Munn v. Illinois*, 94 U.S. 113 (1877), had considered the word "life" in the Fourteenth Amendment, expounding that

> something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, but of whatever God has given to everyone with life, for its growth and enjoyment, is prohibited by the provision in question, if its efficacy be not frittered away by judicial decision.

Id. at 142. *See also People v. Clough*, 17 Wend. 351, 352 (N.Y. Sup. Ct. 1837) (citing common law sources as to the crime of maiming and mayhem, as implicated in amputating appendages).

Accordingly, the common law protection for life and limb has been carried over to our nation's jurisprudence. Justice Story, in explaining the extent to "colonies in distant countries . . . carry with them English common law, he wrote that "protection from personal injuries, the rights secured by Magna Charta, and the remedial course in the administration of justice, are examples as clear perhaps as any, which can be stated, as presumptively adopted, or applicable" to the American colonies. J. Story, *Commentaries*, §147-149.

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[5] The solicitude for the body is seen also in the common law rule protecting a person's limbs from injury. Blackstone's *Commentaries*, *130 ("A man's limbs (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise Creator, to enable him to protect himself from external injuries in a state of nature. . . . [T]hey cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.").

Therefore, all persons have a right to protection from bodily injury. And it being a private right, physicians like any other person have a duty in their practice not to injure the bodies of other persons. Tennessee statutes now make more secure this common law duty of physicians.[6] *See* Tenn. Code Ann. § 29-26- 101 (defining a "Health care liability action" as "any civil action, including claims against the state or a political subdivision thereof, alleging that a health care provider or providers have caused an injury related to the provision of, or failure to provide, health care services to a person, regardless of the theory of liability on which the action is based"); § 29-26-118 ("In a health care liability action, the plaintiff shall prove by evidence as required by § 29-26-115(b) that the defendant did not supply appropriate information to the patient in obtaining informed consent (to the procedure out of which plaintiff's claim allegedly arose) in accordance with the recognized standard of acceptable professional practice in the profession and in the specialty, if any, that the defendant practices in the community in which the defendant practices and in similar communities").

Moreover, state jurisdiction to regulate the practice of medicine to protect the health of its citizens has been recognized since adoption of the Fourteenth Amendment. *See*, *e.g.*, *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (acknowledging the state's authority over public health, quoting *Ogden v. Utah*, 22 U.S. 1, 203 (1824), that "health laws of every description" were left to the powers of the state and "[n]o direct general power over these objects is granted to Congress; and, consequently, they remain subject to state legislation.").

[6] In *Munn v. Illinois*, 94 U.S. at 134, the Supreme Court addressed the relationship between common law and State statutes in a Fourteenth Amendment dispute, explaining that "the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances."

In sum, the state has a duty to protect persons against intentional bodily injury, and provide process for restitution upon violation. To exclude any person from that protection is to deny persons the equal protection of the laws. Tennessee's statutory protection of children from medical harms and exploitation is not a denial of the Fourteenth Amendment's requirement to provide equal protection of the laws, but in furtherance of it.

III. Tennessee's codification of its common law duty to protect persons against intentional bodily injury conforms to equal protection standards.

A. Tennessee's justly protects persons from intentional injury to their bodies.

Because the word "person" is found in the Fifth Amendment's Due Process Clause, "[t]he conclusion is . . . irresistible, that when the same phrase was employed in the Fourteenth Amendment to restrain the action of the States, it was used in the same sense and with no greater extent" than was true of the Fifth Amendment's restraint on the federal government. *Hurtado v. California*, 110 U.S. 516, 535 (1884). Thus, even as "[d]ue process of law" under the Fifth Amendment is to be "interpreted according to the principles of the common law," *Id.* at 535, the word "person" to whom that process applies must mean the same thing in the Fourteenth Amendment to whom both due process and equal protection of the laws apply.

At common law, persons were "divided by the law into either natural persons, or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic." 1 Blackstone's *Commentaries*, *123. Nothing in the text or history of the Fourteenth Amendment remotely implies that this understanding of persons was thereby abrogated, especially as relates to protection of a person's limbs and body from physical injury.

But Intervenor United States would have this court do just that by redefining persons according to the nouveau concept of gender identity.[7] While Anglo-American law (to say nothing of human law always and everywhere) has deferred to the patent and physiologically distinct sexes of male and female, Intervenor argues that the Constitution divides persons instead according to the non-physical terms of an individual's announced psychological interiority. This is both an irrational and unworkable proposal for State jurisdiction over health, and one that implies a fundamental redefinition of personal identity, social institutions, and venerable legal categories. The Equal Protection Clause of the Fourteenth Amendment requires no such refutation of its own standards (as discussed below) or disruption to state law.

Yet in order to eliminate the objective, embodied realities of male and female, Intervenor would have this Court nullify Tennessee's recognition of such embodiment by replacing sex with mental states: transgendered, transgendered with gender dysphoria, and non-transgendered. *See* Intervenor's Complaint, ¶ 19 ("Gender identity refers to a person's core sense of belonging to a particular gender, such as male or female. Every person has a gender identity."); ¶ 20 ("Transgender people are people whose gender identity does not align with the sex they were assigned at birth."); ¶ 6 (differentiating between transgender people from "transgender minors" with "a diagnosis of gender dysphoria"); ¶ 24 ("The American Psychiatric Association recognizes

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[7] UCLA psychoanalyst Robert Stoller was one of the first to use the term "gender identity." In 1968, exactly 100 years after the Fourteenth Amendment was ratified, he wrote that gender had "psychological or cultural rather than biological connotations." Robert J. Stoller, *Sex and Gender: On the Development of Masculinity and Femininity* 9 (1968). To him, "sex was biological but gender was social." David Haig, The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001, Archives of Sexual Behavior, Apr. 2004, at 93. "Biological sex" is not the same as "socially assigned gender." *Id.* (quoting Ethel Tobach, 41 Some Evolutionary Aspects of Human Gender, Am. J. of Orthopsychiatry 710 (1971)).

that not all transgender persons have gender dysphoria."); ¶¶ 5, 49, 50, 51, 64, 65 (distinguishing between "non-transgender" persons and transgender persons).

Intervenor argues in terms of the "dignity" of persons (Complaint, ¶ 2), yet it does so in terms denying "the meaning of [person] that has persisted in every culture throughout human history." *Obergefell v. Hodges*, 135 S.Ct. 2584, 2611 (2015) (Roberts, CJ., dissenting). In fact, just as the Second Amendment "was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors," *Bruen*, 142 S.Ct. at 2127, the Constitution did not lay down a novel replacement understanding of persons; it codified the inherited common law understanding.

B. Intervenor's argument inverts the Supreme Court's equal protection caselaw which it invokes.

The Equal Protection Clause does not forbid State legal acknowledgment of vital differences between male and female persons, nor does it foreclose States to protect children's bodies from harm by regulating the medical profession accordingly. And it is precisely because of the physical, embodied differences among the two sexes that equal protection analysis on sex classifications deviates from the "sameness norm" typical of civil rights law on (for instance) race. The Supreme Court recognizes that there is much that is *not* the same between the sexes, and that there is deep significance of these features of embodied difference.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1982). "The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). The Court's "traditional view of the core concern of the Equal Protection Clause" is "as a shield against *arbitrary* classifications." *Engquist v. Oregon Dept. of*

Agric., 553 U.S. 591, 598 (2008) (emphasis added)—not against State recognition of patent, momentous, and universally acknowledged distinctions of human existence and identity.

Sex-based classifications (unlike those of race) are not presumptively unlawful. "Gender has never been rejected as an impermissible classification in all instances." *Kahn v. Shevin*, 416 U.S. 351, 356 n.10 (1974); *accord Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 469 (1981) ("the sexes are not similarly situated in certain circumstances"). The Supreme Court recognizes that sex is both a "high visibility ... characteristic" and an "immutable characteristic determined solely by the accident of birth." *Frontiero v. Richardson*, 411 US. 677, 686 (1973) (plurality). The Supreme Court also emphasizes that the differences manifest in the sex binary are not a matter of choice or triviality:

> Physical differences between men and women … are enduring: '[T]he two sexes are not fungible; a community made up exclusively of one is different from a community composed of both.

United States v. Virginia, 518 U.S. 515, 533 (1996) (*VMI*) (citation omitted); *see also Nguyen v. INS*, 533 U.S. 53, 73 (2001) (condemning the failure "to acknowledge even [the] most basic biological differences" between the sexes, as if those real differences were but stereotypes).

In *VMI*, the court majority, while denouncing "overbroad generalizations" about the sexes, *VMI,* 518 at 516, 533, volunteered that the admission of women to VMI "would undoubtedly require" adjustments to VMI's physical training program previously designed only for men. *Id*. at 550 n.19. The Court cited congressional notes addressed to service academies' regulations, referencing the "essential adjustments" proper to those academies' admission standards in order to accede to the "physiological differences between male and female individuals." *Id*.; *see also id.*

at 540 (same).[8] In similar fashion the Ninth Circuit ratified a state policy that forbade male student participation on female high school sports teams. The court resolved that there is "no question that the Supreme Court allows for these average real differences between the sexes to be recognized or that they allow gender to be used as a proxy in this sense if it is an accurate proxy." *Clark ex rel. Clark v. Arizona Interscholastic Ass'n*, 695 F.2s 1126, 1131 (9th Cir. 1982).

While Intervenor United States argues that the MPPA is subject to heightened equal protection scrutiny as a sex-based classification (Court Document 41, 10-12), Intervenor's argument does not match the jurisprudence it relies on. Intervenor does not argue on behalf of a sex-based class. Instead, it argues by implication that the very category of sex should be replaced by gender identities, which is how it grounds all its descriptions of persons.

It is not just that this novel argument is unknown to the Supreme Court's sex-classification equal protection caselaw. Rather, the argument repudiates the categories on which it feigns to depend. Intervenor nominally wields the intermediate scrutiny equal protection principle based on the real category of the physical sex binary. Court Document 41, 10. But it does so hoping to achieve a ruling that the MPPA is unconstitutional for acknowledging the reality of male and female sex (and attending medical vulnerability of children) instead of the psychological alternative it proffers (gender identity). If sex-specified categories in law are unconstitutional, then so also is the Supreme Court's sex-based intermediate scrutiny analysis that Intervenor purports to employ to attain such a ruling. Intervenor's goal defeats its method, and vice versa.

Intervenor also errs in requesting elevated equal protection consideration for the class of transgender-identifying persons. Unlike suspect or quasi-suspect classes that the Supreme Court

[8] The Supreme Court's additional statement that "housing assignments" on campus would likewise require adjustment for women implied the court's acknowledgment of yet additional significance to female presence, of a sort calling for appropriate residence separation. *VMI*, 518 U.S. at 540.

has acknowledged (*e.g.*, race, alienage, illegitimacy) which have an objective and independent character, transgender status only exists in a negative and inverted relation to the existing equal protection category of sex. Transgender identity's attainment to the requested quasi-suspect class of equal protection would mean and require the elimination of its antithesis (sex) as an operative category from the same field of jurisprudence. Intervenor proposes the putative suspect class of transgender identity to eliminate Tennessee's authority to countenance the central identity-significance of embodied sex. All to say, a legally privileged "suspect" status for gender identity requires nullification of legal status for sex.

Equal protection suspect-class analysis simply cannot map onto Intervenor's claim for a new protected class, as it would erase the operation of another class that State law presently (and constitutionally) recognizes favorably.

C. The place of history and separation of powers.

Neither this court nor the state of Tennessee is free to "sweep away what has so long been settled" nor could such a radical change be made by this Court without rendering the Supremacy Clause and the separation of powers meaningless. *See Obergefell*, 135 S. Ct. at 2612 (Roberts, CJ., dissenting) quoting *Town of Greece v. Galloway,* 572 U. S. 565, ___, 134 S.Ct. 1811, 1819 (2014) (stating with respect to certain religious invocations the Court should not "sweep away what has so long been settled" without showing greater respect for all that preceded us"). Years ago, Justice Sutherlin succinctly described the constitutional dynamic Intervenor seeks to upend:

> The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase 'supreme law of the land' stands for and to convert what was intended as inescapable and enduring mandates into mere moral reflections.

West Coast Hotel Co. v. Parrish, 300 U.S. 379, 404 (1937) (Sutherland, J., dissenting).

IV. Conclusion

For the reasons stated above, Amici respectfully request that Intervenor's Motion for a Preliminary Injunction be denied.

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Respectfully submitted,

Constitutional Government Defense Fund

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