No. 23-477

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JONATHAN THOMAS 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 PROFESSOR KURT T. LASH AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

Kurt T. Lash is a professor at the University of Richmond School of Law. He teaches and writes about the history and original understanding of the Constitution. He has published multiple books on the history of the Fourteenth Amendment, including The Fourteenth Amendment and the Privileges and Immunities of American Citizenship (Cambridge Univ. Press, 2014) and, most recently, The Reconstruction Amendments: Essential Documents (2 volumes) (Univ. of Chicago Press, 2021). He has an interest in advancing an historically accurate judicial interpretation of the Fourteenth Amendment, including the equal rights of American citizenship and recently wrote an article on this subject: *The State Citizenship Clause* (2023), available at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1863&context=jcl.

[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and his counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This brief investigates the original understanding of the Fourteenth Amendment. It concludes that nothing in the text or original meaning of the Fourteenth Amendment altered the reserved authority of the people in the several states to reasonably regulate the local practice of medicine in a manner that distinguishes between the two complementary (male and female) human reproductive systems. Accordingly, this Court should affirm the decision of the Sixth Circuit.

Tennessee Senate Bill 1 ("SB1") prohibits all "medical procedure[s]" whose purpose is "[e]nabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or "[t]reating purported discomfort or distress from a discordance between the minor's sex and asserted identity."[2] The statute defines "sex" as "a person's immutable characteristics of the reproductive system that define the individual as male or female, as determined by anatomy and genetics existing at the time of birth."[3] The statute defines "medical procedure" as "[s]urgically removing, modifying, altering, or entering into tissues, cavities, or organs of a human being" or "[p]rescribing, administering, or dispensing any puberty blocker or hormone to a human being."[4]

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[2] Tenn. Code § 68-33-103(a)(1)(A) & (B).

[3] *Id.* § 68-33-102(9).

[4] *Id.* § 68-33-102(5)(A) & (B).

In every instance, the statute uses the term "sex" in reference to human reproductive systems.[5] The classification thus depends on biological facts established prior to birth ("anatomy and genetics *existing* at the time of birth"), as opposed to post-birth "social construction" (something that can be "assigned" at birth).[6]

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[5] There are only two human reproductive systems; one organized around the production of large gametes (ova) and one around the production of smaller gametes (sperm). There is no verified case of a true hermaphrodite (two fully functional reproductive systems) in human history. *See* John C. Avise, Hermaphroditism: A Primer on the Biology, Ecology, and the Evolution of Dual Sexuality (Columbia Univ. Press, 2011).

[6] Petitioners claim that SB1 classifies according to a person's "sex assigned at birth." This is incorrect. No such term appears in SB1. Instead, the statute expressly classifies on the basis of human "reproductive systems" "existing at the time of birth." *See id.* The idea that sex can be "assigned at birth" is a recent formulation or characterization with no analogue at the time of the Fourteenth Amendment. *See* Jessica A. Clarke, *Sex Assigned at Birth*, 122 Colum. L. Rev. 1821, 1835 n.66 (2022) (noting that "'assigning' terms do not seem to be used with frequency prior to the mid-twentieth century") (interior quotation marks added). According to Clarke, the concept of "sex assigned at birth" emerged in the 1990s when "scholars and activists began using 'assigned' terminology, rather than anatomy or biology, to define various identities under the transgender umbrella." *Id.* at 1842–43. Petitioners similarly refer to what they term SB1's exclusion of "intersex" conditions. Petitioner's Brief at 6, 23. This too is a modern concept linked to the idea that sex is not biological but is

This classification system is fully consistent with the post-Fourteenth Amendment authority of the states. This brief first describes the legal pedigree of reserved state authority to regulate medical procedures, including those involving human reproductive systems and designed to treat dysmorphias and dysphorias. It then explains that nothing in the Fourteenth Amendment altered this authority in any way pertinent to the federal constitutional challenge presented in this case.

State regulation of medical procedures has a historical pedigree extending back prior to the

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socially constructed. *See, e.g.*, Robyn Ryle, Questioning Gender: A Sociological Exploration 8 (2012) ("What intersexuality teaches us is that sex itself is socially constructed."). Once again, the term "intersex" does not appear in the statute. Instead, SB1 recognizes that some persons have rare conditions that affect *secondary sex characteristics*. *See* Tenn. Code § 68-33-103(b)(1)(A) (referring to "a minor's congenital defect, precocious puberty, disease, or physical injury"); *see also id.* § 68-33-102(1) (defining "congenital defect" as "a physical or chemical abnormality present in a minor that is inconsistent with the normal development of a human being of the minor's sex including abnormalities caused by a medically verifiable disorder of sex development."); Maayan Sudai, *A Woman and Now a Man: The Legitimation of Sex Assignment Surgery in the United States (1849–1886)*, 52 Soc. Stud. of Sci. 82 (Feb. 2022) (online publication Feb. 2021), https://tinyurl.com/3rmk2jek ("The phrase 'sex assignment surgery' (commonly used to describe normalization surgeries for intersex people in the present) did not exist [in the mid-nineteenth century].").

adoption of the federal Constitution.[7] The Constitution preserved this pre-existing authority as part of the powers reserved to the States under the Tenth Amendment. As Chief Justice John Marshall noted in *Gibbons v. Ogden*, the Constitution reserved each state's authority to pass "health laws of every description."[8]

Between the Founding and the Civil War, every state in the Union not only regulated the local practice of medicine but also passed myriad laws restricting or prohibiting procedures viewed as contrary to the public good. Such laws included prohibitions on procedures or the administration of drugs for an abortion[9] and laws prohibiting the administration of drugs for ending life (assisted suicide).[10] The practice

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[7] *See* William G. Rothstein, American Physicians in the 19th Century: From Sects to Science 74–75 (1985) (describing the rise of state incorporated medical societies during the 1780s and 1790s with state granted power to issue medical licenses); *see also* David A. Johnson & Humayun J. Chaudhry, Medical Licensing and Discipline in America 8–9 (2012).

[8] 22 U.S. 1, 203 (1824); *see also Thorpe v. Rutland & B.R. Co.*, 27 Vt. 140, 149 (1854) ("This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state.").

[9] See, for example, the state laws listed in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 417 (2022) (Appendix A).

[10] *See Washington v. Glucksberg*, 521 U.S. 702, 715 (1997) ("Between 1857 and 1865, a New York commission led by Dudley Field drafted a criminal code that prohibited 'aiding' a suicide

of medicine during this period included treatments for dysphoric conditions such as anorexia nervosa, and surgical procedures involving congenital defects affecting secondary sex characteristics.[11] There is no evidence that anyone viewed state oversight of these matters as triggering constitutional concerns prior to the adoption of the Fourteenth Amendment.[12]

The Fourteenth Amendment significantly expanded the scope of American liberty but did not change the original federalist structure of the Constitution in matters relating to the local control of medicine. Nothing in the amendment's text implicates reasonable state regulation of medicine, and no one during the framing or ratification debates mentioned the need to constrain state regulation of medicine or to establish a constitutional right to certain medical or putatively medical treatments.

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and, specifically, 'furnish[ing] another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life.'" By the time the Fourteenth Amendment was ratified, it was a crime in most States to assist a suicide." (citation omitted)).

[11] *See infra* n.26.

[12] *See, e.g.*, *Dobbs*, 597 U.S. at 248 (noting that, "by 1868, the year when the Fourteenth Amendment was ratified, three-quarters of the States, 28 out of 37, had enacted statutes making abortion a crime even if it was performed before quickening."); *see id.* at 236 ("The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a 'mere pretex[t] designed to effect an invidious discrimination against members of one sex or the other.'").

Even if one presumes that the original meaning of the Equal Protection Clause requires heightened scrutiny of laws classifying on the basis of sex (a question the court need not resolve in this case), state regulations that distinguish between male and female reproductive systems are not sex-based classifications requiring heightened scrutiny.[13] Nor is there any historical evidence that any person in 1868 thought otherwise.

ARGUMENT

I. The Original Constitution Preserved the Pre-Existing Authority of Every State to Regulate the Practice of Medicine.

The original Constitution (i.e., the Constitution as it existed prior to the Reconstruction Amendments) preserved the states' authority to regulate the practice of medicine.

A. Under the Original Constitution, the People in the States Retained the Power to Pass "Health Laws of Every Description."

Under the original Constitution, state governments retained all powers not delegated to the United States nor prohibited to the states. As James

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[13] Cases like *Bradwell v. Illinois*, 83 U.S. 130 (1872), and *United States v. Virginia*, 518 U.S. 515 (1996), involved sex-based licensing and public education admission standards. Whether the original understanding of the Fourteenth Amendment plays a role in these kinds of cases is a question this court need not address in this case.

Madison explained in Federalist No. 45, "[t]he powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite."[14] These reserved powers "extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people."[15] The Tenth Amendment textually enshrined this original understanding by declaring that all powers not constitutionally delegated away (or prohibited to the states) are "reserved to the states respectively or to the people."[16] As Chief Justice John Marshall later explained, these constitutionally reserved powers include state "*health laws of every description*."[17]

B. Between the Founding and the Fourteenth Amendment, the People in the States Freely Exercised Their Retained Constitutional Authority to Regulate the Practice of Medicine.

State establishment of medical societies with state-granted power to issue medical licenses

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[14] The Federalist No. 45 (James Madison), *in* The Federalist Papers 292 (Rossiter ed., 1961).

[15] *Id.* at 293.

[16] U.S. Const. amend. X.

[17] *Gibbons*, 22 U.S. at 203 (emphasis added).

preexisted the adoption of the Federal Constitution.[18] Throughout the early decades of the Constitution, states relied both on such societies to control entry into the medical profession, and also enacted medical licensing laws in order to prohibit "quackery" and medical procedures viewed as contrary to the public good.[19] In 1806, New York passed an "elaborate medical law" and established the Medical Society of the State of New York.[20] Although a number of states adopted more permissive regulatory regimes during the Jacksonian period,[21] by the time of the Civil War this anti-regulatory spirit had waned. For example, in 1859 North Carolina created the state's first Medical Board.[22] By the end of the nineteenth century, almost

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[18] Rothstein, *supra*, at 74–75.

[19] *See* Johnson & Chaudhry, Medical Licensing*, supra*, at 10–11. North Carolina, for example, praised the state's new charter for a state medical society which they hoped would help "the community to distinguish the true Physician from the ignorant pretender; [and] suppress the fatal and criminal practices of Quacks." *Id.* at 11.

[20] *Id.*

[21] *Id.* at 18.

[22] *Id.* at 23; *see also* Christina Apperson, Protecting the Public, Strengthening the Profession: A One Hundred Fifty Year History of the North Carolina Medical Board, 1859–2009 (North Manchester, Indiana: HF Group, 2009); David Johnson & Humayun Chaudhry, *The History of the Federation of State Medical Boards: Part One—19th Century Origins*, 98 J. of Med. Regul. 20, 22 (Mar. 2012) ("North Carolina was one of the first states to emerge out of the professional and regulatory dark ages of the Jacksonian Era with the establishment of its medical board in 1859.").

every state had done the same.[23] No antebellum state or federal case called into question a state's power to license and regulate the local medical profession.

Every antebellum state in the Union regulated or prohibited medical procedures deemed harmful to the public. For example, state laws prohibited doctors from supplying medicine for the purpose of facilitating suicide,[24] or causing fetal death.[25] By the time of the Fourteenth Amendment, state regulated medical practices included treatments for body image disturbances or dysphorias, including anorexia nervosa.[26]

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[23]Johnson & Chaudhry, Medical Licensing, *supra*, at 24.

[24] As this Court explained in *Glucksberg*: "The earliest American statute explicitly to outlaw assisting suicide was enacted in New York in 1828[], and many of the new States and Territories followed New York's example. Between 1857 and 1865, a New York commission led by Dudley Field drafted a criminal code that prohibited 'aiding' a suicide and, specifically, 'furnish[ing] another person with any deadly weapon or poisonous drug, knowing that such person intends to use such weapon or drug in taking his own life.'" *Glucksberg*, 521 U.S. at 715 (cleaned up).

[25] *See, e.g.*, Boston Daily Bee (Boston, Mass.), Dec. 17, 1845, p. 2 (reporting local prosecution of a physician for supplying medicine for the purpose of procuring an abortion); *see also Dobbs*, 597 U.S. 215 (Appendix A, listing state laws in existence in 1868 that prohibited the administration of medicines for the procurement of abortion).

[26] For example, mid-nineteenth century doctors recognized and treated what they referred to as "apepsia" but by 1874 had

By 1850, the American practice of medicine included genital surgery,[27] including genital reconstruction surgery.[28] There are only a few mid-nineteenth century examples of surgical efforts to "resolve" the sex of persons with otherwise ambiguous secondary sex structures.[29] Those that were reported, however, were deeply controversial, with some critics claiming they could create civil liability.[30] There is no evidence that anyone in 1868, or at any time during the nineteenth century, considered the availability of such surgery to be a matter of constitutional right. All such practices remained under the regulatory control of the individual states.

One month prior to the ratification of the Fourteenth Amendment, the state of Ohio passed a

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become known as "anorexia nervosa." *See* J.A. Silverman, *Louis-Victor Marcé, 1828–1864: Anorexia Nervosa's Forgotten Man.* 19 Psychol. Med. 833–835 (1989), https://pubmed.ncbi.nlm.nih.gov/2687917/; *see also* J. Laurie, M.D., Homoeopathic Domestic Medicine: Arranged As a Practical Work for Students 101 (1850) (discussing conditions called "apepsia" or "anorexia" that involve "want of appetite").

[27] *See* Sudai, *supra*, at 82.

[28] *Id.*

[29] *Id.* at 80.

[30] *Id.* at 89, 93. In 1866, the American editor of the British Taylor Manual of Jurisprudence criticized a surgeon for surgically resolving sexual ambiguity by removing a patient's testicles and thus erasing the legal evidence that the person could enjoy what were then the legal privileges of males. *See* Clement B. Penrose, A Manual of Medical Jurisprudence 577 (1866), https://tinyurl.com/5n9x8mye.

law prohibiting any person from "perform[ing] or attempting to perform any surgical operation upon any person within the limits of said state" unless they had "attended two full courses of instruction and graduated from some school of medicine" or been in practice for at least ten years prior to the enactment of the law.[31] One year after it voted for the ratification of the Fourteenth Amendment, and one month prior to that amendment's ratification, Kansas adopted a criminal code containing a provision declaring that "Every person who shall administer to any woman, pregnant with a quick child, any medicine, drug or substance whatsoever, or shall use or employ any instrument or other means, with the intent thereby to destroy such child, unless the same shall have been necessary to save the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be guilty of manslaughter in the second degree."[32]

Notice that, in addition to reflecting a binary view of the reproductive system (only women can bear a "quick child"), the Kansas statute mentions only women and not men. The statute does not thereby exclude men (making it a sex-based classification). Instead, the statute reflects the biological facts that women can, and men cannot, conceive offspring and give birth. Men, *i.e.*, males—persons whose reproductive system is organized to produce the

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[31] *See Important Law: Kemp's Medical Bill*, Cin. Daily Gazette (Cincinnati, Ohio), May 4, 1868, at 3.

[32] The General Statutes of the State of Kansas ch. 31, § 15, p. 320–21 (1868), https://tinyurl.com/2mu7euvz.

smaller gamete and not to conceive or give birth—are not *excluded* from the statute, they are *irrelevant* to the statute.

Not long after the adoption of the Fourteenth Amendment, this Court repeated the long-standing view that medicine remained within the basic police powers of the state. In *Dent v. State of West Virginia* (1889), for example, the Court upheld West Virginia's refusal to grant a medical license to a graduate of the American Medical Eclectic College of Cincinnati.[33] According to Justice Field, state regulation in this area must be deemed as reserved to the states unless determined by the court to be "arbitrary and capricious."[34] Writing for a unanimous court, Justice Stephen Field explained why the Constitution leaves such matters to state control:

> The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. ... Few professions require more careful preparation by one who seeks to enter it than that of medicine. … [It] requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its

[33] *Dent v. West Virginia*, 129 U.S. 114 (1889).

[34] *Id.* at 124.

> complicated parts, and their relation to each other, as well as their influence upon the mind.[35]

II. The Fourteenth Amendment Does Not Restrict the States' Authority to Regulate the Practice of Medicine on the Basis of Biological Function.

Ratification of the Fourteenth Amendment did not deprive the States of this well-established authority. Both the amendment's ratification debates and its text make this clear.

A. The Fourteenth Amendment's Drafters Remained Committed to the Basic Federalist Structure of the Constitution.

The Republicans who drafted and adopted the Thirteenth Amendment believed they were advancing the true pro-freedom ideal of the original

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[35] *Id.* at 122–23. The majority of the Court in *Bradwell v. Illinois*, 83 U.S. 130 (1872), dismissed a citizenship clause-based claim against a state law excluding women from the practice of law. *Id.* at 139 ("[T]he right to control and regulate the granting of license to practice law in the courts of a state is one of those powers which are not transferred for its protection to the federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license."). Whether such-sex-based exclusions violate the original understanding of the Equal Protection Clause or any other provision in the Fourteenth Amendment is not an issue the Court need address in this case.

Constitution, not revolutionizing its basic structure.[36] Congressional Republicans originally hoped that abolition would result in both freedom and equality for black citizens in the southern states.[37] Such hopes wilted, however, in the face of the newly enacted Black Codes and the refusal of southern states to equally protect the lives and property of black residents as well as visiting citizens from the northern states.[38]

Republicans responded by drafting an amendment that prohibited race or "caste" based distinctions among citizens and which secured the natural right of all persons to the due and equal protection of their life, liberty, and property.[39] Although profoundly expanding the scope of American liberty, neither the framers nor ratifiers understood the texts of the Fourteenth Amendment as inhibiting the authority of

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[36] *See Introduction to the Drafting History of the Thirteenth Amendment*, *in* 1 Reconstruction Amendments: Essential Documents 374–75 (Kurt T. Lash, ed.) (2021).

[37] Kurt T. Lash, *The State Citizenship Clause*, 25 Penn. J. Cont. Law 1097, 1106 (2023).

[38] *Id.*

[39] *See, e.g.*, Speech of Senator Jacob Howard Introducing a Proposed Fourteenth Amendment, *in* 2 Reconstruction Amendments: Essential Documents 188 (Kurt T. Lash, ed.) (2021) ("[The Due Process and Equal Protection Clauses] abolish[] all class legislation in the states and do[] away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged.").

the states to enact biologically-based regulations of on the practice of medicine for the sake of the public good.

In fact, the Republican Party of Abraham Lincoln remained deeply committed to Madison's vision in Federalist 45 and the federalist division of power between the national and state governments.[40] The Republican Platform of 1860 expressly declared its fidelity to federalism and the rights of the states,[41] and Republicans throughout Reconstruction repeatedly invoked Madison's essays in the Federalist Papers as representing the best understanding of American constitutionalism.[42] Rather than revolutionizing the original Constitution, Republicans like John Bingham who were active in the framing of the Fourteenth Amendment and the campaign for its ratification sought only to force the states to respect American liberties already declared in the original

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[40] *See* Kurt T. Lash, *The Federalist and the Fourteenth Amendment—Publius in Antebellum Public Debate, 1788–1860*, 48 B.Y.U. L. Rev. 1831, 1862–63 (2023).

[41] *See* 1860 Republican Party Platform, *in* 1 Reconstruction Amendments: Essential Documents, *supra*, at 320 ("4. That the maintenance inviolate of the rights of the states ... is essential to that balance of powers on which the perfection and endurance of our political fabric depends").

[42] *See, e.g.*, Speech of John Bingham Introducing Draft Fourteenth Amendment, Feb. 28, 1866, *in* 2 Reconstruction Amendments: Essential Documents, *supra*, at 115 (quoting Madison's declaration in Federalist 45 that "[t]he powers reserved to the [] States will extend to all the objects which, in the ordinary course of affairs, concerns the lives, liberties and properties of the people, and the internal order, improvement, and prosperity of the State").

Constitution.[43] As Bingham explained regarding his initial draft, "The proposition pending before the House is simply a proposition to arm the Congress of the United States, by consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It hath that extent, no more."[44] Neither Bingham nor any other moderate Republican had any interest in nationalizing the local practice of medicine.

B. The Fourteenth Amendment's Drafters Were Not Concerned with States Regulating the Practice of Medicine Based on Reproductive Biology.

Three central concerns informed the drafting and public understanding of Section One of the Fourteenth Amendment. First, the text overruled this Court's holding in *Dred Scott* and established the equal status of native-born black Americans as citizens of the United States and citizens of their state

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[43] *Id.* at 113 ("The adoption of the proposed [Fourteenth] amendment will take from the states no rights that belong to the states.").

[44] *Id.* at 109. Although Congress modified aspects of Bingham's initial proposal, Bingham's understanding of the meaning and scope of his draft never changed. *See* Speech of John Bingham Regarding the Meaning of the Privileges or Immunities Clause, Mar. 31, 1871, *in* 2 Reconstruction Amendments: Essential Documents, *supra*, at 620, 625.

of residence.[45] This is addressed by the opening clauses of Section One and they establish a principle of equal treatment regardless of race.[46] As explained below, no one understood the idea of equal citizenship to require equal medical treatment regardless of reproductive difference.

Second, the federal Bill of Rights needed to be enforceable against the states.[47] Originally a list of subjects reserved to state control, between the time of the Founding and the Civil War, most Americans had come to view these enumerated rights as declaring the privileges and immunities of American citizenship.[48] The failure of the slave states to respect these rights became a scandal in the north and securing their enforcement against the states was a major goal of

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[45] *See* Lash, *The State Citizenship Clause*, *supra*, at 1108.

[46] *See* U.S. Const. amend. XIV ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.").

[47] *See* Speech of John A. Bingham Introducing a Draft Fourteenth Amendment, Feb. 27, 1866, *in* 2 Reconstruction Amendments: Essential Documents, *supra*, at 113 ("Is the bill of rights to stand in our Constitution hereafter, as in the past five years within eleven states, a dead letter? It is absolutely essential to the safety of the people that it be enforced.").

[48] *See* Kurt T. Lash, *Becoming the "Bill of Rights": The First Ten Amendments from Founding to Reconstruction*, 110 Va. L. Rev. 411 (2024) (describing the evolving public understanding of the first ten amendments in the period between the Founding and the Civil War).

Fourteenth Amendment drafters like John Bingham.[49]

Third, in addition to the rights of citizenship, Republicans were committed to protecting the natural rights of all persons (regardless of citizenship). Abolitionists had long insisted that slavery violated the natural rights of life, liberty, and property as originally declared in 1776 and constitutionalized in the Due Process Clause of the Fifth Amendment.[50] Republicans insisted that these natural rights belonged to all persons, regardless of race. Slave holding states denied these rights to enslaved persons and they continued to deny both black residents and visitors the same protections of life, liberty, and property that were granted to white residents. Republicans responded, first by passing the 1866 Civil Rights Act, and then by enacting the Fourteenth Amendment with its express Due Process and Equal Protection Guarantees.[51]

This Court's current Section One jurisprudence does not perfectly track the original understanding of the Fourteenth Amendment. For example, although the court protects substantive rights under the Due Process Clause, many scholars (including this one) and at least one Justice believe that this

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[49] See historical sources cited above in footnotes 43, 44 and 47.

[50] *See* Kurt T. Lash, *Enforcing the Rights of Due Process: The Original Relationship Between the Fourteenth Amendment and the 1866 Civil Rights Act*, 106 Geo. L.J. 1389, 1398 (2018).

[51] *See id.* at 1414.

jurisprudence has better historical and textual support in the Privileges or Immunities Clause.[52] Scholars also increasingly look to the citizenship clauses as the proper textual and historical source of the Court's equal rights jurisprudence.[53] Nothing about this case, however, requires the Court to revisit these basic doctrines. Whichever clause is viewed as the textual source of constitutional equality, there is no evidence that anyone read *any* of the clauses in Section One as calling into question state classifications involving basic biological (including reproductive) differences between medical patients.

C. The Due Process and Equal Protection Clauses Secured Rights Unrelated to State Regulation of the Medical Profession.

The Due Process and Equal Protect Clauses are meant to be read in *pari materia*.[54] John Bingham

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[52] *See McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring); Michael McConnell, *Ways to Think About Unenumerated Rights*, 2013 U. Ill. L. Rev. 1985, 1995.

[53] *See* Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Pre-Enactment History*, 19 Geo. Mason Univ. Civ. Rts L.J. 1, 3 (2008) (compiling historical evidence that the Equal Protection Clause secured protection against unjust deprivation of life, liberty, or property).

[54] Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts § 39, at 252 ("Statutes in *pari materia* [dealing with the same subject] are to be interpreted together, as though they were one law.").

initially proposed their addition as a single sentence.[55] Although divided into two clauses in the final version of the Fourteenth Amendment, they continue to work in tandem.

The Due Process Clause guarantees that no person will be deprived of life, liberty, or property without having first received the procedural protections of due process. According to Charles Sumner, "due process" meant that "no member of the State shall be disenfranchised or deprived of any of his rights or privileges unless the matter shall be adjudged against him upon trial had according to the course of common law. The words 'due process of law' in this place cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property."[56]

Unfortunately, the former slave holding states either denied such protections to their black residents, or they did not provide the same measure of protection afforded to white residents. The Black Codes, for example, often denied black residents an equal right to own property and defend title to property in a court

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[55] *See* Speech of John A. Bingham Introducing a Draft Fourteenth Amendment, Feb. 27, 1866, *in* 2 Reconstruction Amendments: Essential Documents, *supra*, at 99 (proposing an amendment providing "to all persons in the several States equal protection in the rights of life, liberty and property").

[56] *See* Speech of Charles Sumner, April 8, 1864, *in* 1 Reconstruction Amendments: Essential Documents, *supra*, at 435.

of law.[57] Thus, Republicans insisted on adding a provision declaring that that every person be *equally* protected against unjust deprivations of life, liberty, or property.[58]

These clauses address a narrow category of laws that "protect" the natural right to life, liberty, and

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[57] *See* Jacobus tenBroek, Equal Under Law 185–86 & n.14 (1965 ed.) (describing congressional discussion of the Black Codes and their denial of equal protection).

[58] John Bingham had long insisted that the concepts of due process and equal protection were inextricably linked. In an 1862 speech advocating the abolition of slavery in the District of Columbia, Bingham compared the Magna Charta's due process for "freedmen" with the American Constitution's due process for all "persons":

> Sir, our Constitution, the new Magna Charta, which the gentleman aptly says is the greatest provision for the rights of mankind and for the amelioration of their condition, rejects in its bill of rights the restrictive word "freeman," and adopts in its stead the more comprehensive words "no person;" thus giving its protection to all, whether born free or bond. The provision of our Constitution is, "no person shall be deprived of life, or liberty, or property without due process of law." This clear recognition of the rights of all was a new gospel to mankind, something unknown to the men of the thirteenth century. … [T]he patriots of America proclaimed the security and protection of law for *all*. The later and nobler revelation to our fathers was that all men are *equal* before the law.

Speech of John Bingham, Cong. Globe, 37th Cong., 2d Sess. 1638 (1862).

property—rights which Republicans associated with the Declaration of Independence and the right of every person to "life, liberty and the pursuit of happiness."[59] Such rights had been denied to the enslaved, and they continued to be denied to black residents and Union supporters in the southern states. These clauses apply to laws that *protect*. They do not apply to local laws that *provide*—for example, state laws providing a license to practice medicine if certain conditions are met, or laws providing public benefits to resident citizens (e.g., the provision of a free public education).

Instead, the Equal Protection Clause guarantees that all persons receive the benefit of equal *protection*

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[59] As Sen. Charles Sumner (R-MA) explained:

> [N]o American need be at a loss to designate some of the distinctive elements of a republic according to the idea of American institutions. These will be found, first, in the Declaration of Independence, by which it is solemnly announced "that all men are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." And they will be found, secondly, in that other guarantee and prohibition of the Constitution, in harmony with the Declaration of independence; "*no person* shall be deprived of life, *liberty*, or property *without due process of law*."

Speech of Charles Sumner, Cong. Globe, 38th Cong., 1st Sess. 1480 (Apr. 8, 1864).

of their life, liberty, and property.[60] This guarantees equal protection against private violence, prohibits unequal deprivations of life or liberty, and secures an equal opportunity to sue in court to secure a property title or enforce a contract.

It is important to note that these clauses protect all persons regardless of race, sex, age, or any other classification. A law protecting only men from bodily assault would violate women's right to equal protection of the laws. Not because females are in a protected class, but because females no less than males are a *person*. The same would be true of persons denied the equal protection of the laws on account of their reproductive system. Once again, the denial would violate the Fourteenth Amendment not because of the classification but because equal protection had been denied to a person.

Although these clauses protect all persons, regardless of race or sex, the primary impetus for their addition was the failure of southern states to provide equal due process rights for black residents. As Jacob Howard explained to his Senate colleagues, the Fourteenth Amendment prevented states from enacting racial "codes" where "one measure of justice is to be meted out to a member of one caste while

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[60] *See* Green, *The Original Sense of the (Equal) Protection Clause*, *supra*, at 3 (2008) (arguing that the original meaning of the Equal Protect Clause "imposes a duty on each state to protect all persons and property within its jurisdiction from violence and to enforce their rights through the court system").

another and a different measure is meted out to the member of another caste."[61]

As historically understood, neither the Due Process or Equal Protection Clauses are implicated by local laws limiting the opportunity to practice medicine or limiting the kinds of treatments or drugs one can lawfully receive from a physician. Neither type of local law involves a failure to protect against private violence or deny any person judicial enforcement of contract or property rights.[62] Although restrictions on practicing a trade might be thought as implicating the Privileges or Immunities Clause (see below), no framer or ratifier at the time suggested such laws violate a person's natural rights.

The above reading of the Equal Protection Clause differs somewhat from the Court's current "suspect class" approach to the Equal Protection Clause.[63] The Court's current approach to constitutional equality extends beyond laws that "protect" and requires heightened scrutiny of any law that discriminates on the basis of a protected or "suspect" class. Although this approach was not part of the original understanding of the Equal Protection Clause, a

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[61] Speech of Jacob Howard Introducing a Proposed Fourteenth Amendment, May 23, 1866, *in* 2 Reconstruction Amendments: Essential Documents, *supra*, at 187–88.

[62] Neither in 1868 nor today is there a constitutional right to enforce an illegal contract. *See, e.g.*, *Armstrong v. Toler*, 24 U.S. 11 (1826).

[63] *See United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

similar principle informed the original understanding of the opening Citizenship Clauses.

It is to those clauses that this brief now turns. However, as explained below, whether viewed as a matter of Equal Protection or Equal Citizenship, there is no historical evidence that the people of 1868 would have understood the Fourteenth Amendment as having any effect whatsoever on laws reasonably classifying the permitted practice of medicine on the basis of biological difference.

D. The Citizenship Clauses Do Not Invalidate State Regulation of the Practice of Medicine on the Basis of Biological Difference.

1. The Citizenship Clauses Reverse Dred Scott*, Incorporate the Bill of Rights, and Establish a Principle of Equal Citizenship.*

As explained above, the original understanding of the Equal Protection Clause did not include a general principle of equality beyond the specific categories of life, liberty, and property. The Fourteenth Amendment's opening Citizenship Clauses, however, were originally understood as communicating a more general principle of equal citizenship. Although it remains debatable whether this principle casts constitutional doubt on sex-based classifications, there is no evidence whatsoever that anyone read these texts as affecting reasonable biologically-based classifications in the permitted practice of medicine.

The Citizenship Clauses of the Fourteenth Amendment declare:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States[.][64]

Ratifiers understood these words as overruling the infamous decision in *Dred Scott*[65] and as requiring states to respect the rights of *national* citizenship (primarily the Bill of Rights[66]) and the rights of *local* (i.e., state) citizenship. The State Citizenship Clause in particular prevented states from denying black residents the status of citizenship or creating a kind of second-tier citizenship lacking the same privileges

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[64] U.S. Const. amend. XIV.

[65] *See* Akhil Amar, America's Constitution: A Biography 380 (2005).

[66] *See* Speech of Jacob Howard Introducing a Proposed Fourteenth Amendment, May 23, 1866, *in* 2 Reconstruction Amendments: Essential Documents, *supra*, at 187–88 (the Privileges or Immunities Clause protects, among other things, "the personal rights guaranteed and secured by the first eight amendments of the Constitution"); Speech of John Bingham Regarding the Meaning of the Privileges or Immunities Clause, Mar. 31, 1871, *in* 2 Reconstruction Amendments: Essential Documents, *supra*, at 625 (the rights protected by the Privileges or Immunities Clause are "chiefly defined in the first eight amendments to the Constitution of the United States").

and immunities as those granted to white resident citizens.[67]

The equality principle of the State Citizenship Clause goes far beyond the narrow protections of the Equal Protection Clause and included the entire category of local civil rights—from local licensing opportunities to the provision of local public education. As Fourteenth Amendment framer Lyman Trumbull explained, by "*civil* liberty it ought to be understood, or rather expressed, that the restraints introduced by the law should be equal to all, or as much so as the nature of things will admit."[68] This mirrored the common understanding at the time that local "privileges and immunities" were those "which the citizens of the same State would be entitled to *under the like circumstances*."[69]

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[67] Lash, *The State Citizenship Clause*, *supra* (presenting the history of the Fourteenth Amendment's State Citizenship Clause and the original understanding that to be a citizen of the State was to have the same rights as other similarly situated state citizens).

[68] Speech of Lyman Trumbull, Jan. 29, 1866, *in* 2 Reconstruction Amendments: Essential Documents, *supra*, at 69.

[69] Joseph Story, Commentaries on the Constitution § 1800, at 674–75 (1833). For example, in his speech responding to President Johnson's veto of the Civil Rights Act, Representative William Lawrence specifically quoted Story's discussion of Article IV and its protections of "'all the privileges and immunities of citizens,' that is, all citizens under the like circumstances." Cong. Globe, 39th Cong., 1st Sess. 1836 (1866), *in* 2 Reconstruction Amendments: Essential Documents, *supra*, at 149.

The first Justice Harlan recognized the inherent equality principle informing the citizenship clause in his famous dissent in the *Civil Rights Cases*.[70] There Justice Harlan specifically addressed the meaning and effect of the State Citizenship Clause:

> But what was secured to colored citizens of the United States—as between them and their respective States—by the national grant to them of State citizenship? ... There is one, if there be no other—exemption from race discrimination in respect of any civil right belonging to citizens of the white race in the same State. That, surely, is their constitutional privilege when within the jurisdiction of other States. ... Citizenship in this country necessarily imports equality of civil rights among citizens of every race in the same State.[71]

Although this Court currently reads the Equal Protection Clause as establishing a general principle of equality, the original understanding of the State Citizenship Clause roughly approximates the same idea: To be a citizen means to receive the same civil rights as similarly situated citizens.[72]

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[70] 109 U.S. 3 (1883).

[71] *Id.* at 48 (Harlan, J., dissenting).

[72] *See* Lash, *State Citizenship Clause*, *supra*, at 1098. This principle includes this Court's holding in *Brown v. Board*. *See id.* at 1145.

2. The State Citizenship Clause Requires Similar Treatment of Citizens in "Like Circumstances."

The State Citizenship Clause establishes a principle of similar treatment for similarly situated local citizens. To the framers and ratifiers of the Fourteenth Amendment, the definitive example of unconstitutional distinctions among citizens involved classifications based on race. This was the preeminent issue under discussion in 1866 and drove the passage of both the Civil Rights Act and the citizenship clauses of the Fourteenth Amendment. Southern black Americans faced the enactment of "Black Codes" denying basic civil rights on the basis of race. The text of the Civil Rights Act prohibits such racial codes by requiring that "*citizens*, of every race and color ... *shall have* ... [the] full and equal benefit of all laws and proceedings for the security of person and property, *as is enjoyed by white citizens*."[73] This Act, Reverdy Johnson explained, "gives the rights of citizenship to all persons without distinction of color."[74]

It is historically beyond question that the framers and ratifiers viewed race-based distinctions in the enjoyment of civil rights to be the focal case of what the State Citizenship Clause no longer permitted. What is not clear is whether people at the time viewed sex-based classifications as constitutionally

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[73] 14 Stat. 27 (1866) (emphasis added); *see also* 2 Reconstruction Amendments: Essential Documents, *supra*, at 142.

[74] 2 Reconstruction Amendments: Essential Documents, *supra*, at 78 (remarks of Reverdy Johnson).

problematic. At the time of Reconstruction, a number of women's rights advocates insisted that equal citizenship necessarily involved an equal right to vote.[75] Others insisted that equal citizenship included an equal right of women to pursue a lawful trade, such as the practice of law.[76]

The Republican framers of the Fourteenth Amendment, however, rejected efforts to establish equal political (suffrage) rights for women, and John Bingham led a House Committee that officially denied that the texts of the Fourteenth Amendment granted women an equal right to vote.[77] Instead, the framers drafted, and the people ratified, an amendment that expressly introduced a sex-based classification into the Constitution for the first time.[78]

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[75] *See, e.g.*, The Petition of Victoria Woodhull on the Subject of Female Suffrage, Jan. 2, 1871, *in* 2 Reconstruction Amendments: Essential Documents, *supra*, at 607.

[76] *See Bradwell v. Illinois*, 83 U.S. 130 (1872). Note that Myra Bradwell brought her legal claim on the basis of the Fourteenth Amendment's Citizenship Clauses and not, as would be the case today, on the basis of the Equal Protection Clause. *Id.* at 137–38. This would be expected if, as explained in this brief, people at the time held a far more limited understanding of the Equal Protection Clause and looked instead to the Citizenship Clause for equal civil rights.

[77] *See* The Woodhull Report (1871), *in* 2 Reconstruction Amendments: Essential Documents, *supra*, at 609.

[78] Section Two of the Fourteenth Amendment reduces representation in House of Representatives to the degree that states refuse to grant the right to vote to otherwise qualified "male citizens." U.S. Const. amend. XIV, § 2.

In the *Slaughterhouse Cases*, the Court declined to read the Privileges or Immunities Clause as establishing a substantive right to pursue a trade, and a majority of the Court in *Bradwell v. Illinois* relied on *Slaughterhouse* in turning aside Myra Bradwell's claim to an equal right to practice law.[79] Although Justice Field concurred on the basis of his views regarding the differences between men and women, nothing in the majority opinion addressed the constitutionality of sex-based classifications among citizens.

This Court has not considered whether the original understanding of the Fourteenth Amendment rendered sex-based classifications suspect. And there is no need for the Court to address that matter in the instant case. That is because there is no evidence that *anyone* at the time of the ratification of the Fourteenth Amendment considered classifications reflecting the separate and distinct, albeit complementary, reproductive systems of males and females to be constitutionally suspect in any way. It's unlikely there is a clearer example of categories different "in the nature of things" than the male and female reproductive systems.

This Court has previously concluded that statutes involving classifications reflecting differences between the male and female reproductive system are *not* sex-based classification even if the regulated category is associated with one sex or the other. This was the basis of the Court's conclusion in *Geduldig v.*

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[79] *Bradwell*, 83 U.S. at 139.

Aiello,[80] which held that "[a]bsent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, *just as with respect to any other physical condition*."[81]

In *Dobbs v. Jackson Women's Health Organization*,[82] this Court reaffirmed this commonsense non-suspect understanding of reasonable medical classifications. There the majority of the Court explained (again):

> The regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a "mere pretex[t] designed to effect an invidious discrimination against the members of one sex or the other." *Geduldig v. Aiello* []. And as the Court has stated, the "goal of preventing abortion" does not constitute "invidiously discriminatory animus" against women.[83]

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[80] 417 U.S. 484 (1974).

[81] *Id.* at 496 n.20 (emphasis added).

[82] 597 U.S. 215 (2022).

[83] *Id.* at 236 (citation omitted).

The Court rejected a sex-classification reading of abortion statutes despite the common historical practice of referring to a women's sex in the regulatory statute.[84] In an appendix to the majority opinion, the Court listed twenty-eight historical statutes enforced at the time of the ratification of the Fourteenth Amendment, *every one of which* specifically referred to the pregnant "woman" or "mother."

In the same way, SB1 contains references to a person's "sex," but does so in the context of classifications which are reasonably designed to reflect the biological facts concerning male and female reproductive systems. There is no more reason (and in fact substantially less reason) to view SB1 as a pretextual attempt to accomplish invidious sex-discrimination than there was in *Dobbs*.

Most of all, there is no historical reason to treat either SB1 *or* statutes regulating abortion as triggering heightened scrutiny under the original understanding of the Fourteenth Amendment. Even if this Court looks beyond the original understanding of the Fourteenth Amendment and considers the history and tradition of American law post-1868,[85] there is no historical tradition establishing "gender affirming care" as a constitutional right or establishing its denial as a violation of constitutional equality. As

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[84] *See id.* at 302, Appendix A.

[85] *See id.* at 250 ("[A] right to abortion is not deeply rooted in the Nation's history and traditions.").

Respondent's brief explains in detail,[86] the debate over the harms and putative benefits of medical treatments for gender dysphoria are distinctly modern and are nowhere near resolved.

[86] *See* Brief for Respondents at 7–11 (describing the on-going national and international disagreement over the proper treatment of "gender" dysphoria).

CONCLUSION

States currently take a variety of approaches to surgical or hormonal treatment of gender dysphoria. They have full authority to do so under the original understanding of the Fourteenth Amendment.

This Court should therefore affirm the ruling of the Sixth Circuit.

Respectfully submitted,

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