No. 18-107

In The Supreme Court of the United States

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,

V.

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,
Respondent,

AND

AIMEE STEPHENS,
Respondent-Intervenor.

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

BRIEF OF MILITARY SPOUSES UNITED AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Arthur A. Schulcz, Sr.
Chaplains' Counsel, PLLC
21043 Honeycreeper Pl.
Leesburg, Virginia 20175
(703) 645-4010
art@chaplainscounsel.com
Counsel of Record
for Amicus Curiae

August 23, 2019

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond VA 23219 (800) 847-0477

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INTERESTS OF THE AMICUS CURIAE[1]

Military Spouses United is an informal group of military spouses and women united by their common concerns raised here. Audrey Rogers is their president.

The Military is a unique community. Parker v. Levy, 417 U.S. 733, 743 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society"). Its members are not asked if they agree with policies imposed upon them by their appointed and elected authorities, policies which can have serious consequences and often change the rules and conditions that existed when they agreed to serve. These concerns are particularly highlighted here because some of Military Spouses United members and their families are stationed overseas and must live on U.S. bases whose facilities are necessary for their sustainment and living. This dependence limits their freedom to choose among differing options of where they shop, exercise, and engage in recreational

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[1] Pursuant to Supreme Court Rule 37, all Parties have received timely notice of Amici's intent to file this Brief and have consented to its filing. No Party or Party's Counsel authored this Brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the Amici Curiae, their members or their Counsel, contributed money that was intended to fund the preparation or submission of this Brief.

activities involving use of changing, showering or bathroom facilities.

Military Spouses United raises five specific concerns affecting the military community arising from the Sixth Circuit's conclusion it could rewrite Title VII's definition of "sex" to include biological males claiming they can change their "sex" to female by a mere assertion, a voluntary "gender re-identification." This judicial legislation changes what was formerly considered an immutable or unalterable term or category, i.e., either male or female as determined biologically at birth, into a meaningless variable that can be changed on a whim. This makes sex a choice rather than a biological fact and an irrelevant and meaningless term with no objective and/or immutable criteria.

It appears to Amici the Sixth Circuit has modified the Constitution outside of its Article V provisions using raw judicial power, ignoring the due process of law. It has done this by empowering Respondent here and others who might claim the same rights now or later to assault and abrogate these Amici's absolute and unalienable right to personal privacy and security specifically protected by the Constitution's Bill of Rights, and especially the First (religion, free speech and association), Fourth and Ninth Amendments.

These Amici's five concerns are:

1. Female erasure.[2] The term "female" used to mean a characteristic associated with women based on their unique physical, physiological, and emotional characteristics. These distinct differences formed the basis for statutory protections society thought necessary to provide protection against discrimination in certain areas, e.g., Title IX. Those protections become meaningless if sex is a variable that can change on the individual's will. This erases the unique and well-recognized distinctions that define "female."

Recognizing a biological male as a female, a protected status under Title VII, based on an individual's own choice and feelings erases the distinctions between male and female, making them interchangeable in all meaningful aspects. One other nation eliminated that distinction; it used the term "comrade" to make males and females interchangeable. History shows that concept did not work very well with women being the losers.

This phenomenon can be seen in the consequences of allowing biological males to compete as females in sports. The U.S. Dept. of Ed., Office for Civil Rights ("OCR"), opened an investigation against the Connecticut Interscholastic Athletic Conference and Glastonbury, CN, Board of Education on August 8, 2019, in response to parents' and students' claim

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[2] See Female Erasure (Ruth Barrett ed., 2019)

that allowing biological males, who claim to be female, to compete in girls athletics discriminates against biological females. U.S. Dept. of Ed, OCR letter to Roger Brooks, Alliance Defending Freedom, re: Complaint Nos. 01-19-4025 & 01-19-1252. These males have dominated their female events. The parents and students claim the presence of these biological males in competitive events sends a message to females that they should not try to compete, given men's superiority in certain factors when measured against females. The record in Connecticut and other places shows females have no chance to win against men claiming to be female.

Biological males have challenged women shelters' policies that exclude biological men because of the trauma a biological male would inflict on the shelter's residents. The Downtown Soup Kitchen D/b/a Downtown Hope Center v. Municipality of Anchorage, Anchorage Equal Rights Commission, No. 3:18-CV-00190-SLG, 2019 WL 3769623, at *1 (D. Alaska Aug. 9, 2019) ("Most of the women at Hope Center shelters have escaped from sex trafficking or been abused or battered, primarily at the hands of men").[3]

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[3] Hope Center's attorney told the Judge "women have told shelter officials that if biological men are allowed to spend the night alongside them, 'they would rather sleep in the woods,' even in extreme cold like the city has experienced this week with temperatures hovering around zero." AP News 1/11/19 article by Rachel D'Oro, " Faith-based shelter fights to keep out transgender women" *found at* https ://www.apnews.com/85494d367c2d4a38b1749f76a89f49c3

2. Feelings versus Facts. There appears to be a trend to the unwarranted and dangerous substitution of "feelings" for "fact" as the subjects to which courts apply law. Judges are supposed to decide law based on the facts. Recognizing "gender" in place of "sex" requires courts to evaluate feelings rather than facts and decide which **feelings** are superior to others. This undermines, if not destroys, the very concept of individual rights supported by the due process of law, which depends on facts, not feelings. This allows courts to ignore the reality of the serious and critical biological differences between men and women.

Rather than examining the facts of biology and physiology of the different sexes and the impact of their differences, courts are now being asked to evaluate whether one person's feelings trump another person's well-founded natural fear when a biological male claiming to be female is allowed into formerly female private and secure places where women's physical distinctions, e.g., breasts and pubic areas, are exposed. See Hope Center above and note 3 supra.

3. Coerced Consent. Women currently have the right to consent to who can interact with them sexually. Women should continue to enjoy free consent regarding who can share private, sexually revealing places with them. Redefining sex as "gender" would strip women of their freedom to consent and instead would coerce them to share

private, sexually revealing spaces with biological males. This would also destroy women's unalienable right to personal security and privacy. See § I.B-C infra.

4. Granting biological males legal access to protected female private spaces creates uncertainty and a natural fear in females. Women and their children are most vulnerable to deviant and criminal activity in these private places and situations. Women and children will have little or no legal recourse for prevention, defense, or imposition of liability for damages from such encounters if Title VII eliminates the biological differences between the sexes. Reports of attempted criminal acts against women and children in stores which have opened women's restrooms, dressing, fitting and changing rooms to biological males are evidence this fear is not unfounded speculation.[4]

5. Government compelled speech and behavior. The government's exercise of its power through Title VII to coerce acceptance and approval of what many consider unacceptable behaviors, results in assaults on and conflicts with Amici's right to personal security and privacy and their First, Fourth and

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[4] Christian Post, *Transgender Bathroom Policies Have Led to 21 Attacks on Women* (2/16/17), *available at* https://www.christianpost.com/news/transgender-bathroom-policies-have-led-to-21-cases-of-crimes-against-women-family-research-council.html

Ninth Amendment rights and interests. This coercion inevitably suppresses any evidence or discussion showing the behaviors are harmful. See Notes 5-7, 9 infra. Persons diagnosed with gender dysphoria, a recognized mental disorder, see note 9 infra, experience high negative mental and physical conditions and injuries from body altering surgery, e.g., high rates of suicide, substance abuse,[5] depression, and later remorse for a bad choice.[6] People who do not cooperate with redefining sex as gender have been harmed. Teachers and professors have been fired for refusing to address students by their desired pronoun rather than their biological one.[7]

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[5] The 2104 National Transgender Discrimination Survey , https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pd

[6] Ryan T. Anderson, Sex Reassignment Doesn't Work. Here Is the Evidence, (3/9/2018) https://www.heritage.org/gender/commentary/sex-reassignment-doesnt-work-here-the-evidence

[7] Washington Examiner, *Professor suing Ohio University for forcing him to use a student's transgender pronoun* (11/24/18) *available at* https://www..com/.../professor-wanted-to-use-a-studen...; NBC News report, *Teacher fired for refusing to use transgender student's pronoun* (12/10/18), *available at* https://www.nbcnews.com/.../teacher-fired-refusing-use-transgender-studen...

This conflict is further illustrated in the actual situation involving a chaplain whose orthodox, Christian belief embraces and adheres to the biblical Creation account that God made humans only as males and females, with no mistake in that designation. The chaplain's commanding officer was a biological woman who adamantly claimed she was a male.[8] She informed the chaplain that during the unit's annual training, the chaplain, who was married, would be sharing sleeping accommodations with the commander who was still a biological female because they were part of a command team. The chaplain informed his endorser of the situation and stated there was no way he would sleep with another female not his wife. The commander received orders precluding her attendance at the training, thus avoiding a conflict. Had that not happened, the chaplain's career could have ended because his natural and religious beliefs would be in conflict with the commander's view of reality, i.e., she was a male because she said so and any conflicting views were not tolerated.

The chaplain theoretically had some statutory protection, see § 533 of 2013 National Defense Authorization Act ("NDAA"), Public Law 112-239, 126 Stat 1727; § 532 of 2014 NDAA, Public Law 113-66,127 STAT. 672. Any other officer or enlisted person would find themselves with few options and

[8] Counsel was involved in this issue which never reached the public news.

no defense against malicious rumors, allegations of disrespect of a peer, failure to obey an order, etc. Sharing sleeping quarters with a biological female would result in the chaplain's loss of his endorsement, result in rumors of sexual impropriety, create marriage difficulties, and the possibility of unfounded charges of sexual misconduct if the biological woman decided to claim she was sexually assaulted or harassed. This situation is a made to order stressor for married military couples and military persons with traditional biblical beliefs concerning sex and marriage.

The above situation highlights these Amici's concerns and the risks they face because of limited choices for medical, professional and commercial services on military bases, involving female private and protected spaces, e.g., medical, legal, recreational, athletic and shopping facilities. Any change to Title VII resulting from this case would be mandatory, stripping Amici of their well-established rights to personal security and privacy.

INTRODUCTION

Military Spouses United is an informal group of military spouses and women united by their common concerns raised here. Their great concerns center and spring from the profound impacts that follow if Title VII is judicially rewritten to exclude biology from its definition of "sex", recognizing transgender as a protected category. Those impacts include threats to the Amici's constitutional right to personal privacy, safety and security, their First Amendment rights, and those of their children and families. These threats are especially serious given the unique military culture, community, structure and environment in which they live

These amici leave it to Petitioners and other Amici to address why (a) Congress and the Executive who signed the bill did not and could not have included biological males claiming to be females or gender identity preference in Title VII's definition of "sex" when that legislation was passed; and (b) such inclusion is inconsistent with other legislation addressing "sex." For example, allowing courts to redefine Title VII's meaning of sex to include gender identity essentially vitiates the purposes of Titles VII and IX since allowing one's sex to be self-determined apart from his/her biological characteristics makes those statutes and their purposes meaningless.

SUMMARY OF ARGUMENT

I. The Sixth Circuit's rewrite of Title VII's definition of "sex" to include a biological male who demands to be treated as a female reflects an assault upon these Amici absolute and unalienable rights to personal security and its inherent, corollary or collateral right of personal privacy. The Constitution's Bill of Rights, specifically the First, Fourth and Ninth Amendments, protect these rights of personal security and privacy. Respondent asks this Court to affirm by sheer judicial power the Sixth Circuit's modification of the Constitution outside of Article V's amendment procedures, abandoning the due process of law.

Sir William Blackstone's Commentaries on the English Law (1756), ("Commentaries") clearly defined these rights of personal security and privacy. Blackstone explained these were fundamental rights of every Englishman under England's unwritten Constitution, including our colonial forbearers and America's founders. Those rights became our fundamental rights. No party has or can point to any recognized official surrender of those rights to the federal or local government by either American citizens or the States. These rights of personal security and privacy are further protected by common law criminal sanctions such as assault, sexual assault, rape, battery, and unlawful imprisonment.

II. Respondent also asks this Court to authorize biological males sufferings from a recognized mental condition, gender dysphoria, to unilaterally impose that condition's negative consequences and manifestations on females and children, like these amici, while depriving these females protection of their basic rights. This has never been done before. Courts have never prioritized the consequences of a biological male's mental illness or condition over innocent females' rights to personal security, privacy, First Amendment protections and freedom from fear of assault or other crimes.

ARGUMENT

I. The Bill of Rights Precludes Government from Recognizing or Forcing Acceptance of a Biological Male's Claim He Is a Female

Sir William Blackstone's Commentaries, "Book the First. Of the Rights of Persons. Chapter I: Of the Absolute Rights of Individuals", clearly defined the "absolute rights" of all Englishmen at the time of the War of Independence and the Constitution's ratification. See District of Columbia v. Heller, 554 U.S. 570, 595 (2008) (citing Blackstone's discussion of the right to bear arms). The Declaration of Independence presents a long list of American grievances which identify specific violations of those well-established rights as Englishmen which Blackstone defined.

The founders and citizens of the new United States were suspicious of centralized, arbitrary power. Americans obtained their independence at great cost after a long war to secure the absolute and unalienable rights Blackstone's Commentaries described. They wanted to protect these rights from the tyranny of despots, whether as monarchs, parliaments, or other men.

The issue facing the American people at the time the Constitution was ratified was the proper and well-defined limitations on the proposed federal government's power. They did not want the new government to subvert, reduce or marginalize their fundamental rights the Constitution did not specifically mention. Americans insisted as a condition of ratification Congress provide a Bill of Rights guaranteeing the new federal government would not abuse or diminish their fundamental rights purchased by blood and sacrifice. See W.Va. State Board of Education v. Barnette, 319 U.S. 624, 636 (1943).

That term, "Bill of Rights" was not created in a vacuum. Blackstone articulated its pedigree and meaning, giving the term substance and context. To ensure all those "fundamental rights" they enjoyed as Englishmen were secured from federal government encroachment and abuse, the Founders drafted and the States ratified 10 constitutional amendments. Those amendments became our Bill of Rights.

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Barnett, 319 U.S. at 638.

The Bill of Rights contains one specific constitutional guarantee at issue before this Court. Amendment IX states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Ninth Amendment, in conjunction with the other identified rights in the first 8 amendments, bars this Court from recognizing new rights that destroy the absolute and unalienable right of personal security and privacy and diminish our other fundamental rights. Such destruction is the inevitable consequence of recognizing as a protected class biological males demanding treatment as females.

A. The Issue Before the Court: Did Congress Exclude Biology from Title VII's Definition of Sex

Gender dysphoria is a recognized mental health disorder.[9] It's a condition which has serious negative consequences to those suffering from it or those who come in contact with such persons. Those consequences include high suicide rates, depression, destructive addictions and other mental issues. See Lawrence C. Mayer & Paul R. McHugh, "Sexuality and Gender," 50 The New Atlantis 1 (Fall 2016), https://www.thenewatlantis.com/docLib/20160819_TNA50SexualityandGender.pdf (last visited Aug. 19, 2019).

The Sixth Circuit's decision now before this Court allows males to self-identify as females without a sex change operation and to be treated as females, allowing unrestricted access to formerly "protected female privacy spaces." Such protected privacy spaces include private, business related or government changing rooms, bathrooms and bath-shower facilities where females undress and/or

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[9] Gender dysphoria is listed as a mental disorder by the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-5). Gender dysphoria was called "gender identity disorder" before 2013 and part of the medical literature as early as 1923. *See* 102 *The J. of Clinical Endocrinology & Metabolism* 3869, 3873 (2017), found at https://doi.org/10.1210/jc.2017-01658 (last visited May 21, 2019).

expose portions of their body which historically have been shielded from public view, e.g, female breasts and pubic areas. These protected privacy spaces, until recently, were limited to young children and females as determined by biology. This privacy historically protected the women and children using them from unwelcome contact, trauma, viewing or access by biological males. See Hope Center and note 3 supra.

Respondent asks the Court to "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." See Griswold v. Connecticut, 381 U.S. 479, 482 (1965). This conflicts with the duty of courts to protect citizens from threats to their rights, including personal privacy and security, and not empower those with disruptive behavior or mental disorders to harm or force the natural consequences of that behavior or disorder, including criminal acts, on ordinary citizens who rely on the law and courts for protection.

"Constitutional provisions for the security of person and property are to be liberally construed, and 'it is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'" Byars v. United States, 273 U.S. 28, 32 (1927) (quoting Boyd v. U.S., 116 U.S. 616, 635 (1886) and Gouled v. U.S., 255 U.S. 298, 304 (1921)); accord Coolidge v. New Hampshire, 403 U.S. 443, 453–54 (1971)(quoting Boyd).

The Sixth Circuit ignored the natural consequences of elevating gender dysphoria, a recognized mental disorder, to a protected class, essentially finding historic protections for women and children are fossilized notions inconsistent with the current fad to be supersensitive to the feelings of confused individuals. That court appears to have abandoned its duty to enforce constitutional guarantees and protect the vulnerable from trauma and, in some cases such as Hope Center, to prevent further victimization and injury. The Sixth Circuit seeks to amend the Constitution outside of Article V's processes and provisions by ignoring its duty.

B. The Individual Right to Personal Security and Privacy Was Recognized as a Fundamental, Absolute Right of United States Citizens When the Constitution Was Adopted

The fundamental right of personal security and its inherent corollary, the right of personal privacy and safety, was well-established in the English common-law. Blackstone identified it as one of the rights of all Englishmen.

Blackstone explained "the primary and principal object of the law" are rights; he identified "rights that are commanded" and "wrongs that are forbidden", 1 Commentaries at *122. He subdivided rights into two classes, "first, those which concern

and are annexed to the persons of men… or the rights of persons", and second, "the rights of things." Id. He explained persons were "either natural persons or artificial. Natural persons are such as the God of nature formed us" and artificial persons were formed by law, such as corporations, for government and society's purposes. Id at *123.

> By the absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it.

Id.

Individuals are endowed with "those absolute rights ... by the immutable laws of nature" but preserved by "friendly and social communities." Id. at *124. According to Blackstone, it followed "that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals", id., and "the principal view of human laws is, or ought always to be, to explain, protect and enforce such rights as are absolute, which in themselves are few and simple[.]" Id. at *124-25. Blackstone then explained, "the rights of the people of England ... may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property." Id. at *129.

Nowhere in our history do we find a precedent where a recognized mental disorder establishes an absolute right for a biological male to behave in ways that damage or harm innocent females or children, violating their absolute right to personal security and privacy.

1. The absolute right of personal security

"The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation." Id. Concerning enjoyment of an individual's body, Blackstone's third point explaining an individual's enjoyment of her body states:

> 3. Besides those limbs and members that may be necessary to a man in order to defend himself or annoy his enemy, the rest of his person or body is also entitled, by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member.

Id. at *134. This directly applies to the issue here and the Amici's concerns and interests.

2. Inherent in the absolute right of personal security is the right of privacy

Inherent in the absolute right of personal security is the corollary, ancillary or collateral right of privacy. Privacy is inherent and ancillary to personal security because it provides both the expectation of safety from unwelcome invasions of that privacy and the protection necessary for safety from unwelcome invasions. Privacy excludes likely or possible threats to personal security. For women, that includes protection from unwanted contacts, sexual advances, both actual and threatened, and other crimes or threats against a woman's body or that of her children. This would include fear of assault, emotional distress, and embarrassment from the unwanted viewing, touching, or exposure of intimate private female body parts by biological males.

When Blackstone wrote his Commentaries, our nation was founded, the Constitution and the 14th Amendment were ratified, and up until recently, the appearance of a biological man in a woman's personal protected privacy space would automatically be considered assault. Such appearance would naturally put women or children in fear of injury or sexual battery. A male claiming in that time he had the right to walk into a female dressing room or shower because he felt like or thought he was a woman would have been instantly

declared a lunatic and a criminal. Nothing shows that fear was unreasonable then or is unreasonable now. See note 3 supra. Privacy is the result of establishing the conditions for personal security by limiting the natural means that compromise that security.

The First Amendment also has an inherent privacy right, the flip side or corollary of our rights to associate and assemble peaceably. See NAACP v. State of Alabama, 357 U.S. 449, 462, (1958) (First Amendment protects freedom to associate and privacy in one's associations). The right to assemble also means the right not to assemble and to limit our associations for a specific time. See NAACP v. Button, 371 U.S. 415, 430-31(1963); Griswold, 381 U.S. at 483. The right to free speech includes the right not to be forced to speak or speak a message one disagrees with. Wooley v. Maynard, 430 U.S. 705, 714 (1977). Correspondingly, the right to personal security for females and children means the right to ensure security by limiting access to those areas where exposure of private and intimate bodily parts places them in great potential danger and vulnerability from the opposite sex.

The First Amendment right to limit one's associations to either many or none deserves special consideration given the circumstances of biological males seeking to enter female private and protected spaces. This First Amendment right reinforces the recognized right of personal security and privacy.

3. The right of personal security included special protection for women

Blackstone's Book 4, "Public Wrongs", identifies special crimes "immediately affecting the personal security of individuals, relat[ing] to the female part of his majesty's subjects", 4 Commentaries at 208. These were crimes specifically directed against women because of their sex's characteristics. The first was "that of their forcible abduction and marriage", id. The second was rape. Id. at 210 The fact they were crimes under English common-law and its Constitution shows there were special concerns for and severe penalties for violating women's rights to security and privacy. Laws against assault and battery also protected women.

Until recently, there has been no question that allowing a biological male into female dressing, changing or bathroom facilities was a violation of a woman's sense of privacy and control over her body. This was the equivalent of a trespass, and the natural fear of a physically stronger man in a private place gave rise to an assault per se, in addition to fears of actual violence or other acts of a criminal or tortuous nature.

4. The Bill of Rights specifically identified and retained Blackstone's absolute personal rights including the inherent right of personal privacy

Our colonist forefathers and founders were greatly concerned the new federal government would usurp their hard-fought rights and liberties because the Constitution did not clearly identify or define those rights. Ratification of the Constitution was premised on the timely enactment of a Bill of Rights. While identifying specific fundamental rights in the first eight amendments, they "retained" their other fundamental rights for "the people" under the Constitution's Ninth Amendment.

English common law continued to be the law of the individual States and the basis for new federal law, although English law per se did not govern and control the law in the newly independent United States. Blackstone's Commentaries remained the legal authority for American courts and legal systems, and his rights and wrongs continued to be applied in American jurisprudence. Successive reprints of his commentaries updated the application to American law and jurisprudence.

Chancellor James Kent, "Commentaries on American Law" (1826-30), adopted Blackstone's methodology and explanation of the law. For

example, his Lecture 24, "Of the Absolute Rights of Persons", tracks very closely with Blackstone's Commentaries.

> The rights of persons in private life are either absolute, being such as belong to individuals in a single unconnected state; or relative, being those which arise from the civil and domestic relations.
>
> The absolute rights of individuals may be resolved into the right of personal security, the right of personal liberty, and the right to acquire and enjoy property. These rights have been justly considered, and frequently declared, by the people of this country to be natural, inherent, and unalienable.

Id. at 1, htps://lonang.com/library/reference/kent-commentaries-american-law/kent/24/. Compare with 1 Commentaries at *129 ("the rights of the people of England ... may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property."

The Constitution neither delegates nor recognizes any power to abrogate those rights except where compelling governmental interests are at stake or the provisions of Article V are used to amend the Constitution.

> This Court has recognized the ancillary or peripheral right to privacy in the specific rights comprising the Bill of Rights. The First Amendment, for example, imposes limitations upon governmental abridgment of 'freedom to associate and privacy in one's associations.' NAACP v. State of Alabama, 357 U.S. 449, 462 (1958.) The Third Amendment's prohibition against the unconsented peacetime quartering of soldiers protects another aspect of privacy from governmental intrusion. To some extent, the Fifth Amendment too 'reflects the Constitution's concern for * * * '* * * the right of each individual 'to a private enclave where he may lead a private life.'"(citation omitted)

Katz v. United States, 389 U.S. 347, 351, n.5 (1967).

Katz, a Fourth Amendment case, held "the Fourth Amendment protects people, not places." Id. at 351. The Fourth amendment does not protect what a person knowingly exposes to the public, but "what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Id. That principle certainly applies here to the Amici's interests in protecting their specific personal privacy and security rights in maintaining control over exposure of their and their children's

bodies and maintaining the specific uniqueness of that right given their status as females.

Griswold, finding a right of privacy in the marital relationship, cited approvingly Katz's holding on the "peripheral rights" of privacy in the First, Third, Fourth and Fifth Amendments. 381 U.S. at 484. Griswold explained, "Without those peripheral rights, the specific rights would be less secure." Griswold explained how the "freedom to associate and privacy in one's associations" was a First Amendment peripheral right, id. at 430. "Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful. Id at 43. See, e.g., Ex parte Jackson, 96 U.S. 727, 733 (1877) ("Liberty of circulating [a publication] is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value").

5. The Ninth Amendment retained Blackstone's absolute personal rights for all American Citizens

The very language of the Ninth Amendment clearly stated the nation's decision to ensure that all of their rights they had known as Englishmen were protected from diminishment or destruction. The full scope of Blackstone's

fundamental rights, especially the right to personal security, are retained in that Amendment. There is no record of the American people rejecting those rights nor ceding them to the government.

C. The Sixth Circuit's Decision Is Incompatible with the Bill of Rights Protection of Amici's Privacy and First Amendment Rights

Consideration of the issues arising from a biological male's claim his real sex is female rather than that indicated by his actual sexual equipment must consider the actual consequences of granting such a claim.

Respondent claims he can use government power and agencies to force Petitioner to acknowledge and treat Respondent as a female based on Respondent's claim he is a male who wants to change into a female despite being born a biological male. Respondent is still a biological male. He does not argue his right to be treated as a female despite being a biological male ends at the Funeral Home property line. Rather he claims entitlement to enjoy all the rights available to biological females.

Absent from the Sixth Circuit's discussion is the impact on the fundamental and well-established constitutional rights of other Americans, including these Amici, flowing from the Sixth Circuit's Title VII rewrite. The Court cannot enlarge a protected

category if doing so conflicts with or assaults the "absolute" rights of others, including these Amici.

The Constitution is constructed so its defined and protected rights support and complement each other, ensuring what courts have referred to as ordered liberty. For example, Fifth or Fourteenth Amendment rights don't conflict with the First Amendment. See Barnett, 319 U.S. at 639 ("Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. *** [W]hile it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case.").

Male and female adults and parents have come to rely on the historic and inherent privacy of these uniquely private places such as dressing, changing or bathroom facilities to provide safety for themselves and their children from sexual predators of the opposite sex by excluding the opposite sex.

Governmental policies removing the natural barriers between biological males and females have left victims without legal recourse to recover damages for the violation of their privacy or other injuries including psychological, physical, and emotional damage. Those damages are easily foreseeable when government agencies remove the historic restrictions on biological males from the private places where females should have every expectation of privacy and security. See note 3 supra.

II. The Sixth Circuit's Decision Authorizes Persons Suffering from a Recognized Mental Disorder, Gender Dysphoria, to Unilaterally Harm Others While Escaping Liability

The Sixth Circuit's decision here shows a willful blindness to the consequences of placing a biological man with a recognized mental disorder, gender dysphoria,[10] in a protected class. That allows him to run roughshod over well-established female privacy and personal security rights.

This is not the case of a person with a disability seeking a reasonable accommodation. Here a biological man demands treatment as a woman and the Sixth Circuit has granted his request despite the obvious dangers to the personal security and privacy rights of females. That decision allows a biological man with a mental disorder to enter into those special protected female privacy places. The Sixth Circuit decision ignores reality and the constitutional rights of privacy and personal security of females.

Unwanted exposure to a biological male, whether dressed or undressed, in these previously historic private places can (1) produce long-lasting emotional, psychological and physical injury and trauma, see Hope Center and note 3 supra; (2) divest

[10] See note 9 supra and Lawrence C. Mayer & Paul R. McHugh, "Sexuality and Gender," op. cit.

parents from control over when and how their children learn of and become exposed to the realities of the different sexes; and (3) open children and women particularly to sexual abuse, harassment, unwanted sexual advances, or voyeuristic opportunities from such males. Even if Respondent commits no crime, his very presence creates tension, stress, and fear; in some cases such presence creates actual trauma, see Hope Center and note 3 supra.

Yet under the Sixth Circuit's decision biological men demanding treatment as women can escape liability for the harm they cause. The recently decided Downtown Hope Center case, described in Amici's Interests, illustrates in graphic detail the potential untrammeled violation of female victims' rights. It also illustrates the foreseeable piling on of traumatic harm with no liability for the male perpetrator and no recourse for the female or child victim. This pursuit of an ideology has no foundation in American jurisprudence.

Hope Center is a faith-based shelter for battered and abused women. Id. at *1 ("Most of the women that Hope Center shelters have escaped from sex trafficking or been abused or battered, primarily at the hands of men"). The Sixth Circuit's ruling ignores the privacy and personal security interests of these unfortunate women which now must give way to Respondent's "feelings." Likewise, the faith and religious beliefs of those who operate Hope Center and minister to these victims means nothing. They

are expected to facilitate, if not take part in, the continued traumatization of women already abused by exposing them to biological men in what was formerly a private and protected female space.

The 1/11/19 AP News article at Note 3 describes the serious emotional damage Hope Center's women clients have suffered and the stark choices they would face were the Anchorage Equal Rights Commission to succeed in forcing Hope Center to admit that biological man claiming to be a woman: "they would rather sleep in the woods, even in extreme cold like the city has experienced this week with temperatures hovering around zero." Id.

Even being forced to consider the choice in other circumstances would be serious "intentional infliction of emotional distress" and the perpetrators would be liable for damages and medical treatment. But because of the Sixth Circuit's ruling, regardless of how many women were traumatized by this biological man's presence and/or his behavior, they would be without remedy since the law protects the biological man's actions. This is absurd.

Government may provide special treatment for gender dysphoria that does not involve subjecting innocent bystanders to trauma or harm, but that decision should come not from unelected judges, but from those who make laws legislatively and are accountable to the voters for their decisions.

CONCLUSION

The Sixth Circuit has established a dangerous precedent. This Court should grant Petitioner Harris Funeral Home's request for relief and clearly and strongly reject the Sixth Circuit's ruling, reasoning, and attempt to avoid Article V's provisions to change the Constitution. The Court should also reaffirm the well-established right of personal privacy and security and admonish the lower courts their duty is to protect those rights from degradation, destruction or marginalization.

Respectfully submitted,

/S/ Arthur A. Schulcz Sr.
Arthur A. Schulcz Sr.
Counsel of Record
Chaplains' Counsel, PLLC
21043 Honeycreeper Pl.
Leesburg, Virginia 20175
(703) 645-4010
art@chaplainscounsel.com