

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,

and

L.W., BY AND THROUGH HER PARENTS AND NEXT
FRIENDS, SAMANTHA WILLIAMS AND BRIAN WILLIAMS,
ET AL.,
Respondents in support of Petitioner.

*On Writ of Certiorari to the United States Court of
Appeals for the Sixth Circuit*

**BRIEF OF SCHOLARS OF PHILOSOPHY,
THEOLOGY, LAW, POLITICS, HISTORY,
LITERATURE, AND THE SCIENCES AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENTS**

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INTEREST OF AMICUS CURIAE¹

Amici, whose names and affiliations are set forth in the attached Appendix, are distinguished professors of philosophy, theology, law, politics, history, literature, and the sciences, as well as members of public policy research centers, who have studied, taught, and published variously on matters concerning anthropology, marriage and family, sexual difference, human action, political community, natural law, ethical theory, bioethics and sexual ethics, as well as the intersection of these with jurisprudence, science, technology, social science, psychology, language, and gender theory. Based on their expertise, they critically evaluate the constructs of “gender identity” and “transgender/transitioning status” that inform the Sixth Circuit’s ruling in favor of Respondents here.

Amici show that “gender identity” and “transgender/transitioning status” are metaphysical constructs of dubious ideological and political origin, enabled by the technological manipulation of human biology, and that they are destined to catalyze further and more radical biotechnical interventions whose safety and ultimate consequences cannot be known in advance. They show, moreover, the authoritarian nature of these constructs, how they impose a divisive design on the whole of society, present and future, and undermine the basic liberties of all.

¹ No counsel for a party authored this brief in whole or in part, and no person other than amicus and its counsel made any monetary contribution intended to fund the preparation or submission of this brief. The primary author of this brief is David S. Crawford, J.D., S.T.D.

SUMMARY OF THE ARGUMENT

Every legal case involves competing interests and rights. But some unavoidably also raise questions concerning the nature of personhood and the fabric of civil society. Such cases necessarily evoke a clash of worldviews, a conflict over what is real. The present case is of this kind.

Tennessee’s 2023 Minors Protection Act attempts to address the sudden explosion of dysphoria cases among children and adolescents—particularly girls—under the powerful influence of social media and other sources of social pressure. The purpose of Tennessee’s legislation is to protect these vulnerable children from a path that often leads to irreversible alterations of the body and a lifetime of medical dependency.

As important as these aims are, also at stake is a much wider set of mostly tacit but definite principles centering on the question of whether “sex” is a non-arbitrary and natural reality and whether it is properly and organically rooted in the body’s sexual dimorphism.

According to Petitioner, the United States, the Sixth Circuit’s application of the rational basis standard in its review of Tennessee’s law was incorrect for two reasons: (1) the court should have held that the law depends on a sex-based classification, and (2) the court should have treated “transgender status” as a quasi-suspect class. If one or both of these arguments prevails, Tennessee’s law will be examined under heightened scrutiny, which Petitioner thinks (wrongly) it cannot survive.

Both of these arguments rest on a reduction of “sex” to a number of highly questionable concepts, such as “sex assignment at birth” and “gender identity.” They presuppose a dubious, fragmented understanding of the meaning of personhood, one that denatures sex and introduces an element of arbitrariness into the natural and organic relationship between the sexually dimorphic body and the personal subject. Followed to its logical conclusion, this understanding of personhood will effectively obscure the perennial reality of men and women—or in this case, boys and girls—and therefore also the natural relations of mother and father, son and daughter, sister and brother, and so forth.

While the Court assiduously (and appropriately) seeks to *avoid* mediating between competing metaphysical doctrines, Petitioner’s arguments would have the Court adopt one such doctrine: a philosophical anthropology of fragmentation, in which the mental aspects of sex have almost entirely displaced the meaning of the body and organic wholeness of the person.

This result could be set in constitutional concrete, as it were, and its application in the future would be wide-ranging, affecting all reaches of social life. The anthropologist Clifford Geertz long ago observed that law is “part of a distinct manner of imagining the real.” Law offers “visions of community,” he said, “not echoes of it.”² More profoundly than we might think,

² Clifford Geertz, *Local Knowledge* (New York: Basic Books, 1983), 173, 218, quoted in Fernanda Pirie, *The Anthropology of Law* (Oxford: Oxford University Press, 2013), 57.

the doctrines proposed by Petitioner could tacitly mediate a false understanding of who and what we are.

ARGUMENT

I. Petitioner's Arguments Fragment the Human Subject.

A. Petitioner Has Replaced "Sex" with "Gender Identity."

The heart of Petitioner's sex-based argument is summed up in the claim that the primary purpose of Tennessee's legislation is "to force boys and girls to *look and live* like boys and girls," Pet. Br. 14 (quoting White, J., dissenting, Sixth Circuit), or "to enforce conformity with characteristics that are 'typically male or typically female.'" Pet. Br. 23, quoting *United States v. Virginia*, 518 U.S. 515, at 541 (1996).

In other words, Petitioner seeks to portray Tennessee's law as a fairly transparent effort to impose the legislature's or voters' prejudices and stereotypes concerning sex or gender on the state's children.

Petitioner several times supports this depiction with the assertion that under Tennessee's law "a teenager whose sex assigned at birth [was] male can be prescribed testosterone to conform to the male identity, but a teenager assigned female at birth cannot." Pet. Br. 2. Here we see the centrality of the concepts of "sex assignment" and "gender identity" at work in the argument.

Petitioner’s attempt to illustrate how the legislation would work supposes that the two “teenagers,” a boy and a girl, are similarly situated insofar as each seeks only to “affirm” a male “identity” through the use of testosterone. The basis for the difference in their treatment under Tennessee’s law, then, would be their sexes as “assigned at birth.” The argument is presumably designed to shoehorn the case into this Court’s Title VII case, *Bostock v. Clayton County*, 590 U.S. 644 (2020).

However, the difference in treatment here is not based on “sex,” as in *Bostock*, but on the reason or goal of the treatment in the two cases. In Petitioner’s example, the boy receives puberty blockers and cross-sex hormones not “to conform to the male identity,” as the argument wants us to believe, but rather to correct a physical disorder such as a “congenital defect, precocious puberty, disease, or physical injury.” Tenn. Code Ann. § 68-33-103(b)(1)(A). See Pet. Br. 45. In the dysphoria context, on the other hand, the intention is to force the girl’s perfectly healthy body to take on characteristics that are *not* natural to it for the sake of conformity to an interior state of mind, a purely subjective condition—that is to say, the “identity.”

Put more simply, the *boy’s* doctors are treating the body to *remedy* a defect in his function or in his natural developmental arc, while in the case of the *girl*, they are attempting to thwart and subvert her body’s functions or developmental arc. In fact, this distinction hews very precisely to Tennessee’s central concern for the effects of the banned use of these therapies. Tennessee’s law does not draw lines based on *who* is requesting treatment but rather on *the*

treatment requested and its risks and benefits to the patient.

Petitioner seems to come close to putting the question in these terms as well. In Petitioner's telling, however, Tennessee "bans the use of . . . treatments to assist minors in *departing from* the physical expectations consistent with their sex assigned at birth, and permits them for other purposes, including to assist minors in *conforming to* physical expectations consistent with their sex assigned at birth." Pet. Br. 45. In other words, Petitioner interprets the boy's straightforward medical treatments intended to correct physical disorders as seeking to "*conform[] to* physical expectations consistent with . . . sex assigned at birth" hence also to "conform to . . . [his] identity." Likewise, Petitioner treats the use of blockers and hormones in the case of dysphoria as if they were merely remedying or fixing a mistaken "assignment" so as to match an identity.

But how could it *seem* to Petitioner that the real purpose for the treatment is in both cases "to conform to identity?"

For Petitioner, the adolescents' bodies and their sexual maturation have been replaced by mere abstractions, represented in the language of "identity," "assignment," "expectations," and so on. The purpose of the rhetoric is to obscure the natural processes of the growing and maturing child's body so completely that they become almost invisible. So, the use of these therapies for normal development is interpreted as *normal development into a man or woman*, which in turn can be characterized as "conform[ing] with characteristics that are 'typically

male or typically female” or “*look[ing]* and *liv[ing]* like boys and girls.” But how can the natural, organic growth of a child’s body be treated in such a reductive, even crudely mechanistic way?

The logic only works through a presupposed reduction of the bodily aspects of human life to a substrate at the service of what seems to really count, “gender identity.” “Assignment” implies that the newborn’s sex at birth is an external, subjectively attributed stand-in for an unknown “identity.” It serves as a mere label, given by doctors and parents at birth, but having about as much basis in nature as the stamp of an overworked bureaucrat. The concept “gender identity” likewise indicates that the inner, personal subject is only arbitrarily related to the sexually dimorphic body and that the internal sense of self could very well and naturally be at odds with the arbitrary birth assignment.

The terms “assignment,” “physical expectations,” and the like, are intended here to convey temporary and subjective contingency and arbitrariness, while “gender identity” designates an objective, constant, non-contingent element, the non-negotiable seat of the self. But under this optic, any aspect of medicine could be viewed as aiding the patient in “conform[ing] with characteristics that are ‘typically male or typically female’ or “*look[ing]* and *liv[ing]* like boys and girls.”

Under Petitioner’s argument, “sex” in any normal or traditional sense of the word has simply disappeared from the horizon. All that is left is “identity,” accompanied by a set of arbitrary and contingent elements or parts. Needless to say, this

absorption of bodily life and sexuality into identity is universal. It applies to both the “aligned” and “non-aligned.” For both, identity, rather than the embodied whole, is the personal integrating principle. Hence, a boy is only a boy and a girl only a girl because of their respective “identities.” Through this lens, “sex” is entirely dissolved into the concept of “identity.”

B. The Reduction of the Body to a Substrate Explains the Radical Undervaluation of Secondary Sex Characteristics.

If this lens has reduced the body to a substrate for the “identity,” it has reconceived the body as purely mechanical and exposed it to rampant manipulation. This devaluation of bodily life is so extreme that it authorizes Petitioner’s dramatic undervaluing of important elements of the body’s natural makeup and development.

Petitioner complains that Tennessee’s law “bars medical treatments only when sought ‘for the purpose of’ inducing physiological changes, like secondary sex characteristics, that are ‘inconsistent with’ how society expects boys and girls to appear. *Id.* § 68-33-103(a)(1)(A).” Pet. Br. 22. Likewise, Tennessee’s concern about “irreversible” changes, such as to vocal cords, jaw size, or facial hair, are taken as an attempt to “ensure conformity with the physical expectations for the sex assigned to an individual at birth” and are therefore not a “valid governmental objective.” Pet. Br. 41.

No doubt, Petitioner believes that the question of secondary sex changes is vastly more consequential and important than other “social expectations,” such

as in dress or hairstyle. Petitioner grants the need for gatekeeping regulations. But the implication is clear: the difference is one of degree and not of kind. In this sense, Tennessee’s legislation is treated as analogous to forcing boys to wear pants and girls to wear skirts, even though the legislation concerns the alteration of natural development and its irreversible results. See Pet. Br. 23, citing Tenn. Code Ann. §§ 68-33-102(1), 68-33-103(b)(1)(A).

Even more tellingly, Petitioner treats the potential loss of fertility glibly, pointing out that it can be remedied if “patients . . . ‘preserve their sperm or eggs for future assisted reproduction by stopping puberty suppression briefly before initiating gender-affirming hormones.” Pet. Br. 43-4, quoting Pet. App. 292a. Here again, simple natural and organic bodily integrity, growth, and health are dramatically undervalued. The implication is that what most would consider a vital function is interchangeable with medical technologies, suggesting that the body has been reduced, machine-like, to the interrelation of parts that can be swapped out and replaced without much consequence.

II. The Deep Historical and Philosophical Roots of Petitioner’s Fragmented Anthropology.

A. Abstraction and Fragmentation Have Been Built into the Concept of “Gender Identity” from Its Inception.

The question arises as to how the body could be so thoroughly drained of its full human meaning and how identity could so thoroughly ride roughshod over

it. To see both the sources of this fragmentary and reductive understanding of human sexuality and the depth of the problem it poses, we need to examine the background of the word “gender,” which was plucked from linguistics by the psychologist and sexologist John Money in the 1950s.

Money selected the term to aid in his study and clinical work on the rare set of conditions then grouped under the term “hermaphroditism.” For Money, “gender” was a distinct psychosocial determinant, which related in complex ways to the physiological aspect, “sex,” which he further divided into its various parts or aspects—morphological sex, gonadal sex, chromosomal sex, and so forth.³ This division and then subdivision into further elements spawned an influential but ultimately problematic way of seeing sexuality: a sexed body, which was separated into parts and reduced to physiological functionality, alongside “gender.”

If Money provided for a certain integration of the physiological and psychosocial elements through his theory of neurological “mapping,” his division of sex

³ John Money, Joan Hampson, John Hampson, “Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism,” *Bulletin of the John Hopkins Hospital*, vol. 97 (1955): 301-319; Money, Hampson, Hampson, “Imprinting and the Establishment of Gender Role,” *A.M.A. Archives of Neurology and Psychiatry*, vol. 77 (1956): 333-336. See also, M. Dru Levasseur, “Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science Is Key to Transgender Rights,” *Vermont Law Review*, vol. 39 (2015): 943-1004, at 980-1, n. 214 (noting that the number and character of the elements has varied over time).

and gender quickly hardened into a classic dualism in the hands of those who took it up thereafter.⁴ Among the first of these was the famed psychoanalyst, Robert Stoller. Stoller's primary work in the 1960s was with "transsexuals." Given this context, Stoller brought the term "gender identity" to prominence, which he described as "the awareness 'I am a male' or 'I am a female.'"⁵

Paradoxically, the effect of this dualism, with its devaluation of the body, as can be seen in Petitioner's argument, has been to maximize the importance of "gender identity" for personal self-understanding and to vest it with an inviolable spiritual quality, as an unchangeable center surrounded by a set of essentially plastic or alterable body parts.

Importantly, Money's reductive understanding of sex, with its implied absolutization of "identity," has radically shaped the perspective of the "specialists." As an expert from the World Professional Association of Transgender Health put it, "attempts to change one's gender identity have been unsuccessful and in many cases were very harmful to the individual involved." Therefore, "whenever there is a lack of congruence among the various elements of sex, the goal of gender specialists is to bring the other elements of sex into conformity with one's gender

⁴ Jennifer Germon, *Gender: A Genealogy of an Idea* (Palgrave MacMillan, 2009): 63ff.

⁵ Robert Stoller, "A Contribution to the Study of Gender Identity," *International Journal of Psychoanalysis* 45 (1964), 220, quoted in Germon, *Gender*, at 65. See also, Stoller, *Sex and Gender: The Development of Masculinity and Femininity* (Karnac Books, 1968), at 40.

identity, thus confirming the primacy of gender identity relative to the other aspects of sex.”⁶

“Transition” and “reassignment surgery” are therefore treated in essence as ways to “fix” an otherwise perfectly healthy body that does not fit an internal subjective state. Indeed, if “identity” (*identitas*=“sameness”) refers to the distinctness and unity, or perhaps “self-sameness,” of an individual, to change one’s “identity” would not only be “unsuccessful” or “harmful”—it would be *impossible* under this Money-inspired anthropology. (Curiously, while there are a number of different kinds of dysphoria, including anorexia, gender dysphoria is the *only* one where some professionals recommend aligning the body with the mind rather than the mind with the body. No doctor would recommend that a young woman suffering from anorexia should eat less because she imagines herself to be overweight in her mind.)

Further, the human subject appears to be unitary only by virtue of *not* being organically related to this fragmented and materialistic body, now

⁶ Sharon M. McGowan, “Working with Clients to Develop Compatible Visions of What It Means to ‘Win’ a Case: Reflections on *Schroer v. Billington*,” *Harvard Civil Rights-Civil Liberties Law Review*, vol. 45 (2010): 205-245, at 234-5, citing tr. of Bench Trial at 402-03, *Schroer v. Billington*, 525 F. Supp. 2d 58 (D.D.C. 2005) (No. 05- 1090). The “various elements” here echo Money’s division of identity and the sexed body into parts, increasing the number from seven to nine.

instrumentalized as the means of showing one's inner nature to society.

B. Understanding Sex Through the Optic of Fragmentation.

Both Money and Stoller were concerned with what they considered disorders. Yet, their reconceptualization of sexuality presents us with a certain paradox. Already in their own work, this fragmented way of seeing persons, such that the whole is in effect reduced to its parts, rapidly expanded to become a lens for understanding human sexuality as such, even for those who do not experience non-alignment.

In other words, a category originally intended to aid in understanding and remediating disorders or anomalous conditions became an indispensable conceptual tool for understanding the nature of sexuality universally. Both Money and Stoller acknowledged this seeming paradox. Indeed, Stoller characterized his patients as “natural experiments” by which we can gain a more exact understanding of the nature of human sexuality.⁷ So, the ideas of “gender” and “gender identity” effectively viewed human sexuality in its very nature through a lens designed to understand aberration.

If activists claim that centralizing the “binary” falsely pathologizes sexual variance, Money and Stoller in fact inaugurated a pathological understanding of sex *as such*. In their hands, the conditions explaining transgender or intersex—i.e.

⁷ Stoller, *Sex and Gender*, at vii, 5, 14.

the fact of non-alignment of parts and aspects—have become the optic for saying what sex *is*.

We can now see clearly why it is proper to speak of “gender identity” in terms of “fragmentation” and “arbitrariness.” The Money/Stoller optic assumes a principled lack of organic unicity or order between the sexually dimorphic body and the internal subjective state, and this lack of order—this arbitrariness—is taken as the universal character or truth of sex. In other words, we can understand “sex” by knowing that “identity” and the various physical elements are in principle independent aspects.

It follows, for example, that a woman who “identifies” as a woman does so because these aspects “align,” rather than because she is an organically constituted whole. The relationship (and therefore what we mean by “sex”) in that sense is essentially “fragmented” and “arbitrary,” i.e. without order (=disorder), *even where there is “alignment.”* To put it differently, the perspective views the whole of human sexuality through an essentially transgender lens, as though sexuality as a whole is constituted as so many variations of transgender.

As we shall see, this understanding of sex is logically and metaphysically fraught. But, at this point it becomes clear why, under this optic, Petitioner could think of medical interventions to correct organic issues in the maturation process as just another way to “conform to identity” or “to enforce conformity with characteristics that are ‘typically male or typically female.’”

C. Mainstreaming of This Optic

For second-wave feminists who followed in the 1970s, the medical context was removed entirely, while the fragmentation of the human subject into sexed “biology” plus a gendered “identity” was further universalized, popularized, and politicized.⁸ Hence, Gayle Rubin was able to dream of “an androgynous and genderless (though not sexless) society, in which one’s sexual anatomy is irrelevant to who one is, what one does, and with whom one makes love.”⁹

Since then, “gender identity” has come to dominate discourse about human sexuality on the back of the developing but potent “LGBTQ+” movement, which is at times highly critical of Money,¹⁰ the binary, and sometimes the sex/gender division, but which nevertheless continues the absolute priority of “identity” over an indeterminate body, whose sexual dimorphism is drained of its fully human meaning.

The effect of this legacy, then, has been to generate a principled separation between the personal subject and the now subdivided body. But

⁸ E.g., Ann Oakley, *Sex, Gender, and Society (Toward a New Society)* (London: Temple Smith, 1972), ch. 6.

⁹ Gayle Rubin, “The Traffic in Women: Notes on the ‘Political Economy’ of Sex,” in *Toward an Anthropology of Women*, ed. Rayna R. Reiter (Monthly Review Press, 1975): 157-210, 204.

¹⁰ Money is now condemned by all sides for his research and clinical practices. See, for example, John Colapinto, *As Nature Made Him: The Boy Who Was Raised as a Girl* (Harper Perennial, 2006); Judith Butler, *Whose Afraid of Gender?* (New York: Farrar, Straus, and Giroux, 2024): 194-5.

once this separation occurs, gender identity appears to be liberated from the natural conditioning of the body, or for that matter, material reality. Hence, we are dealing here with a strain of modern Gnosticism, where the soul is trapped in a shell we call the “body,” a shell which is of no independent significance and can be manipulated according to our will. The tendency has been for this Gnostic identity to roam freely from one ideologically driven doctrine to the next.

D. “Gender Identity” as Ideologically Driven into Obscurity.

On this last point, consider the welter of options currently available for understanding “gender identity.”

References to “incongruence”¹¹ or “non-alignment”¹² might be understood to imply an objectively natural ordination between the sexed body and “identity,” against which they can be compared or measured. Indeed, while the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5) eliminated the previous category “gender identity disorder,” its definition of “gender dysphoria” nevertheless depends in part on the patient’s experience of “incongruence.”¹³

¹¹ American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition, Text Revision (DSM-5-TR) (American Psychiatric Association Publishing, 2022), at 512.

¹² See, e.g., *Equal Emp’t Opportunity Comm’n v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 577 (6th Cir. 2018).

¹³ The 2022 DSM-5 TR characterizes “gender dysphoria” as an “incongruence between one’s experienced/expressed gender and

Individuals speak of “the trauma of being cast” or “trapped in the wrong body.”¹⁴ There is the figure of the “transitioning” individual, ostensibly bringing the body into alignment with subjective feelings, which at times are spoken of as though they are an immutable, preexisting, and gendered “identity” or true self, living in tension with a merely external and personally indeterminate body.¹⁵

This first version of “gender identity” would seem to be what Petitioner has in mind in quoting the private petitioners. For example, 16-year-old L.W. expresses the idea of being “trapped in the wrong body.” Pet. Br. 9. Similarly, 13-year-old John Doe expresses anxiety in “under[going] the wrong puberty.” Pet. Br. 11.

“*Disorder*,” “*incongruence*,” and “*nonalignment*” suggest the logical and ontological priority of order, congruence, and alignment. If so, perhaps the concept of gender identity does not dissolve, but rather presupposes, an underlying given or naturally ordered relationship between the sexed body and gendered identity, but then gives decisive weight to identity when nonalignment does occur. This framing of the debate suggests that the “transgender man”

assigned gender” (manifested in certain desires) and says that it is “associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning” (at p. 512).

¹⁴ Malloy, “What Best to Protect Transsexuals from Discrimination,” at 283.

¹⁵ For example, there is the commonly reported experience of transgender individuals of having always known their identity differed from their bodily sex. See e.g. *Harris Funeral Homes*, 884 F.3d 560 at 568,

really is a man and the “transgender woman” *really is* a woman, even though their bodies *really are* the opposite of their experienced identities. It suggests, therefore, the idea of an underlying personal truth or nature, which by implication is both sexed and immaterial, a kind of sexually differentiated Cartesian ego or consciousness. Its opposite would then be a separate body, conceived as an outer shell.

The idea that the transgender individual really is a man or woman, according to his or her subjective feelings and in opposition to his or her body, is repeatedly reinforced in court decisions, where, for example, judges scrupulously employ the pronouns correlating with the claimed identity of litigants. It also seems to be presupposed in much of the popular discussion and habits of mind. “Transition” and “reassignment surgery” are therefore treated in essence as ways to “fix” a body that does not fit an internal nature. Petitioner’s hypothetical of the teenagers who share a male identity would seem to match this view.

This idea of an inner and natural subjective truth may even be expressed in the growing phenomenon of hormone “micro-dosing,” by which individuals attempt to achieve a “non-binary”¹⁶ status, if “non-binary” is thought of as one’s individual and essential nature. Yet, because of the Cartesian implications of this understanding, the individual is conceptually

¹⁶ E.g., Julie Compton, “Neither Male nor Female: Why Some Non-Binary People Are ‘Microdosing’ Hormones, NBC News Website (July 13, 2019): <https://www.nbcnews.com/feature/nbc-out/neither-male-nor-female-why-some-nonbinary-people-are-microdosing-n1028766>.

fragmented into marginally related parts—body and conscious subject, with the latter offering the decisive weight of personal identity.

On the other hand, there are a number of variations within the larger gender identity movement as it currently exists. A part of the movement, for example, resists the “medicalization” of transgenderism. This suggests that “congruity” and “incongruity” of gender identity with bodily order are nothing more than normal sexual variants. “Non-alignment” would be the equivalent perhaps of congenital heterochromia—statistically non-normative, but hardly a profound personal determinant.

Again, the implication is radically dualistic. The only difference from the first alternative is the elimination of any sort of natural correlation between the inner and outer selves. Hence, according to this second view, the body is in no way indicative of what identity *should* be. The pairs “order”/“disorder,” “congruity”/“incongruity,” and “alignment”/“non-alignment” effectively disappear as categories, since the relationship of body and inner truth are conceived as entirely arbitrary. Who is to say, after all, that the merely statistically normative constitutes “alignment” rather than “non-alignment”? But if there is no alignment or non-alignment, then there are only androgynous identities and asexual bodies. If so, then sex organs, for example, would not seem to be by nature male or female. Sex organs, in other words, would be (paradoxically) sexless.

This second possibility blends into a third. The debate is often folded into the larger claim that

“gender” and subjectivity are socially constructed realities, rather than an inner essence or “nature.” Indeed, this latter version seems in part supported by Petitioner’s argument insofar as it speaks of “*conforming to* physical expectations consistent with their sex assigned at birth,” Pet. Br. 45, or forcing “boys and girls to *look and live* like boys and girls,” Pet. App. 85a (White, J., dissenting).

Even if there is no natural correlation between the sexed body and the inner identity, then, there certainly is a socially constructed one. Of course, the cultural shaping of sexuality must be granted, but the claim in this part of the movement rejects any aspect of gender rooted in nature. As with the second possibility, the ideas of “alignment” and “non-alignment” here seem to have little real or intrinsic meaning outside the constructed categories. Not only is the relationship between the sexed body and identity arbitrary, it would seem that, in the absence of a natural ordination, the social construction of gender is as well. The “incongruence” underlying dysphoria would be more accurately described, then, as a lack of alignment between a socially constructed identity and the social expectations for a materially sexed body.

If so, then Judith Butler’s observation concerning surgery on intersex patients carving social expectations into the patient’s flesh would seem to similarly apply in the case of the therapies banned by Tennessee.¹⁷

¹⁷ “Corrective surgery is sometimes performed with parental support and in the name of normalization, and the physical and psychic costs of the surgery have proven to be enormous for those

The “cure”—“transition”—then boils down to tailoring the body to fit social prejudices correlating with an “identity.” Here dualism disappears only to the extent that the subject—“identity”—and the meaning of the body are both dissolved into social construction.

Yet another closely related variant treats identity as an individual choice. We find an example of this possibility in the case of parents who raise a child as “non-binary” by means of hiding or suppressing the child’s sex for the sake of the child’s later choices.¹⁸

Alignment or non-alignment seem in this example to be chosen “identities,” like lifestyles or manner of dress. Here the body is externalized and instrumentalized to a certain idea of freedom, sometimes called “indifferent freedom,” that views any sort of given order or natural direction as outside of and antagonistic to free acts or decisions.

Finally, the debate sometimes concerns a choice for “gender non-conformity” as an explicit form of protest or aggression toward society’s “rigid[] binary sex/gender system.” Here we have come full circle, and “non-alignment” is treated as a goal, rather than

persons who have been submitted, as it were, to the knife of the norm. The bodies produced through such a regulatory enforcement of gender are bodies in pain, bearing the marks of violence and suffering. Here the ideality of gendered morphology is quite literally incised in the flesh.” Butler, “Gender Regulations,” in *Undoing Gender* (Routledge, 2004): 40-56, at 53.
¹⁸ E.g., Nayanika Guha, “How to Raise Theybies: Children without Imposed Gender Identities,” *Verywell Family*, 19 September, 2022. Available online: <https://www.verywellfamily.com/how-to-raise-a-child-without-gender-6499907> (accessed 27 July, 2024).

a problem. This last variant can perhaps be seen in the continual multiplication of “identities” represented in the expansion of “LGBT” to “LGBTQ” and from there to “LGBTQ+.” It considers the idea of “nature” itself as an oppressive form of soft totalitarianism, similar to Adrienne Rich’s “compulsory heterosexuality.”¹⁹ Transgression, in other words, is liberation.

In sum, “transgender” can refer to situations in which individuals feel extreme distress at a perceived disjuncture between the sense of self and the dimorphic body, represented most clearly in the feeling “I was born in the wrong body.” But it can also refer to individuals who have *decided*, often for ideological reasons, to reject the “binary,” for example through “gender bending.” It also includes many variations on these two examples, and many other possibilities as well. Indeed, activist members of the gender movement no longer tend to think that “gender identity” indicates a true inner essence or stable self that might be trapped in the wrong body. Rather, as the Sixth Circuit pointed out in *Harris Funeral Homes*, the concept “gender identity” is “*fluid, variable, and difficult to define . . . [with] deeply personal, internal genesis that lacks a fixed external referent.*”²⁰

¹⁹ Adrienne Rich, “Compulsory Heterosexuality and Lesbian Existence,” *Signs: Journal of Women in Culture and Society* 5(4): 631-660 (Summer 1980).

²⁰ *Harris Funeral Homes*, 884 F.3d 560 at 576, n. 4. DSM 5 TR acknowledges the fluctuations in the concept “gender identity” (at 511), and indeed its nixing of the term “gender identity disorder” illustrates the rapidly evolving constructs, which have evolved under the influence of political and cultural pressures.

Both legal and popular depictions of “gender identity” oscillate among these possibilities, as can be seen both in *Harris Funeral Homes’* talk of “fluidity” and in other courts’ adoption of the relatively staid but explicitly dualistic version.²¹ Indeed, it lies as a point of ambiguity in Petitioner’s various depictions.

Of course, if Petitioner’s arguments prevail, there is no constitutionally principled stopping point between the first, dualistic position and this last explicitly political one.

On the last point, see Andreas de Block, Pieter R. Adriaens, “Pathologizing Sexual Deviance: A History,” *Journal of Sex Research* 50(3-4) 276-298 (2013), offering a helpful and non-partisan discussion of how the American Psychiatric Association has made decisions historically concerning what constitutes deviancy or a disorder.

²¹ *E.g.*, the District Court in this case, *L.W. v. Skrmetti*, 679 F.Supp.3d 668 (M.D.Tenn. 2023) implies this: “Whether a medical procedure is banned . . . therefore requires a comparison between the minor’s sex at birth and the minor’s (gender) identity; that is, it requires the ascertainment of whether the minor’s sex at birth is consistent with that minor’s (gender) identity. So if a minor’s sex is female at birth and that minor wants to access hormone therapies to enable her to conform her gender identity to her sex at birth (*i.e.* she wants to live as a girl), SB1 would allow this minor to access such care. However, if a minor’s sex at birth is male and that minor wanted access the same treatment for the same purpose (*i.e.* live as a girl), SB1 would deny that minor access to the treatment,” at pp. 692-3.

E. The Problem of Gender Identity Cannot be Solved by Recourse to Science.

Given this maelstrom of meanings, courts and advocates alike turn to science to provide a “theory-neutral” viewpoint. Conservatives draw on the “biological body” (yet Money was in some sense doing biology) and liberals marshal armies of experts and the testimony from ideologically captured professional and scientific associations.²²

But, while Money and Stoller were scientists, in fact they unwittingly opened a snake pit of classic metaphysical dilemmas. Their conclusions involve, for example, judgments concerning the relationship between the body and subjectivity (a variant of the “body-mind problem”), how elements of sex relate to the sexually dimorphic person as a whole (the problem of parts and wholes), and the question of whether the nature of sexuality can be understood by looking to anomalous instances (the debate between nominalism and realism). These are not scientific problems but metaphysical ones. Indeed, at this point in history, and despite its cultural prestige, few sophisticated thinkers would grant that science is in fact a purely objective or neutral source of knowledge about the world, let alone about the persons in it.²³

²² See, generally, Block, Adriaens, “Pathologizing Sexual Deviance.”

²³ This would seem to be the ineluctable conclusion to be drawn, for example, from T.S. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, Chicago, IL1962, 4th ed., 2012), however much Kuhn himself might want to qualify it. See Henry Veatch, *Human Rights: Fact or Fancy?* (Louisiana

F. The Court Should Not Adopt Petitioner’s False Anthropology.

This larger background demonstrates the quandary the issue of gender identity poses.

Petitioner’s argument only works if we assume that it is *true* that the relationship between the body’s sex and the interior self is indeed arbitrary, as implied by the terms “assignment” and “gender identity,” rather than rooted in the organic wholeness of the human subject. In other words, it only works if we assume that the underlying metaphysics is true.

For the Court to adopt this argument, then, could be taken to adopt the line of reasoning’s metaphysical presuppositions and establish them as a Constitutional principle to govern society universally. And this would be to impose that metaphysics—along with all of its implications for personal self-understanding and the nature of human communities and society—on the whole of society for years and perhaps decades to come. Such an imposition would impact, for example, the Constitutional treatment of women’s sports, women’s private showers, locker rooms, and prison-cell spaces.

III. “Transgender Status” Should Not Be Considered a “Quasi-Suspect Class.”

The foregoing also suggests the problems with Petitioner’s claim that “transgender status” should constitute a “quasi-suspect” class. Petitioner argues that transgender status satisfies the four factors this

State University Press, 2007), p. 236, and Germon, *Gender*, at 9ff.

Court has traditionally used for determining the applicability of intermediate scrutiny, including its third prong, that ““obvious, immutable, or distinguishing characteristics that define [the class] as a discrete group.” *Lyng v. Castillo*, 477 U.S. 635, 638. (1986), See Pet. Br. 29. To the Sixth Circuit’s conclusion that “transgender” is not an immutable characteristic, Petitioner responds that the category nevertheless does possess “distinguishing characteristics that define [its members] as a discrete group.” Pet. Br. 30.

Setting aside the questionable conflation of “dysphoric children” and “transgender status,” the argument fails because transgender, relying as it does on the concept “gender identity,” does not in fact possess “distinguishing characteristics that define [it] as a group.” Rather, “transgender” is a broad term that has had fluctuating meanings, turning on the ebbs and flows of its central concept, “gender identity,” and these have profoundly changed and indeed expanded over time. While it may in principle be easy to distinguish “T” from “LGB,” which describe “orientations,” it is not so clear how it is distinct from the indefinite set “Q+.”

CONCLUSION

The crucial human question posed by this case is whether “sex” is an objective, non-arbitrary and natural reality and whether it is properly and organically rooted in the body’s sexual dimorphism. Only this non-arbitrary character allows recognition of the individual person as a whole. The non-arbitrary character also points to the natural relationships that form the most fundamental human communities,

beginning with natural family relations. From there the tissue of relations extends indefinitely, to encompass the sense in which we are all connected, through the endless river of generations. The subjective, fragmenting and arbitrary implications of Petitioner's arguments invite a forgetfulness of this tissue of organic ties.

If Petitioner's arguments are accepted by this Court, these unstated but destructive presuppositions could be woven into our constitutional framework, where they will continue to play out in untold ways for the whole of society and in perpetuity. In short, they will amount to the imposition of a false Anthropology on every man, woman, and child in our society.

While this case appears to be about only the limits of court or legislative authority, or on the other hand, the debate over whether dysphoric children will be harmed or helped through the therapies in question, in fact the most universally consequential question at stake is what assumptions concerning human nature will control how the Fourteenth Amendment is interpreted. That judgment will influence other Constitutional issues, such as how a wide variety of civil institutions will operate and how rights will be interpreted.

Accepting Petitioner's arguments would unleash an entirely uncertain and never-ending font of Court-derived and enforced individual rights in the area of sexuality. It would be one more square in the courts' checkered history of supporting and advancing the sexual revolution. The Court should respectfully decline Petitioner's invitation.

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OCTOBER 11, 2024

APPENDIX

APPENDIX

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