

21-10486

IN THE
United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

DARCY CORBITT, ET AL.,

Plaintiffs-Appellees,

—v.—

HON. HAL TAYLOR, in his official capacity as Secretary
of the Alabama Law Enforcement Agency, ET AL.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
CASE NO. 2:18-CV-00091-MHT-SMD

**BRIEF FOR THE NATIONAL WOMEN’S LAW CENTER AND
32 ADDITIONAL ORGANIZATIONS AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLEES
[ADDITIONAL AMICI ON INSIDE COVER]**

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GENDER JUSTICE
IN OUR OWN VOICE: NATIONAL BLACK WOMEN'S REPRODUCTIVE JUSTICE
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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1(a) and 26.1-2(b), the National Women's Law Center and Allen & Overy LLP, counsel for *amici curiae*, certify that the following persons and entities have or may have an interest in the outcome of this appeal:

1. Alabama Attorney General's Office;
2. Alabama Center for Law and Liberty;
3. Alabama Law Enforcement Agency;
4. Alabama Policy Institute;
5. Allen & Overy LLP;
6. American Civil Liberties Union Foundation;
7. American Civil Liberties Union Foundation of Alabama;
8. American Civil Liberties Union of Alabama;
9. Anti-Defamation League (ADL);
10. Arkles, Gabriel;
11. Autistic Self Advocacy Network;
12. Bay Area Lawyers for Individual Freedom (BALIF);
13. Brown, David;
14. California Women Lawyers;
15. Chandy, Sunu P.;

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16. Chynoweth, Brad A.;
17. Coalition of Labor Union Women;
18. Cooper, Leslie J.;
19. Corbitt, Darcy;
20. Davies, Andrew Rhys;
21. Davis, James W.;
22. Equal Rights Advocates;
23. Esseks, James D.;
24. Faulks, LaTisha Gotell;
25. FORGE, Inc.;
26. Gender Justice;
27. In Our Own Voice: National Black Women's Reproductive Justice Agenda;
28. KWH Law Center for Social Justice and Change;
29. LaCour Jr., Edmund G.;
30. LatinoJustice PRLDEF;
31. Legal Aid at Work;
32. Legal Momentum, the Women's Legal Defense and Education Fund;
33. Legal Voice;
34. Marshall, Hon. Steve;
35. Martin, Emily;

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36. Messick, Misty S. Fairbanks;
37. Movement Advancement Project;
38. NARAL Pro-Choice America;
39. National Association of Social Workers (NASW);
40. National Association of Women Lawyers;
41. National Center for Transgender Equality;
42. National Council of Jewish Women;
43. National Network to End Domestic Violence;
44. National Organization for Women Foundation;
45. National Partnership for Women & Families;
46. QLaw Association of Washington;
47. Reproductive Health Access Project;
48. Saxe, Rose;
49. Sinclair, Winfield J.;
50. SisterLove Inc.;
51. SisterReach;
52. Taylor, Hon. Hal;
53. The National Women's Law Center;
54. The Women's Law Center of Maryland;
55. Transgender Law Center;

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56. Transgender Legal Defense and Education Fund;
57. Welborn, Kaitlin;
58. Wilson, Thomas A.;
59. Women's Bar Association of the District of Columbia;
60. Women's Bar Association of the State of New York; and
61. Women's Law Project.

Counsel for *amici curiae* further certify that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

Date: August 2, 2021

Respectfully submitted,

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City of Richmond v. J.A. Croson Co.,
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Tuan Anh Nguyen v. I.N.S.,
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Zzyym v. Pompeo,
 958 F.3d 1014 (10th Cir. 2020)12

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Ala. Code 1975 § 17-9-30.....20

OTHER SOURCES

Graham Ives et al., *Evaluation of BMI as a Risk Factor for Complications Following Gender-Affirming Penile Inversion Vaginoplasty*, 7 *Plastic Reconstructive Surgery Global Open* e2097 (2019)15

Human Rights Campaign, *A National Epidemic: Fatal Anti-Transgender Violence in America in 2018* 62 (2018), https://assets2.hrc.org/files/assets/resources/AntiTransViolence-2018Report-Final.pdf?_ga=2.243619713.563891009.1626694807-385765680.1626443839.....17

Human Rights Campaign, *Dismantling a Culture of Violence* 17 (2020), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/Dismantling-a-Culture-of-Violence-010721.pdf>.....4, 18, 19, 20

Human Rights Campaign, *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2020*, <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020>17

Jody L. Herman et al., UCLA School of Law, The Williams Institute, *Suicide Thoughts and Attempts Among Transgender Adults* 20 (Sept. 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender-Sep-2019.pdf>16, 18

Kathryn O’Neill and Jody L. Herman, UCLA School of Law, The Williams Institute, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2020 General Election* 2 (Feb. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Voter-ID-Feb-2020.pdf>20

Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 *B.C. L. Rev.* 507 (2016)17

Nat’l Council on Disability, *National Disability Policy: A Progress Report* (2017), https://ncd.gov/sites/default/files/NCD_A%20Progress%20Report_508.pdf.....15

Olga Tomchin, *Bodies and Bureaucracy*, 101 Cal. L. Rev. 813, 825
(2013).....15, 21

Sandy E. James et al., Nat’l Ctr. for Transgender Equal.,
The Report of the 2015 U.S. Transgender Survey 96-97 (2016),
[https://transequality.org/sites/default/files/docs/usts/USTS-Full-
Report-Dec17.pdf](https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf)20

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Women’s Law Center (“NWLC”) is a nonprofit legal organization that is dedicated to the advancement and protection of women’s legal rights and the rights of all people to be free from sex discrimination. NWLC advocates for gender justice in the courts, in public policy, and in broader society to ensure that women can live free of sex discrimination. Since its founding in 1972, NWLC has focused on issues of key importance to women and girls, including economic security, reproductive rights and health, workplace justice, and education, with special attention to the needs of low-income women and those who face multiple and intersecting forms of discrimination, including LGBTQ people. NWLC has participated in numerous cases, including before Courts of Appeals and the Supreme Court, to ensure that rights and opportunities are not restricted based on sex and that all enjoy the protections against sex discrimination as promised by federal law.

NWLC submits this amicus brief joined by 32 additional organizations committed to gender justice in support of Plaintiffs-Appellees. Based on the issues presented in this case, *amici*’s perspective and experience as entities that have long

fought to address and prevent sex discrimination—including against transgender people—would be valuable to assist the Court in its resolution of this case.¹

SUMMARY OF ARGUMENT

Alabama’s Policy Order 63 (the “Policy”) at issue in this matter—which classifies people based on sex in a manner that denies an accurate driver’s license to transgender Alabama residents—violates the Constitution’s Equal Protection Clause, as the district court below correctly held. *Corbitt v. Taylor*, No. 2:18cv91-MHT, 2021 WL 142282 (M.D. Ala., Jan. 15, 2021). The Policy constitutes sex discrimination, similar to the types that *amici* have combatted for decades—*i.e.*, enforcing narrow expectations about what it means to be “male” or “female” that are then used to justify discrimination against individuals who do not adhere to those expectations. As detailed herein, Alabama’s Policy discriminates on its face based on sex, and targets and harms transgender people in particular.

Settled law in the Eleventh Circuit establishes that state actions like Alabama’s Policy constitute sex-based classifications, triggering heightened scrutiny under the Equal Protection Clause. *See Glenn v. Brumby*, 663 F.3d 1312,

¹ All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No party’s counsel authored this brief in whole or in part. No party or party’s counsel contributed money that was intended to fund the preparation or submission of this brief. NWLC staff, including Phoebe Wolfe and Adaku Onyeka-Crawford, and Claire Rajan, Melinda Bothe, Changhee Han, and Jack Butz of Allen & Overy LLP also contributed to this brief.

1316 (11th Cir. 2011) (“[D]iscriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause”); *see also Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (“[I]t is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.”). Alabama’s purportedly benign justifications for the Policy do not change the level of scrutiny applied, as sex-based classifications automatically trigger the searching analysis required by heightened scrutiny. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

Applying heightened scrutiny to the Policy, Alabama fails to identify how its sex-based classification is “substantially related” to any “important governmental objectives.” *Craig v. Boren*, 429 U.S. 190, 197 (1976). The district court properly found that any purported interests in definitional consistency or accurate identification were too attenuated to the Policy to survive heightened scrutiny, and that these goals may actually be undermined by the Policy. *Corbitt*, 2021 WL 142282, at *6-11. Indeed, Alabama’s justifications are too thin to survive even rational basis review. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985) (under rational basis review, equal protection is violated by state action that is “arbitrary or irrational,” or if it is motivated by “a bare . . . desire to harm a politically unpopular group”).

Amici also emphasize that Alabama’s Policy causes significant, tangible harm to transgender people—harms that are exacerbated for transgender people of color. As the district court discussed below, the Policy requires transgender Alabama residents to choose between invasive, expensive surgery that they may not want or be able to undergo and being misgendered on their driver’s license. *Corbitt*, 2021 WL 142282, at *3. Incongruent identification can have wide-ranging harms, from increasing employment discrimination to exacerbating already-existing inequalities in healthcare. And carrying a driver’s license with an inaccurate sex marker subjects transgender people to heightened risk of violence, harassment, and discrimination based on their transgender status. *See* Human Rights Campaign, *Dismantling a Culture of Violence* 17 (2020), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/Dismantling-a-Culture-of-Violence-010721.pdf>.

The Policy’s harmful impact is more than hypothetical and has severe consequences on the lives of transgender people in Alabama, like the Plaintiffs here. For these reasons, *amici* urge the Court to affirm the district court’s decision finding that Alabama’s Policy violates the Equal Protection Clause.

ARGUMENT

I. THE DISTRICT COURT PROPERLY APPLIED HEIGHTENED SCRUTINY TO ALABAMA’S POLICY, WHICH CLASSIFIES BASED ON SEX IN A MANNER THAT DISCRIMINATES AGAINST TRANSGENDER PEOPLE.

The district court correctly determined that heightened scrutiny applies to Alabama’s Policy because it is a sex-based classification, and that Alabama failed to provide sufficient justification for the classification. *Corbitt*, 2021 WL 142282, at *1.

A. Heightened Scrutiny Applies to All Sex-Based Classifications.

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from “deny[ing] to any person within its jurisdiction the equal protection of the laws,” U.S. Const. amend. XIV § 1, which is “essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne*, 473 U.S. at 439. Challenged state action is generally sustained “if the classification . . . is rationally related to a legitimate state interest,” but certain classifications, including those based on sex, “call for a heightened standard of review.” *Id.* at 439-40; *see also Craig*, 429 U.S. at 197 (heightened scrutiny applies to “classifications that distinguish between males and females”). Under this heightened standard of review, a state seeking to defend any “gender-based government action” must “demonstrate an exceedingly persuasive justification for that action.” *U.S. v. Virginia*, 518 U.S. 515, 531 (1996).

Sex-based classifications are presumptively invalid “[b]ecause sex or gender generally provide no sensible ground for differential treatment” and thus must be scrutinized under a more exacting standard. *Adams v. Sch. Bd. of St. John’s Cnty.*, No. 18-13592, 2021 WL 2944396, at *4 (11th Cir. July 14, 2021) (quoting *City of Cleburne*, 473 U.S. at 440); *see also Brumby*, 663 F.3d at 1319 (“[G]ender-based classifications are ‘inherently suspect’ because they are often animated by ‘stereotyped distinctions between the sexes.’” (quoting *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973))); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) (“The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny.”). Subjecting all sex-based classifications to heightened scrutiny ensures “that the validity of a classification is determined through a reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Miss. Univ. for Women*, 458 U.S. at 726. Regardless of how Alabama attempts to characterize or justify its policy, all classifications based on sex must undergo this heightened scrutiny analysis.

B. Alabama’s Policy Is a Sex-Based Classification Subject to Heightened Scrutiny.

As the district court properly found, Alabama’s Policy is a sex-based classification because it “publicly designates people’s sex based on state-determined criteria.” *Corbitt*, 2021 WL 142282, at *4. In other words, heightened scrutiny

applies because the Policy “cannot be stated without referencing sex.” *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (finding that a school policy that used the sex on students’ birth certificates to determine which bathroom the students may use was “inherently based upon a sex classification”); *see also Adams*, 2021 WL 2944396, at *4 (applying heightened scrutiny where school district’s bathroom policy “categorizes on the basis of sex”); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020) (applying heightened scrutiny because “[o]n its face, the Board’s policy creates sex-based classifications for restrooms”); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 719 (D. Md. 2018) (“Defendants’ decision to bar M.A.B. from the boys’ locker room ‘cannot be stated without referencing sex’ because they decide which locker room M.A.B. may use based upon his birth sex.”). The lower court therefore properly found that “[b]y making the content of people’s driver licenses depend on the nature of their genitalia, the policy classifies by sex,” and therefore must be subjected to heightened scrutiny. *Corbitt*, 2021 WL 142282, at *1.

This conclusion is strengthened by the fact that the Policy targets transgender people in particular because, in light of the Supreme Court’s decision in *Bostock v. Clayton County*, there is now no question that classifications based on transgender status are necessarily sex-based classifications. 140 S. Ct. at 1741 (“[I]t is impossible to discriminate against a person for being . . . transgender without discriminating

against that individual based on sex.”).² In targeting transgender people, Alabama’s Policy “necessarily and intentionally applies sex-based rules,” *id.* at 1745, and is therefore a sex-based classification subject to heightened scrutiny.

Even before *Bostock*, this Court had already definitively concluded that discrimination based on transgender status is sex discrimination subject to heightened scrutiny, given its reliance on and enforcement of sex stereotypes. *See Glenn*, 663 F.3d at 1316-17 (“[D]iscriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause.”); *Adams*, 2021 WL 2944396, at *4 (finding school policy that required “biological females” to use girls’ bathrooms and “biological males” to use boys’ bathrooms was subject to heightened scrutiny because it discriminated based on sex). Other circuits have analyzed the issue the same way. *See Whitaker*, 858 F.3d at 1053 (discrimination against transgender students constitutes sex discrimination under the Equal Protection Clause); *Grimm*, 972 F.3d at 608 (“Grimm was subjected to sex discrimination because he was viewed as failing to conform to the sex

² While *Bostock* involved a sex-discrimination claim under Title VII, the same definition of “sex” applies in the equal protection context. *See Holt v. Pennsylvania*, 683 Fed. Appx. 151, 160 (3d Cir. 2017) (“[B]ecause of the overlap between Title VII claims and constitutional discrimination claims, we have applied Title VII caselaw to equal protection claims.”); *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 82 (2d Cir. 2015) (“[W]e have recognized that . . . an equal protection claim parallels a plaintiff’s Title VII claim.” (citations omitted)); *see also Glenn*, 663 F.3d at 1321 (applying Title VII cases in equal protection context).

stereotype propagated by the Policy.”); *Dodds v. U.S. Dep’t of Educ.*, 845 F.3d 217, 221 (6th Cir. 2016) (“Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination.”). Thus, Alabama’s Policy is also subject to heightened scrutiny given that discrimination based on someone’s failure to conform to sex stereotypes is also a form of sex discrimination.³

Alabama’s incorrect characterization of the sex-based classification as benign does not change the level of scrutiny applied. Alabama cites no authority holding that a court must first determine if “legal benefits or prohibitions” flow from a policy before applying heightened scrutiny. Instead, Alabama created this requirement out of whole cloth.⁴ Appellant Br. at 31. Although it can point to no court that has ever

³ Additionally, “heightened scrutiny applies because transgender people constitute at least a quasi-suspect class.” *Grimm*, 972 F.3d at 610 (collecting cases from “many district courts” that “have analyzed the relevant factors for determining suspect class status and held that transgender people are at least a quasi-suspect class”). As one district court explained: “[C]lassifications based on transgender status are per se entitled to heightened scrutiny because transgender status itself is at least a quasi-suspect class. Transgender people have been historically subjected to discrimination, their status bears no relation to their ability to contribute to society, they exhibit immutable and distinguishing characteristics, and they are both a minority and politically powerless.” *M.A.B.*, 286 F. Supp. 3d at 721–22 (noting that “[m]ost district courts that have considered the issue came to the same conclusion”).

⁴ Alabama cites to two cases for the statement that “classification is not discrimination,” see Appellant Br. at 17 (citing *Caskey Baking Co. v. Virginia*, 313 U.S. 117, 121 (1941) and *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)), but those cases were decided decades before the Supreme Court even created the heightened scrutiny standard, do not involve sex-based classifications, and are inapposite to this case. Here, neither the plaintiffs nor the district court have argued that the government may never make classifications based on sex, but only

made this inferential leap, the State claims that the Supreme Court has used the word “classification” only “casually . . . as shorthand,” and that heightened scrutiny only applies once it is determined that “prohibitions or entitlements” flow from the policy. *Id.* That interpretation is again unsupported by case law or by any dictionary definition of “classification.” *See, e.g., Adams*, 2021 WL 2944396, at *4 (“When state actors *draw distinctions using sex or gender*, the constitutional mandate ‘call[s] for a heightened standard of review.’”) (quoting *City of Cleburne*, 473 U.S. at 440) (emphasis added); *Craig*, 429 U.S. at 197–98 (“[C]lassifications that *distinguish between males and females*” are subject to heightened scrutiny) (emphasis added); *Nev. Dep’t of Human Res.*, 538 U.S. at 730 (“[M]easures that *differentiate on the basis of gender warrant heightened scrutiny.*”) (emphasis added). Indeed, the Supreme Court has explicitly rejected applying a lower level of scrutiny to sex-based classifications that the state defends as neutral or benign. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975) (“[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.”); *Miss. Univ. for Women*, 458 U.S. at 728 (citing *Frontiero*, 411 U.S. at 93) (“The same searching analysis

that they must be subjected to appropriate levels of scrutiny. Just as the tax classification at issue in *F.S. Royster Guano Co.* was subject to rational basis review, the sex-based classification here is subject to heightened scrutiny.

must be made, regardless of whether the State’s objective is to . . . achieve administrative efficiency.”); *Cohen v. Brown Univ.*, 101 F.3d 155, 183 (1st Cir. 1996) (noting that “controlling authority does not distinguish between invidious and benign discrimination in the context of gender-based classifications”). Allowing the State to evade heightened scrutiny by characterizing the Policy as neutral would undermine the purpose of applying higher standards of review to suspect classes and short-circuit the entire doctrine. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (explaining that heightened levels of scrutiny are applied in order to “smoke out” illegitimate uses of suspect classifications).

Even if it were true that heightened scrutiny could only be applied to policies “that result in differential treatment,” Appellant Br. at 30, that criteria is easily met here because the Policy’s sex-based classification *is* differential treatment of transgender people. As Section II, *infra*, explains, Alabama’s Policy causes tangible harm to transgender people by forcing them either to submit to expensive, invasive, and sterilizing surgery that they may not want or be able to undergo, or be misgendered on their driver’s license. Individuals whose sex assigned at birth matches their gender, on the other hand, can access a driver’s license with the correct gender without undergoing any such procedures or inquiry. This constitutes differential treatment under the Equal Protection Clause. *See Grimm*, 972 F.3d at 615 (applying heightened scrutiny to school’s refusal to update transgender student’s

records to reflect his gender and finding equal protection violation because “[u]nlike students whose gender matches their sex assigned at birth, Grimm is unable to obtain a transcript indicating that he is male”). Because the Policy’s sex-based classification forces such misgendering only on transgender people, it is subject to heightened scrutiny.

C. Alabama’s Policy Fails Under Heightened Scrutiny.

Applying heightened scrutiny, the district court easily found that Alabama’s Policy violates equal protection because Alabama failed to provide a sufficiently persuasive justification for the sex-based policy. *Corbitt*, 2021 WL 142282, at *5. To survive heightened scrutiny, sex-based classifications must be “substantially related” to the achievement of “important governmental objectives.” *Craig*, 429 U.S. at 197. “The burden of justification is demanding and it rests entirely on the state.” *Virginia*, 518 U.S. at 533. The State’s purported justifications fail to meet this exacting standard.

First, as the district court properly found, the State does not have an important interest in consistency between the sex designation on birth certificates and driver’s licenses. *Corbitt*, 2021 WL 142282, at *5. “[R]equiring consistency between inaccurate identification documents does not render them more accurate or reliable.” *Zzyym v. Pompeo*, 958 F.3d 1014, 1024 (10th Cir. 2020). At best, this argument collapses into one of administrative convenience, which courts consistently reject

when applying heightened scrutiny. *See Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152 (1980) (“We think, then, that the claimed justification of administrative convenience fails, just as it has in our prior cases.”). Even if this interest was cognizable, Alabama’s Policy is not substantially related to furthering consistency because transgender people may have previously amended their license or birth certificate in a state with no surgical requirement. Alabama accepts the sex designation on other state driver’s licenses and birth certificates, without an inquiry into any surgery the person has had or whether their documents are consistent with each other. “This arbitrariness of the policy means that it does not pass [heightened] scrutiny.” *Adams*, 2021 WL 2944396, at *5.

The district court properly rejected Alabama’s alternative justification that the Policy furthers its interest in being able to physically identify license-holders because it was “hypothesized or invented *post hoc* in response to litigation.” *Corbitt*, 2021 WL 142282, at *9 (quoting *Virginia*, 518 U.S. at 533). A narrow, arbitrary definition of sex based on genitalia in fact undermines the State’s interests in accurate identification, as genitalia are generally covered and other visual sex characteristics may provide a more accurate description. *See Grimm*, 972 F.3d at 622 (“[A]s this case shows, a person’s birth sex is not dispositive of their actual physiology.”). Thus, Alabama is unable to demonstrate a “substantial, accurate

relationship between its sex classification and stated purpose.” *Adams*, 2021 WL 2944396, at *6.

Moreover, Alabama’s Policy would even fail under rational basis review because it is “marked by misconception and prejudice” towards transgender people. *Grimm*, 972 F.3d at 615 (citing *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 73 (2001)). Under any standard of review, equal protection prohibits “classifications that are arbitrary or irrational and those that reflect a bare . . . desire to harm a politically unpopular group.” *Glenn*, 663 F.3d at 1315 (citing *City of Cleburne*, 472 U.S. at 447). “Of course, deriding those who are different—whether due to discomfort or dislike—is not new. But the Constitution’s guarantee of equal protection prohibits the law from countenancing such discrimination.” *Grimm*, 972 F.3d at 627. *Amici* urge this Court to uphold the district court’s proper finding that the Policy cannot survive heightened scrutiny under the Equal Protection Clause.

II. ALABAMA’S POLICY CAUSES SIGNIFICANT HARM TO TRANSGENDER PEOPLE, PARTICULARLY TRANSGENDER PEOPLE OF COLOR.

While the application of heightened scrutiny does not depend upon the consequences of a sex-based classification, *see* Section I.A, *supra*, *amici* also highlight that Alabama’s Policy is far from harmless. To the contrary, the Policy causes significant harm to Plaintiffs and other transgender people, and that harm is

compounded for transgender people of color.⁵ “The consequences of misclassification . . . are extremely high, particularly in the kinds of institutions and systems that have emerged and grown to target and control poor people and people of color, such as criminal punishment systems, public benefits systems, and immigration systems.” Olga Tomchin, *Bodies and Bureaucracy*, 101 Cal. L. Rev. 813, 825 (2013). Incorrect sex designations on driver’s licenses cannot be viewed separately from the systems and situations that require identification. “[M]isclassification intersects with and results in problems regarding housing, education, healthcare, identity documentation and records, employment, . . . public facilities, . . . police profiling, police brutality, and false arrest; sexual harassment and assault; beatings and rapes; firings from jobs; evictions; denials and rejections from caseworkers in social service and welfare agencies; rejections for legal services; and family rejection.” *Id.* Thus, as the district court correctly found, “[t]he injuries caused by Policy Order 63 are severe.” *Corbitt*, 2021 WL 142282, at *2.

⁵ Additionally, the surgery requirement harms transgender people with disabilities, including because people with disabilities experience poverty at twice the rate of people without disabilities. Nat’l Council on Disability, *National Disability Policy: A Progress Report* (2017), https://ncd.gov/sites/default/files/NCD_A%20Progress%20Report_508.pdf. People with certain disabilities may also be turned away by surgical clinics because their disability is, or is perceived to be, a risk factor. *See, e.g.*, Graham Ives et al., *Evaluation of BMI as a Risk Factor for Complications following Gender-affirming Penile Inversion Vaginoplasty*, 7 Plastic Reconstructive Surgery Global Open e2097 (2019).

Carrying a driver's license with an inaccurate gender classification is itself harmful. The stigmatic and dignitary harms of being misgendered on one's identification documents are not hypothetical and have been recognized by this Court. In *Adams*, this Court upheld an award of compensatory damages for a transgender student who, for purposes of the school's bathroom policy, was incorrectly classified by the sex marker on his original enrollment forms, finding that there was "no doubt [the student] suffered harm." 2021 WL 2944396, at *13. This Court acknowledged the medical consensus that "forcing transgender people to live in accordance with the sex assigned to them at birth both fails to change transgender people from who they are and causes significant harm." *Id.* (citations omitted). Just as the school's restrictive and arbitrary definition of sex in *Adams* "heightened the stigma [the student] felt for being transgender," Alabama's Policy too causes significant stigmatic harm. *Id.*; *see also Corbitt*, 2021 WL 142282, at *2 (quoting Plaintiff Darcy Corbitt explaining that carrying an "incorrect ID feels I am not able to be my true self" and is "proclaim[ing] a lie").

Being forced to carry a driver's license with an incorrect sex marker also places transgender people at a heightened risk of violence and harassment. *See* Jody L. Herman et al., UCLA School of Law, The Williams Institute, *Suicide Thoughts and Attempts Among Transgender Adults* 20 (Sept. 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender->

Sep-2019.pdf. Incongruence between a person’s gender presentation and the sex marker on their license exposes them to being “outed” as transgender to whomever they show their license. *Id.* It is well-documented that transgender people “experience violence more often than the general population, including violence that is related to transgender status.” *Id.* Black and Latinx transgender women, in particular, face disproportionately high rates of violence, including fatal violence, due to “the intersections of racism, sexism, homophobia, biphobia, transphobia and unchecked access to guns.” Human Rights Campaign, *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2020*, <https://www.hrc.org/resources/violence-against-the-trans-and-gender-non-conforming-community-in-2020>.⁶ As Congress has considered relevant legislation, “the House Judiciary Committee recognized ‘the extreme bias against gender nonconformity’ and the ‘particularly violent’ crimes perpetrated against transgender persons.” *Grimm*, 972 F.3d at 612 (quoting Kevin M. Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507,

⁶ In 2018, the Human Rights Campaign reported that at least 80% of transgender people killed in the previous five years in the United States were transgender women of color—69% were Black trans women—and that 45% lived in the South. Human Rights Campaign, *A National Epidemic: Fatal Anti-Transgender Violence in America in 2018*, at 62 (2018), https://assets2.hrc.org/files/assets/resources/AntiTransViolence-2018Report-Final.pdf?_ga=2.243619713.563891009.1626694807-385765680.1626443839.

555 (2016)). Experiencing physical attack has long-term mental health consequences for transgender people, as well. As the Williams Institute found, 70% of respondents who had been physically attacked because of their transgender status reported suicidal thoughts and 21% had attempted suicide in the previous year. Herman et al., *Suicide Thoughts and Attempts Among Transgender Adults*, *supra*, at 20.

Given the above context, Alabama's Policy directly increases the risk of violence to transgender people by causing them to be misgendered on their licenses. Indeed, this case demonstrates just that, as Plaintiff Doe was assaulted and nearly killed by her co-workers when they discovered her transgender status as result of this license misgendering. *See Corbitt*, 2021 WL 142282, at *3. The correlation between incongruent identification and risk of violence is well documented. As the Human Rights Campaign has reported, nearly one-third of individuals who have presented an ID with a name or gender that did not match their presentation reported negative experiences, such as being harassed, denied services, and/or attacked. *See Human Rights Campaign, Dismantling a Culture of Violence*, *supra*, at 17. Thus, for transgender people, "ID discrepancies are not just an inconvenience," but "can also threaten their physical safety and overall well-being" and "may lead to discriminatory and potentially dangerous interactions with medical professionals, law enforcement and community members." *Id.* Prohibiting transgender people from

obtaining a driver's license that accurately reflects their sex directly contributes to an increased risk of violence and harassment.

Therefore, by denying transgender people identification that accurately describes their sex, the Policy increases the risk that they will face harm and harassment in other contexts. For example, Alabama's Policy makes mistreatment more likely in the law enforcement context. Among transgender people who interacted with police in the past year and who said officers were aware they were transgender, 58% report facing mistreatment. Human Rights Campaign, *Dismantling a Culture of Violence, supra*, at 16. And due to fear of mistreatment, "[m]any transgender people, and especially transgender people of color, avoid interaction with law enforcement." *Id.*

Incongruent identification also exacerbates employment discrimination for transgender people, who have historically faced devastating levels of discrimination and harassment in the workplace. *See id.* at 12. "These barriers are even higher for Black transgender people, who have double the unemployment rate of all transgender people and four times that of the U.S. general population." *Id.* Alabama's Policy further increases the risks of encountering this discrimination by essentially forcing many transgender people to divulge their transgender status to their employer as they are required to provide identification including for employment eligibility verification forms. Plaintiff Doe was in fact fired after

showing her male-designated driver's license to someone at work who informed her employer that she is transgender. *Corbitt*, 2021 WL 142282, at *3.

The Policy also inflicts harm on transgender Alabamans by limiting access to healthcare—a harm that directly impacts their ability to obtain the required gender-confirmation surgery. In the 2015 U.S. Transgender Survey, 33 percent of transgender people reported at least one negative experience with a healthcare provider related to being transgender, such as inadequate care or refusal of treatment, and 23 percent reported avoiding seeing health care providers for fear of disrespect or mistreatment as a transgender person. *See* Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 96-97 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. Transgender people, particularly transgender people of color, also face disproportionately high rates of poverty and homelessness, undercutting their ability to access expensive medical procedures out of pocket. *See* Human Rights Campaign, *Dismantling a Culture of Violence*, *supra*, at 22.

Alabama's Policy may also have an outsized impact on voting rights, as presenting identification is required to vote in Alabama. Ala. Code 1975 § 17-9-30. An estimated 260,000 transgender people who live in the 35 states with voter ID laws, did not have a form of ID that accurately reflected their name and/or gender identity to use in the 2020 general election. Kathryn O'Neill and Jody L. Herman,

UCLA School of Law, The Williams Institute, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2020 General Election 2* (Feb. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Voter-ID-Feb-2020.pdf>. The lack of access to an accurate photo identification could also chill the exercise of the right to vote and present a barrier to access to the polls for transgender voters.

Moreover, a person's access to sex-segregated services and programs may be impacted by their ability to secure an identification that correctly describes their gender. These contexts may include some "homeless shelters, drug treatment programs, [and] mental health services." Tomchin, *Bodies and Bureaucracy*, at 825.

Given the host of examples provided herein, the significant harms that transgender people, particularly transgender people of color, experience under Alabama's Policy certainly belie the State's characterization of the Policy as a benign classification.

CONCLUSION

For the foregoing reasons and those argued by Plaintiffs-Appellees, *amici* urge this Court to affirm the district court's decision finding that Alabama's Policy violates the Equal Protection Clause.

Dated: August 2, 2021

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CERTIFICATE OF COMPLIANCE

Counsel for *amici curiae* certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B)(I). This brief contains 4,820 words, including all headings, footnotes, and quotations, and excluding the parts of the brief exempted under Fed. R. App. 32(f). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25(d), I certify that on August 2, 2021, I electronically filed this brief using the Court's CM/ECF system, thereby serving all counsel of record.

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