No. 23-477

IN THE

Supreme Court of the United States

UNITED STATES

Petitioner,

v.

JONATHAN SKRMETTI, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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

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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]

SUMMARY OF ARGUMENT

"Choices about marriage, family life, and the upbringing of children are among [the] associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)). In landmark decisions, this Court has affirmed parental rights to oppose state censorship in their children's schools, *Meyer v. Nebraska*, 262 U.S. 390 (1923); to send their children to private schools or to home school them, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); and even to curtail children's visitation with their grandparents, *Troxell v. Granville*, 530 U.S. 57 (2000).

The Tennessee Legislature agrees: "The liberty of a parent to the care, custody, and control of the parent's child, including the right to direct the upbringing, education, health care, and mental health of the child, is

1. This Brief *Amicus Curiae* is filed pursuant to Rule 37. No party or party's counsel authored, and no one other than *amici* and their counsel contributed money for this brief.

a fundamental right." Tenn. Code § 36-8-103(a) (added by SB2479, the Families' Rights & Responsibilities Act of 2024). Parents in Tennessee have the "exclusive right," without any government interference, "to make all physical and mental healthcare decisions for the child and consent to all physical and mental health care on the child's behalf." *Id.* 36-8-103(c)(3).

In Tennessee, parents of transgender children—and only those parents—do not enjoy these freedoms.

Enacted in 2023, Tennessee's SB1 singles out minors whose gender identity does not match their state-assigned sex and denies them and their parents the right to seek medical treatments routinely afforded the families of minors whose gender identity matches their state-assigned sex. Tenn. Code § 68-33-101 et seq. The Equal Protection Clause requires heightened scrutiny *both* because SB1 is pervasively sex-discriminatory to commandeer children's gender-roles *and* because SB1 denies some parents their fundamental interest in decisions about their children's well-being, health, and medical treatment. This *amicus* brief will focus on the fundamental-interest wing of equal protection analysis, *e.g.*, *Zablocki v. Redhail,* 434 U.S. 374, 386 (1978) (protecting fundamental marriage interests against selective statutory limits); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (protecting fundamental interests in procreation and family against a discriminatory state law), and will argue that SB1 cannot satisfy heightened or any kind of serious scrutiny.

ARGUMENT

SB1 asserts that "medical procedures that alter a minor's hormonal balance, remove a minor's sex organs, or otherwise change a minor's physical appearance are harmful to a minor"—but *only* "when these medical procedures are performed for the purpose of enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex or treating purported discomfort or distress from a discordance between the minor's sex and asserted identity." Tenn. Code § 68-33-101(b); *accord id.* § 68-33-101(n) (similar statement of policy), § 68-33-103(a) (criminal penalty for performing such treatments, including telehealth).

Excepted from the statutory prohibition is any such medical procedure, "the performance or administration of [which] is to treat a minor's congenital defect, precocious puberty, disease, or physical injury." Tenn. Code § 68-33-103(b)(1)(A). These terms are defined to exclude "gender dysphoria, gender identity disorder, gender incongruence [etc.]." *Id.* § 68-33-103(b)(1). Tennessee doctors today legally administer blockers to delay "precocious" puberty, perform rhinoplasty to reshape a minor's nose, do breast-enhancement surgery to correct "breast asymmetry," and perform otoplasty to fix a minor's ears that stick out too far. *See* PSG (Plastic Surgery Group) of Memphis, "Plastic Surgery for Teens," Plastic Surgery For Teens | Memphis Plastic Surgery (viewed July 2024). Overall, most gender-affirming medical care is provided by parents to children whose gender identity matches their sex assigned at birth. Theodore Schall & Jacob Moses, *Gender-Affirming Care for Cisgender People,* 53 Hastings Center Rep. 15–24 (2023).

Even dispensing birth control pills containing estrogen to a transgender minor seeking relief from gender anxiety can violate SB1's bar to "dispensing" any "hormone," *see* Tenn. Code § 68-33-102(5)(B) (defining banned "medical procedure"), § 68-33-103(a)(1) (making such a procedure illegal for the needs of transgendered minors). But those same pills are legal for unmarried teenagers, with parental consent, to prevent pregnancies. Tenn. Code § 63-6-249(b)(3) (added by SB2749 and interpreted to allow birth control pills when there is parental consent).

SB1 justifies its sex-based discrimination as "encouraging minors to appreciate their sex," but only if "their sex" is that assigned by the state at birth. Tenn. Code § 68-33-101(m). This Court in *Sessions v. Morales-Santana,* 582 U.S. 47 (2017), held that "'all gender-based classifications'" are subject to heightened scrutiny. *Id.* at 58, quoting *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 137, 146 (1994); *accord* Steven Calabresi & Julia Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1 (2011). A rule that discriminates against individuals because their gender identity does not match their sex assigned by the state is sex discrimination, *Bostock v. Clayton County, Georgia,* 590 U.S. 644, 659 (2020), a conclusion fortified when, as here, the stated goal is conformity to state-assigned sex-and-gender roles. *United States v. Virginia*, 518 U.S. 515 (1996) (state-assigned gender roles require "an exceedingly persuasive justification").

The discrimination targeting transgender children also targets their families. Although Tennessee has traditionally followed a policy of protecting "the rights of parents to rear children who are members of their

household," Tenn. Code § 37-10-301(a)(3); *accord Hawk v. Hawk*, 855 S.W.2d 573, 579 (Tenn. 1993), SB1 undermines the rights of parents. Section 68-33-103(c)(1) provides that it is no defense that "the minor, or a parent of the minor, consented to the conduct that constituted the violation." Thus it is a crime for a doctor to treat a teenager for gender dysphoria, even with parental consent. Parents are potential lawbreakers themselves. Section 68-33-104 prohibits parents from providing medically necessary hormones or puberty blockers to their transgender children. We are not aware of any other Tennessee law that, with no exceptions, sweepingly overrides accepted medical protocols *and* the rights of parents *and* the medical needs of children. "Big Brother" in Orwell's *1984* was neither as controlling nor as pervasively discriminatory as SB1.

Ignoring the trial court's record and the severity of the discrimination, the Court of Appeals deferred to the political process. Under the Supremacy Clause, however, our governance is a constitutional democracy, where the most lop-sided legislative majorities must give way to constitutional rules. *Moore v. Harper*, 600 U.S. 1, 19–22 (2023). Tennessee's Legislature recognized what the Court of Appeals missed. Government "shall not substantially burden the fundamental rights of a parent," unless it "demonstrates that the burden, as applied to the parent and the child, is required by a compelling governmental interest of the highest order and is the least restrictive means of furthering that compelling governmental interest." Tenn. Code § 36-8-103(b).

We maintain that SB1 is inconsistent with the equality and liberty guarantees of the Fourteenth Amendment,

which "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997) (liberty); *accord Vacco v. Quill*, 521 U.S. 793, 799–800 (1997) (equal protection). This is not a case where families cannot use certain banned medical procedures because they are risky—but is instead one where supposedly risky procedures are available to most families and are denied only to families with sex- and gender-nonconforming children. Nor is it a case where a diligent Legislature discovered that some children posed a public health problem—but is instead one where the Legislature exaggerated or fabricated supposed risks to transgender youth, *see L.W. by and through Williams v. Skrmetti,* 679 F. Supp. 3d 668, 702–07 (M.D. Tenn. 2023), while ignoring the overwhelming public health problem of suicide by transgender teens with untreated gender dysphoria. *See id.* at 707–08; Johanna Olson et al., *Baseline Physiologic & Psychologic Characteristics of Transgendered Youth Seeking Care for Gender Dysphoria,* 2015 J. Adolescent Health 374; Jack Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 Pediatrics (Feb. 2020), https://doi.org/10.1542/peds.2019-1725 (viewed Aug. 2024).

The Equal Protection Clause requires heightened scrutiny because SB1 denies some parents and their children their fundamental interest in decisions about the children's medical treatment. *Zablocki,* 434 U.S. at 386 (invalidating statutory restrictions on remarriage by former spouses defaulting on support obligations); *Skinner*, 316 U.S. at 541 (invalidating law depriving petty thieves but not embezzlers of opportunities to procreate); *cf. Turner v. Safely*, 482 U.S. 78, 95 (1987) (protecting

fundamental family-formation interest even in prison context).

Parents enjoy a long-established constitutional interest "in the care, custody, and control of their children," which is "the oldest of the fundamental liberty interests" recognized by this 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 judgment); *Glucksberg,* 521 U.S. at 720; *In re Angela E.*, 303 S.W.3d 240 (Tenn. 2010) (similar principle under Tennessee's Constitution). Constitutionally presumed to be acting in the best interests 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). Parents of transgender children face particularly difficult and sensitive decisions given the risk of suicide associated with untreated gender dysphoria and the need to make individualized determinations about what treatment to choose at particular times in a minor's development.

Children suffering from gender dysphoria and their parents—and only those families—are denied a right to elect certain medical treatments that are available to families whose children suffer from other conditions related to puberty and gender-formation. The highly selective deprivation of parents' ability to make choices long understood as a particularly important component of parental responsibility for children is cause enough for heightened equal protection scrutiny. That the

discrimination turns on the gender or sex identity of their children raises the stakes even more.

This Court has enforced the equality guarantees of the Fourteenth Amendment with special vigor when the state denies important rights to a minority. *Skinner* invalidated a class-based law that burdened the fundamental interest in having children for chicken thieves but not embezzlers. "When the law lays an unequal hand" on people and deprives them of fundamental interests in parenting, "it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." 316 U.S. at 541. *Brown v. Board of Education,* 347 U.S. 483 (1954), held that the right to a public education, which this Court deemed important to our democratic society, "must be made available to all on equal terms." *Id.*, at 493, quoted and relied on in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 204 (2023) (*SFFA*); *accord Strauder v. West Virginia*, 100 U.S. 303 (1876) (fundamental jury-service right).

In *Brown, SFFA*, and *Strauder*, this Court invalidated longstanding legal rules and practices as inconsistent with equal protection. In the instant case, as in *Skinner*, the novelty of the legal regime justifies more skeptical scrutiny. "Perhaps the most telling indication of . . . [a] severe constitutional problem" with a liberty-threatening regime is a "lack of historical precedent" for it. *Free Ent. Fund v. Public Co. Accounting Oversight Bd.,* 561 U.S. 497, 505 (2010), quoting and following 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting); *accord New York State Rifle Ass'n v. Bruen*, 597 U.S. 1, 36 (2022).

We follow the Court's suggestion that fundamental interests—such as those of families—and aggressive discriminations—such as sex-based exclusions—might be evaluated in light of the constitutional norms and values recognized in the Founding Era, reflected in the background of the Fourteenth Amendment and its aftermath, and entrenched by this Court's longstanding precedents. *United States v. Rahimi*, 144 S.Ct. 1889, 1897–98 (2024); *id.* at 1910–20 (Kavanaugh, J., concurring). As Tennessee recognizes, the Constitution requires that such fundamental rights can only be denied to a minority if such discrimination "is required by a compelling governmental interest of the highest order and is the least restrictive means of furthering that compelling governmental interest." Tenn. Code § 36-8-103(b).

Unmindful of Tennessee's established pro-family principles, the Court of Appeals rejected the claims of transgender minors and their families because society and medicine have evolved. But "[t]he world changes in which unchanging values [or legal texts] find their application." *Ollman v. Evans,* 750 F.2d 970, 995 (D.C. Cir. 1984, en banc) (Bork, J., concurring). This Court does not consider the application of original constitutional meaning to be "trapped in amber." *Rahimi,* 144 S.Ct. at 1897. Instead, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck by the founding generation to modern circumstances.'" *Id.* at 1898. This Court has applied historically-rooted constitutional principles to critically evaluate legislation in light of modern developments in

technology, *303 Creative LLC v. Elenis,* 600 U.S. 570, 587 (2023); *Heller v. District of Columbia*, 554 U.S. 570, 582 (2008); medicine, *Cruzan v. Director, Missouri Dep't of Health,* 497 U.S. 261, 269–70 (1990); and society. *Bostock v. Clayton County,* 590 U.S. 644 (2020) (applying original public meaning of "discrimination because of sex" to transgender employees, even though that social group was not well-recognized in 1964).

I. AT THE FOUNDING

ENGLISH & COLONIAL RECOGNITION OF PARENTAL RIGHTS & DUTIES TO ASSURE THEIR CHILDREN'S HEALTH

Coke and Blackstone, well-recognized authorities on common law rights, *Kahler v. Kansas*, 589 U.S. 271, 283–85 (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 was primarily governed 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, specifically, "their maintenance, their protection, and their education." Blackstone, *Commentaries,**434. The duty of "maintenance" was " to endeavor 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*; see* Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "maintenance" to include the "supply of the necessaries of life"); *Dale v. Copping,* 80 E.R. 743 (King's Bench 1610) ("necessaries" included medical treatment for "falling sickness" [epilepsy]).

Consistent with this tradition, colonial governments left family medical decisions entirely to the parents, with one exception—epidemics—and even then parents were the default medical decisionmakers for their children. *See* John Witt, *Epidemics and the Law from Smallpox to COVID-19* (2020).

Consider the Boston smallpox epidemic of 1721. Stephen Coss, *The Fever of 1721: The Epidemic That*

Revolutionized Medicine and American Politics (2016). 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: inoculation, 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. *Id.* at 86–95.

Because inoculation could create or expand an epidemic, it was controversial. The Boston Selectmen forbade Boylston from inoculating others outside his family. Jennifer Lee Carroll, *The Speckled Monster: A Historical Tale of Battling Smallpox* 206–38 (2003); Coss, *Fever,* 96–109. Without controversy, Boylston successfully inoculated his oldest son. *Id.* at 145. Other parents (encouraged by inoculation's efficacy) reached out to Boylston—including Reverend Cotton Mather. Carroll, *Speckled Monster*, 257–58, 280–83; Coss, *Fever,* 129–30. Although the Selectmen again denounced the practice, *id.* at 143–47, the Governor and the General Court supported Boylston and authorized other families to take advantage of his treatment. Carroll, *Speckled Monster*, 250–60. All but six of Boylston's 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 spread smallpox. 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) (App. 3a–4a). *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) (App. 4a–5a).

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) (App. 5a–8a). 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.

Smallpox was not alone as an epidemic threat. In 1793, Philadelphia (the seat of government) was swept by a yellow fever epidemic. John 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, 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 family law framework outlined in Coke and Blackstone reflected 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

PARENTAL RIGHTS, EQUAL TREATMENT & PUBLIC HEALTH

The Fourteenth Amendment's Due Process Clause carried with it the common law understanding of family integrity, and its Equal Protection Clause imposed on the states an obligation to create rules of general application. Overall, the Amendment translated traditional responsibilities of parents into constitutional rights—with due allowance for states to adopt neutral public health regulations.

A. BEFORE THE FOURTEENTH AMENDMENT, 1789–1868

We found no early state statutes inconsistent with the common law understanding of family integrity, and

a number that implemented that fundamental ubernorm. For example, an 1815 Massachusetts law made it a crime to enlist a minor into the Army without the written permission of "his parent, guardian and master." Mass. Acts ch. 136, § 1, at 60 (1815) (App. 11a). 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) (App. 13a).

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." *Id.* at 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." *Id.* at 190. 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) (reversing a judgment imposing maintenance costs on the father without a showing of gross "neglect of duty")); *accord In re Ryder,* 11 Paige Ch. 185 (N.Y. Ch. 1844); *Stanton v. Willson*, 3 Day 37, 51–53 (Conn. 1808).

While the English rule mandating parental provision of necessary maintenance was transported to America

through our common law, several states enacted it as statutory law. *See* App. 9a–14a; *cf.* Dakota Terr. Code ch. 2, § 98 (1877) (enforcing parental duty to provide "necessaries" for their children). 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. Blackstone referred to a child's "necessary meat, drink, apparel, *physic*, and such other necessaries." 1 Blackstone, *Commentaries,* *454 (emphasis added). "Physic" in that era meant "the science of healing" and "[m]edicines; remedies." Johnson, *Dictionary* (1755 ed.) (defining "Phy'sick"); *accord* Noah Webster, *American Dictionary of the English Language* (1828) ("Physic"). Thus, a parent's duty to provide "necessaries" for their children included appropriate medical care. "The rights of parents," Kent observed, "resulted from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority." Kent, *Commentaries*, 190.

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* App. 15a–18a. In most states, minors over the age of fourteen had the power to appoint their own guardians. *See, e.g.*, *id.* 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). "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 § 114 (1885); *accord* Tenn. Code § 3645 (1858); App. 19a–22a. California required the consent of minors over the age of twelve. Cal. Civ. Code ch. 2, § 225 (1874) (App. 21a); *accord* Dakota Terr. Code ch. 2, § 111 (1877) (App. 21a–22a).

As states assumed greater responsibilities for protecting children through adoption and guardianship laws, they were expanding their regulation of public health to protect Americans against incompetent physicians, unsafe drugs, 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), Tenn. Code § 1729 (1858). None of the public health regulations targeted parental decision-making or adopted rules discriminating against some families. Some laws expanded parental choices. For example, vaccination with the cowpox virus, a safer treatment, supplanted inoculation as the best prevention for smallpox, and governments made that treatment widely available. *See Jacobson v. Massachusetts,* 197 U.S. 11, note † (1905).

B. AFTER THE FOURTEENTH AMENDMENT, 1868–1905

When the Fourteenth Amendment was adopted, the fundamental right 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). Judges and commentators recognized (1) parental rights as fundamental liberties assured to all persons and families, (2) constitutional interests of children themselves, and (3) conditions under which states could impose even-handed regulations for the benefit of the common good. *See* 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?" Tiedeman, *Police Power,* 134 n.2. Liberty included equal treatment. Tiedeman, for example, criticized state laws barring different-race marriages as inconsistent with the Fourteenth Amendment. He dismissed as fabrications the claims that intermarriage would foment sterility and enfeeble the population. *Id.* at 537. "Is it not an unwarrantable act of tyranny to prohibit such a marriage, simply because the community

is prejudiced against it?" *Id.*; *accord Loving v. Virginia,* 388 U.S. 1 (1967); *Burns v. State*, 48 Ala. 195 (1872); Steven Calabresi & Andrea Matthews, *Originalism and Loving v. Virginia*, 2012 B.Y.U. L. Rev. 1393 (2012).

Second, parents remained the default regulatory regime. As at common law, parental duties toward their children—"protection, maintenance, and education," Tiedeman, *Police Power,* 555–56—were also deemed to be the basis for the constitutional authority of parents to make decisions for their children. "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. *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. Tiedeman, *Police Power,* 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; *accord* James Schouler, *A Treatise on the Law of Domestic Relation*s § 256 (5th ed. 1895).

Judges and commentators recognized the traditional state power to protect citizens against harm—especially in cases where a "disease is infectious or contagious." Tiedeman, *Police Power*, 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. Moreover, even when the state can regulate in the interest of public health, it may not "establish an inequality in respect to the enjoyment of any rights or privileges." *Id.* at 614.

"[A] statute would not be constitutional which * * * should [identify] particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same locality or class are exempt." Cooley, *Constitutional Limitations,* 390–91. In Tennessee today, all families have the "right or privilege" of access to puberty blockers, hormones, sex or gender therapies, and cosmetic surgery under a doctor's supervision—except for a small "class" of families whose children's gender dysphoria renders them subject to "peculiar rules" and "special burdens" from which "others in the same locality" are "exempt." Under the original meaning of the Equal Protection Clause, this is the kind of class legislation invalidated in *Romer v. Evans*, 517 U.S. 620 (1996) and *Skinner v. Oklahoma*, 316 U.S 535 (1942).

C. PUBLIC HEALTH & JUDICIAL REVIEW, 1897–1922

The relative safety of vaccination and the seriousness of smallpox motivated government programs to encourage vaccination. In the late nineteenth century, officials

sometimes required public school students to be vaccinated as a condition of enrollment. These policies were 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 were no 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 there were no grounds to believe "that the public health was in any danger whatever").

Massachusetts was the first state to require smallpox vaccination, 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 override parental decision-making. But this Court set forth an influential structure for analyzing Fourteenth Amendment claims. *See* Lawrence Gostin, *Jacobson v. Massachusetts at 100 Years: Police Power and Civil Liberties in Tension*, 95 Am. J. Pub. Health 576 (2005).

This Court understood 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. Given the "emergency" nature of smallpox epidemics, *Jacobson* held that officials carried their burden of demonstrating a tangible threat to public health and people's safety that justified a measure limiting freedom to regulate one's medical regimens. *Id.* at 25–28, 31. Conversely, a health regulation responding to public necessity could be unconstitutional if the human burdens imposed were disproportionate to the likely benefits or where public health measures would, as applied, be "cruel and inhuman." *Id.* at 38–39.

Jacobson was a due process challenge, but due process and equal protection were principles "closely associated in the minds of courts." Ernst Freund, *The Police Power* 632 (1904). Equal protection was considered more consistent with the judicial role in a democracy: "Government cannot be conceived without an infringement of liberty, while the claim of equality is consistent, in idea at least, with almost any form of governmental power." *Id.* at 633. The application of equal protection, of course, depended on whether "equal conditions" were receiving "equal treatment." Context mattered. For example, a San Francisco ordinance responded to the discovery of six bodies in the center of town with a quarantine of only that section of town occupied by Chinese families. The Circuit Court ruled that the ordinance violated the Fourteenth Amendment: the City's restrictions imposed a disproportionate burden on minority families that the general population was not willing to bear. *See Jew Ho v. Williamson*, 103 F. 10 (C.C. C.D. Cal. 1900).

III. FROM *MEYER* TO *SKRMETTI*, 1923–2023

Under *Jacobson*'s public health logic, this Court upheld a vaccination requirement for attendance in public schools in *Zucht v. King*, 260 U.S. 174 (1922). The issue in *Meyer v. Nebraska,* 262 U.S. 390 (1923), was the constitutionality of a law barring the teaching of German in parochial schools. This Court subjected the law to searching means-ends scrutiny. Its premise was that fundamental liberty entails "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 so forth. *Id.* at 399 (emphasis added).

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 public health. "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 (namely, German Americans during World War I) was being targeted. *Id.* at 400–02. Third, the State bore the burden of showing not only that its rule served the public interest, but also that a liberty-respecting, nondiscriminatory 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.

This 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. The requirement, which effectively banned parochial and other private schools, violated the Fourteenth Amendment because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 533.

"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." *Pierce*, 268 U.S. at 533–34 (emphasis added); *accord* Tenn. Code § 36-8-103(c)(5). What the Court found "extraordinary" was Oregon's effort to "standardize" its children and to supplant the historical caregiving role of parents. Compare Tennessee's effort to standardize its children's gender identities contrary to their own self-understandings, to supplant the historical caregiving role of parents, and to disrupt the dialogue among parents, their transgender children, and their physicians. *Cf.* Tenn. Code § 36-8-103(a) (recognizing the "fundamental right" of *all* parents to make medical decisions for the welfare of their children).

There are several lessons that might be drawn from *Meyer*, *Pierce*, and subsequent precedents. To begin with, parents have a fundamental interest in their children's upbringing and bring their own experience to bear on the particular needs of individual children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion). Parents have both an interest and a 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* Tenn. Code § 36-8-103(a). If the Fourteenth Amendment protects against state standardization of parental choices regarding their children's education, as this Court held in *Meyer, Pierce,* and *Yoder,* consider how these cases would have been even easier if the state had denied education choices *only* to German-American, Catholic, and Amish parents, respectively. If as many as nine million American children have been home-schooled at least once, surely it is within the power of parents to seek gender-affirming medical care for their transgender children.

Accordingly, courts have a constitutional obligation to subject liberty-infringing discriminatory measures such as Tennessee's SB1 to heightened scrutiny, where the State must demonstrate that its displacement of parental health decisions for minority families is necessary to protect important public interests. SB1 says the targeted medical procedures "can lead to the minor becoming irreversibly sterile, having increased risk of disease and illness, or suffering from adverse and sometimes fatal psychological consequences"—but only when those procedures are applied to align the minor's gender identity with the minor's sex or to relieve "distress from a discordance between the minor's sex and asserted identity." Tenn. Code § 68-33-101(b).

The District Court received detailed affidavits and statements from medical experts supporting and opposing SB1 and offered to conduct an evidentiary hearing, which the State declined. *Skrmetti*, 679 F. Supp. 3d at 699 & n.41. Evaluating the record evidence and the credibility of the various experts, the District Court concluded that the asserted risks were exaggerated by the State and that

the medical evidence demonstrates that side-effects are minimal, can be mitigated, and are offset by the benefits to the children themselves, whose gender dysphoria distress creates an alarming risk of suicide. *Id.* at 701–08; *accord Brandt v. Rutledge*, 677 F. Supp. 3d 877, 901–09 (E.D. Ark. 2023) (detailed findings of fact after evidentiary trial) (appeal pending); *Doe v. Ladapo,* 676 F. Supp. 3d 1205, 1213–15, 1221–23 (N.D. Fla. 2023) (findings on record for preliminary injunction) (appeal pending).

SB1's assertion that gender-confirming treatments following a diagnosis of gender dysphoria are "inconsistent with professional medical standards," Tenn. Code § 68-33-101(c), is baffling in light of the endorsement of the WPATH protocol by the AMA and as many as eighteen other mainstream medical associations. *Id.* at 700–01; *see also* Caroline Salas-Humara et al., *Gender affirming medical care of transgender youth,* 49 Current Probs. Ped. Adolescent Health Care 1–15 (Sept. 2019). The Court of Appeals opined that the protocol has no "meaningful pedigree," *L.W. by and through Williams v. Skrmetti*, 83 F.4th 460, 477 (6th Cir. 2023), and went outside the record to reference European reports that have been decisively criticized for poor methodology. Anne Alstott & Meredithe McNamara, *An Evidence-Based Critique of "The Cass Review" on Gender-affirming Care for Adolescent Gender Dysphoria*, The Integrity Project (Yale Law School, July 2024), https://law.yale.edu/sites/default/files/documents/integrity-project_cass-response.pdf (viewed Aug. 2024).

Based on the record below, SB1 *undermines*, *rather than advances*, the State's asserted policies. Recall that the State regulates puberty blockers and hormone therapy only when sought by transgender minors for treatment of

gender dysphoria. Tenn. Code § 68-33-101(b). If these are such risky procedures, why are they not prohibited for use by all minors? *See* Armand Antommaria, *Decision-Making for Adolescents with Gender Dysphoria*, 67 Persps. Biol. & Med. 244, 249–50 (Spring 2024) (risks of gender-affirming care for transgender minors are no greater than those associated with hormone therapies and other medical procedures allowed for minors whose gender matches their sex assigned at birth). SB1 criminalizes particular forms of medical care only for the transgender children who need them most, to head off suicidal thoughts and other forms of distress.

More alarming, if the injunction against SB1 is lifted, the plaintiff teenagers already taking hormones or puberty blockers will be cut off immediately, as the allowance of treatment until March 31, 2024, has passed. Tenn. Code § 68-33-103(b)(1)(B). Tennessee's expert, Dr. Levine, has testified that the psychological impact of cutting off gender-affirming medical care for those currently receiving it would be "shocking" and "devastating" for those children. *Brandt*, 677 F. Supp. 3d at 910.

This case presents a record for appeal that is much worse for the State than the record in previous cases where this Court found a Fourteenth Amendment violation. In *Meyer, Pierce, Skinner,* and *Troxel,* the State did not carry its burden of demonstrating that unequal deprivations of liberty 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 medical goals articulated by the State, and SB1 discriminatorily bans the procedures only for the

children and families that need them most urgently. *E.g.*, Amy Green et al., *Association of Gender-Affirming Hormone Therapy With Depression, Thoughts of Suicide, and Attempted Suicide Among Transgender and Nonbinary Youth*, 70 J. Adolesc. Health 643 (Apr. 2022) (transgender youth are at "elevated risk for depression, thoughts of suicide, and attempted suicide" compared to non-transgender youth, both straight and gay); Russell Toomey et al., *Transgender Adolescent Suicide Behavior*, 142 Pediatrics (Oct. 2018) (similar). If Tennessee wants to protect "vulnerable" gender-nonconforming youth, it can do so in a nondiscriminatory manner, by enforcing standards of care and informed consent for all minors. As this Court said in *Meyer* and *Pierce,* a regulatory approach rather than a discriminatory prohibition might be permissible. *Accord* Tenn. Code § 36-8-103(b) (for the State to regulate parental decision-making, it must demonstrate that less intrusive measures would not work).

We are not aware of any law in Tennessee history where the Legislature has inserted its views as the arbiter of medical care for a small minority, overriding the judgments and medical needs of selected parents and families. For a recent example, Tennessee's restrictive abortion law applies to everyone. For all minors, Tennessee imposes parental consent rules consistent with its policy of "[p]rotecting the rights of parents to rear children who are members of their household," Tenn. Code § 37-10-301(a)(3). A recent law bars adults from assisting minors to secure an abortion that would be illegal in Tennessee—but (consistent with the Families' Rights & Responsibilities Act) the law does not apply to a minor's parents or legal guardian. 2024 Tenn. Stats. ch. 1032 (HB1895).

This Court's equal protection 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, hormone therapies, and puberty blockers). SB1's discriminatory reach is both radically overinclusive (it usurps parental decision-making and burdens many families who desperately need the medical care denied them by the statute) and underinclusive (it leaves unregulated similar, assertedly risky, medical and cosmetic procedures applied to youth whose gender identity matches their assigned-at-birth sex). This would be an equal protection violation even if Tennessee were not using a (quasi)suspect classification, were not trying to standardize its children's sex and gender, and were not burdening rights recognized as fundamental by longstanding constitutional tradition and by the State itself. *See Romer*, 517 U.S. at 626–31 (striking down a state constitutional amendment under rational basis review because its means were so mismatched from its asserted goals as to be both underinclusive and overinclusive); *Jew Ho* (similar analysis for a public health measure that targeted only Chinese neighborhoods).

The Court of Appeals opined that "sound government usually benefits from more rather than less debate." *Skrmetti*, 83 F.4th at 472. The Equal Protection Clause requires more consistent and fact-based debate than the Tennessee Legislature has provided in this case. Was it "sound government" for lawmakers to scapegoat a feared minority and override their parents' rights as well? To shun medical consensus and rely on false assertions of fact? To ignore the possibility of regulating the questioned procedures for the benefit of all children?

Justice Robert Jackson said this: "Invocation of the equal protection clause * * * does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact." *Railway Express, Inc. v. New York,* 336 U.S. 106, 112 (1947) (Jackson, J., concurring). If hormone therapy is risky, why not regulate it for everyone? Puberty blockers? As for "sound government," Jackson had this to say:

> [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Id. at 112–13; *cf. Cruzan v. Director, Missouri Dep't of Health,* 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (skeptical of an expansive application of the Due Process Clause's protection of personal liberty but praising the Equal Protection Clause, "which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me").

CONCLUSION

SB1 is a classic violation of the Fourteenth Amendment, for it singles out a vulnerable minority population and subjects it to an unfounded regime that disrespects well-established (under both the Constitution and the Tennessee Code) deference to parental decision-making and puts their children at risk of suicide.

We recognize that society and medical protocols have evolved, but the meaning of the Equal Protection Clause has been stable with regard to parental liberties. Semantically, it requires Tennessee to demonstrate that there is a reasonable basis for treating parents and their transgender children so differently from everyone else and denying them necessary medical services. Normatively, the original meaning of equal protection reveals a surprising fit with the parental values implicated here. Senator Charles Sumner, an abolitionist parent of the Fourteenth Amendment, opined that pre-1868 state constitutional equality clauses mandated that every person be treated as "one of the children of the State, which, like an impartial parent, regards all its offspring with an equal care." Charles Sumner, *Equality before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts*; Argument of Charles Sumner, *Roberts v. City of Boston* 7 (Rives & Bailey, 1870), discussed in William Eskridge, *Original Meaning and Marriage Equality*, 52 Hous. L. Rev. 1067, 1080–86 (2015).

For the foregoing reasons, *amici* urge this Court to reverse the Court of Appeals decision, affirm the preliminary injunction, and remand to the District Court for further proceedings.

Dated: September 3, 2024 Respectfully submitted,

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Appendix A

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APPENDIX B — RELEVANT STATUTES

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:

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> *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.

Appendix B

(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.

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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.

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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.

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(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.

Appendix B

(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.

Appendix B

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.