No. 21-10486

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DARCY CORBITT, *et al.*,

Plaintiffs-Appellees

v.

HAL TAYLOR, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the United States as amicus curiae certifies that, in addition to those identified in the briefs filed by plaintiffs-appellees and defendants-appellants, the following persons may have an interest in the outcome of this case:

1. Clarke, Kristen, U.S. Department of Justice, Civil Rights Division, counsel for the United States;
2. Lee, Jason, U.S. Department of Justice, Civil Rights Division, counsel for the United States;
3. Robin-Vergeer, Bonnie I., U.S. Department of Justice, Civil Rights Division, counsel for the United States.

The United States certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

s/ Jason Lee
JASON LEE
Attorney

Date: August 2, 2021

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INTEREST OF THE UNITED STATES

The United States has a strong interest in protecting the rights of individuals who are lesbian, gay, bisexual, transgender, intersex, or otherwise gender nonconforming. The President has issued an Executive Order that recognizes the right of all people to be "treated with respect and dignity" and receive "equal treatment under the law, no matter their gender identity or sexual orientation." Exec. Order No. 13988, § 1, 86 Fed. Reg. 7023 (Jan. 20, 2021). The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

Whether Alabama's policy of requiring transgender individuals to undergo "gender reassignment surgery" before they may amend the sex designation on their driver licenses violates the Equal Protection Clause.[1]

STATEMENT OF THE CASE

1. Policy Order 63

Though not required under State law, Alabama driver licenses include, among other information, a designation of the license holder's sex. Doc. 101, at 25, 32 n.6; Doc. 48-5, at 66.[2] For individuals born in Alabama, the default designation on their driver license is the sex listed on their birth certificate. Doc. 101, at 4-5; Doc. 48-5, at 123.

Transgender individuals who want to amend the sex designation on their Alabama driver licenses must satisfy Policy Order 63. Doc. 101, at 4-5. The Driver License Division of the Alabama Law Enforcement Agency (ALEA) first

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[1] The term "transgender" refers to a person whose gender identity differs from their sex assigned at birth, whereas the term "cisgender" refers to a person whose gender identity is the same as their sex assigned at birth. See *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir.), as amended (Aug. 28, 2020), cert. denied, 2021 WL 2637992 (June 28, 2021).

[2] "Doc. __, at __" refers to the docket entry and page number of documents filed on the district court's docket. Policy Order 63 uses the term "driver license." See Doc. 52-1, at 2.

issued Policy Order 63 in 2012. Doc. 101, at 4. The current version of the policy states, in relevant part:

> It is the policy of the Chief of the Driver License Division that an individual wishing to have the sex changed on their Alabama driver license due to gender reassignment surgery are [sic] required to submit to an Examining office OR the Medical Unit the following:
>
> 1. An amended state certified birth certificate and/or a letter from the physician that performed the reassignment procedure. The letter must be on the physician's letterhead.

Doc. 52-1, at 2.

For transgender people born or previously licensed in Alabama, both types of documentation permitted under Policy Order 63 require them to undergo "gender reassignment surgery." Obtaining an amended Alabama birth certificate requires an "order of a court of competent jurisdiction indicating that the sex of an individual born in [Alabama] has been changed by surgical procedure." Ala. Code § 22-9A-19(d) (2021). Alternatively, if proffering a letter from a physician, the individual must have undergone "gender reassignment surgery." Doc. 52-1, at 2. ALEA takes the position that this requires, at a minimum, "surgery to alter the applicant's genitals" and "suggest[s] it may also require chest surgery," though the district court found that defendants were not "consistent about what surgery or surgeries Policy Order 63 requires" in practice. Doc. 101, at 5, 28; see also Doc. 101, at 28-30.

In limited circumstances, transgender individuals may obtain a driver license sex designation that matches their gender identity without undergoing "gender reassignment surgery." ALEA will accept an amended birth certificate issued by another State, even if that State does not require surgery for amendment. Doc. 101, at 6; see also Doc. 48-5, at 53. Additionally, if persons move to Alabama, not having previously been licensed there, and provide an out-of-state driver license and U.S. Passport that correctly reflect their gender identity, ALEA will accept the sex listed on those documents. Doc. 48-5, at 110-111. These narrow exceptions aside, the upshot of Policy Order 63 is to make the sex designation on Alabama driver licenses changeable only if applicants undergo "gender reassignment surgery," with no non-surgical route available. Doc. 101, at 5-6.

2. Procedural History

Plaintiffs-appellees are transgender women in Alabama who live and present as female. Doc. 101, at 1, 8. Each attempted to obtain an Alabama driver license designating her as "female," but ALEA denied these requests, Doc. 101, at 1-2, citing the need for a letter from their respective physicians stating that they had completed "full sexual reassignment surgery." Doc. 52-36, at 42; see also Doc. 51, at 18 ("the full surgery") (citation omitted); Doc. 52-29, at 46 ("surgery").

Plaintiffs filed suit in the Middle District of Alabama against the Secretary of ALEA and other ALEA officials. Doc. 1; see also Doc. 38 (First Am. Compl.).

They brought four claims under 42 U.S.C. 1983 challenging the constitutionality of Policy Order 63. Doc. 38, at 19-23. As relevant here, plaintiffs allege that the policy violates the Equal Protection Clause. Doc. 38, at 22-23. The parties agreed to submit the case for resolution by the district court via a bench trial based on the parties' summary-judgment briefs and exhibits. Doc. 69, at 1. The court ruled in favor of plaintiffs and held that Policy Order 63 violates the Equal Protection Clause. Doc. 101, at 4.

The district court first considered whether Policy Order 63 was subject to heightened scrutiny. Doc. 101, at 11-14. The court noted that the policy "imposes [a] sex classification" because it "obligates ALEA officials to review a license applicant's birth records and medical documentation, decide what they believe the applicant's sex to be, and determine the contents of the individual's license based on that decision." Doc. 101, at 13. In the court's view, this triggered intermediate scrutiny. See Doc. 101, at 14.

Applying intermediate scrutiny, the district court considered whether Policy Order 63 "'serves important governmental objectives' and [whether] the particular policy it employs is 'substantially related to the achievement of those objectives.'" Doc. 101, at 15 (quoting *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1690 (2017)). Defendants had articulated two governmental interests. First, Policy Order 63 allegedly helps "ensure consistency" between Alabama's requirements

for amending the sex designation on a driver license and a birth certificate. Doc. 101, at 16-17. Second, Policy Order 63 allegedly "'provid[es] an accurate description of the bearer of an Alabama driver license' to make it easier for law enforcement officers to identify people when determining appropriate post-arrest search and placement procedures." Doc. 101, at 17 (quoting Doc. 54, at 10).

Turning first to Alabama's interest in aligning the requirements for amending a driver license and a birth certificate, the district court concluded that the interest was not important. Doc. 101, at 17-25. The court noted that, under Supreme Court case law, "'administrative ease and convenience' is not a sufficiently important justification for a state policy based on sex." Doc. 101, at 21 (quoting *Craig* v. *Boren*, 429 U.S. 190, 198 (1976)). The court found, moreover, that conforming the requirements for amending a driver license to those for amending a birth certificate offered "only the convenience of avoiding the need to gather some additional documentation of sex changes" if, at some point, the sex on a person's driver license is found to differ from that on their birth certificate. Doc. 101, at 21. The court held that avoiding this "occasional burden" was not "an adequate basis for [a] sex-based state policy." Doc. 101, at 23.

The district court further determined that Policy Order 63 did not substantially relate to furtherance of this interest. Doc. 101, at 25-32. The court found insufficient evidence that the policy actually aligned with Alabama's

requirements for amending a birth certificate. ALEA interpreted Policy Order 63 to require both genital and chest surgery, but defendants had proffered no evidence of whether the "surgical procedure" needed for amendment of a birth certificate, Ala. Code § 22-9A-19(d), similarly required genital and chest surgery. Doc. 101, at 26-28.

The district court also pointed to inconsistencies in how ALEA applied Policy Order 63. Doc. 101, at 28-31. While ALEA denied some requests for driver-license amendments because a physician's letter did not say that the applicant had undergone a "complete" surgery, including genital and chest surgery, ALEA granted other applications where this attestation was absent. Doc. 101, at 28-29 (citation omitted). These inconsistencies left the court "convinced" that "there [was] no rhyme or reason" to ALEA's decisions to grant or deny amendment. Doc. 101, at 29-30.

Turning next to Alabama's interest in providing information about the license holder to law enforcement for purposes of post-arrest and booking procedures, the district court found that this interest "fares no better" under intermediate scrutiny. Doc. 101, at 32; see also Doc. 101, at 32-40. The court stated that "[e]nsuring that law enforcement officers apply appropriate booking procedures is important." Doc. 101, at 34. However, the court found that this interest did not "play[] any part in ALEA's calculus when it developed Policy

Order 63." Doc. 101, at 35. Rather, based on the deposition testimony of ALEA's representative under Federal Rule of Civil Procedure 30(b)(6) and defendants' concession in supplemental briefing, the court concluded that "consistency with [the procedure for amending] birth certificates was all ALEA considered." Doc. 101, at 39; see also Doc. 101, at 37-38 (citing Doc. 84, at 4).

Accordingly, the district court ruled that Policy Order 63 violated the Equal Protection Clause and declined to address plaintiffs' remaining claims. Doc. 101, at 3-4, 41-43. The court entered judgment in favor of plaintiffs and enjoined defendants from "failing to issue to [plaintiffs] new driver licenses with female sex designations." Doc. 102, at 1-2. Defendants appealed. Doc. 105, at 1-2.

SUMMARY OF ARGUMENT

The district court correctly held that Policy Order 63 violates the Equal Protection Clause because the policy is subject to, but cannot satisfy the requirements of, intermediate scrutiny. Policy Order 63 requires transgender individuals born or previously licensed in Alabama to undergo "gender reassignment surgery" before they may amend the sex designation on their driver licenses. This constitutes a classification based on sex and transgender status that discriminates against transgender individuals. Therefore, the policy is subject to intermediate scrutiny.

Policy Order 63 fails under intermediate scrutiny because defendants cannot show that the policy serves important governmental objectives and is substantially related to achieving those objectives. Defendants assert two interests: aligning the requirements for amending the sex designation on a driver license and a birth certificate, and providing accurate information about a license holder to law enforcement. Neither interest suffices. Regarding the first interest, defendants do not explain why it is important or how the district court erred in concluding that Policy Order 63 does not substantially relate to this interest, especially given ALEA's arbitrary enforcement of the policy. Regarding the second interest, defendants cannot show that the court clearly erred in finding it to be a post-hoc justification. Even if they could, the record evinces no substantial relationship between Policy Order 63 and furtherance of this interest.

The district court's ruling should be affirmed.[3]

ARGUMENT

POLICY ORDER 63 VIOLATES THE EQUAL PROTECTION CLAUSE

A. Intermediate Scrutiny Applies To Policy Order 63

The district court was correct to apply intermediate scrutiny because Policy Order 63 classifies based on sex and transgender status in a manner that discriminates against transgender individuals. The policy facially classifies based

[3] The United States takes no position on plaintiffs' other claims.

on sex for two reasons: it uses an individual's sex assigned at birth to determine whether "gender reassignment surgery" will be required to amend a driver license to match the holder's gender identity, and it discriminates against transgender persons because of their nonconformity with gender stereotypes. Additionally, Policy Order 63 classifies based on transgender status because it restricts access to a process—obtaining a driver license with a sex designation that differs from the person's sex assigned at birth—that is specifically relevant to transgender individuals. Either way, Policy Order 63 singles out transgender persons for differential treatment and causes them affirmative harm.

1. Policy Order 63 Facially Classifies Based On Sex

Under the Equal Protection Clause, legislative classifications based on sex are subject to "a heightened standard of review." *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Termed "intermediate scrutiny," *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988), this level of scrutiny "[focuses] on the differential treatment for denial of opportunity for which relief is sought." *United States* v. *Virginia*, 518 U.S. 515, 532-533 (1996). Policy Order 63 constitutes a facial sex classification warranting intermediate scrutiny because it treats people differently based on their sex assigned at birth and discriminates based on nonconformity with gender stereotypes.

Policy Order 63 prevents transgender individuals born or previously licensed in Alabama from amending the sex designation on their driver license unless they undergo "gender reassignment surgery." Doc. 101, at 4-6. Changing a sex designation requires one of two types of documentation. A person may present an amended birth certificate with a different sex designation. Doc. 52-1, at 2. Obtaining an amended birth certificate in Alabama requires a court order indicating that the person's sex "has been changed by surgical procedure." Ala. Code § 22-9A-19(d). Alternatively, under ALEA's interpretation of Policy Order 63, a person can submit a letter from their physician stating that the applicant has undergone "complete" surgery, which consists of "at least" genital surgery and possibly also chest surgery, though ALEA inconsistently applies both requirements. Doc. 101, at 5, 27-30 (citation omitted).

Policy Order 63 facially classifies based on sex because these requirements apply differently depending on a person's sex assigned at birth and whether that sex accords with their gender identity. While cisgender individuals, by default, receive a driver license that matches their gender identity, Policy Order 63 bars transgender individuals from obtaining the same unless they undergo "gender reassignment surgery"—a requirement that carries "severe" consequences. Doc. 101, at 4-10.

Notably, multiple appellate courts have concluded that school bathroom policies that restrict access based on an individual's sex assigned at birth represent facial sex classifications, warranting heightened scrutiny. The Fourth and Seventh Circuits concluded that where a school district "decides which bathroom a student may use based upon the sex listed on the student's birth certificate," that "policy is inherently based upon a sex-classification." *Whitaker by Whitaker* v. *Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017); accord *Grimm* v. *Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir.), as amended (Aug. 28, 2020), cert. denied, 2021 WL 2637992 (June 28, 2021). This Court also applied heightened scrutiny when reviewing a school bathroom policy because it "categorize[d] on the basis of sex." *Adams* v. *School Bd. of St. Johns Cnty.*, No. 18-13592, 2021 WL 2944396, at *4 (11th Cir. July 14, 2021).

Comparable logic applies here. Policy Order 63 denies transgender persons the opportunity to amend the sex designation on their driver licenses unless they undergo "gender reassignment surgery." But if a cisgender person's driver license contains an incorrect sex designation that differs from their gender identity, Policy Order 63 does not require that person to undergo surgery before permitting amendment. See Doc. 101, at 5. Thus, like the school bathroom policies in

Whitaker, *Grimm*, and *Adams*, Policy Order 63 constitutes a sex-based classification that treats people differently based on their sex assigned at birth.[4]

In addition, Policy Order 63 discriminates based on nonconformity with gender stereotypes. As this Court noted in *Glenn* v. *Brumby*, 663 F.3d 1312 (11th Cir. 2011), "[a] person is defined as transgender precisely because of the perception that [their] behavior transgresses gender stereotypes." *Id.* at 1316. And "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination," which requires "heightened scrutiny under the Equal Protection Clause." *Id.* at 1317, 1319.

Policy Order 63 discriminates against transgender individuals based on their nonconformity with gender stereotypes by assuming that a person is "male" or "female" only if their genitalia and chest correspond to what is typical for male and female individuals. Indeed, it bars transgender persons from amending the sex on their driver licenses if their genitalia or chest has not been surgically changed to match defendants' conception of what male and female individuals should look like. In short, Policy Order 63 burdens those whose genitalia or chest does not

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[4] Defendants argue that Policy Order 63 is not a facial sex classification because it "applies to all 'individual[s] wishing to have the sex changed on their Alabama driver license due to gender reassignment surgery.'" State Br. 25 (quoting Doc. 52-1, at 2). The pertinent question, however, is not whether a policy *applies* to both sexes, but rather, whether sex operates as a "ground for differential treatment," as it does here. *Adams*, 2021 WL 2944396, at *4 (quoting *City of Cleburne*, 473 U.S. at 440).

conform to conventional expectations about the gender with which they identify. See *Glenn*, 663 F.3d at 1320 (noting that "governmental acts based upon gender stereotypes—which presume that men and women's appearance and behavior will be determined by their sex—must be subjected to heightened scrutiny").

2. Policy Order 63 Also Classifies Based On Transgender Status

Alternatively, intermediate scrutiny applies because transgender individuals represent a quasi-suspect class under the Equal Protection Clause, and Policy Order 63 applies to them as a class.

a. Transgender Individuals Constitute A Quasi-Suspect Class

The Supreme Court has analyzed four factors to determine whether a group constitutes a "suspect" or "quasi-suspect" class, such that classifications targeting the group warrant heightened scrutiny: (1) whether the class historically has been subjected to discrimination, see *Lyng* v. *Castillo*, 477 U.S. 635, 638 (1986); (2) whether the class has a defining characteristic that "frequently bears no relation to [the] ability to perform or contribute to society," *City of Cleburne*, 473 U.S. at 440-441 (citation omitted); (3) whether the class has "obvious, immutable, or distinguishing characteristics that define them as a discrete group," *Lyng*, 477 U.S. at 638; and (4) whether the class is a minority lacking political power, see *Bowen* v. *Gilliard*, 483 U.S. 587, 602 (1987).

As the Fourth Circuit and numerous district courts have concluded, analysis of these factors demonstrates that "transgender people constitute at least a quasi-suspect class." *Grimm*, 972 F.3d at 610 (collecting cases); see also, *e.g.*, *Karnoski* v. *Trump*, 926 F.3d 1180, 1202 (9th Cir. 2019) (holding that intermediate scrutiny applied to a policy barring transgender persons from serving in the military, while noting that "appropriate military deference" is due in that analysis).[5]

First, "[t]here is no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity, including high rates of violence and discrimination in education, employment, housing, and healthcare access." *Grimm*, 972 F.3d at 611 (citation omitted). For example, the 2015 U.S. Transgender Survey (USTS Report),[6] which represents "the largest nationwide study of transgender discrimination," *Grimm*, 972 F.3d at 597, found that 33% of respondents who had seen a healthcare provider in the previous year reported at least one negative experience because of their real or perceived gender identity, USTS Report at 96. The report also found that 77% of transgender

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[5] The Tenth Circuit in *Brown* v. *Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995), held that a transgender plaintiff "[was] not a member of a protected class." However, that decision "reluctantly followed a since-overruled Ninth Circuit opinion." *Grimm*, 972 F.3d at 611.

[6] Sandy E. James et al., Nat'l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* (Dec. 2016), available at https://perma.cc/FC9M-4QZJ.

respondents who had a job the previous year "hid their gender identity at work, quit their job, or took other actions to avoid discrimination." *Id.* at 154.

Second, the characteristic that defines the transgender community—having a gender identity that differs from one's sex assigned at birth—bears no relation to transgender individuals' ability to perform or contribute to society. In *Grimm*, the Fourth Circuit specifically found that "[b]eing transgender bears no such relation," pointing out that "[s]eventeen of our foremost medical, mental health, and public health organizations agree that being transgender 'implies no impairment in judgment, stability, reliability, or general social or vocational capabilities.'" 972 F.3d at 612 (citation omitted).

Third, there is no reasonable dispute that transgender persons share "obvious, immutable, or distinguishing characteristics that define them as a discrete group." *Bowen,* 483 U.S. at 602 (quoting *Lyng*, 477 U.S. at 638). Transgender individuals "'consistently, persistently, and insistently' express a gender" that differs from their sex assigned at birth. *Grimm*, 972 F.3d at 594 (citation omitted). This "is not a choice," but rather, "is as natural and immutable as being cisgender." *Id.* at 612-613.

Finally, transgender individuals constitute a minority that lacks political power. Transgender people comprise a small percentage of the United States population, estimated at 0.6% of adults. *Grimm*, 972 F.3d at 613. But even taking

this low percentage into account, transgender individuals still are "underrepresented in every branch of government" and "constitute a minority that has not yet been able to meaningfully vindicate their rights through the political process." *Ibid.* (citing data).

These factors confirm that transgender individuals constitute a quasi-suspect class. Consequently, classifications based on transgender status are subject to intermediate scrutiny. See *Grimm*, 972 F.3d at 613.

b. Policy Order 63 Restricts Access To A Process Specifically Relevant To Transgender Individuals

Policy Order 63 classifies based on transgender status because it imposes onerous requirements on a process—obtaining a driver license with a sex designation that differs from the person's sex assigned at birth—that transgender individuals, in particular, need and use. Such a process has little relevance for cisgender individuals because, by definition, the sex designation on their driver licenses matches their gender identity. The same is not true for transgender persons, for whom obtaining a driver license that accords with their gender identity is necessary to avoid "a serious risk of violence and hostility whenever they show their licenses." Doc. 101, at 8.

Policy Order 63 classifies based on transgender status even though it does not explicitly mention transgender people. As the Supreme Court has recognized, "[s]ome activities may be such an irrational object of disfavor that, if they are

targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993). For example, in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), both the majority and Justice O'Connor in a concurring opinion suggested that Texas's law criminalizing "deviate sexual intercourse," Tex. Penal Code Ann. § 21.06(a) (2003), operated to target gay people. The majority noted that when a State criminalizes conduct typically associated with gay people, "that declaration in and of itself is an invitation to subject [gay] persons to discrimination." *Lawrence*, 539 U.S. at 575. Justice O'Connor added that because "the conduct targeted by [Texas's] law is conduct that is closely correlated with being [gay] * * * [the] law is targeted at more than conduct * * * [and] is instead directed toward gay persons as a class." *Id*. at 583 (O'Connor, J., concurring). The "activity" at issue here—changing the sex designation on a driver license—is something that is almost exclusive to transgender people. Thus, just as "[a] tax on wearing yarmulkes is a tax on Jews," *Bray*, 506 U.S. at 270, so, too, does Policy Order 63 classify based on transgender status.

3. Policy Order 63 Subjects Transgender Individuals To Differential Treatment

Policy Order 63 does more than classify based on sex and transgender status: it also subjects transgender people to differential treatment. Specifically, the

policy discriminates against transgender people by effectively forcing them (but not cisgender individuals) to use driver licenses that are inconsistent with their gender identity, singling them out for adverse treatment and subjecting them to harm.

As the Supreme Court noted in *Bostock* v. *Clayton County, Georgia*, "[t]o 'discriminate against' a person * * * mean[s] treating that individual worse than others who are similarly situated." 140 S. Ct. 1731, 1740 (2020). When analyzing discrimination against a transgender individual, the relevant comparator is a cisgender person with the same gender identity. See *id.* at 1741 (comparing a transgender person who "identifies as a female" with "an otherwise identical employee who was identified as female at birth"). Here, subject to narrow exceptions, Policy Order 63 requires a transgender individual to undergo surgery before obtaining the type of driver license that a cisgender individual with the same gender identity receives automatically—one that accords with their gender identity. This amounts to discrimination, as Policy Order 63 imposes a "difference[] in treatment that injure[s]" transgender people. *Id.* at 1753 (quoting *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53, 59 (2006)).

The district court rightly found that these injuries are "severe." Doc. 101, at 7. Unless a transgender individual wants and is willing to undergo, is capable of paying for, and is eligible for some form of "gender reassignment surgery," Policy

Order 63 forces them to choose between carrying an identification document that contradicts their gender identity or forgoing a driver license altogether.

Reliance on a driver license that lists a transgender person's sex assigned at birth results in "pain and risk." Doc. 101, at 7. On a personal level, there is dignitary harm in being denied a license that accurately reflects one's identity. Cf. *Wall-DeSousa* v. *Florida Dep't of Highway Safety & Motor Vehicles*, 691 F. App'x 584, 591 (11th Cir. 2017) (noting "harm in being denied the opportunity to obtain a driver's license in [one's] preferred legal name" where a state agency denied an application for a driver license reflecting the last name of a newly married same-sex couple). Indeed, for a transgender person, carrying a license that reflects their sex assigned at birth can feel like "proclaim[ing] a lie." Doc. 101, at 7 (alteration in original and citation omitted). On a broader level, because transgender persons already are "more likely to be the victim of violent crimes," *Grimm*, 972 F.3d at 612, using such a license "is dangerous," Doc. 101, at 8. "One-quarter of all transgender people who carry identification documents that do not match their gender have been harassed after showing those documents," and "[o]ne in 50 * * * has been physically attacked after doing so." Doc. 101, at 9; see also Doc. 52-45, at 6-8.

Forcing transgender individuals to forgo driver licenses is also untenable. As the Supreme Court noted decades ago, "[o]nce licenses are issued * * * their

continued possession may become essential in the pursuit of a livelihood." *Bell* v. *Burson*, 402 U.S. 535, 539 (1971); see also Doc. 52-29, at 37 (noting practical difficulties in traveling to and from work without a driver license). More recently, this Court acknowledged that "the loss of a driver's license would make a number of basic daily functions of modern life appreciably more difficult for the ordinary person." *Wall-DeSousa*, 691 F. App'x at 591. Accordingly, the "option" of going without a driver license is hardly an option at all.

B. Policy Order 63 Fails Under Intermediate Scrutiny

Under intermediate scrutiny, a State must show that a classification "serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Virginia*, 518 U.S. at 533 (quoting *Mississippi Univ. for Women* v. *Hogan*, 458 U.S. 718, 724 (1982)). This justification must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *Ibid.* It also must "be reasonable, not arbitrary." *Adams*, 2021 WL 2944396, at *4 (quoting *Reed* v. *Reed*, 404 U.S. 71, 76 (1971)).

Defendants rely on two purported interests: (1) aligning the requirements for amending the sex designation on a driver license with those for doing so on a birth certificate, and (2) providing information to law enforcement personnel to aid in identifying individuals and making decisions about post-arrest and booking

procedures. State Br. 13, 29. As the district court correctly ruled, neither interest satisfies intermediate scrutiny.

1. Defendants' Alleged Interest In Aligning The Processes For Amending Driver Licenses And Birth Certificates Is Insufficient

Defendants fail to demonstrate that their asserted interest in consistency between the requirements for amending driver licenses and birth certificates is important or that Policy Order 63 is substantially related to furtherance of that interest. See Doc. 101, at 17-32.

a. Defendants Have Not Demonstrated That This Interest Is Important

None of defendants' arguments establish that this interest is important. The district court found that Alabama's "interest in conformity with the rules for birth certificates provides only the convenience of avoiding the need to gather some additional documentation of sex changes on infrequent occasions." Doc. 101, at 21. The court deemed this interest insufficiently important because any administrative "inconvenience of disuniformity between the two [sets of requirements]" was "minimal." Doc. 101, at 23, 25.

Defendants do not explain why this conclusion is wrong. To the contrary, they admit that "[a]dministrative convenience constitutes some * * * of the State's interest," but other than the conclusory statement that "[t]his interest is important," defendants provide no argument for why. State Br. 28.

Instead, defendants cite purported interests in "objectively defining sex" and complying with the Real ID Act of 2005, Pub. L. No. 109-13, § 202(b)(3), 119 Stat. 312. State Br. 28-29. But defendants neither asserted these interests below nor showed that they motivated ALEA to adopt Policy Order 63. See Doc. 54, at 46-48. Consequently, defendants cannot rely on these interests now. See *Circuitronix, LLC* v. *Kinwong Elec. (Hong Kong) Co.*, 993 F.3d 1299, 1308 (11th Cir. 2021) ("[a]bsent extraordinary circumstances," a court will not consider for the first time on appeal "legal theories and arguments not raised squarely before the district court" (citation omitted)).

Even if defendants could rely on these newly articulated interests, it is hardly clear that either interest is important or even factually sound. Alabama law neither requires that driver licenses include a sex designation, nor mandates a particular definition of sex. Doc. 101, at 25, 32 n.6. The same is true of the REAL ID Act and its implementing regulations, which, as defendants acknowledge, simply require that state identification documents list a person's "gender." See Pub. L. No. 109-13, § 202(b)(3); 6 C.F.R. 37.17; State Br. 29.[7] Accordingly, any

[7] Policy Order 63 contrasts starkly with the U.S. Department of State's approach in issuing U.S. Passports, which permits a person to self-select the gender to be printed on the document. See *Selecting your Gender Marker*, U.S. Dep't of State, available at https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gender-marker.html (last visited July 30, 2021).

obligation ALEA perceived for it to align the requirements for amending the sex designation on driver licenses and birth certificates is entirely self-imposed.

b. In Any Event, Policy Order 63 Does Not Substantially Relate To This Interest

Defendants also fail to identify any error in the district court's finding that Policy Order 63 does not substantially serve their interest in aligning the two document-amendment processes. As the court pointed out, defendants offered "no evidence whatsoever" of whether the "surgical procedure" required for amending a birth certificate includes genital and chest surgery, as Policy Order 63 purportedly does. See Doc. 101, at 27; see also Ala. Code § 22-9A-19(d). The court also noted significant inconsistencies in how ALEA enforced Policy Order 63, concluding that "there [was] no rhyme or reason" to ALEA's actual practices. Doc. 101, at 29-30; see also Doc. 101, at 26-31. Defendants ignore these portions of the court's analysis. This failure "to show a substantial, accurate relationship between [the policy's] sex classification and its stated purpose" is fatal. *Adams*, 2021 WL 2944396, at *6.

Defendants counter that Policy Order 63 substantially relates to advancing their asserted interests because "an estimated 0.3% of adults are transgender," and thus Policy Order 63 "accurately define[s] [Alabama] citizens' sexes on their

driver's licenses about 99.7% of the time." State Br. 31.[8] This argument "misapprehends intermediate scrutiny," *Adams*, 2021 WL 2944396, at *11, because it does not address whether Policy Order 63 actually furthers defendants' stated interest. Rather, defendants' statistic simply speaks to how often sex assigned at birth accurately operates as a proxy for gender identity. This Court rejected a similar contention in *Adams* that the school district there was 99.96% accurate in determining students' sex for purposes of its school bathroom policy. See *id.* at *12 ("The relevant inquiry in this case is not what percentage of St. Johns students are transgender, but whether the challenged policy furthers the important goal of student privacy.").

In addition to being arbitrary in its operation, Policy Order 63 is arbitrary in its reach. The policy generally requires transgender individuals to undergo "gender reassignment surgery" before they may amend the sex designation on their driver licenses. Doc. 101, at 5. Nevertheless, transgender persons who obtain an amended birth certificate from a State that has no surgical requirement for amendment may, under Policy Order 63, use that birth certificate to amend the sex designation on their Alabama driver license. Doc. 101, at 6; Doc. 48-5, at 53. And the policy does not apply to transgender people who move to Alabama and have

[8] More recent estimates suggest that 0.6% of adults are transgender. See *Grimm*, 972 F.3d at 594 (citation omitted).

not previously been licensed there—these individuals may use an out-of-state driver license and U.S. Passport to obtain a license that accurately reflects their gender identity. Doc. 48-5, at 110-111; note 7, *supra* (gender on passport may be self-selected without surgery). Thus, under Policy Order 63, some transgender individuals are subject to the policy's requirements "while others are beyond its reach"; "[the] arbitrariness of the policy means it does not pass intermediate scrutiny." *Adams*, 2021 WL 2944396, at *5-6.

2. Defendants' Alleged Interest In Providing Information To Law Enforcement Also Does Not Suffice

Second, as the district court determined, defendants' reliance on their alleged interest in "providing law-enforcement officers with the information they need to accurately identify individuals" and make decisions about "arrests, medical emergencies, booking and retaining, interviewing and questioning," State Br. 29 (quoting Doc. 48-5, at 16), also fails. The court did not clearly err in finding that this is a post-hoc justification and thus insufficient as a matter of law. But even if the Court were to consider this justification, Policy Order 63 is not substantially related to achieving this interest. Doc. 101, at 34-41.

a. The District Court Did Not Clearly Err In Finding That This Is A Post-Hoc Rationalization

In considering this interest, the district court agreed that "[e]nsuring that law enforcement officers apply appropriate booking procedures is important." Doc.

101, at 34. The court declined, however, to consider whether Policy Order 63 is substantially related to this interest, determining it to be a post-hoc justification. Doc. 101, at 34-41. The court reviewed testimony by Deena Pregno, the chief of ALEA's driver license division and ALEA's designated representative under Federal Rule of Civil Procedure 30(b)(6), as well as defendants' supplemental briefing. Doc. 101, at 35-38. This review left the court with "little doubt" that ALEA did not adopt Policy Order 63 to "help[] officers decide on proper arrest and booking procedures." Doc. 101, at 36.

This finding was not clear error. See *Bellitto* v. *Snipes*, 935 F.3d 1192, 1197 (11th Cir. 2019) (reviewing a district court's factual findings for clear error). When asked in her deposition about the considerations that motivated ALEA's adoption of Policy Order 63, Pregno replied, "[w]hat the state requires for amended birth certificates." Doc. 48-5, at 45. When asked if there were "any other considerations," she responded, "[n]ot that I'm aware of." Doc. 48-5, at 45. And when specifically asked, regarding Policy Order 63's creation, whether "ALEA consider[ed] the impact of th[e] policy on arrest and booking procedures," Pregno answered, "I don't—I'm not sure if they did or not." Doc. 48-5, at 44-45.

Defendants contend that the district court committed clear error, but they cannot identify a single affirmative statement by Pregno establishing that providing accurate identifying information to law enforcement prompted adoption of Policy

Order 63. Lacking such a statement, defendants rely on the "context" of the testimony summarized above, State Br. 34, but that "context" evinces no clear error. In the testimony cited by defendants, Pregno discussed ALEA's general interest as "a law enforcement agency" in providing accurate information to law enforcement officers and correctional agencies. Doc. 48-5, at 43-44; see also State Br. 32-33. But immediately following that discussion, Pregno confessed that she was "not sure" if ALEA actually considered this interest when it created the policy later codified as Policy Order 63. Doc. 48-5, at 44-45. Pregno's testimony, thus, provides no "definite and firm conviction that a mistake has been committed." *Bellitto*, 935 F.3d at 1197 (citation omitted).

b. Policy Order 63 Also Does Not Substantially Relate To This Interest

Even if this Court were to consider defendants' post-hoc law-enforcement interest, and even assuming that the interest were important, it still would fail under intermediate scrutiny because Policy Order 63 is not substantially related to furthering this interest.

In her deposition, Pregno suggested that the policy aids law enforcement personnel in identifying individuals. Doc. 48-5, at 55-56, 64-67. But as the district court pointed out, "licenses denoting the license-holder's genital status are wholly unhelpful" for identification purposes because, as Pregno acknowledged, "officers

don't typically check a person's genitals" during traffic stops or arrests. Doc. 101, at 40.

Nor is there a record basis for finding a substantial relationship between Policy Order 63 and assisting law enforcement officers in selecting appropriate arrest and booking procedures. Pregno suggested that the policy helps law enforcement personnel determine who should search a detainee or be present for questioning, how a search should be conducted, and in which holding cell a detainee should be placed. Doc. 48-5, at 44, 64-67, 73-74, 86. But the record contains no information about these procedures, apart from Pregno's brief descriptions of them. And Pregno undermined her own testimony on this point by admitting that she was not "able to testify about [the] arrests, search, or booking procedures" that might be used by a county Sheriff's department or municipal police department. Doc. 48-5, at 121.

Moreover, it is hardly clear why communicating information about transgender detainees and inmates *via their driver licenses* would be necessary. Under regulations implementing the Prison Rape Elimination Act of 2003 (PREA), 34 U.S.C. 30301 *et seq.*, law enforcement personnel obtain information about a person's genital status through, for example, "conversations with [an] inmate" or review of the inmate's medical records. 28 C.F.R. 115.15(e); see also 28 C.F.R. 115.115(d). PREA regulations also require prisons and jails to make placement

decisions for transgender inmates on a case-by-case basis to ensure inmate health and safety, so genital status in not determinative in any event. 28 C.F.R. 115.42(c). Since all these determinations, of course, can be made for individuals who lack a driver license, having the information on a license is unnecessary.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE:

(1) complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 6,498 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

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s/ Jason Lee
JASON LEE
Attorney

Date: August 2, 2021

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2021, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that the following participant in this case will be served by certified First-Class mail:

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All other participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

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s/ Jason Lee
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