No. 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 OF THE STATE DEFENDANTS-APPELLANTS

Steve Marshall
Attorney General
Edmund G. LaCour Jr.
Solicitor General
Thomas A. Wilson
Deputy Solicitor General
Brad A. Chynoweth
Assistant Chief Deputy Attorney General
James W. Davis
Winfield J. Sinclair
Misty S. Fairbanks Messick
Assistant Attorneys General

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300

Counsel for the State Defendants

May 26, 2021

AMENDED CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case:

1. Alabama Attorney General's Office;
2. *Alabama Center for Law and Liberty;
3. Alabama Law Enforcement Agency;
4. *Alabama Policy Institute;
5. American Civil Liberties Union Foundation;
6. *American Civil Liberties Union Foundation of Alabama;
7. American Civil Liberties Union of Alabama;
8. Archer, Jon;
9. Arkles, Gabriel;
10. Barnes, Meridith H.;
11. *Barnes, Noel S.;
12. Boone, Brock;
13. Borden, Hon. Gray M.;
14. Chynoweth, Brad A.;
15. Clark, Destiny;
16. *Clark, Matthew J.;

17. Cooper, Leslie J.;
18. Corbitt, Darcy;
19. Davis, James W.;
20. Doe, Jane (*see* DE41);
21. Doe, John (*see* DE10);
22. Doyle, Hon. Stephen M.;
23. Eastman, Jeannie;
24. *Esseks, James D.;
25. Faulks, LaTisha Gotell;
26. *LaCour Jr., Edmund G.
27. Marshall, Randall C.;
28. Marshall, Hon. Steve;
29. Messick, Misty S. Fairbanks;
30. Pregno, Deena;
31. Robinson, Michael W.;
32. Saxe, Rose;
33. Sinclair, Winfield J.;
34. Taylor, Hon. Hal;
35. Thompson, Hon. Myron H.;
36. Transgender Legal Defense and Education Fund;

37. Ward, Charles;

38. Welborn, Kaitlin; and,

39. *Wilson, Thomas A.

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

Respectfully submitted this 26th day of May, 2021.

Steve Marshall
Attorney General
s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Solicitor General
Thomas A. Wilson
Deputy Solicitor General
Brad A. Chynoweth
Assistant Chief Deputy Attorney General
James W. Davis
Winfield J. Sinclair
Misty S. Fairbanks Messick
Assistant Attorneys General

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300

Counsel for the State Defendants

STATEMENT REGARDING ORAL ARGUMENT

This case involves at least five constitutional theories—Plaintiffs brought four, and the district court, *sua sponte*, offered its own. The court ultimately held that the federal Constitution prohibits the State of Alabama from objectively defining sex on its State-issued driver's licenses. Its reasoning relied on an unprecedented interpretation of the Fourteenth Amendment's Equal Protection Clause, which no party had argued below. Moreover, some of the claims Plaintiffs did press implicate unsettled areas of law. The State Defendants thus believe oral argument will benefit the Court.

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JURISDICTIONAL STATEMENT

The District Court properly exercised jurisdiction over Plaintiffs' constitutional claims pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1343, DE101:2,[1] and entered final judgment for Plaintiffs on January 15, 2021, DE102. The State Defendants[2] (hereinafter "the State") timely appealed on February 12, 2021. DE105. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

[1] "DE" refers to docket entries in the district court. The pin-cited page numbers follow the colon, corresponding to CM/ECF pagination.

[2] Alabama Law Enforcement Agency (ALEA) Secretary Hal Taylor, Department Director Colonel Charles Ward, Chief of the Driver License Division Deena Pregno, and Driver License Supervisor Jeannie Eastman were originally the State Defendants in this official capacity suit. *See* DE38:1, 3-4. Chief Jon Archer is now Chief of the Driver License Division, and is substituted for Chief Pregno, *see* Fed. R. App. P. 43(c).

STATEMENT OF THE ISSUES

The State of Alabama defines sex on its driver's licenses based on objective physical characteristics that nearly always correspond with a person's sex. Plaintiffs demand that the State issue each of them a driver's license that defines sex based on each Plaintiff's gender identity. The issues presented are whether the State's policy of objectively defining sex on its driver's licenses violates the Equal Protection Clause, the First Amendment, Plaintiffs' "Constitutional Right to Informational Privacy," or Plaintiffs' "Liberty Interest in Refusing Unwanted Medical Treatment."

The case also presents the issue whether the statute of limitations bars claims by Plaintiffs Corbitt and Clark.

STATEMENT OF THE CASE

This case is about whether sovereign States may objectively define the words they use. The State of Alabama declined to adopt Plaintiffs' definition of sex on its driver's licenses, so Plaintiffs sued. They put forward four novel theories as to why the Constitution compels the State to adopt their definition.

The district court invented a fifth. Rather than address Plaintiffs' arguments, the court "analyze[d] Policy Order 63 as a sex-based classification not because it harms transgender people but because it classifies driver license applicants by sex." DE101:10. The court first reasoned that a State need not *treat* individuals unequally to offend the Constitution's Equal Protection Clause; "classification itself" is

enough. *Id.* at 12. The court then also deemed the Policy treatment, but declined to determine whether the State's actions had treated Plaintiffs unequally. Finally, applying heightened scrutiny, the court misconstrued the State's justifications for its practices and held that objectively defining sex on driver's licenses violates the Constitution.

The district court erred. This Court should reverse.

I. The State's Objective Definition of Sex.

Since statehood, Alabama has subscribed to the general proposition that individuals born with penises are male and individuals born with vaginas are female. This foundational understanding of sex informs every sex-conscious law, policy, and institution the State oversees. When the State incarcerates its citizens, for example, it generally separates men from women. Its rationale for doing so involves historically accepted observations about the implications of men and women's biological differences. As then-Professor Ruth Bader Ginsburg explained, "Separate places to disrobe, sleep, [and] perform personal bodily functions are permitted, in some situations required, by regard for individual privacy." Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, Wash. Post, Apr. 7, 1975. Ensuring its citizens' privacy, though a compelling interest to be sure, is not the State's only concern. "[S]afety concerns arising from the biological difference between males and females" have also led societies "throughout history … to separate public

restrooms, locker rooms, and shower facilities." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709, 734 (4th Cir. 2016) (Niemeyer, J., concurring in part and dissenting in part), *vacated on other grounds*, 137 S. Ct. 1239 (2017). Indeed, such separation "dates back as far as written history will take us." W. Burlette Carter, *Sexism in the "Bathroom Debates*," 37 Yale L. & Pol'y Rev. 227, 287-88 (2018); *see also id.* at 261 ("[B]etween 117 and 138 A.D., the emperor Hadrian issued an edict requiring separation of the sexes in Roman public baths.").

These policies and institutions necessarily assume the State's ability to objectively define sex. That is, sex-conscious policies and institutions can rely on the terms "man" and "woman" or "male" and "female" because these terms convey meaning; they signify the presence or absence of specific physical characteristics. Defining the words "man" and "woman" to refer instead to subjective states of mind (*e.g.*, defining "woman" as "anyone who identifies as a woman") jeopardizes the objective meaning the words themselves convey.

Were the State forced to define the word "woman" with reference not to objective physicality but instead to subjective impressions, the State would have to create new language to explain who has what physical characteristics just to preserve its people's interests in privacy and safety. The Constitution does not require States to adopt new words, let alone create them.

II. The Origin and Enactment of Policy Order 63.

In 1992, the State codified a narrow exception to its general understanding of sex. The State permitted individuals to amend the sex designation on their birth certificates by providing "a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and that the name of the individual has been changed." Ala. Code §22-9A-19(d) .

The State's approach to driver's licenses later followed suit. As a general matter, the State requires that driver's licenses "bear thereon a distinguishing number assigned to the licensee and a color photograph of the licensee, the name, birthdate, address, and a description of the licensee." Ala. Code §32-6-6; *see also* DE48-5:5. The "description" includes sex. DE48-5:19, 24. To gather this information in the first instance, the State accepts, among other documents, a valid State birth certificate. *See Id.* at 30, 31; DE48-7:24. Indeed, a birth certificate is the "default" for establishing a licensee's sex. DE48-7:25. Because the sex designation on an individual's driver's license frequently reflects the sex designation on the individual's birth certificate, in many cases driver's licenses necessarily incorporate birth certificates' sex-designation-change policy. *See* DE48-5:11.

At least as early as 2004, the Alabama Department of Public Safety, which oversaw, among other things, the issuance of State driver's licenses and changes

thereto, *see* DE48-7:5-6, 14, 27, 41; *see also* DE48-7 at 48, 54, 82, adopted an unwritten practice that likewise tied changing sex designation on a license to whether the licensee had completed sex-change surgery, *see* DE48-10:81 ("In essence, the sex on the driver's license will only be changed upon successful completion of surgery and with corresponding documentation from the attending physician.").[3] Over time, the unwritten practice evolved to typically require not only documentation from a physician, but also an amended birth certificate. *See* DE48-5:9-10.

As requests from licensees to change the sex identification on their licenses increased, the State decided to formalize its approach. *See* DE48-5:9, 13. The Department of Public Safety enacted Driver License Policy Order No. 63 ("Policy Order 63," or the "Policy") in 2012. *Id.* Policy Order 63 provided: "[I]ndividuals wishing to have their sex changed on their Alabama license due to gender reassignment surgery are required to submit to the Medical Unit an amended birth certificate along with documentation on letterhead from the physician that performed the sexual reassignment surgery stating the surgery has been completed." DE48-10:9. The State based these requirements on the analogous birth-certificate provision. DE48-5:13-14, 33-34; *see also* Ala. Code §22-9A-19(d). Policy Order 63

[3] The Alabama Department of Public Safety became part of ALEA in 2013. *See* DE101:4 n.2.

did not establish the State's definition of sex; it simply formalized a preexisting accommodation which had long served the State and its people.

The Policy was amended in July 2015, DE48-5:9; DE48-10:5, and then again in late 2015 or early 2016, DE48-5:9. The current policy states:

> 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 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.

DE48-10:10. Thus, instead of requiring both an amended birth certificate and a physician's letter to change a license's sex designation, the amended Policy required either one or the other. *See id.* The amendment thus upheld the State's interest in aligning its driver's-license and birth-certificate policies while at the same time "allow[ing] more latitude" for the State's citizens seeking sex-designation changes. DE48-5:10. This iteration of the Policy remains in effect today. *See* DE48-5:9.

Including sex as part of the description of the licensee is consistent with the REAL ID Act of 2005, which requires that State-issued driver's licenses include sex/gender. 6 C.F.R. §37.17. Beginning in 2023, individuals will need REAL-ID-Act-compliant driver's licenses to board airplanes. *See REAL ID*, Dep't Homeland Sec., https://www.dhs.gov/real-id (last visited May 26, 2021) ("On May 3, 2023,

U.S. travelers must be REAL ID compliant to board domestic flights and access certain federal facilities."). To ensure its citizens are able to board planes, the State has continued to include information about the license-holder's sex on the license.

III. Plaintiffs' Claims.

Plaintiffs Darcy Corbitt, Destiny Clark, and Jane Doe were born with male genitalia and identify as transgender women. *See* DE38:13-19. Clark in April 2015 (DE48-1:6) and Doe thereafter sought to change the sex identifications on their State-issued driver's licenses. DE38:1-18. In 2013, Corbitt obtained a name change and a new driver's license from the State that reflected the name change. DE48-2:8-9. In 2017, Corbitt sought a new Alabama driver's license with a sex designation different from the one that had been on Corbitt's original Alabama license. *Id.* at 13-14. Because none of the Plaintiffs satisfied Policy Order 63's criteria, the State denied their requests. DE38:13-19.

Plaintiffs sued in February 2018, alleging the State's refusal to adopt their definition of sex on State-issued driver's licenses violated the Constitution in four discrete ways. *See* DE1. *First*, Plaintiffs claimed "Policy Order 63 Violates Plaintiffs' Right to Privacy." DE38:19. More specifically, Plaintiffs defined the asserted right as a "constitutional right to informational privacy," DE58:27, which they located in the Fourteenth Amendment's Due Process Clause, *see* DE38:19

Second, Plaintiffs alleged "Policy Order 63 Violates Plaintiffs' Liberty Interest in Refusing Unwanted Treatment." DE38:20-21. The Policy, they claimed, effectively "force[s]" them to undertake sex-reassignment surgery because the alternative—"endanger[ing] their health and safety with an incorrect driver's license," DE38:20—is no choice at all. Like their informational privacy right, Plaintiffs found this "liberty interest" in the Due Process Clause. *Id.*

Third, Plaintiffs insisted that "Policy Order 63 Violates the First Amendment." DE38:21-22. This is so, they argued, because the Policy "forc[es] them to identify themselves to each person who sees their license by a gender that conflicts with their core identity." DE38:22. Because Corbitt did not, at the time, carry an Alabama driver's license, Plaintiffs alleged the Policy violated Corbitt's First Amendment rights because Corbitt could not receive a license without "stating something is true that she knows to be false." *Id.*

And finally, Plaintiffs argued that "Policy Order 63 Violates Equal Protection." DE38:22-23. Specifically, they claimed the Policy leads to "differential treatment of transgender people," DE38:23, was "put in place for the improper purpose of disadvantaging a specific class," *i.e.*, transgender people, *id.*, and is "founded on animus toward transgender Alabam[i]ans," *id.*

As for relief, though Plaintiffs purported to assert an interest in merely "refrain[ing] from speaking," DE38:22, they demanded that the State issue them

driver's licenses that adhered to their definition of sex, rather than to the State's. *Id.* at 24.

IV. The Decision Below.

Before addressing the merits, the court "dispose[d] of" the State's statute-of-limitations defense. DE101:16 n.4. The court explained it "[was] not persuaded" by the State's affirmative defense, "at least as to Corbitt," and concluded it could proceed to the merits and a grant of as-applied relief to all Plaintiffs because there was no challenge to Doe's ability to pursue injunctive relief. *Id.*

On the merits, the district court declined to rule on any of the four theories Plaintiffs argued. Rather than determining whether the Policy discriminated against "transgender Alabam[i]ans," DE38:23, the court reasoned that "[a]ll state actions that classify people by sex" demand heightened scrutiny, and that "classification itself"—not any associated legal treatment or discrimination—"is the trigger," DE101:12. That is, any State conception of sex that distinguishes between individuals (defining some as men and others as women, for example) is inherently suspect, and requires federal courts to apply heightened scrutiny to any such "classification itself." *Id*.

Thus, the court subjected Policy Order 63 to heightened scrutiny. *Id.* at 17. First, the court assessed the State's "important government interests in maintaining consistency between the sex designation on an Alabama birth certificate and an

Alabama driver license." *Id.* at 17-18. The court understood that, in the State's view, applying a consistent definition of sex served the "important government interest in using identity documents to provide physical descriptions of individuals and … [in] providing a uniform understanding of 'sex' on a driver license for law enforcement." *Id.* at 18. It even acknowledged the State's "serious interests" in defining sex in terms of genitalia on birth certificates. *Id.* at 24. But the court drew a distinction between the State's desire to define sex on birth certificates and the same desire to define sex on driver's licenses, concluding the State could not "export the interests underlying one presumably lawful sex classification," *i.e.*, defining sex on birth certificates, to "prop up" the same classification on driver's licenses. *Id.* at 25. The court cast the State's interests in formalizing its standard sex-designation practice and consistently defining sex as a singular "interest … in the occasional reduction of paperwork." *Id.* at 31. The court then held that the State had failed to produce sufficient evidence to support that interest and that the Policy could not survive heightened scrutiny. *Id.* at 31-32.

The court next "turn[ed] to [the State's] alternative asserted interest in facilitating identification by law enforcement." *Id.* at 32. The State, through the Rule 30(b)(6) deposition of ALEA Chief Deena Pregno, explained the Alabama Law Enforcement Agency's law enforcement interests in defining sex in terms of genitalia as follows:

> ALEA is a law enforcement agency. Although we … produce a driver's license, it's also an official identity document. And as law enforcement we want to ensure the information that is on the card is correct, and so we want to make sure the information we're providing to law enforcement officers, correctional agencies, emergency responders, when you question someone—when a male officer questions a female subject normally they have more than themselves in a room so they can't allege that there's no impropriety going on. So that's why we wanted to make sure we were in line on the handling of the subject as a law enforcement professional. If you detain someone or arrest them as far as booking procedures and things like that, it's upon us to let them know the right procedures.

DE48-5:13; *see also id.* at 16 (describing importance of giving law enforcement officers and first responders "the information they need to make decisions on how to handle this person for arrest procedures, medical, emergency procedures, booking and retaining procedures, interviewing and questioning procedures, and as well as maintaining the actual physical identifiers of that person").

The court focused on the State's law enforcement interests in the context of searching and booking arrestees, *see* DE101:32-34, and agreed that the portion of these interests relating to "appropriate booking procedures" was "important," DE101:34. But the court declared these interests to be "invented *post hoc* in response to litigation," *id.*, because Chief Pregno also explained that the State's requirements for "amended birth certificates" contributed to Policy Order 63's enactment, *id.* at 35-36. The court thus excluded the State's law enforcement interests from its intermediate-scrutiny analysis, reiterating its view that the State's only interest in

Policy Order 63 was "one of marginal administrative convenience." *Id.* at 40. On these grounds, the court reasoned the Policy could not survive heightened scrutiny.

The court then entered an order "declar[ing]" the Policy unconstitutional and "enjoin[ing]" the State Defendants "from failing to issue to [Plaintiffs] new driver licenses with female sex designations." DE102:1-2.

The State appealed.

STANDARD OF REVIEW

This case comes to this Court following a bench trial on the papers. DE101:2-3; *see also Fla. Int'l Univ. Bd. of Tr. v. Fla. Nat'l Univ., Inc.*, 830 F.3d 1242, 1252-55 (11th Cir. 2016). This Court reviews legal determinations *de novo, United States v. Scott*, 263 F.3d 1270, 1271 (11th Cir. 2001), and generally reviews findings of fact for "clear error," *Albra v. Advan, Inc.*, 490 F.3d 826, 828–29 (11th Cir. 2007). However, "[a] finding based on an erroneous legal test is invalid; it cannot be sustained under the 'clearly erroneous' rule," *June Medical Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2160 (2020) (Alito, J., dissenting).

SUMMARY OF THE ARGUMENT

Plaintiffs adopted a scattershot approach to their constitutional theories and the district court introduced its own theory, but each teed up the same fundamental question: Whether the State may objectively define sex on the driver's licenses it

issues. As Plaintiffs and the district court would have it, the federal Constitution forbids Alabama from doing so. They are wrong on all counts.

None of the theories offered below even implicate the Constitution's protections, let alone outweigh the State's interests in objectively defining sex on State driver's licenses. The State's approach does not violate the Equal Protection Clause—whether looked at through the lens of sex or transgender status—for at least three reasons. First, the State's classification of someone's sex, without accompanying treatment based on that classification, does not implicate the Equal Protection Clause. Second, the Policy is facially neutral—applying to all individuals regardless of sex or gender identity. It does not target transgender persons, and Plaintiffs failed to prove animus underlay the Policy's implementation. Third, the State's Policy is justified by its important interests in (a) objectively defining sex in order to produce an accurate document for law enforcement purposes and (b) doing so consistently with how the State handles changes to birth certificates.

Nor does the Policy infringe on Plaintiffs' First Amendment rights. Indeed, this case presents precisely the opposite issue: If the sex designation on an Alabama driver's license constitutes speech, it is government speech, and Plaintiffs, by judicial fiat, seek to infringe on the State's right to speak for itself. And even if Plaintiffs' speech were at issue, that speech is plainly incident to the State's

requirement that its citizens carry and present driver's licenses in specific circumstances.

Plaintiffs derive their last two claims—a "constitutional right to informational privacy" and a "liberty interest in refusing unwanted medical treatment"—from the Fourteenth Amendment's Due Process Clause The Constitution does not provide the protections Plaintiffs assert. But, even if it did, both claims fail. This Court has expressly rejected the argument that any "right to informational privacy" applies to information like driver's licenses, and the Supreme Court has denied similar claims. And a right to "refus[e] unwanted medical treatment" plays no role in this case. The State has never recommended, let alone compelled, Plaintiffs to undergo any medical treatment; conflating the Policy's requirements with State-mandated surgery cannot carry the day.

Finally, the statute of limitations bars the claims of two of the three Plaintiffs. The district court erred in concluding that Clark's and Corbitt's claims could proceed because Doe pressed similar claims that were not time-barred.

For all these reasons, this Court should reverse.

ARGUMENT

I. Policy Order 63 Does Not Violate the Equal Protection Clause.

Policy Order 63 reflects the State's approach to classifying men and women. *See* DE52-1. The district court thought that was enough to trigger heightened

scrutiny but no legal benefits or prohibitions flow from the Policy. The Policy thus bears no resemblance to the statutes or policies at issue in the equal protection jurisprudence on which Plaintiffs and the district court relied. There is a fundamental distinction between the State (a) simply classifying persons for identification purposes and (b) treating them differently based on a classification. *See* DE101:12-15.

States retain the right to determine which individuals fall within various classifications—even classifications which are constitutionally suspect in the context of discriminatory State action. Indeed, a State cannot implement race- or sex-conscious policies without the right to first determine what "race" or "sex" means, and thus to whom the policies apply. The State's interest in classification is therefore critical to the State's self-governance, for it necessarily informs every subsequent law or ordinance applying the classification. *Plyler v. Doe*, 457 U.S. 202, 216 (1982). While laws that use these classifications to selectively benefit or inhibit classes of individuals may be subject to heightened scrutiny, the classifications themselves are not.

Plaintiffs' equal protection theory was that they were harmed by Policy Order 63 because they are transgender, but this theory too fails to trigger heightened scrutiny. Policy Order 63 is facially neutral and applies to anyone who wants to change the sex designation on her driver's license, irrespective of transgender status.

To trigger intermediate scrutiny, Plaintiffs therefore bore the burden of proving that "invidious gender-based discrimination" animated the Policy's implementation. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979). They failed to do so; indeed, the record reflects the State's desire to ease the burdens on those seeking to change the sex designation on their driver's licenses. Thus, as with *Feeney*'s veteran's preference, only rational basis applies. *Id.* at 260, 271-74, 281.

Even if Policy Order 63 were subject to heightened scrutiny, it would easily pass constitutional muster. The "governmental objective" of a State to define categories and thus control the scope and application of its own laws goes far beyond "important." *United States v. Virginia*, 518 U.S. 515, 545 (1996). The State has important interests in providing law enforcement with the accurate information they need to appropriately conduct searches, arrests, and other law enforcement functions, and in being consistent with the birth certificate policy.

A. Classification Itself, Without More, Does Not Implicate the Equal Protection Clause.

The district court's analysis turned on the idea that classifying men and women was sufficient to trigger heightened scrutiny, even where the classification did not result in differential treatment. This was error.

The Equal Protection Clause of the Fourteenth Amendment prohibits any State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. The Clause applies where governments treat

similarly situated groups differently. *See, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 682-83 (1973). Where a government action classifies people into a specific group *and* tethers legal treatment to that classification, an equal-protection claim arises. *See, e.g.*, *Virginia*, 518 U.S. at 532-33 (sex-discrimination jurisprudence "focus[es]" on "differential treatment").

But where no legal treatment accompanies the threshold classification, the Equal Protection Clause is silent. Indeed, such a scenario necessarily raises the question, "Protection from what?" Although the Equal Protection Clause provides a bulwark against unlawful discrimination, as the Supreme Court has explained time and again, "[c]lassification is not discrimination." *Caskey Baking Co. v. Virginia*, 313 U.S. 117, 121 (1941); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) ("[T]he 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the states from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard.").

Many cases casually refer to "classification" as shorthand for class-based application of legal prohibitions or entitlements. *See, e.g.*, *Virginia*, 518 U.S. at 546 (generally referring to university policy excluding women as "gender-defined classification"); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-25 (referring to university policy excluding men as "gender-based classification"); *Regents of*

Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978) (referring to racial affirmative-action program as "classification based on race and ethnic background"). These cases make clear that the equal protection was triggered because the challenged policies tied benefits or exclusions to these classifications; classification was a step toward differential treatment. The classification itself was not constitutionally suspect. It thus appears that the district court here is the first court to hold that "classification itself is the trigger" for heightened scrutiny. DE101:12.

That approach was both novel and wrong. Indeed, even in cases where classifications led directly to government benefits, some courts have applied rational basis to the *classification* itself, even as they recognized that *treatment* based on a racial classification would be subject to greater scrutiny. In *Jana-Rock Construction, Inc. v. New York Department of Economic Development*, for example, Rocco Luiere owned a construction company and was "the son of a Spanish mother whose parents were born in Spain," but he was not considered Hispanic for purposes of New York's affirmative-action program for minority-owned businesses. 438 F.3d 195, 199 (2d Cir. 2006). Lueire did not "challenge the constitutional propriety of New York's race-based affirmative action program," but only the State's decision not to classify him as Hispanic for purposes of the program. *Id.* at 200, 205. The Second Circuit explained that strict scrutiny applied "to ensure that the government's choice to use racial classifications [was] justified," but that "the contours of the specific racial

classification that the government chooses" required only rational justification. *Id.* at 210. As the court explained, "[t]he purpose of [strict scrutiny] is to ensure that the government's choice to use racial classifications is justified, not to ensure that the contours of the specific racial classification that the government chooses to use are in every particular correct." *Id.* [4] Indeed, it would be "difficult to imagine what a 'correct' racial classification would be." *Id.*

Even so, the district court reasoned that "[g]overnment agencies collecting demographic data routinely ask people to self-report their race," lest the government raise "constitutional concerns" by applying some external standard. *Id.* at 13. But

[4] This Court's decision in *Peightal v. Metropolitan Dade County*, is not to the contrary. 26 F.3d 1545 (11th Cir. 1994). That case involved a white male who challenged Dade County's affirmative action program after he was not hired for a position as a firefighter. *Id.* at 1548. Like the *Jana-Rock* plaintiffs, Peightal challenged the government's definition of "Hispanic." But, importantly, unlike the *Jana-Rock* plaintiffs, Peightal alleged the definition was too broad and that the whole program therefore was unconstitutional. *Id.* at 1559 ("Peightal contends that the Plan is nevertheless constitutionally flawed because of its definition of 'Hispanic.'"). Thus, to consider this programmatic "over-inclusiveness" challenge, the Court applied heightened scrutiny to the county's definition of "Hispanic." And, notably, one of the reasons the program was not overbroad was that the county itself verified whether applicants self-identifying as Hispanic had "strong visible indications of cultural and linguistic identification with the group." *Id.* at 1559-60. In any event, because the Court held the definition survived narrow tailoring, *id.* at 1558-61, the level of scrutiny had no bearing on the Court's decision and does not constitute binding precedent. *See, e.g.*, *United States v. Caraballo-Martinez*, 866 F.3d 1233, 1244 (11th Cir. 2017) ("[D]icta is defined as those portions of an opinion that are not necessary to deciding the case then before us.") (internal quotation marks omitted).

this factual premise is false. For example, States and the federal government routinely place people in racial categories whenever they implement affirmative-action programs, conduct censuses, or provide identifying information to law enforcement. Consider, for example, the U.S. Department of Transportation's Disadvantaged Business Enterprise program, which provides funds for States to distribute to "economically disadvantaged individuals," Pub. L. No. 114-94 §1101, and expressly presumes certain enumerated races are "disadvantaged," 49 C.F.R. §26.5(2); 49 C.F.R. 26.67(a)(1). DOT's legislative scheme requires States to determine which applicants fall into which racial classifications. *See* 49 C.F.R. §26.61. And on this score, States vary wildly. *Compare, e.g.*, Conn. Gen. Stat. §32-9n (excluding people of Hispanic origin from class of "Black Americans") *with* Fla. Stat. §288.703(4)(a) (including in class of "African American" anyone "having origins in any of the black racial groups of the African Diaspora, regardless of cultural origin"); *see also Jana-Rock*, 438 F.3d at 200 ("The federal and state programs have different definitions of the term 'Hispanic.'").

It follows then that forcing States to justify classifications themselves under heightened scrutiny would sound the death knell for numerous State actions relying on objective definitions of suspect classes—from affirmative-action programs to censuses. So too with law enforcement's classifications on everything from Amber

Alerts to driver's licenses. The State's definition of sex cannot conceivably require greater scrutiny than the rational basis attendant to decisions about who is what race.

And, of course, the State's decision to define sex by genitalia easily survives rational basis. Beyond affirming the State's paramount interest in defining the terms underpinning its own law, defining sex according to genitalia aids the State's interests by giving law enforcement officers and first responders "the information they need to make decisions on how to handle this person for arrest procedures, medical, emergency procedures, booking and retaining procedures, interviewing and questioning procedures, and as well as maintaining the actual physical identifiers of that person." DE48-5:16. When booking and retaining individuals "in[] a holding cell," for example, the State "want[s] to know that information" regarding those individuals' genitalia "is accurate." *Id.* at 24.

The district court ignored all of this. Despite this Court's admonition that "in *sua sponte* amending a plaintiff's claim … the court may create the impression that it has become the plaintiff's advocate," *Miccosukee Tribe of Indians of Fla. v. United States*, 716 F.3d 535, 559 (11th Cir. 2013), the court created and sided with an argument no party had advanced. Under the court's novel approach, intermediate scrutiny applies to "classification itself," DE101:12, and the State's interests in defining sex were insufficiently important to justify the harms Plaintiffs alleged. The

court confidently noted that "the difficult question here is not whether intermediate scrutiny applies, but whether Policy Order 63 survives such scrutiny." *Id.* at 14.

But the court gave the game away in its first and only attempt to support its novel and flawed holding. Unable to garner any precedent suggesting that the Equal Protection Clause applies heightened scrutiny to "classification itself," DE101:12, the court cited a solo concurrence in a case addressing whether a court could require Missouri to remedy racial discrimination in schools through salary increases and remedial-education programs, *id.* (citing *Missouri v. Jenkins*, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring)). Justice Thomas recognized the Equal Protection "principle that the government must *treat* citizens as individuals, and not as members of racial, ethnic, or religious groups." *Id.* at 120-21 (emphasis added). He, no doubt, would recognize the difference between race-based treatment (racially segregating schools) and defining sex by genitalia (classification for identification purposes).

The district court then attempted to bolster its unsupported conclusion with a parade of horribles that follows when States get to define things. *See* DE101:13-14. The court's reasoning evinces significant factual and legal misunderstandings that go to the heart of its decision. The court insisted, for example, that "it would be apparent that [a State defining racial categories] raised constitutional concerns," for such a scheme would produce a scenario in which governments "trac[e] family lineages to decide who is white and who is black." *Id.* at 13-14. But thankfully,

assured the court, this "troubling" practice no longer occurs: "Government agencies collecting demographic data routinely ask people to self-report their race." *Id.* at 13.

As explained above, the court's factual premise, like its legal analysis, is patently wrong. Governments enforce State-determined definitions of race all the time, and directly tie benefits to those determinations. *See, e.g.*, Va. Code. Ann. §2.2-1604 (defining "African American" for purposes of affirmative-action program as "a person having origins in any of the original peoples of Africa"). And even where governments do "ask people to self-report their race," DE101:13, those governments may still validate the self-reporting and even punish those who check the wrong boxes. *See, e.g.*, 13 U.S.C. §221(b) (federal crime to lie about race on census). States and the federal government alike retain the right to "decide who is white and who is black." DE101:14; *see also Peightal*, 26 F.3d at 1559 (noting that "[t]he investigatory procedures utilized by the affirmative action office operated as a check to the self-identification procedure" for determining who was "Hispanic").

Equally fatal to its analysis, the district court's logic lacks any limiting principle. By the court's lights, the State will bear the burden of proving—under heightened scrutiny—the important or compelling interests of every definitional decision relating to protected classes. The court's rationale would, for example, compel the State to prove that a binary conception of sex contributes to an "important interest," and that binarily defining sex is "substantially related" to that interest.

What is more, apparently millennia of history will not pass muster. *See, e.g.*, *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1312 (11th Cir. 2020) ("Separating bathrooms based on sex dates back as far as written history will take us.") (Pryor, C.J., dissenting) *petition for rehearing en banc filed* Aug. 28, 2020.

Race would present an even bigger problem. To take just one example, would the State satisfy strict scrutiny if its definition of "African American" denied that classification to Egyptians or Sudanese? *See* Memorandum from Albert E. Fontenot, Jr., Assoc. Dir. for Decennial Census Programs, U.S. Dep't of Commerce (Jan. 26, 2018), https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018_02.pdf (for purposes of U.S. Census Bureau, a "person having origins in … the Middle East[] or North Africa" is "White"). And surely the State does not have to rely solely on someone's self-designation before placing them in a racial category. *See Peightal*, 26 F.3d at 1560.

In sum, heightened scrutiny applies when the State relies on suspect classifications to dole out discriminatory treatment, but that same scrutiny does not apply to the mere classification itself. The district court's contrary position was error and constitutes an independent ground for reversal. *See, e.g.*, *Forsyth Cnty. v. U.S. Army Corps of Eng'rs*, 633 F.3d 1032, 1039 (11th Cir. 2011).

B. Plaintiffs' Theory Grounded in Transgender Status Fails to Trigger Heightened Scrutiny.

The equal protection theory Plaintiffs actually advanced was based on their transgender status. Under this theory, the court was required to determine whether Policy Order 63 is discriminatory or neutral on its face. *See Feeney*, 442 U.S. at 271-74. Where a policy facially discriminates against a suspect class, heightened scrutiny generally applies. *See, e.g.*, *Virginia*, 518 U.S. at 533-34. But where a policy is facially neutral, the plaintiff challenging the policy bears the burden of proving "the adverse effect reflects invidious gender-based discrimination." *Feeney*, 442 U.S. at 274; *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 265 (1977) ("Proof of ... discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). Where there is no discriminatory intent, heightened scrutiny is not triggered and only rational basis applies. *Feeney*, 442 U.S. at 260, 271-74, 281.

Policy Order 63 does not limit its application whatsoever, let alone on the basis of sex. *See* DE52-1. Rather, the Policy applies to all "individual[s] wishing to have the sex changed on their Alabama driver license due to gender reassignment surgery." *Id*. If men transition to women, they must submit an updated birth certificate or a physician's letter to the State; women transitioning to men face precisely the same requirement. Plaintiffs did not allege otherwise, and bore the burden of proving the Policy "reflects invidious gender-based discrimination."

Feeney, 442 U.S. at 274. Likewise, the Policy applies to persons who are transgender and those who want their sex designation changed for any other reason as well. Moreover, it reflects the opposite of animus. The record demonstrates that the State enacted Policy Order 63 to increase its "latitude" and help individuals—man or woman, transgender or not—"get what they want" on their driver's licenses. DE48-5:14.

Plaintiffs insist the Policy is "directed solely at transgender people." DE38:23. But the Policy is facially neutral toward transgenderism, never once mentioning the classification. *See* DE52-1. Some courts have incorrectly assumed similar policies necessarily apply only to transgender individuals, and Plaintiffs sought to import that error here. *See, e.g.*, *Morris v. Pompeo*, 2020 WL 6875208, at *7 (D. Nev. Nov. 23, 2020) ("Any person who has undergone a 'gender transition' to a new gender is, by definition, transgender."). This view, however, ignores those individuals who seek to "de-transition" to their previous gender identities—to whom the Policy equally applies. According to Plaintiffs, "[t]ransgender people are people who have a gender identity different from their assigned sex at birth." DE38:7. And if "gender identity is innate" and "every person has a gender identity … which cannot be altered voluntarily," DE38:7 (internal quotations omitted), individuals who undergo sex-reassignment and later seek to de-transition remain their original gender despite their altered presentation. So, when those individuals who have undergone sex-

reassignment surgery later realize they are in fact their original gender and wish to revert the sex on their driver's licenses to reflect this reality, they must follow the Policy just as any transgender individual would. The Policy equally applies to those who are intersex, and to those who want to change their sex designation for any other reason.

Even assuming the Policy disparately impacts transgender individuals, because it is facially neutral, Plaintiffs were required to prove animus to trigger heightened scrutiny, and they failed to do so. *See Feeney*, 442 U.S. at 274; *cf. Adams*, 968 F.3d at 1296 (explaining school policy was facially discriminatory because its reference to "transgender students" "single[d] out transgender students for differential treatment"). Instead, they simply asserted that they met their burden because "[n]o reasonable factfinder would conclude that Defendants did not intend Policy Order 63 to function in exactly that way because of Defendants' views about sex and transgender people." DE58:39. This conclusory statement is a far cry from the proof required to support their claim. *See Feeney*, 442 U.S. at 274.

C. Policy Order 63 Survives Heightened Scrutiny.

For the reasons discussed above, Policy Order 63 should only be subject to rational basis review. Nevertheless, it easily survives intermediate scrutiny. Under intermediate scrutiny, the State must prove the Policy "serves important governmental objectives." *Virginia*, 518 U.S. at 533. These objectives must be

"genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* Second, the State must prove that "the discriminatory means employed are substantially related to the achievement of those objectives." *Id*. (internal quotation marks omitted).[5]

Policy Order 63 implicates several important State objectives. At a fundamental level, the State has interest in objectively defining sex; by having the sex-designation-change procedures for both driver's licenses birth certificates turn on changes to physical characteristics, Policy Order 63 promotes the State's interests in consistently defining sex. *See* DE48-5:13 ("[T]he [P]olicy was established based on the state statute for changing the gender on a birth certificate."); *see also* Ala. Code §22-9A-19(d). Administrative convenience constitutes some, but not nearly all, of the State's interest in defining the terms it uses. Defining sex necessarily affects the scope of numerous sex-conscious laws and policies. This interest is important.

[5] The district court misconstrued intermediate scrutiny's first inquiry to require "an 'exceedingly persuasive justification.'" DE101:24. But "[t]hat phrase is best confined, as it was first used, as an observation on the difficulty of meeting the applicable test, not as a formulation of the test itself." *Virginia*, 518 U.S. at 559 (Rehnquist, C.J., concurring in the judgment). The relevant test is, as it has always been, whether the sex-based classification "bear[s] a close and substantial relationship to important governmental objectives." *Feeney*, 442 U.S. at 273; *see also Virginia*, 518 U.S. at 533.

The federal government also recognizes the importance in accuracy of government issued identity documents. The 2005 REAL ID Act requires gender as well as a photograph of the licensee, 6 C.F.R. §37.17(c), on any REAL ID-compliant identification, which will be needed "to board domestic flights and access certain federal facilities," *see REAL ID*, Dep't Homeland Sec., https://www.dhs.gov/real-id (last visited May 26, 2021). *See also* DE48-5:15. Alabama has a significant interest in providing its citizens with licenses that will let them board flights, and certainly no less an interest in accurately defining sex on these licenses.

Policy Order 63 also serves the State's important interest in providing law-enforcement officers with the information they need to accurately identify individuals. As the State's expert in correctional administration explained, in the law enforcement context accurate identification relates to, among other things, "arrest, detention, identification of missing persons or crime suspects, and the provision of medical treatment." DE48-10:62-63. The Policy gives law enforcement personnel and first responders "the information they need to make decisions" about arrests, medical emergencies, booking and retaining, interviewing and questioning. DE48-5:16. The Policy thus furthers these "important governmental objectives." *Virginia*, 518 U.S. at 533.

Indeed, this Court has recently acknowledged that introducing individuals with penises into communities of individuals with vaginas amplifies the risk of rape

and violence against the latter category—especially in the law-enforcement and correctional context. This is one reason why States have separate prisons for men and women. And this is why the Court reversed a district court's qualified-immunity grant to officers who, believing a woman was a transgender man, had placed the woman in a men's prison during pre-trial custody. *See De Veloz v. Miami-Dade Cty.*, 756 F. App'x 869 (11th Cir. 2018). No party disputed that "placing a female in the general population of a male detention facility created an extreme condition and posed an unreasonable risk of serious harm to the female's future health or safety." *Id.* at 877. Nor could they have; it is "abundantly clear … that housing a biological female alongside 40 male inmates poses an outrageous risk that she will be harassed, assaulted, raped, or even murdered." *Id.* at 877; *see also* DE48-9:29 (State's expert referring to sex segregation in prison, explaining "there is a certain level of sexual violence that would occur out there that we need to be cognizant of"); *see also id.* (noting, in addition to violence, improperly segregating prison population "could have females saying, you know, I feel unduly embarrassed and my privacy rights have been intruded upon. You can have males do the same thing. There's nothing to say you couldn't have males do it"). That the State wants to reduce the potential for "harass[ment], assault[], rape[], or even murder[]" and violations of its citizens' privacy rights are, at a minimum, "important."

The Policy substantially relates to these important interests. Plaintiffs assert "an estimated 0.3% of adults are transgender." DE52-46:2. By Plaintiffs' measure, the State's Policy therefore enables it to accurately define its citizens' sexes on their driver's licenses about 99.7% of the time. This virtually perfect result easily satisfies intermediate scrutiny. *See, e.g.*, *Nguyen v. Immigr. & Naturalization Serv.*, 533 U.S. 53, 70 (2001) ("None of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance.").

The district court gave short shrift to the State's interests in definitional consistency and misread the record to avoid addressing the underlying law enforcement interests the State's approach advances. The State highlighted that "maintain[ing] consistency between the information on an Alabama birth certificate and a driver license" was "one of [the] interests" Policy Order 63 supports. *See* DE54:11. The district court recast the State's interest as "the occasional reduction of paperwork they achieve by maintaining uniformity between" the sex-designation-change procedures for birth certificates and those for driver's licenses. DE101:31. But the State has an important interest in being able to define the terms it uses and to do so consistently across these often related forms of State identification.

Addressing the State's goal of providing law enforcement with "the information they need" to do their jobs, DE48-5:16, the court partly agreed such

interests were hypothetically "important" but ultimately determined the interests were "invented *post hoc* in response to litigation." DE101:34 (quoting *Virginia*, 518 U.S. at 533). The court reached its conclusion by misconstruing the State's interests and misreading the State's testimony.

ALEA Chief Deena Pregno, in a Rule 30(b)(6) deposition, testified about (i) the law enforcement interests underlying Policy Order 63 and (ii) the origins of the Policy. These are separate concepts. According to Chief Pregno's testimony, the Alabama Department of Public Safety (which was later merged into ALEA) followed an unwritten sex-identification-change practice which required proof of an amended birth certificate and proper documentation from a physician. *See* DE48-5:9-10. She explained the Department codified this practice into Policy Order 63 in 2012, *id.* at 9, 13, and that around 2015 the newly-formed ALEA amended the Policy to require only one document or the other in an effort to "allow more latitude" to those seeking sex-designation changes, *id.* at 9.

Plaintiffs focused several lines of questioning on the unwritten policy's evolution into Policy Order 63. *Id.* at 12-13. Chief Pregno explained part of the impetus for the Policy was to align ALEA's procedures with the State statute for changing sex on a birth certificate. *Id.* at 13. Describing the principal benefits of sex identification on driver's licenses from a law enforcement perspective, she reiterated that "ALEA is a law enforcement agency" and that driver's licenses are "official

identity document[s]" that serve law enforcement officers, first responders, and agencies' shared interests in obtaining accurate sex-designation information about individuals. *Id.* This information, she explained, allows these State actors to apply the "right procedures" during "detain[ment]," "arrest," "booking procedures," and "things like that" more generally. *Id.* at 13. Chief Pregno's explanations complement the State's interrogatory responses. *See* DE48-10:62-63. Taken together, these statements unequivocally demonstrate that law enforcement interests have been integral to the State's decision to identify sex on driver's licenses and to define sex in terms of physical characteristics, both of which the Policy necessarily implicates.

The district court ignored Chief Pregno's on-point statement and the State's interrogatory responses, stripping testimony from its context to conclude the State did not "develop[] Policy Order 63 … [to] help[] officers decide on proper arrest and booking procedures." DE101:36. The court's formulation of the State's law-enforcement interests reaffirms the court's broader misunderstanding. The Policy itself was not a referendum on whether to include sex designations on driver's licenses, let alone on how to define sex; the Policy simply formalized an accommodation to the baseline approach. And even if the court had intended to attack the State's law-enforcement-related interests in accurately defining sex on its licenses, it still misconstrued these interests; while "proper arrest and booking procedures" are themselves sufficiently important to satisfy intermediate scrutiny,

they are, as the State made clear, only components of the State's broader law-enforcement interests. *See* DE48-10:62-63; DE48-5:13.

Equally detrimental to its conclusion was the district court's misinterpretation of the State's testimony. For example, the court (at DE101:36) quotes the following question-and-answer from Chief Pregno's deposition as evidence of a rift between law enforcement's interests and the Policy's rationale:

> Q: So just sticking again just to the time before the creation of this policy, in the course of creating this policy, what considerations went into ALEA's decision to adopt this policy as opposed to some other.
>
> A: What the state requires for amended birth certificates.

DE48-5:14. The context surrounding this statement—which the court completely omitted—is essential. This line of questioning did not relate to why the State decided to align sex designations with physical characteristics in the first place. Instead, it was about what form the Policy—which is an accommodation—would take. That is, why the State decided that physical characteristics are controlling and need to change if the sex designation is going to change, "as opposed to some other" policy. Thus, Chief Pregno's response did not address or negate the State's interest in designating sex based on physical characteristics, let alone suggest the State incorporated the birth certificate procedure into the Policy without considering the fundamental interest in law enforcement. Indeed, this exchange came only two questions after Pregno testified to the practice's various law enforcement benefits. DE48-5:13.

The court then dinged the State again for Chief Pregno's equivocal answer to the following question: "So at the time that this policy was created in 2012, did ALEA consider the impact of this policy on arrest and booking procedures?" DE48-5:13-14. But "this policy"—*i.e.*, Policy Order 63—only mildly altered the unwritten policy that had already been in place. The question thus asked not whether defining sex in terms of physical characteristics aided "arrest and booking procedures," but whether the State considered those procedures as part of the rationale for formalizing the unwritten sex-designation-change policy. That Pregno was "not sure" whether "arrest and booking procedures" catalyzed the unwritten policy's formalization is unremarkable; after all, the decision to codify the unwritten policy only tangentially related to the underlying practice itself. As with the court's earlier mischaracterization, nothing about Pregno's response plausibly undermines her antecedent explanation of law-enforcement obvious interests in aligning sex designations with physical characteristics. *Id.* at 13. After all, for about 80 years, Alabama licensees have been required to have their driver's license in their "immediate possession at all times when driving a motor vehicle" and to "display the same, upon demand of a judge of any court, a peace officer, or a [S]tate trooper." Ala. Code §32-6-9(a). The State interest in requiring a person to carry identification presupposes an important State interest in having that identification reflect the State's view of who that person is.

"Consider[ing] [Chief Pregno's testimony] as a whole," DE101:36, the chosen exchanges in no way suggest the State's compelling law enforcement interests are "*post hoc*." DE101:34-36. To find otherwise, the court conflated the State's interests and misunderstood its testimony. The court's reading of the record amounts to clear and reversible error. *Forsyth Cnty.*, 633 F.3d at 1039.

* * *

The Equal Protection Clause of the Fourteenth Amendment does not prohibit States from objectively defining sex on their licenses, let alone compel them to adopt contrary definitions. The court rewrote the Equal Protection Clause to restrict "classification itself" as opposed to discriminatory treatment, and that was error. Even on the theory the Plaintiffs advocated, Policy Order 63 does not trigger heightened scrutiny because it is a facially neutral accommodation, not an exercise in purposeful discrimination. The court also improperly rejected the State's significant interests because it misunderstood them. This Court should reverse.

II. Policy Order 63 Does Not Violate Plaintiffs' First Amendment Rights.

Plaintiffs also allege that Policy Order 63 violates their First Amendment rights.[6] *See* DE38:21-22. But it is Plaintiffs who seek to violate the State's right to

[6] This Court should not hesitate to address—and reject—each of Plaintiffs' additional claims. Although the district court ruled only on Plaintiffs' equal-protection claim, the parties vigorously litigated each claim below, engaging in discovery and developing robust record evidence going to each claim in preparation for trial. Indeed, as the district court explained during oral argument, it would "tak[e]

speak for itself. Indeed, Plaintiffs demand, *via* judicial fiat, an order requiring that the State "change the gender marker on Alabama driver licenses" to reflect Plaintiffs' preferred definition of sex. *Id.* at 24. If the sex designation on a driver's license constitutes speech, it is government speech, *Walker v. Texas Div., Sons of Confederate Veterans*, Inc., 576 U.S. 200, 212 (2015), and when the government speaks it "has the right to speak for itself," *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (internal quotation marks omitted). Even assuming the Policy implicated Plaintiffs' First Amendment rights, any constitutional harm is minimal and "plainly incidental" to the State's uncontroversial requirement that its drivers carry licenses. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) ("*FAIR*"); *see also* Ala. Code §32-6-9(a). Infringement so attenuated cannot support Plaintiffs' constitutional claim. *Id.*

Plaintiffs concede, as they must, that "the sex designation on a driver's license is government speech." DE58:35. Yet they fail to recognize that when the government speaks "it is entitled to say what it wishes, and to select the views that

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the case under submission," including "the evidence [the parties] presented." DE74:7. Taking the case under submission is not simply resolving the case on "cross motions for summary judgment," DE74:7; in the court's words, its ruling on submission "would just be resolving the case as if [it] had held a trial," DE74:7-8. Because the parties fully litigated each claim and the court "resolv[ed] the case as if [it] had held a trial," *id.*, there are no issues to remand for further deliberation, and resolving the claims would promote a "just, speedy and inexpensive determination" of this litigation, Fed. R. Civ. P. 1.

it wants to express." *Summum*, 555 U.S. at 467-68 (cleaned up). That Plaintiffs might disagree is no matter; "[i]t is the very business of government to favor and disfavor points of view." *Nat'l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in judgment). "Indeed, it is not easy to imagine how government could function if it lacked this freedom." *Summum*, 555 U.S. at 468. What is to stop Plaintiffs, by their own logic, from challenging a license's date-of-birth designation because it reinforces a Christian conception of time? Implicit in the State's right to speak is its right to define, which too "is exempt from First Amendment scrutiny." *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005).

Plaintiffs cling to the Supreme Court's decision in *Wooley v. Maynard*, 430 U.S. 705 (1977), to support a compelled-speech claim, DE58:35-37, but that case is inapposite. In *Wooley*, the Supreme Court found itself "faced with the question of whether the State may constitutionally require an individual to participate in the dissemination [on a license plate] of an ideological message ['Live Free or Die'] by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public," and "h[e]ld that the State may not do so." 430 U.S. at 713. The *Wooley* plaintiffs sought only to "refrain from speaking," so the Court analyzed the First Amendment's protection of "both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714.

But a State driver's license is not a "mobile billboard" to "be observed and read by the public." *Id.* at 714-15; *see also Mayle v. United States*, 891 F.3d 680, 686 (7th Cir. 2018) (holding "In God We Trust" on United States currency did not compel speech in part because "most people do not brandish currency in public—they keep it in a wallet or otherwise out of sight until the moment of exchange"). And, most fundamentally, Plaintiffs here seek not to "refrain from speaking" through their private vehicles, but to use the State's licenses as means for expressing their own viewpoints. *See* DE38:24; DE101:32 n.6 (court did not consider order to remove sex designation from driver's licenses "because it was not requested by the [P]laintiffs"). The respective demands of the *Wooley* plaintiffs and Plaintiffs in this case could not be more different. *Cf. Walker*, 576 U.S. at 219 ("[J]ust as Texas cannot require SCV to convey 'the State's ideological message,' SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.") (quoting and distinguishing *Wooley*, 430 U.S. at 715). Because *Wooley* governs the right to say nothing, here it has nothing to say.

To the extent the Policy implicates Plaintiffs' First Amendment rights at all, any infringement is "plainly incidental" to the State's broader (and clearly constitutional) regulation requiring that Plaintiffs carry driver's licenses. *FAIR*, 547 U.S. at 62; *see also* Ala. Code §32-6-9(a). Indeed, the Supreme Court's decision in *FAIR* is fatal to Plaintiffs' claim. There, the Court upheld the constitutionality of a

federal program that tied funding to law schools' allowance of military recruitment on campus. 547 U.S. at 59. The federal program required, among other things, that law schools "send e-mails and post notices on behalf of the military." *Id.* at 61. These compulsory messages constituted "compelled statements … subject to First Amendment scrutiny." *Id.* at 61-62. But the unanimous Court had no trouble concluding such a minor infringement was "plainly incidental" to the federal program, explaining "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 62 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). The Court concluded the requirement was "simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is." *Id.*

Plaintiffs' complaint that they "are compelled to associate with the message" on their driver's license, DE58:35-36, is a feeble rendition of exactly what the *FAIR* Court rejected. Indeed, contra *FAIR*, in this case the State does not force Plaintiffs to speak at all, even in means so minimal as sending communications on the government's behalf. *Id.* at 61. Plaintiffs' quasi-compelled-association claim thus fails; just as "[n]othing about recruiting suggests that law schools agree with any

speech by recruiters," *FAIR*, 547 U.S. at 65, nothing about a government-issued driver's license suggests Plaintiffs agree with the sex designation. *See also, e.g.*, *Mayle*, 891 F.3d at 686 (rejecting similar argument because someone viewing "In God We Trust" on currency "would understand that the government designed the currency and is responsible for all of its content, including the motto").

The State has the right to "speak for itself" on its driver's licenses. *Summum*, 555 U.S. at 467; *see also Walker*, 576 U.S. at 212. If sex designation on a license is speech, Plaintiffs may not commandeer the State's right for the purposes of broadcasting a contrary message.

III. Policy Order 63 Does Not Violate Plaintiffs' "Constitutional Right to Informational Privacy."

Drawing from the Fourteenth Amendment's Due Process Clause, Plaintiffs next allege the Policy violates their "constitutional right to informational privacy." DE58:27 (internal quotation marks omitted). The Policy does so, the argument goes, by "forc[ing] transgender people to disclose that their assigned sex at birth differs from their gender identity … every time they must produce a driver's license." DE51:45.

But Plaintiffs "must" reveal their State license only in exceedingly limited circumstances, and in those rare instances the only audience is an official State actor. *See* Ala. Code §32-6-9(a) (requiring individuals to display driver's license only "upon demand of a judge of any court, a peace officer, or a state trooper"); *see also*

DE48-2:18 (Plaintiff Corbitt testifying to ability to use passport bearing preferred sex designation in lieu of driver's license in many circumstances). And more to the point, this Court has twice held that the Constitution does not protect the right Plaintiffs assert. *See Pryor v. Reno*, 171 F.3d 1281 (11th Cir. 1999), *cert. granted*, *judgment vacated on other grounds*, 528 U.S. 1111 (2000); *Collier v. Dickinson*, 477 F.3d 1306 (11th Cir. 2007). And even if it did, the State's compelling interests in objectively defining sex would outweigh Plaintiffs' limited interest in withholding their transgender status from State law enforcement. *See supra* §I.A-C.

Plaintiff's insistence notwithstanding, whether a "constitutional right to informational privacy" exists in the first place is open for debate. *See NASA v. Nelson*, 562 U.S. 134, 147 (2011) ("As was our approach in *Whalen*, we will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance."); *see also id.* at 160 (Scalia, J., concurring) ("A federal constitutional right to 'informational privacy' does not exist."). Even if "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (internal quotation marks omitted), the "informational privacy" Plaintiffs' assert here does not fit the bill. The requisite "'careful description' of the asserted fundamental liberty interest," *id.* at

721, compels this conclusion: No right to withhold vital identifying information from law enforcement is "deeply rooted in this Nation's history and tradition." *Id*.

Indeed, this Court's precedent squarely forecloses Plaintiffs' claim. In *Pryor v. Reno*, this Court held that personal information contained in motor vehicle records—including "identification card[s] issued by a department of motor vehicles," 171 F.3d at 1284 n.2—did not constitute the "sort of information" the Fourteenth Amendment's "right to confidentiality" protects, *id.* at 1288 n.10. The Court reaffirmed this limitation in *Collier* by holding that State-official defendants who sold "personal information that Plaintiffs provided to [defendants] in order to obtain their drivers' licenses" did not violate plaintiffs' "constitutional right to privacy." 477 F.3d at 1308 (citing *Pryor*, 171 F.3d at 1288 n.10).

Moreover, courts routinely uphold the constitutionality of significantly more invasive disclosures. *See, e.g.*, *Nelson*, 562 U.S. at 138 (allegedly invasive background check did not violate "privacy right" which Court "assume[d], without deciding, that the Constitution protect[ed]"); *Hester v. City of Milledgeville*, 777 F.2d 1492, 1497 (11th Cir. 1985) (allegedly invasive polygraph test did not violate "'confidentiality strand' of the constitutional right to privacy"). Like "other federal courts to address this question," this Court should "decline to expand the constitutional right to privacy to cover" withholding vital identification information from the government. *Cassano v. Carb*, 436 F.3d 74, 75 (2d Cir. 2006).

And even if the Court were to decide a "fundamental right to informational privacy" exists and apply it in this case, the relevant inquiry would then become "whether there is a legitimate state interest in disclosure that outweighs the threat to the plaintiff's privacy interest." *James v. City of Douglas*, 941 F.2d 1539, 1544 (11th Cir. 1991); *accord Strange v. J-Pay Corp.*, No. 20-11437, 2021 WL 1526423, at *2 (11th Cir. Apr. 19, 2021) ("When state action implicates one's privacy interest in avoiding the disclosure of personal matters, it violates the Constitution only when it fails to serve "legitimate state interest[s]."") (quoting *James*, *supra*). As described above, the State has significant interests in using consistent definitions in similar State documents and in providing law enforcement officers the information they need to identify individuals. *See supra* §I.A-C.

Plaintiffs' alleged interests do not outweigh the State's. Plaintiffs claim, for example, that a law enforcement officer "disclosed that [Plaintiff Doe] was transgender to others, causing Ms. Doe to have to leave her job," DE58:24; that an officer's "demeanor shifted rapidly from friendly to rude," *id.*; and that a "[state] trooper began looking at [Plaintiff Corbitt] in a way she could not interpret," *id*. But even assuming the stigma Doe faced was so severe that Doe had no choice but to change jobs, "stigma … standing alone" does not deprive individuals of "any 'liberty' protected by the procedural guarantees of the Fourteenth Amendment."

Paul v. Davis, 424 U.S. 693, 708-09 (1976). Nor do vacillating demeanors or inscrutable facial expressions.

The Constitution does not protect the right Plaintiffs assert. Though this Court has observed a privacy right in unrelated circumstances, the Court should reject Plaintiffs' invitation to enlarge the substantive due process doctrine's penumbrae in this Circuit. *Cassano*, 436 F.3d at 75.

IV. Policy Order 63 Does Not Violate Plaintiffs' Right to Refuse Unwanted Medical Treatment.

Plaintiffs round out their constitutional claims by arguing that Policy Order 63 "violates their liberty interest in refusing unwanted medical treatment." DE38:20. They allege the Policy "requires transgender Alabama residents to undergo surgery that results in permanent sterilization as a condition to obtain a government benefit." DE51:52.

The Policy does no such thing. First, the State has not denied Plaintiffs access to driver's licenses. Clark and Doe had Alabama driver's licenses, and Corbitt could have obtained one, albeit not with the sex designation of female. DE38:13-18. Plaintiffs therefore implicitly assert that a driver's license reflecting their preferred definition of sex constitutes the "government benefit" allegedly at issue. But Alabama has never offered any of its citizens this imagined "benefit," and, for the reasons discussed above, it does not intend to.

Second, the State does not even recommend that Plaintiffs undergo any medical treatment, much less "require" that they do so. To support their claim, Plaintiffs quote *Cruzan v. Director, Missouri Department of Health*, in which the Supreme Court asserted that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment." 497 U.S. 261, 278 (1990). The case before this Court is nothing like those cases in which the Supreme Court found such an interest—primarily because the State is not forcing Plaintiffs to do anything. *See id.* ("In *Jacobson v. Massachusetts*, 197 U.S. 11, 24-30 (1905), for instance, the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease.").

Undeterred, Plaintiffs attempted to square the circle by reminding the court that "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." DE51:51 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992). How any of this bears on Policy Order 63 is indeed a mystery.

The "liberty interest in refusing unwanted medical treatment," *Cruzan*, 497 U.S. at 279, plays no role in this case. As discussed above, *see supra* §III, the *Glucksberg* Court's "reluctan[ce] to expand the concept of substantive due process," 521 U.S. at 720, led it to articulate a two-part test for whether the doctrine applies to litigants' asserted rights: First, the right must be "deeply rooted in this Nation's

history and tradition, and implicit in the concept of ordered liberty"; and second, the party asserting the right must provide a "careful description of the asserted liberty interest." *Id.* at 720-21 (cleaned up). Despite repeatedly citing *Glucksberg* to support their claim, *see* DE51:50-52, Plaintiffs never even attempted to satisfy these conditions. It is not hard to see why.

The "fundamental liberty interest" Plaintiffs allege is the right to possess "an Alabama driver's license that accurately states their sex." DE58:33. An "accurate[]" license, by Plaintiffs' lights, is one that accords with their definition of sex and, necessarily, not with the State's. But the "right" to define sex for oneself on government-issued identification documents is self-evidently neither "deeply rooted in this Nation's history and tradition" nor "implicit in ordered liberty." *Glucksberg*, 521 U.S. at 721; *accord Morris*, 2020 WL 6875208 at *5 (rejecting identical claim regarding passport's sex designations). Like their first attempt to invoke substantive due process, *see supra* §III, Plaintiffs' second attempt fails.

V. The Statute of Limitations Bars Clark's and Corbitt's Claims.

Plaintiffs' Section 1983 claims "are tort actions, subject to the statute of limitations governing personal injury actions in the state where the §1983 action has been brought," *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008), which in this case is two years, Ala. Code §6-2-8(*l*). The statute of limitations on Section 1983 claims "begins to run from the date the facts which would support a cause of action

are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Brown v. Ga. Bd. of Pardons & Paroles*, 335 F.3d 1259, 1261 (11th Cir. 2003) (internal quotation marks omitted). "This rule requires a court first to identify the alleged injuries, and then to determine when plaintiffs could have sued for them." *Rozar v. Mullis*, 85 F.3d 556, 562 (11th Cir. 1996).

Where defendants raise a statute-of-limitations defense and assert the facts supporting plaintiffs' claim were or should have been apparent "to a person with a reasonably prudent regard for his rights," *Brown*, 335 F.3d at 1261, plaintiffs bear the burden of proving "they were justifiably ignorant," *Rozar*, 85 F.3d at 562. In *Rozar*, plaintiffs brought equal protection claims against a Georgia county and other defendants "alleging racial discrimination in the siting and permitting of a solid waste landfill in their neighborhood." *Id.* at 558. Defining plaintiffs' relevant "injury" as the county board's vote regarding where to site the landfill, *id.* at 562, the Court explained that at least one named plaintiff was present at the vote and that plaintiffs failed to argue that the remaining plaintiffs were unaware of the vote. *Id.* Thus, the Court held plaintiffs' equal protection claim accrued against defendants at the time of the vote.

Plaintiff Clark obtained a name change in mid-2015. DE48-1:6. Shortly thereafter, Clark sought to change the sex designation on Clark's driver's license, and the State denied this request. *Id.* at 11-12. Yet Clark failed to bring suit until

February 2018, well past the two-year limitations period. *See* DE1. The injury about which Clark complains—*i.e.*, denial of a sex-designation change request—preceded this litigation by more than two years. The State's statute of limitations bars Clark's claims. *See McNair*, 515 F.3d at 1173; Ala. Code §6-2-8(*l*).

Plaintiff Corbitt obtained both a name change and a driver's license from the State reflecting that change in 2013. DE48-2:8-9. At this point, Corbitt had transitioned and identified as a transgender woman. *Id.* at 9 ("I had started living as Darcy full-time on May 11th, 2013, and part of the process for me was making sure that my identification correctly reflected who I was and who I knew myself to be and who my friends knew me to be."). Policy Order 63 was in effect at this time. *See* DE48-5:9, 13. The notion that Corbitt worked with the State to complete a driver's-license name change yet remained "justifiably ignorant" of the corresponding sex-identification-change process—all while "making sure that [Corbitt's] identification correctly reflected who [Corbitt] was," DE48-2:9—beggars belief. *Rozar*, 85 F.3d at 562. Indeed, Plaintiffs failed to shoulder their burden of showing Corbitt was "justifiably ignorant" of the Policy in 2013, and instead simply asserted the State did not deny Corbitt's sex-identification change request until 2017. But that is not the test; a "reasonably prudent" individual in Corbitt's shoes would have noted the sex-designation-change policy while handling a name change. *See Brown*, 335 F.3d at 1261; *Rozar*, 85 F.3d at 562.

Completing its statute-of-limitations analysis in a single footnote, the district court misapplied the relevant legal framework and impermissibly granted relief to all Plaintiffs. The court summarily concluded "Corbitt neither knew nor had reason to know that she had been injured by Policy Order 63 until she requested a female-designated license and was denied; indeed, she had not been injured by the policy until that point." DE101:16 n.4. But, as discussed above, injury is not the test; a claim "begins to run from the date the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Brown*, 335 F.3d at 1261 (internal quotation marks omitted). Moreover, the court failed to even address Clark's claims, which at least implicitly suggests they were time-barred. Though this Court generally reviews findings of fact for "clear error," *Albra v. Advan, Inc.*, 490 F.3d 826, 828–29 (11th Cir. 2007), "[a] finding based on an erroneous legal test is invalid; it cannot be sustained under the 'clearly erroneous' rule," *June Medical*, 140 S. Ct. at 2160 (Alito, J., dissenting); *see also* 9C Fed. Prac. & Proc. Civ. §2585 (3d ed.) ("Insofar as a finding is derived from the application of an improper legal standard to the facts, it cannot be allowed to stand.").

What is more, the court then essentially shrugged off the issue altogether by reasoning that, "[i]n any event, defendants do not challenge [Plaintiff] Doe's capacity to bring the same injunctive claims." DE101:16 n.4. This might be relevant

had Doe represented a class of plaintiffs or brought a facial challenge, but Plaintiffs brought individual, as-applied challenges, *see generally* DE38, and the district court ordered as-applied relief. DE101:43; DE102:2. Because Plaintiffs Corbitt and Clark failed to timely bring their claims, this Court should vacate their court-ordered relief.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and render judgment for the State Defendants.

Respectfully Submitted,

Steve Marshall
Attorney General
s/Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Solicitor General
Thomas A. Wilson
Deputy Solicitor General
Brad A. Chynoweth
Assistant Chief Deputy Attorney General
James W. Davis
Winfield J. Sinclair
Misty S. Fairbanks Messick
Assistant Attorneys General

STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300

Counsel for the State Defendants

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B). The brief contains 11,904 words, including all headings, footnotes, and quotations, and excluding the parts of the brief exempted under Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

2. In addition, this brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Counsel for the State Defendants

CERTIFICATE OF SERVICE

I certify that on May 26, 2021, I electronically filed this document using the Court's CM/ECF system, which will electronically serve a copy of this document to all counsel of record electronically registered with the Clerk.

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Counsel for the State Defendants