No. 23-2681

United States Court of Appeals
for the Eighth Circuit

DYLAN BRANDT, *et al.*,
Plaintiffs-Appellees,

v.

TIM GRIFFIN, Arkansas Attorney General, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Arkansas
Case No. 4:21-CV-00450 JM
Hon. James M. Moody, Jr., United States District Judge

BRIEF OF WILLIAM ESKRIDGE JR., STEVEN CALABRESI, NAOMI CAHN, JUNE CARBONE, CHRISTOPHER RIANO, AMANDA SHANOR, AND ALEXANDER VOLOKH AS *AMICI CURIAE* IN SUPPORT OF THE APPELLEES AND AFFIRMANCE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST FOR *AMICI*

Amici are scholars who have published influential works of constitutional law, family law, and legal history. They share a faith in the orderly elaboration of the rule of law and an interest in an accurate historical foundation for constitutional law.[1]

ARGUMENT

The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997). The Supreme Court has repeatedly held that the most fundamental liberties are those "implicit in the concept of ordered liberty" or "deeply rooted in this Nation's history and tradition," *id.* at 721, including the "Anglo-American common law tradition." *Id.* at 711. Parents' interest "in the care, custody, and control of their children" is "the oldest of the fundamental liberty interests" recognized by the Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality); accord, *id.* at 77 (Souter, J., concurring in the judgment); *id.* at 80 (Thomas, J., concurring in the

[1] All parties consented to the filing of this brief. No party or party's counsel authored, and no one other than *amici* and their counsel contributed money for this brief.

judgment); *Glucksberg,* 521 U.S. at 720.[2] Constitutionally presumed to be acting in the best interest of their children, parents have a "'high duty' to recognize symptoms of illness and to seek and follow medical advice" for the benefit of their children, who have constitutionally recognized interests in their own psychological and physical well-being. *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

These historically-rooted rights and duties protect transgender youth and their parents just as they have protected Amish youth and their parents, see *Wisconsin v. Yoder,* 406 U.S. 205, 233-34 (1972), or the "children of foreigners who had emigrated here," *Meyer v. Nebraska,* 262 U.S. 390, 398 (1923). The Supreme Court has rejected a time-machine approach to fundamental rights (where judges ask how Framers would have answered questions involving technologies and social groups they could not have imagined) and applies historically-rooted constitutional principles to our society as it exists today, in light of modern developments in technology and society, *303 Creative LLC v. Elenis,* 600 U.S. 570, 587 (2023); *Heller v. District of Columbia*, 554 U.S. 570, 582

[2] See also *Santosky v. Kramer,* 455 U.S. 745, 753 (1982); *Quilloin v. Walcott*, 434 U.S. 246, 355 (1978); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

(2008), and in medicine, *Cruzan v. Director*, 497 U.S. 261, 269-70 (1990) (applying common law to protect persons whose life is artificially sustained). See also *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) (applying original [1964] public meaning to transgender employees, even though that social group was not known in 1964).

In this brief, we explore the historical roots of the Supreme Court's due process jurisprudence as it applies to laws targeting medical treatment of children and not the general population. Targeting only care for gender-nonconforming children, Arkansas's Act 626 deprives parents of the fundamental freedom to deal with their children's medical issues through discussions with their doctors rather than mandates from the State. Consistent with our centuries-long traditions, the Supreme Court has announced a strong constitutional presumption that the "natural bonds of affection lead parents to act in the best interests of their children," *Parham*, 442 U.S. at 602; accord, *Troxel*, 530 U.S. at, 68-70 (plurality); *id.* at 77-79 (Souter, J., concurring in the judgment), a presumption that is strengthened when children assert a liberty interest aligned with that of their parents. *Id.* at 87-89 (Stevens, J., dissenting). To rebut that strong presumption, the State has the burden of proving

that (1) its measure is necessary and proportionate (2) to prevent harm to third parties or children themselves, (3) as established by scientific or other objective evidence.

The State's brief on appeal argues that Act 626 is needed to protect children against "experimental, dangerous, life-altering" treatments. Defendants-Appellants' Opening Brief, ii, 6-7, 19, 44. Arkansas does not meet the constitutional burden required for it to substitute its judgment for parental medical decisions for the benefit of their children, consistent with professional standards. To the contrary, the District Court's Findings of Fact (binding unless clearly erroneous) document that every relevant medical association considers the gender-affirming medical care made illegal to be "safe and effective" for gender-nonconforming minors, App. 239; R.Doc 283 at 8, and "not experimental care." App. 241; R.Doc 283 at 10. "Decades of clinical experience" and systematic studies have demonstrated that these treatments (administered under carefully-developed protocols) are necessary for the well-being of many transgender youth. App. 264–266; R.Doc. 283 at 33–35. Given these findings and our careful articulation of the right as limited to parental decisions for their children, the Due Process Clause requires this Court

to affirm the permanent injunction assuring parents and their children the freedom to choose medical care deemed necessary by health-care professionals and science-based standards.

I. AT THE FOUNDING: ENGLISH AND COLONIAL RECOGNITION OF PARENTAL RIGHTS AND DUTIES TO ASSURE THE HEALTH OF THEIR CHILDREN

Coke and Blackstone, well-recognized authorities on common law rights, *Kahler v. Kansas*, 140 S. Ct. 1021, 1029 (2020), viewed the family as a self-regulating natural institution animated by reciprocal natural rights and duties among parents and their children. From the beginning, American "family life" has been a "private realm" that "the state cannot enter" without strong public justification. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

Edward Coke declared that the relationship among members of the family is fundamentally governed not by statutory law but by common law, and thus by the order of nature. Coke, *The First Part of the Institutes of the Lawes of England* *11 (1628). The resulting conception of the family was of a self-contained unit, independent of state control. See Joan Bohl, *Family Autonomy versus Grandparent Visitation*, 62 Mo. L. Rev. 755,

763-64 (1997) (relying on Coke to articulate a constitutional vision of family integrity that anticipated *Troxel*).

William Blackstone's *Commentaries on the Laws of England* (1765) declared that law properly "restrains a man from doing mischief to his fellow citizens," but any denial of "natural liberty" is "tyranny." *Id.* at *121-22. What counted as "natural liberty"? Blackstone's Chapter XVI described the "*power* of parents over their children," which was in turn derived from their responsibilities; "this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompence for his care and trouble in the faithful discharge of it." *Id.* at *440.

Blackstone recognized natural rights of children, "which principally consist in three particulars; their maintenance, their protection, and their education." *Id.**434. The duty of "maintenance" was "to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved," thus entailing attention to their children's physical and mental health. *Id.* at *435*; cf. Dale v. Copping,* 80 E.R. 743 (King's Bench 1610) (holding that "necessaries" included medical treatment for "falling sickness" [epilepsy]).

Consistent with this common law tradition, American colonial governments left family medical decisions entirely to the parents, with one exception: epidemics. See John Witt, *Epidemics and the Law from Smallpox to COVID-19* (2020).[3]

The Boston smallpox epidemic of 1721 illustrates the colonial response to a plague that killed or disfigured ten percent of the world's population in previous centuries. Stephen Coss, *The Fever of 1721: The Epidemic That Revolutionized Medicine and American Politics* 55 (2016). In April 1721, sailors carrying smallpox triggered the epidemic. Jennifer Lee Carroll, *The Speckled Monster: A Historical Tale of Battling Smallpox* 134-41 (2003). Infectious and often fatal, smallpox had no known cure, so the main regulatory response was to quarantine the ill and allow families to move outside the city. Zabdiel Boylston sent his wife and daughters to the relative safety of Roxbury, but he tried an experimental treatment on his youngest son and two slaves: inoculation,

[3] Medical care in colonial America relied on a limited supply of trained physicians, supplemented by midwives, chemists, apothecaries, and "quacks" (men with no formal medical training). Richard Skyrock, *Medicine and Society in America, 1660-1860*, at 5-16 (1960); Whitfield J. Bell, Jr., *Medical Practice in Colonial America*, 31 Bull. Hist. Med. 442, 448 (1957).

whereby a small amount of smallpox would be injected into the body, producing (one hoped) a mild but not fatal case of smallpox and lifetime immunity. Coss, *Fever*, 86-95.

Because inoculation could create or expand an epidemic, it was controversial. Supported by leading doctors, the Boston Selectmen forbade Boylston from inoculating others outside his family. Carroll, *Speckled Monster*, 206-38; Coss, *Fever*, 96-109. Apparently, the order did not apply to Boylston's subsequent (successful) inoculation of his oldest son. *Id.* at 145. Other parents (encouraged by the relative efficacy of inoculation) reached out to Boylston—including the Reverend Cotton Mather. Carroll, *Speckled Monster*, 257-58, 280-83; Coss, *Fever,* 129-30. Although the Boston Selectmen again denounced the practice, *id.* at 143-47, the Governor and the General Court supported Boylston. Carroll, *Speckled Monster*, 250-60. All but six of his patients survived. Coss, *Fever*, 193-94. Based on this and its own evidence, the Royal Society of London announced that inoculation was an effective treatment, even with the associated risks.

The Royal Society's imprimatur did not remove concerns that preventive inoculation could actually create an epidemic. Although some

colonies barred inoculation, we are not aware of any prosecution of parents who inoculated their children or of the medical personnel who assisted them. An illustrative statute was Virginia's "Act to regulate the inoculation of the Small-pox" (1769) (Addendum (A)). See Andrew Wherman, *Thomas Jefferson, Inoculation, and the Norfolk Riots,* 110 Transactions, Am. Phil. Soc'y 129, 140-41 (2022). The Act barred any effort to import smallpox into the colony for prophylactic inoculations, but once an epidemic was imminent, the statute recognized that inoculation might be a "prudent and necessary" response for families. Specifically, parents could give notice to local authorities if they felt immediate danger of smallpox, and barring community objection could inoculate their children. See *id.* at 141-42; accord, Mass. Acts ch. 8, at 67 (1776).

In 1777, Virginia's legislature amended the 1769 Act to allow families to inoculate (without imminent threat) if they received the consent of a majority of neighboring families. "An act to amend an act entitled An act to regulate the inoculation of the small-pox within this colony" (1777) (Addendum (A)). Thomas Jefferson relied on the 1777 Act to inoculate two of his slaves in 1778 and his two daughters in 1782.

Wherman, *Inoculation*, 144. John Adams, Benjamin Franklin, and most members of the Continental Congress chose to inoculate themselves and their families. *Id.;* Coss, *Fever*, 273. George Washington directed inoculation of the Continental Army in 1777-78. Wherman, *Inoculation,* 144-45.

Smallpox was not alone as an epidemic threat. In 1793, when Philadelphia was the seat of government, the city was swept by a yellow fever epidemic. John Harvey Powell, *Bring Out Your Dead: The Great Plague of Yellow Fever in Philadelphia in 1793* (1970). Philadelphia adopted the most extensive public health measures of the century—quarantines of sick persons, sanitation requirements, relief for the destitute, and travel restrictions. *Id.* at 20-23, 30-66, 184-207, 238-42. Families turned to various treatments, ranging from bleeding to vomit-inducing medications, without interference from the government. *Id.* at 77-85, 182-83, 208-30.

The foregoing history demonstrates that the common law framework for family law outlined in Coke and Blackstone reflected and molded the normative experience of the colonists and the Founders. The regulatory responses to epidemics were consistently universal—they

created science-based public health rules applicable to everyone—and built upon rather than overrode parents' natural concern for protecting their children.

II. THE FOURTEENTH AMENDMENT, FAMILY INTEGRITY & PUBLIC HEALTH

Copied from the Fifth Amendment (1791), the Fourteenth Amendment's Due Process Clause (1868) carried with it the common law understanding of family integrity. The Amendment translated traditional responsibilities of parents into constitutional rights—with due allowance for states to adopt health regulations to prevent harm to the public.

A. BEFORE THE FOURTEENTH AMENDMENT, 1789-1868

Nineteenth-century treatises adapted the common law's family integrity theme to announce legally enforceable rights while also authorizing government to protect citizens against harm. Statutes applied the common law understanding of family integrity. For example, Massachusetts enacted a law in 1815 making it a crime for anyone to knowingly enlist a minor into the United States Army *unless* they had the written permission of "his parent, guardian and master." See Mass.

Acts ch. 136, § 1, at 60 (1815) (Addendum (B)). Minnesota declined to prosecute parents as accessories for knowingly harboring their children after they committed a felony. *See* Minn. Terr. Rev. Stat. § 120, at 25 (1851).

James Kent's *Commentaries on American Law* (1826-1830) articulated the "duties of parents to their children" to be "maintaining and educating them during the season of infancy and youth, and in making reasonable provision for their future usefulness and happiness in life, by a situation suited to their habits, and a competent provision for the exigencies of that situation." Kent, "Of the Duties of Parents," in *Commentaries*, 189. Citing Coke, Kent declared that the "obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws"—but noted an English statute that required parents and grandparents of "any poor, blind, lame, or decrepit person" to provide maintenance for their progeny even during their adulthood if they ended up in the poorhouse. *Id.* at 190 (citing 43 Eliz. I c. 2 [1601]).

During any child's minority, "the parent is absolutely bound to provide reasonably for his maintenance and education, and he may be

sued for necessaries furnished, and schooling given to a child, under just and reasonable circumstances." *Id.* at 191. Given the legal "discretion" vested in the parent, "there must be a clear omission of duty, as to necessaries, before a third person can interfere, and furnish them, and charge the father." *Id.* (citing *Van Valkinburgh v. Watson,* 13 Johns. 480 (N.Y. Sup. Ct. 1816) (recognizing the legal discretion of parents in caring for their children and reversing a judgment imposing maintenance costs on the father without a showing of gross "neglect of duty"), approved by *In re Ryder,* 11 Paige Ch. 185 (N.Y. Ch. 1844)). Accord, *Stanton v. Willson*, 3 Day 37, 51–53 (Conn. 1808).

While the English statute mandating parental provision of necessary maintenance was transported to America through our common law, several states enacted its provisions as statutory law. Addendum (B). Arkansas and other states in this Circuit adopted such provisions early into their statehood or when they were territories. Ark. Code ch. 78, § 48 (1838); Dakota Terr. Code ch. 2, § 98 (1877) (enforcing parental duty to provide "necessaries" for their children), and others quoted in Addendum (B). Even without codification, the common law tradition

"has probably been followed, to the extent at least of the English statutes, throughout this country." Kent, *Commentaries*, 191.

The duty to provide "necessaries" had an accepted legal meaning in the nineteenth century. Blackstone referred to a child's "necessary meat, drink, apparel, *physic*, and such other necessaries." 1 Blackstone, *Commentaries* *454. "Physic" in that era meant "the art of healing" and "medicines." Noah Webster, *American Dictionary of the English Language* (1828) (defining "physic"). In nineteenth-century context, a parent's duty to provide "necessaries" for their children included appropriate medical care.

"The rights of parents," Kent continued, "resulted from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority; and in the support of that authority, a right to the exercise of such discipline, as may be requisite for the discharge of their sacred trust." Kent, "Of the Rights of Parents," in *Commentaries*. Kent contrasted the "barbarous" practices of the "ancients," who placed no limits on parental authority. The father or, upon his death, the mother had wide discretion to regulate their

children's upbringing and medical care—but not to mistreat their children. *Id.*

Similarly, Joseph Story's *Commentaries on Equity Jurisprudence* (2d ed. 1839) recognized that a court of equity could compel parents to support and maintain their children. 2 *Commentaries,* ch. XXXIV § 1345. "[A]lthough in general parents are entrusted with the custody of the persons and the education of their children; yet this is done upon the natural presumption that the children will be properly taken care of." *Id.* § 1341. Such a strong presumption could only be rebutted by "gross ill treatment or cruelty towards his infant children." *Id.*

If parents were deceased, their duties devolved to the guardian appointed by their father's will or trust document. See Ark. Code ch. 72, § 6 (1838), and other statutes excerpted in Addendum (C). Interestingly, minors over the age of fourteen had the power to appoint their own guardians, according to state and territorial laws. *E.g.*, Ark. Code ch. 72, §§ 2, 7 (1838), and other statutes excerpted in Addendum (C).

State adoption statutes transferred the common law responsibilities and rights from the birth parents to the adoptive parents. *E.g.*, Massachusetts's Adoption of Children Act (1851). Arkansas's

adoption law, enacted in 1885, was representative: "After the adoption of such child, such adopted father or mother shall occupy the same position toward such child, that he or she would if the natural father or mother, and be liable for the maintenance, education, and every other way responsible as a natural father or mother." Ark. Code ch. 44, § 1145 (1885), excerpted in Addendum (D), together with similar statutes for states in this Circuit. The Dakota Territory required the consent of minors over the age of twelve. Dakota Terr. Code ch. 2, § 111 (1877). Accord Cal. Civ. Code ch. 2, § 225 (1874) (same); Neb. Terr. Code Civ. P. ch. 2, § 797 (1866) (requiring consent of minors over the age of fourteen); Me. Code ch. 59, § 27 (1857) (same).

As states assumed greater responsibilities for protecting children through adoption and guardianship laws, they were slowly expanding their regulation of public health to protect Americans against incompetent physicians, drugs medical experts considered unsafe, and the spread of infectious diseases. John Duffy, *The Sanitarians: A History of American Public Health* 148-54 (1990); Minn. Code ch. 56, § 3 (1849). None of the public health regulations targeted parental decision-making, and some expanded parental choices. The best example is vaccination

with the cowpox virus, a safer treatment which supplanted inoculation as the best prevention for smallpox. Smallpox epidemics continued, but governments helped parents secure the safety of their children by encouraging and sometimes helping pay for vaccination. See *Jacobson v. Massachusetts,* 197 U.S. 11, note † (1905).

Another avenue of public health regulation opened up in the mid-nineteenth century, when many states adopted laws barring the use of drugs, apparatus, or procedures aborting a woman's pregnancy. E.g., Conn. Stat., tit. 20, §§ 14, 16 (1821). Endorsed by the medical profession, these laws reflected traditional public health goals of preventing harm to the pregnant woman, at a time when such procedures were often dangerous, as well as potential life. James Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900*, at 20-40 (1978); Samuel Buell, Note, *Criminal Abortion Revisited*, 66 NYU L. Rev. 1774, 1783-87 (1991).

B. AFTER THE FOURTEENTH AMENDMENT, 1868-1905

When the Fourteenth Amendment (1868) imposed on the states the requirement that no personal liberty should be denied without due process of law, the personal liberty of parents to regulate the lives of their

minor progeny was unquestioned. *E.g.*, Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 340, 415-16, 426-27 (1868). Applying the Due Process Clause, judges and commentators recognized (1) parental rights as constitutional liberties, (2) constitutional liberty interests of children themselves, and (3) conditions under which states could impose regulations for the benefit of the common good.

The most extensive discussion is Christopher Tiedeman, *A Treatise on the Limitations of Police Power in the United States Considered from Both a Civil and a Criminal Standpoint* (1886). The Fourteenth Amendment was the occasion for constitutional courts and commentators to recognize that the family was a regulatory regime where each participant had positive rights that borrowed from the earlier natural law understanding. First, "all people, everywhere, have the inherent and inalienable right to liberty. Shall we say to the children of the State, you shall not enjoy this right—a right independent of all human laws and regulations?" *Id.* at 134 n.2. Once they were considered "members of the body politick," children could claim constitutional liberties. *Id.* at 551-52.

Second, parents remained the default regulatory regime. As at common law, parental duties toward their children—"protection, maintenance, and education," *id.* at 555-56—were also deemed to be the basis for the constitutional authority of parents to make decisions for their children, even under a modern regulatory understanding of the family. "The natural bond between parent and child can never be ignored by the State, without detriment to the public welfare; and a law, which interferes without a good cause with the parental authority, will surely prove a dead letter." *Id.* at 560-61. This included authority to make medical decisions. "We can readily understand the right of a parent or guardian to compel a child to submit to necessary medical treatment." *Id.* at 31.

Third, the State enjoyed a substantial regulatory authority as *parens patriae*. In the event of parental death or exceptional unfitness, the State could assume responsibility for children, either through appointment of a guardian or referral to an orphan asylum or reformatory. *Id.* at 132-33. "The municipal law should not disturb this relation except for the strongest reason," such as clear proof of "gross misconduct or almost total unfitness on the part of the parent." *Id.* at

556-57. The leading family law treatise agreed that "the State has no constitutional right to interfere with the parent and take charge of a child's education and custody, on the mere allegation that he is 'destitute of proper parental care, and is growing up in mendicancy, ignorance, idleness, and vice.'" James Schouler, *A Treatise on the Law of Domestic Relation*s § 256 (5th ed. 1895) (citations omitted).

Judges and commentators recognized the traditional state power to protect citizens against harm—especially from epidemics. "If the disease is infectious or contagious, we recognize without question the right of the State to remove the afflicted person to a place of confinement, where he will not be likely to communicate the disease to others." Tiedeman, *Limitations of Police Power*, at 31. On the other hand, "where the neglect of medical treatment will not cause injury to others, it is very questionable if any case be suggested in which the employment of force, in compelling a subjection of medical treatment of one who refused to submit, could be justified, unless it be upon the very uncertain and indefinite ground that the State suffers a loss in the ailment of each inhabitant." *Id.* at 32.

C. THE VACCINATION CASES & PARENTAL RIGHTS, 1897-1922

The relative safety of vaccination and the seriousness of smallpox motivated government programs to encourage vaccination. In the late nineteenth century, state and local officials required public school students to be vaccinated as a condition of enrollment. These policies were sometimes blocked by courts when officials lacked evidence that student vaccination was necessary to protect public health. See *State v. Burdge*, 95 Wis. 390 (1897) (voiding policy where "there was no epidemic," for "[t]here must be" circumstances "rendering such a rule or regulation necessary for the preservation of the public health"); *Potts v. Breen*, 167 Ill. 67 (1897) (voiding rule where "[t]he record wholly fails to show that there were any grounds" to believe "that the public health was in any danger whatever").

Massachusetts was the first state to require smallpox vaccination of its citizens, and its policy was upheld in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). Because parents could opt their children out, the case did not present a clash between public policy and parental rights. But the Court set forth an influential structure for analyzing such due process claims. See Lawrence Gostin, *Jacobson v. Massachusetts at 100 Years:*

Police Power and Civil Liberties in Tension, 95 Am. J. Pub. Health 576 (2005).

First, the Court held that the State's exercise of its authority could not be exercised in "an arbitrary, unreasonable manner" or go beyond what was "necessary" for the safety of the public. *Jacobson*, 197 U.S. at 27-28. By stressing the "emergency" nature of the smallpox threat, the Court indicated that Massachusetts' officials carried their burden of demonstrating a tangible threat to the health and safety of third parties that justified a measure limiting people's freedom to regulate their own medical regimen. *Id.* at 25-28, 31. Moreover, a public health regulation responding to public necessity could be unconstitutional if the human burdens imposed were disproportionate to the likely benefits. The Court emphasized that there might be cases where public health measures would, as applied, be "cruel and inhuman in the last degree," in which case a court would "be competent to interfere and protect the health and life of the individual concerned." *Id.* at 38-39.

Jacobson discussed, with approval, measures taken by states to require children to be vaccinated as a condition of attendance in public

schools, *id.* at 33-35, and the Court dismissed a subsequent challenge to such a policy in *Zucht v. King*, 260 U.S. 174 (1922).

III. FROM *MEYER* & *PIERCE* TO THE ARKANSAS CASE, 1923-2023

"[I]f a statute purporting to have been enacted to protect the public health [etc.] has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." *Jacobson,* 197 U.S. at 31. Two such cases came to the Court shortly after *Zucht*.

The issue in *Meyer v. Nebraska*, 262 U.S. 390 (1923), was the constitutionality of a law barring the teaching of German in public schools. A unanimous Supreme Court subjected the law to searching means-ends scrutiny. The Court's starting point was that the "liberty" at the core of the Due Process Clause "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, *establish a home and bring up children*, to worship God according to the dictates of his own conscience, and generally to enjoy those

privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.* at 399 (emphasis added).

Holding that the means were not a sufficient fit with that goal, *Meyer* made three points distinguishing that case from *Jacobson* and *Zucht*. First, the State was imposing a significant liberty restriction without a showing of harm to third parties or affected children. "Mere knowledge of the German language cannot reasonably be regarded as harmful." *Id.* at 400. Second, the statute's discriminatory treatment of foreign languages—Greek and Latin could be taught, but not German or other modern languages—suggested that a small segment of the population was being targeted. *Id.* at 400-02. Third, the State bore the burden of showing not only that its liberty-infringing rule served the public interest, but also that a liberty-respecting rule would have been insufficient. Why was a complete bar to teaching German needed, when a more tailored "regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed." *Id.* at 403.

The Court delivered a similar verdict in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Oregon's constitution required parents and guardians to send their children to public schools between the ages of 8 and 16. Unanimous once again, the Court held that the provision violated the Due Process Clause, because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 533.

The "liberty of parents and guardians to direct the upbringing and education of children" was a longstanding one, with roots in the common law and Founding-era consensus. "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 533-34. Without questioning the State's interest in an educated citizenry, the Court objected to the drastic means it had chosen. *Id.* at 534. The harm to the parents who sent their children to study in parochial schools was tangible, substantial, and highly

disproportionate to the benefits advanced by the State for its "extraordinary measures." *Ibid.*

There are several lessons the Supreme Court has drawn from *Meyer* and *Pierce* in the last century. To begin with, parents have constitutional liberty interests in controlling the terms of their children's upbringing and providing a basis for them to become flourishing, responsible adults, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion), including a "'high duty' to recognize symptoms of illness and to seek and follow medical advice," *Parham v. J.R.*, 442 U.S. 584, 602 (1979); see *id.* at 603 (parents play the key role in deciding "their [children's] need for medical care or treatment"). "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. *Pierce.* And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); accord, *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (the "primary role of the parent in the upbringing of their children is now established beyond debate as an enduring American tradition"). Moreover, children have

their own liberty interests. They are usually presumed to be aligned with those of the parents, for the traditional common law reason that parents internalize the best interests of their children and can be expected to be the best decisionmakers.

A final lesson is that courts have a constitutional obligation to subject liberty-infringing measures such as Arkansas's Act 626 to searching scrutiny, where the State bears a heavy burden of showing that its displacement of parental health decisions is necessary to protect important public interests. Arkansas told the District Court it was "protecting the health and safety of its citizens, particularly 'vulnerable' children who are gender nonconforming," and "ensuring the ethical standards of the healthcare profession." App. 235; R.Doc 283 at 4; see Defendants-Appellants' Opening Brief, ii, 2 (protecting children against "experimental," "life-altering" treatments). These are legitimate interests, but the State failed to meet its burden of demonstrating that its rule against the medical use of "gender transition procedures" is, based upon objective evidence, necessary and proportionate to advancing those purposes.

First, the District Court's Findings of Fact demonstrate that the means chosen by Act 626 *undermine*, *rather than advance*, the State's asserted policies. Arkansas did not seriously dispute that Act 626's bar to medical treatments such as puberty blockers and hormone therapy denies many transgender youth the treatments recommended by the WPATH Standards of Care that are accepted by the national as well as Arkansas medical authorities. App. 239–242, 279; R.Doc 283 at 8–11, 48. "Dr. Levine, the State's expert, expressed concern about the possibility of doctors losing their licenses for continuing to provide gender-affirming medical care" that they would consider necessary to treat their patients, pursuant to the standard, medically developed protocols. App. 282; R.Doc 283 at 51.

Based upon extensive evidence, the District Court also found that Act 626's directive actually harms "'vulnerable' children who are gender-nonconforming" by withholding medically necessary treatments and by cutting off those treatments from children already receiving them. App. 264–266, 279–281; R.Doc 283 at 33–35, 48–50; cf. App. 253–263; R. Doc 283 at 22–32 (harms to the plaintiff children and their parents). "The State's expert, Dr. Levine, described the psychological impact of cutting

off gender-affirming medical care for those currently receiving it as 'shocking' and 'devastating'" for those children. App. 281; R.Doc 283 at 50.

Given these Findings of Fact, this case presents a record for appeal that is much worse for the State than any record in previous cases where the Supreme Court found a violation of the Due Process Clause. In *Meyer*, *Pierce*, and *Troxel*, the State did not carry its heavy burden of demonstrating *both* that the denial of parental liberties would have advanced legitimate public interests *and* that more moderate policies would not have been more appropriate. In this case, the factual record demonstrates that the denial of parental and children's liberties would torpedo the legitimate goals articulated by the State.

Act 626 is unusual in its lack of support in medical science and virtually unprecedented in the degree to which established medical consensus reveals that it would mock the asserted statutory goals. Assume that, in *Jacobson*, Massachusetts had told Henning Jacobson that he could not vaccinate his family on the eve of a smallpox epidemic. By 1905, there was a scientific consensus that vaccination was safe (notwithstanding medical risks for some persons) and was the best way

to protect your family. Any assertion by the State that it was barring the best medical technology in order to protect children and to assure high professional standards would have been rejected out of hand.

Second, even assuming (contrary to the Findings of Fact) there were any connection between the child-protection and medical-ethics justifications the State attributes to Act 626 and the mechanism chosen to carry out those policies, Act 626 would still face heightened scrutiny because it invades "the oldest of the fundamental liberty interests" recognized by the Court. *Troxel*, 530 U.S. at 65 (plurality), 77 (Souter), 80 (Thomas); *Glucksberg,* 521 U.S. at 720. To pass the heightened scrutiny required by *Troxel*, Arkansas had the burden of demonstrating, through objective evidence, *both* that Act 626 advanced the welfare of children—rather than precisely the opposite—and *also* that it was a proportionate means to do so.

If Arkansas really wanted to protect "vulnerable" gender-nonconforming youth, it might have set and enforced standards of care and informed consent that the medical profession has developed. See App. 275–278; R.Doc. 283 at 45–47 (discussing such Arkansas regulation of gastric bypass surgery, opioids, and other medical treatments). *Meyer*

and *Pierce* suggested that a regulatory approach rather than a complete prohibition might be permissible when the State wants to advance a legitimate policy but with minimal intrusion into personal liberties.

Under *Jacobson*, *Meyer*, and *Pierce*, it is relevant that there is a dramatic lack of proportionality between the harm to persons and families denied fundamental rights and the State's asserted interests. According to the State's expert, Act 626 would impose immediate and "devastating" harm on transgender youth already receiving the medically approved treatments and on their families. App. 280–281; R.Doc 283 at 55. And it would impose burdens on families struggling with these issues, both now and in the future. To justify its ban on such medically-necessary treatments, the State contends that they are potentially risky and life-altering, and that minors may later regret them—factors that have not motivated Arkansas to ban elective cosmetic surgery for the teenage population.[4] This regulation is "Draconian," as Dr. Levine

[4] The American Society of Plastic Surgeons reports that 229,740 cosmetic procedures were performed *on teenagers* in the U.S. in 2020, including 3,233 breast augmentation surgeries and 44,686 rhinoplasties. *Plastic Surgery Statistics Report* 15 (2020), https://www.plasticsurgery.org/documents/News/Statistics/2020/plastic-surgery-statistics-full-report-2020.pdf.

conceded, App. 282; R.Doc. 283 at 55, and a "vast government overreach," as Governor Hutchinson opined.

Finally, Arkansas has singled out an unpopular minority to take its stand for (assertedly) protecting "vulnerable" youth and professional standards. We are not aware of other recent Arkansas statutes where the Legislature has inserted its views as "the definitive oracle of medical care, overriding parents, patients and health-care experts" (the Governor's words). There are, indeed, in Arkansas "conversion therapies" (claiming to flip kids from gay to straight) being offered that actually harm vulnerable young persons and that violate established medical protocols. *E.g.*, *Tingley v. Ferguson*, 47 F.4th 1055, 1064 (9th Cir. 2022) (recognizing medical consensus).

The Supreme Court's fundamental rights jurisprudence protects minorities against denial of important liberties when the majority is not willing to impose more general rules (as in the case of cosmetic procedures). For example, on the eve of *Jacobson*, which authorized states to create generally applicable science-based vaccination programs, a federal court invalidated a San Francisco ordinance that responded to the discovery of six bodies in the center of town with a quarantine of that

large section of town occupied by Chinese families. The Circuit Court ruled that the ordinance violated the Fourteenth Amendment: the City's liberty restrictions were overinclusive (they burdened far more people and with too much restriction) and underinclusive (they only burdened Chinese families and businesses). *Jew Ho v. Williamson*, 103 F. 10 (C.C. C.D. Cal. 1900). Like San Francisco's action, Act 626 is overinclusive (it burdens many families who need the medical care denied them by the statute) and underinclusive (it ignores genuine threats to vulnerable youth). Cf. *Romer v. Evans,* 517 U.S. 620, 626-31 (1996) (striking down a state constitutional amendment under rational basis review because its means were so mismatched from its asserted goals).

Like the laws invalidated in *Meyer, Pierce,* and *Troxel*, Act 626 does not create rules for the general population. All the procedures regulated by Act 626 are legal for adults. Thus, it is clear that Act 626 takes aim at parental decision-making for the medical benefit of their children—a direct attack on our most fundamental liberty. Indeed, the Arkansas law is more constitutionally infirm than the laws struck down earlier, because it denies medical care for only some minors (based on their sex and gender identity) and because it has the effect of upending (rather

than advancing) the goals asserted by the State. For these reasons, *amici* urge the en banc Court to affirm the District Court's decision, including its permanent injunction.

Dated: December 13, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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Dated: December 13, 2023

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of *Amici* with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit on December 13, 2023, by using the appellate CM/ECF system, which effected service on all counsel of record.

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No. 23-2681

United States Court of Appeals
for the Eighth Circuit

DYLAN BRANDT, *et al.*,

Plaintiffs-Appellees,

v.

TIM GRIFFIN, Arkansas Attorney General, *et al.*,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Arkansas
Case No. 4:21-CV-00450 JM
Hon. James M. Moody, Jr., United States District Judge

ADDENDUM TO BRIEF OF WILLIAM ESKRIDGE JR., STEVEN CALABRESI, NAOMI CAHN, JUNE CARBONE, CHRISTOPHER RIANO, AMANDA SHANOR, AND ALEXANDER VOLOKH AS *AMICI CURIAE* IN SUPPORT OF THE APPELLEES

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TABLE OF CONTENTS

Page(s)

(C) Guardianship Laws

(D) Adoption Laws

SELECTED COLONIAL & EARLY STATE STATUTES

(A) Colonial Smallpox Laws

Virginia, "An act to regulate the inoculation of Small-Pox within this colony" (1769), *reprinted in* William Waller Hening, *The Statutes at Large* (1823):

> *Be it enacted* * * * That if any person or persons whatsoever, shall wilfully, or designedly, after the first day of September next ensuing, presume to import or bring into this colony, from any country or place whatever, the small-pox, or any variolous or infectious matter of the said distemper, with a purpose to inoculate any person or persons whatever * * * he or she, so offending, shall forfeit and pay the sum of one thousand pounds, for every offense so committed * * *.
>
> But forasmuch as the inoculation of the small-pox may, under peculiar circumstances, be not only a prudent but necessary means of securing those who are unavoidably exposed to the danger of taking the distemper in the natural way, and for this reason it is judged proper to tolerate it, under reasonable restrictions and regulations:
>
> *Be it therefore enacted, by the authority aforesaid*, That from and after the said first day of September next, if any person shall think him or herself, his or her family, exposed to the immediate danger of catching the said distemper, such person may give notice thereof to the sheriff of any county, or to the major or chief magistrate of any city or corporation, and the said sheriff, mayor, or chief magistrate * * * shall consider whether, upon the whole circumstances of the case, inoculation may be prudent or necessary, or dangerous to the

> health and safety of the neighborhood, and thereupon either grant a licence for such inoculation * * * or prohibit the same * * *.

Massachusetts, "An Act to prevent the Continuance of the Small Pox in the Town of *Boston*, and to licence Inoculation there for a limited Time" (1776), *reprinted in 5 Acts and Resolves passed by the General Court* 555, 555-56 (1886):

> *Whereas it appears to this General Assembly, that it has become impossible to prevent a general Spread of the Small Pox in the Town of Boston, in the Country of Suffolk; and that it is of the utmost Importance, considering the State of our public Affairs, that the same Distemper be carried through the said Town with all possible Dispatch*:
>
> *Be it therefore enacted* * * * That any Person or Persons be, and they hereby are permitted to take and receive the Small-Pox by Inoculation within the said Town at any Time before the Fifteenth Day of July 1776; but not afterwards.
>
> *Provided always*, That they remain within the said Town from the Time of their Inoculation, during their being visited with the said Distemper * * *.
>
> *And be it further enacted by the Authority aforesaid*, That no Person or Persons shall be Inoculated at any other Time or Place, than is permitted and allowed by this Act * * *.

Virginia, "An act to amend an act entitled An act to regulate the inoculation of the small-pox within this colony" (1777), *reprinted in A Collection of All Such Public Acts of the General Assembly, and*

Ordinances of the Conventions of Virginia, Passed since the Year 1768, as are now in force 63, 63-64 (1783):

> Whereas the Small-pox, at this time in many parts of the Commonwealth is likely to spread and become general, and it hath been proved by incontestible experience that the late discovery's and Improvements therein have produced great Benefits to Mankind, by rendering a Distemper, which taken in the common way is always dangerous and often fatal, comparatively mild and safe by Inoculation, and the Act for regulating the Inoculation of the smallpox having been found, in many Instances, inconvenient and Injurious makes it necessary that the same shou'd be amended: Be it therefore enacted by the General Assembly, that any person having first obtained in writing to be attested by two Witnesses, the Consent of a Majority of the housekeepers residing within two miles and not separated by a River or Creek half a mile wide and conforming to the following Rules and regulations, may Inoculate or be Inoculated for the small-pox, either in his or her own house, or at any other place. No Patient in the small-pox shall remove from the House where He or She shall have the Distemper, or shall go abroad into the Company of any person who hath not before had the small-pox or been Inoculated, or go into any Public Road where Travellers usually pass, without retiring out of the same, or giving notice, upon the Approach of any passenger, until such Patient hath recovered from the Distemper, and hath been so well cleansed in his or her person and Cloths as to be perfectly free from Infection, under the Penalty of forty shillings for every offence; to be recovered, if committed by a married Woman from her Husband, if by an Infant from the Parent or

Guardian, and if by a Servant or Slave from the Master or Mistress.

Every Physician, Doctor or other person, undertaking Inoculation at any House, shall cause a Written Advertisement to be put up at the nearest public Road, or other most notorious adjacent place, giving information that the small-pox is at such House, and shall continue to keep the same set up, so long as the Distemper or any Danger of Infection remains there under the Penalty of forty shillings for every day that the same shall be omitted or neglected; to be paid by the Physician or Doctor, if the offence shall be committed when He is present, or by the Master, Mistress, Manager or principal person of the Family respectively, if the offence is committed in the absence of the Physician or Doctor. Every Physician Doctor or other person, undertaking Inoculation at any Public place or Hospital for the Reception of Patients, shall before he discharges the Patients, or suffers them to be removed from thence, take due care that their persons and Cloths are sufficiently cleansed, and shall give such Patients respectively a Certificate under his hand, that in his Opinion they are free from all Danger of spreading the Infection; under the Penalty of three pounds for every offence; and every person wilfully giving a false Certificate shall be subject to the Penalty of Ten pounds. If any person who hath not had the small-pox, other than those who have been or intended to be inoculated, shall go into any House where the small-pox then is, or intermix with the Patients, and return from thence, any Justice of the Peace of the County, on due proof thereof, may by Warrant cause such person to be conveyed to the next Hospital where the small-pox is, there to remain until He or She shall have gone thro' the Distemper, or until the Physician or Manager of the Hospital shall certify that in his Opinion such person can not take the same; And if

such person shall not be able to pay the necessary expences, the same shall be paid by the County. Every person wilfully endeavouring to spread or propagate the small-pox, without Inoculation, or by Inoculation in any other Manner than is allowed by this Act or by the said recited Act in special Cases shall be subject the Penalty of five hundred pounds, or suffer six Months Imprisonment without Bail or Mainprize. All the Penalties inflicted by this Act may be recovered with Costs by Action of Debt or Information in any Court of Record, where the Sum exceeds five pounds, or where it is under, or amounts to that Sum only by Petition in the Court of the County where the offence shall be committed, and shall be one half to the Informer, and the other half to the Commonwealth, or the whole to the Commonwealth, where prosecution shall be first instituted on the Public behalf alone.

So much of the act of General Assembly intituled "An Act to regulate the Inoculation of the small-pox within this Colony" as contains any thing contrary to or within the Purview of this Act, is hereby repealed.

(B) Parental Responsibility Laws

South Carolina Laws, No. 325, § 7, Act of Dec. 12, 1712, S.C. Laws, No. 325:

Be it enacted by the authority aforesaid, That in case any person shall be so poor as to become chargeable to the parish, which person hath a father, or a grandfather, or mother, or grandmother, or child, or grandchild, that they or any of them are of sufficient ability to relieve such poor persons, that in such case it shall be lawful for the vestry of the parish, upon complaint made by the overseers of the poor, to order some one or more, or all of such relations, to allow the poor person

so much by the week, as they shall think fitting, and in case of refusal to pay the same, it shall be lawful for any justice of the peace of the county, by his warrant under his hand and seal, directed to any of the constables, to levy the same by distress and sale of the goods of such person or persons refusing to pay, and for want of sufficient distress may commit the offender to prison till payment be made; and the several constables, or any of them, are required and commanded to execute all such warrants, under the same penalties for their neglect as is before by this Act prescribed for a constable neglecting or refusing to execute the justices warrant for the general levy for the poor.

New Hampshire Code ch. 87, § 9 (1771):

> And Be It *further* Enacted *by the* Authority *aforesaid*, That if any person or persons come to sojourn, or dwell in any town within this province, or precinct thereof, and be there received, and entertained by the space of three months . . . every such person shall be reputed an inhabitant of such town, or precinct of the same, and the proper charge of the same, in case, through sickness, lameness, or otherwise, they come to stand in need of relief, to be born by such town **;** unless the relations of such poor impotent persons in the line of father, or grand-father, mother or grand mother, children or grand children be of sufficient ability.

1784 Connecticut Acts 98:

> That when and so often as it shall happen that any Person or Persons shall be naturally wanting of Understanding, so as to be incapable to provide for themselves, or by the Providence of God shall fall into Distraction, and become *Non compos Mentis,* or shall by Age, Sickeness, or otherwise become poor

and impotent, and unable to support or provide for themselves; and having no Estate where-withal they may be supported and maintained, then they, and every of them shall be provided for, taken care of, and supported by such of their Relations as stand in the Line or Degree of Father or Mother, Grand-father or Grand-mother, Children or Grand-children, if they are of sufficient Ability to do the same: Which sufficient Relations shall provide such Support and Maintenance? in such Manner and Proportion as the County Court in that County where such Idiot, illtraded, poor or impotent Person dwells, shall judge just and reasonable; whether such sufficient Relations dwell in the same, or in any other County.

1815 Massachusetts Acts ch. 136, § 1, at 60 (1815):

> *Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same,* That if any person within this Commonwealth shall hereafter enlist or cause to be enlisted, into the army of the United States, any minor under the age of twenty-one years, knowing him to be such minor, without the consent in writing of his parent, guardian and master . . . the person so enlisting such minor, or so causing him to be enlisted, on conviction thereof, before the Supreme Judicial Court, shall forfeit and pay a fine not exceeding five hundred dollars, or be imprisoned for a term not exceeding one year.

New York Rev. Stat. ch. 20, title 1, § 1 (1827):

> The father, mother, and children, who are of sufficient ability, of any poor person who is blind, old, lame, impotent or decrepit, so as to be unable by work to maintain himself, shall, at their own charge, relieve and maintain such poor person,

> in such manner as shall be approved by the overseers of the poor of the town where such poor person may be.

Massachusetts Code ch. 78, § 1 (1835):

> Parents shall be bound to maintain their children, when poor and unable by work to maintain themselves * * *.

Arkansas Code ch. 78, § 48 (1838):

> The father and mother of poor, impotent or insane persons, shall maintain them at their own charge, if of sufficient ability * * *.

12 Iowa Code ch. 48, art. 1, § 787 (1851):

> The father, mother, children, grandfather if of ability without his personal labor, and the male grand children who are of ability, of any poor person who is blind, old, lame, or otherwise impotent so as to be unable to maintain himself by work shall jointly or severally relieve or maintain such poor person in such manner as may be approved by the trustees of the township where such poor person may be or by the directors, but these officers shall have no control unless the poor person has applied for aid.

Minnesota Territory Rev. Stat. § 120, at 25 (1851):

> Every person not standing in the relation of husband or wife, parent or child, by consanguinity or affinity to the offender, who after the commission of any felony, shall harbor, conceal, maintain or assist any principal felon or accessory before the fact, or shall give such offender any other aid, knowing that he has committed a felony, or has been accessory thereto before the fact, with intent that he shall avoid or escape from detection, arrest, trial, or punishment, shall be deemed an

> accessory after the fact, and shall be punished by imprisonment in the county jail, not more than one year, or by fine not exceeding two hundred dollars, or both.

Minnesota Code ch. 15, § 2 (1858):

> Every poor person who shall be unable to earn a livelihood in consequence of bodily infirmity, idiocy, lunacy, or other cause, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers or sisters of such poor person, if they or either of them be of sufficient ability, and every person who shall fail or refuse to support his or her father, grandfather, mother, grandmother, child or grandchild, sister or brother, when directed by the board of commissioners of the county where such poor person shall be found * * * shall forfeit and pay to the county commissioners for the use of the poor of their county, the sum of fifteen dollars per month, to be recovered in the name of the county commissioners for the use of the poor as aforesaid, before any justice of the peace or any court having jurisdiction: *provided,* that when any person becomes a pauper from intemperance or other bad conduct, he shall not be entitled to any support from any relation except parent or child.

Nebraska Rev. Stat. Ch. 54, § 1 (1873):

> Every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers or sisters of such poor person, if they or either of them be of sufficient ability.

Dakota Territory Code ch. 2, § 98 (1877):

> If a parent neglects to provide articles necessary for his child who is under his charge, according to his circumstances, a third person may in good faith supply such necessaries, and recover the reasonable value thereof from the parent.

(C) Guardianship Laws

New York Code ch. 9, § 18 (1801):

> [W]hen any person hath any child under the age of twenty-one years, and not married at the time of his death, it shall and may be lawful to and for the father of such child, whether born at the time of the decease of the father, or at the time in *ventre sa mere* * * * by his deed executed in his life time, or by his last will and testament in writing, signed by such father, or by some other person in his presence, and by his express direction * * * to dispose of the custody and tuition of such child, for and during such time, as he or she shall respectively remain under the age of twenty-one years, or any less time, to any person or persons in possession or remainder; and that such disposition of the custody of such child, shall be good and effectual, against every person claiming the custody or tuition of such child * * *.

1825 Missouri Laws 416, Act of Feb. 8, 1825, § 1:

> *Be it enacted by the General Assembly of the State of Missouri, as follows*: * * * In all cases not otherwise provided by law, the father, while living, and after his death, and when there shall be no lawful father, then the mother, if living, shall be the natural guardian of their children, and have the custody and care of their persons, education and estates; and when such

estate is not derived from the parent acting as guardian, such. parent shall give security and account as other guardians.

Arkansas Code ch. 72 (1838):

> § 2. When a guardian shall be appointed for any minor under the age of fourteen, unless such appointment be according to the deed or last will and testament of the minor's father, if the minor, alter arriving at the age of fourteen years, shall choose another person for his guardian, the court, if there be no just cause to the contrary, shall appoint the person so chosen, and the preceding guardianship shall thereby be superseded * * *.
>
> § 6. Every father may, by deed or last will and testament, name a guardian for his child, and the person named shall be appointed, unless he refuse or neglect to give security, or there be other sufficient causes against appointing him.
>
> § 7. A minor of the age of fourteen years or upwards, may choose a guardian, and the court, if there be no just cause to the contrary, shall appoint the person chosen.

Iowa Code ch. 88 (1851):

> § 1491. The father is the natural guardian of the persons of his minor children. If he dies or is incapable of acting the mother becomes the guardian.
>
> § 1492. The natural and actual guardian of any minor child may by will appoint another guardian for such minor. If, without such will, both parents be dead or disqualified to act as guardian the county court may appoint one. * * *
>
> § 1495. If the minor be over the age of fourteen years and of sound intellect he may select his own guardian, subject to the appointment of the court.

Minnesota Code ch. 67 (1851):

> § 1. The judge of probate in each county, when it shall appear to him necessary, or convenient, may appoint guardians to minors and others, being inhabitants or residents in the same county, and also to such as shall reside without the territory, and have any estate within the same.
>
> § 2. If the minor is under the age of fourteen years, the judge of probate may nominate and appoint his guardian; and if he is above the age of fourteen years, he may nominate his own guardian, who, if approved by the judge shall be appointed accordingly. * * *
>
> § 10. The father of every legitimate child, which is a minor, may by his last will in writing, appoint a guardian or guardians, for any of his minor children, whether born at the time of making such will, or afterwards, to continue during the minority of such child, or for any less time, and every such testamentary guardian shall give bond in like manner and with like condition as is hereinbefore required of a guardian appointed by the said judge, as he shall have the same powers, and shall perform the same duties, with regard to the person and estate of the ward, as a guardian appointed as aforesaid.

Nebraska Rev. Stat. ch. 26 (1873):

> § 3. If the minor is under the age of fourteen years, the court of probate may appoint his guardian, and if he is above the age of fourteen years, he may nominate his own guardian, who, if approved by the court, shall be appointed accordingly. * * *
>
> § 11. Every father may, by his last will, in writing, appoint a guardian for any of his children, whether born at the time of making the will or afterwards, to continue during the

minority of the child, or for any less time, and every such testamentary guardian shall have the same powers and shall perform the same duties with regard to the person and estate of the ward as a guardian appointed by the court.

(D) Adoption Laws

Iowa Code ch. 107, §§ 2600, 2603 (1858):

> § 2600. *Be it enacted by the General Assembly of the State of Iowa*, Any person competent to make a will is authorized in manner hereinafter set forth, to adopt as his own, the minor child of another, conferring thereby upon such child all the rights, privileges, and responsibilities which would pertain to the child, if born to the per- son adopting in lawful wedlock. * * *
>
> § 2603. Upon the execution, acknowledgment and record of such instrument [in writing consenting to the adoption], the rights, duties and relations between the parent and child by adoption shall thereafter in all respects, including the right of inheritance, be the same that exist by law between parent and child by lawful birth.

Nebraska Territory Code Civ. P. ch. 2, § 797 (1866):

> The parents, guardians, or other person or persons having lawful control or custody of any minor child, may make a statement in writing before the probate judge of the county where the person or persons desiring to adopt said child reside, that he, she or they voluntarily relinquish all right to the custody of and power and control over such child (naming him or her), and all claim and interest in or to the services and wages of such child, to the end that such child shall be fully adopted by the party or parties (naming them) desiring

> to adopt such child, which statement shall be signed and sworn to by the party making the same, before said probate judge, in the presence of at least two witnesses; and the person or persons desiring to adopt such child, shall also make a statement in writing, to the effect that he, she or they freely and voluntarily adopt such child (naming him or her) as their own, with such limitations and conditions as shall be agreed upon by the parties, which said statement shall also be signed and sworn to by the parties making the same before said probate judge, in the presence of at least two witnesses: *Provided,* In all cases where such child shall be of the age of four-teen years and upward, the written consent of such child shall be necessary to the validity of such proceeding: *And provided further,*Whenever it shall be desirable, the party or parties adopting such child may, by stipulations to that effect in such statement, adopt such child, and bestow upon him or her equal rights, privileges and immunities of children born in lawful wedlock, and such statement shall be filed with and recorded by said probate judge, in a book kept in his office for that purpose.

California Civil Code ch. 2 (1874):

> § 225. The consent of a child, if over the age of twelve years, is necessary to its adoption. * * *
>
> § 229. The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, end all responsibility for, the child so adopted, and have no right over it.

Minnesota Code ch. 91, §§ 6–7 (1876):

> A child so adopted as aforesaid shall be deemed, as respects all legal consequences and incidents of the natural relation of

parent and child, the child of such parent or parents by adoption, the same as if he had been born to them in lawful wedlock; except that such adoption shall not, in itself, constitute such child the heir of such parent or parents by adoption * * *.

The natural parents of such child shall be deprived by the decree aforesaid of all legal rights respecting the child, and such child shall be free from all obligations of maintenance and obedience respecting his natural parents.

Dakota Territorial Code ch. 2, § 111 (1877):

§ 111. The consent of a child, if over the age of twelve years, is necessary to its adoption. * * *

§ 115. The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and of all responsibility for, the child so adopted, and have no right over it.

Missouri Code ch. 90, § 5248 (1889):

Rights of adopted children.—From the time of filing the deed with the recorder, the child or children adopted shall have the same right against the person or persons executing the same, for support and maintenance and for proper and humane treatment, as a child has, by law, against lawful parents; and such adopted child shall have, in all respects, and enjoy all such rights and privileges as against the persons executing the deed of adoption. This provision shall not extend to other parties, but is wholly confined to parties executing the deed of adoption.