*No. 21-10486*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DARCY CORBITT, *et al.*,

*Plaintiffs-Appellees,*

*v.*

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
*Honorable Myron H. Thompson*
Case No. 2:18-cv-00091-MHT-SMD

# BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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## INTERESTS OF *AMICI CURIAE*[1]

*Amici curiae* are law professors[2] with academic interests including gender, sexuality, privacy, and free expression. *Amici curiae* have an interest in this case because it involves important principles of constitutional law on which they regularly research, write, and/or teach. *Amici* also have an interest in particular in ensuring that the law pertaining to free expression and privacy develop in a way that is consistent with the constitutional protections afforded to transgender individuals. As teachers who work closely with students of all identities, they have an additional interest in fostering inclusive spaces that welcome and treat all people with respect and dignity.

[1] The parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person—other than the *amici* and their counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

[2] A complete list of *amici* appears in the Appendix attached hereto.

## STATEMENT OF THE ISSUE

Whether Alabama Law Enforcement Agency Driver License Policy Order No. 63 violates the First Amendment and the constitutional right to privacy[3] by compelling transgender individuals to bear a gender marker on their driver license that is inconsistent with their gender identity, unless they demonstrate to the State that they have had "complete" genital surgery.

## SUMMARY OF ARGUMENT

By forcing individuals to adopt and profess the State's view of their gender and disclose highly personal and private information, Alabama Law Enforcement Agency Driver License Policy Order No. 63 ("Policy Order 63") violates the First Amendment's prohibition on compelled speech and the Due Process right to informational privacy. Policy Order 63 violates the First Amendment's prohibition on compelled speech by requiring Plaintiffs to bear a gender marker on their driver licenses that is inconsistent with their gender identity. While the government can and does express itself directly on a variety of matters, the First Amendment prohibits the government from "compel[ling] private persons to convey the government's speech." *Walker v. Texas Div., Sons of Confederate Veterans, Inc*.,

[3] Recognizing that Plaintiffs' Equal Protection claim was central to the District Court's analysis, *amici* write to provide this Court with the benefit of additional briefing on the important free speech and privacy claims that are also at issue on appeal.

576 U.S. 200, 219 (2015). When, as here, the State compels an individual to become a mouthpiece for the views of the State, that compulsion is subject to strict scrutiny.

The State fails to show that Policy Order 63 is narrowly tailored to serve any compelling state interest and, in reality, Policy Order 63 actually undermines the government's purported interest in accurate identification. Any argument that Policy Order 63 regulates conduct and only incidentally burdens speech also fails. The policy directly governs speech because it forces individuals to communicate and display the State's view of their gender. Finally, Policy Order 63 not only violates Plaintiffs' First Amendment rights, but also violates Plaintiffs' Due Process right to informational privacy. Policy Order 63 forces transgender individuals to bear a gender marker on their license that discloses that their sex assigned at birth is inconsistent with their gender identity, revealing deeply sensitive, intimate information about them. For these reasons, in addition to those stated by Plaintiffs, the judgment of the District Court should be affirmed.

## ARGUMENT

### I. Policy Order 63 Violates The First Amendment Because It Impermissibly Compels Speech

Pursuant to the First Amendment of the U.S. Constitution, the government "shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.[4] In circumstances like this, the First Amendment protects the right to speak and to refrain from speaking. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Accordingly, the Constitution forbids state action that compels speech when such action compels expression or endorsement of a particular viewpoint or ideological message. *Id.* at 715; *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see also Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2375 (2018) ("*NIFLA*") ("[P]eople lose when the government is the one deciding which ideas should prevail."); *cf. NAACP v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) (noting that the First Amendment prohibits the government from forcing citizens to endorse speech that is "repugnant to them"). This can be so when the speech involves a purported statement of opinion or a purported statement of fact. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 797–98 (1988) ("[C]ases cannot be distinguished simply because they involve compelled statements of opinion while

[4] The First Amendment applies to the states through the Fourteenth Amendment's Due Process Clause. *Manhattan Commc'n Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech."). When the government compels the speech of private parties, it regulates speech on the basis of content, and thus generally must satisfy strict scrutiny.[5] *Id*. at 795–96 (content-based regulations of speech warranted strict scrutiny).

Policy Order 63 requires transgender people to present proof of "complete" genital surgery in order to change the gender marker on their Alabama driver licenses—identification documents critical to an individual's ability to function in society.[6] Because Plaintiffs are transgender women who have not had genital surgery, the State requires that their licenses mark them as male. Even if the gender marker is government speech, "government speech does not mean that the [contents] do not also implicate the free speech rights of private persons [who] . . . convey the messages communicated through those [contents]." *Walker*, 576 U.S. at 219 (citing *Wooley*, 430 U.S. at 717 n.15). The fact that the gender marker forces the individual to convey the government's message is precisely the problem.

[5] There are limited exceptions to this general rule that do not apply here, such as speech claims related to commercial disclosures or compelled campaign disclosures. *Cf. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct.*, 471 U.S. 626, 651 (1985); *Ams. for Prosperity Found. v. Bonta*, 131 S. Ct. 2373, 2383–85 (2021).

[6] Policy Order 63 does not specify which procedures are necessary for surgery to be deemed "complete," though the State apparently "means at least genital surgery (and possibly also chest surgery)," leading to inconsistent and arbitrary application. Appellee Br. at 16 (citing Doc. 101 at 5); *see also id.* at 26–27.

Put differently, concluding that the government is speaking is the start, not the end, of compelled speech analysis. As explained by the United States Supreme Court, the "government's ability to express itself" is not "without restriction." *Id.* at 208. Thus, where, as here, the government "seeks to compel private persons to convey the government's speech," the Free Speech Clause "may constrain the government's speech." *Id.*; *see also Cressman v. Thompson*, 798 F.3d 938, 948–49 (10th Cir. 2015) (noting that, in *Walker*, "the Court dispelled any notion that designating speech as 'government speech' eliminates private-speech concerns"); *NIFLA*, 138 S. Ct. at 2371 (holding that certain "government-scripted" disclosure requirements impermissibly compelled speech).

### A. The Driver License Gender Marker Is Compelled Speech

Policy Order 63 compels speech and is subject to strict scrutiny. To determine whether the State has impermissibly compelled speech, Plaintiffs must demonstrate (1) speech; (2) to which they object; (3) that is compelled by governmental action; and (4) with which they are readily associated. *Cressman*, 798 F.3d at 951; *Wooley*, 430 U.S. at 717 n.15. Each element is met here, and the State's purported justifications for the compelled speech do not withstand scrutiny.

*First*, the forced gender marker, like any disclosure that involves the publication and display of words and text, assuredly is speech. *See Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("If the acts of disclosing and 'publishing'

information do not constitute speech, it is hard to imagine what does fall within that category. . . .” (internal quotation marks omitted)).

*Second*, Plaintiffs strongly object to carrying and displaying government identification that marks them as a gender that is inconsistent with their gender identity, Appellee Br. at 48–49, so much so that they try to avoid situations that would require them to show identification, Appellee Br. at 7, 10–11.[7] Even a point of minor disagreement between the government and the compelled speaker constitutes a sufficient objection under the relevant compelled speech analysis. *See United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001) (“First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to [endorse the government’s view]; and there is no apparent principle which distinguishes out of hand minor debates. . . .”). Here, the disagreement is anything but minor, but instead is core to the conception of one’s self. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“At the heart of liberty is the right to define one’s own concept of

[7] The State had argued below, but evidently no longer, that the fact that Plaintiffs testified that they try to conceal their licenses and avoid displaying them somehow *supports* its argument that Policy Order 63 does not compel speech. Defs.’ Mot. Summ. J. at 38–39. That argument had it exactly backwards. This testimony and other ample evidence in the record shows the extent of Plaintiffs’ aversion to the gender marker and the serious consequences that often result from showing it, further demonstrating the injury to Plaintiffs (and transgender individuals generally) resulting from Policy Order 63’s compelled speech.

existence, of meaning, of the universe, and of the mystery of human life."); *Obergefell v. Hodges*, 576 U.S. 644, 651–52 (2015) (emphasizing one's liberty "to define and express their identity").

*Third*, the gender marker is compelled by the State. Although Plaintiffs are not required to carry a driver license, possessing and displaying one, like possessing and displaying a license plate, is a "virtual necessity." *See Wooley*, 430 U.S. at 715; *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1325–26 (M.D. Ala. 2019) (describing the driver license as a "virtual necessity" and noting that the mere availability of an alternative mode of identification, *e.g.*, a passport, did not undermine the plaintiffs' compelled speech argument). The record details the many instances in which only a driver license will suffice as proper identification. *See* Pls.' Mot. Summ. J. at 23–25. Policy Order 63 forces Plaintiffs to communicate the State's view of their gender and, in doing so, exposes them to a risk of violence, harassment, and antagonism whenever they show their licenses to someone who recognizes that they are women but are "marked" as men. *See* Appellee Br. at 7 (citing statistical evidence of harassment and violence); *Corbitt v. Taylor*, No. 2:18 CV 91-MHT, 2021 WL 142282, at *2 (M.D. Ala. Jan. 15, 2021) (same).

*Fourth*, a driver license is readily associated with its bearer. *See Wooley*, 430 U.S. at 717 n.15 (reasoning that speech interests were implicated because

license plates are "readily associated with" the driver who must display them). A driver license—along with the information it communicates—is literally a means of identifying the person. *See Marshall*, 367 F. Supp. 3d at 1326 ("ID cards are chock-full of Plaintiffs' personal information: their full name, photograph, date of birth, home address, sex, height, weight, hair color, eye color and signature."). No one associates "six feet tall with brown eyes" with the government—they associate it with the holder of the license. *Id*. ("When people see the brand on Plaintiffs' IDs, they associate it with Plaintiffs. The dirty looks that Plaintiffs get are not directed at the State."). The State's reliance on *Mayle v. United States*, 891 F.3d 680 (7th Cir. 2018), a speech case involving currency, is misplaced. *See* Appellant Br. at 39, 41. "[C]urrency is not personalized; it says not a word about the person who holds it. Nor is currency displayed; it is exchanged. Hundreds of people may spend the same dollar bill. Identification cards, by contrast, are personalized. They are meant to convey substantive personal information about their holders." *Marshall*, 367 F. Supp. 3d at 1326.

In sum, the driver license gender marker is speech, Plaintiffs object to it, and the government compels Plaintiffs to display it on a driver license that is associated with Plaintiffs, not the State. Accordingly, Plaintiffs satisfy each of the elements necessary to demonstrate compelled speech.

### B. Because It Compels Speech, Policy Order 63 Must Be Narrowly Tailored To Serve A Compelling State Interest

A government regulation that compels speech violates the First Amendment unless it is narrowly tailored to serve a compelling state interest. *See Wooley*, 430 U.S. at 716.[8] Here, the State claims an interest in administrative efficiency and law enforcement. In the first instance, "administrative ease and convenience" is not a sufficiently important interest to withstand even intermediate scrutiny. *See Craig v. Boren*, 429 U.S. 190, 198 (1976). As the District Court held, "the State's interest in consistency with birth certificate amendment procedures is one of marginal administrative convenience that cannot support a sex-based policy, and Policy Order 63 in practice does little to advance it." *Corbitt*, 2021 WL 142282, at *11.

The State claims that Policy Order 63 serves an important government interest because it provides descriptive physical information to law enforcement officers. It has argued that a "clear definition of 'sex' in terms of physical sex characteristics of statewide applicability . . . allow[s] law enforcement officers to form appropriate arrest, booking, and search procedures, as well as procedures for the provision of medical treatment," and allows for appropriate policies and

[8] This is true except in limited circumstances, which are not present here. *See e.g.*, *Zauderer*, 471 U.S. at 651–52 (holding that the First Amendment permits the government to require factual and uncontroversial commercial disclosures so long as they are neither unjustified nor unduly burdensome).

procedures in the correctional context for inmate searches, housing, and medical care. Defs.' Mot. Summ. J. at 46–47. This argument fails because the record shows that the State's purported law enforcement interest was invented *post hoc* and accordingly cannot withstand scrutiny. *Corbitt*, 2021 WL 142282, at *9–11 (finding that conformity with the State's birth certificate policy was the only consideration when creating the policy, not arrest or booking procedures (citing *United States v. Virginia*, 518 U.S. 515, 533 (1996))).

But even if the State's purported law enforcement interest were genuine and compelling, the State is not using the least restrictive means of achieving it. *See Reed v. Town of Gilbert*, 576 U.S. 155, 179 (2015). Law enforcement interests can only justify compelled speech if the state has adopted the least restrictive means of achieving those interests. *Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1255 (11th Cir. 2004) (holding that "regulating as few as five peaceful protestors . . . [wa]s not the least restrictive means of accomplishing the County's legitimate traffic flow and peace-keeping concerns"). Policy Order 63 is immensely over-inclusive, as driver licenses frequently are required to prove identification beyond the custodial context (*i.e.*, arrest, incarceration, booking, and search procedures).

*See* Appellee Br. at 7. Most often, licenses are required for everyday purposes, such as to travel, visit a bar, or vote.[9]

Moreover, if the purported aim of the State's policy is to identify a suspect for a reported crime, the policy is wholly counterproductive. Describing a suspect as "male" would be a misleading description for any officer searching for a transgender woman with a typically female appearance. *See K.L. v. State of Alaska, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431 CI, 2012 WL 2685183, at *7 (Alaska Superior Ct. Mar. 12, 2012) ("By not allowing transgender[] individuals to change their sex designation, their license will inaccurately describe the discernable appearance of the license holder by not reflecting the holder's lived gender expression of identity."); *see also* Appellee Br. at 34. While it is important that inmates in the custodial context be housed in a safe manner and provided specific medical care, requiring transgender individuals

[9] Beyond the examples in the record in which a driver license is required to obtain a job, to participate in civic life or recreational activities, or to access education and healthcare under Alabama law, Pls. Mot. Summ. J. at 23–25, possessing a photo ID or driver license is often required to access certain government buildings, rent a hotel room, open a bank account, sign a lease or obtain a mortgage, travel by airplane, or apply for food stamps or other government benefits. *See, e.g.*, Sara Simon Tompkins, *Photo Identification Barriers Faced by Homeless Persons: The Impact of September 11*, National Law Center on Homelessness & Poverty, 7, 9, 13 (April 2004), https://nlchp.org/wp-content/uploads/2018/10/ID_Barriers.pdf; *see also Marshall*, 367 F. Supp. 3d at 1325 ("One must show ID to enter some businesses, to cash checks, to get a job, to buy certain items, and more."); *see also* Appellee Br. at 7 (describing how transgender people with inappropriate IDs avoid certain everyday activities (citing Doc. 52-45 at 7)).

to display on their license an incorrect gender marker does nothing to advance that interest. This is particularly so given that sex assigned at birth and external genitalia are poor proxies for determining the care or housing that a person may need, in the custodial context or otherwise.[10]

The numerous other states that permit individuals to conform their identification to their gender identity without medical interventions or proof of those interventions have not encountered the administrative or law enforcement problems the State speculates would occur without Policy Order 63. Nor does the federal government share the State's purported concern, given that the U.S. State Department will now allow applicants for passports to self-select their gender without requiring medical certification and will even include gender markers for non-binary, intersex, and gender non-conforming persons. *See* Press Release, U.S. Dep't of State, *Proposing Changes to the Department's Policies on Gender on U.S. Passports and Consular Reports of Birth Abroad* (June 30, 2021), https://www.state.gov/proposing-changes-to-the-departments-policies-on-gender-on-u-s-passports-and-consular-reports-of-birth-abroad/.

[10] Further, there are other, less restrictive methods of providing a safe custodial environment. *See* 6 C.F.R. § 115.42(b), (c) (regulations for immigrant detention housing require considering detainee's self-identification and prohibit relying solely on physical anatomy); 28 C.F.R. § 115.42(e) ("A transgender or intersex inmate's own views with respect to his or her own safety shall be given serious consideration.").

The State does not deny that being transgender is a valid identity. Indeed, its policy implies acceptance of this reality. The State's argument rests solely on its view that transgender people cannot be identified in accordance with their gender identity unless they undergo "complete" genital surgery. The policy is arbitrary, irrational, and lacks any legitimate purpose, much less the compelling purpose and least restrictive means required to justify the speech compelled here.

The State rejects self-reporting with respect to gender, while accepting self-reporting for other descriptive information included on driver licenses—information often relied on for identification purposes. For example, when an individual fills out their application and estimates their own height and weight, the State requires no proof of measurement.[11] Nor, as the District Court noted, could the State implement a similar racial classification policy, by which the State decides and designates the race of license applicants for purposes of identification.[12] *Corbitt*, 2021 WL 142282, at *4–5 (citing *Jones v. Commonwealth*, 80 Va. 538, 544–45 (1885)).

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[11] Appellee Br. at 18 ("For . . . descriptive information [other than sex], such as height, weight, or hair color, the State permits people to provide updates based on their own self-knowledge, subject only to a 'discreet[]' conversation asking for something 'a little bit more true' if the self-disclosure is plainly not 'reasonable' (as for someone changing their height from five feet to eight feet)." (quoting Doc. 48-7 at 35)).

[12] The State takes the dubious position that it is, in fact, permitted to be the arbiter of an individual's race. Appellant Br. at 22 ("States and the federal government

Treating gender differently from other descriptive information on a driver license is arbitrary. It is, in the first instance, sex discrimination for no legitimate purpose. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741–43, 1754 (2020) (holding that Title VII prohibits transgender discrimination); *id.* at 1783 (Alito, J., dissenting) (noting that the Court's holding in *Bostock* would likely inform constitutional challenges to state laws, *including this very case* (citing Complaint, *Corbitt*, 2021 WL 142282)). Being transgender does not require genital surgery. Many transgender individuals cannot afford or do not have access to such surgery.[13] Many elect not to have that surgery, and it is not always medically necessary.[14]

Policy Order 63 is arbitrary for the additional reason that transgender individuals who move to Alabama may receive a new driver license that reflects the correct gender marker without having had to provide proof of any surgery if

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alike retain the right to decide who is white and who is black." (internal quotation marks omitted)).

[13] S.E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equal., 98–100 (2016) https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf (describing difficulties in paying for and accessing gender affirming care).

[14] Genital gender confirming surgery is "generally less common than chest surgery. . . ." Ian T. Nolan et al., *Demographic and Temporal Trends in Transgender Identities and Gender Confirming Surgery*, 8 Translational Andrology & Urology 188 (June 2019). "Transgender women report bottom surgery at rates between 5–13%. . . ." *Id.* "3% of transgender men have had phalloplasty . . . while 2% have had metoidioplasty. . . ." *Id.*

they already possess a driver license from a state that does not require genital surgery for their gender marker to reflect their gender identity. *See* Appellee Br. at 25–26, 40. This inconsistency plainly undermines the State's purported administrative interest and demonstrates the policy's arbitrariness. Policy Order 63 is not rationally aligned with any legitimate purpose, let alone narrowly tailored to address a compelling interest.

Finally, the State claims that it is entitled to define "sex" in accordance with its past practice and traditional ideas of the term. In *Wooley*, the Supreme Court recognized New Hampshire's interest in promoting state pride and appreciation of its history through its motto "Live Free or Die," 430 U.S. at 716–17, but held that that governmental interest did not prevail over "an individual's First Amendment right to avoid becoming the courier for such message," *id.* at 717.[15] The same holds true here.

[15] Where government speech does not compel private parties' speech, the government is still bound by the parameters of the Equal Protection Clause in how it treats citizens through its own speech. Helen Norton, The Government's Speech and the Constitution 104 (2019); *Pleasant Grove Cty v. Summum*, 555 U.S. 460, 482 (2009) (Stevens, J., concurring) ("[G]overnment speakers are bound by the Constitution's other proscriptions, including those supplied by the Establishment and Equal Protection Clauses").

### C. The First Amendment Permits The Government To Express Its Own Views But Not To Compel Others To Voice Them

The First Amendment generally denies the government the power to compel private parties to state views with which they disagree, regardless of whether those views are the government's or instead those of a third party. In other words, even if the driver license gender marker is deemed the government's own speech, the government's ability to "speak for itself," *Summum*, 555 U.S. at 467, cannot overcome a citizen's First Amendment right to be free from compelled speech. As a general matter, "[j]ust as [the State] cannot require [citizens] to convey the State's ideological message, [citizens] cannot force [the State]" to endorse a citizen's message. *Walker*, 576 U.S. at 219 (internal quotation marks omitted).[16] The government typically is at liberty to have and express a point of view. *Summum*, 555 U.S. at 467–68. But "[t]his does not mean that there are no restraints on government speech." *Id.* at 468; *see also Walker*, 576 U.S. at 219 ("Our determination that Texas's specialty license plate designs are government speech does not mean that the designs do not also implicate the free speech rights

[16] Norton, *supra*, at 51–52 (discussing how the government is permitted "to control the contents of its own expression but not to compel others to join it" and conversely, that "the Free Speech Clause protects a private party's right to be free from the government's efforts to compel her to join or utter its message, but it does not empower her to force the government to join or utter hers. Realizing this reality accommodates individuals' autonomy interests as well as the government's expressive interests").

of private persons."). The Supreme Court in *Walker* expressly noted that "compelled private speech [was] not at issue" in that particular case and recognized that, even where there is government speech, "the First Amendment stringently limits a state's authority to compel a private party to express a view with which the private party disagrees." 576 U.S. at 219.

*Marshall*, in which a district court in this Circuit examined speech issues that arise in connection with driver licenses, is instructive. 367 F. Supp. 3d at 1310. There, the plaintiffs brought a First Amendment challenge against an Alabama policy that required registered sex-offenders to carry driver licenses marked with "CRIMINAL SEX OFFENDER" in bold red letters. *Id*. at 1321. The court accepted that the speech at issue was government speech, but explained that this "does not mean it is immune from the compelled speech analysis." *Id.* at 1325. On that basis, the court applied strict scrutiny to Alabama's branded-identification requirement and held that the marker was not the least restrictive means of achieving the state's interest in enabling law enforcement to identify sex offenders. *Id*. at 1326–27. The court accordingly struck down the branded-identification requirement. *Id.* at 1327.

Conversely, in *Hunt*, this Court held that flying a confederate flag above the Alabama state capitol did not violate the First Amendment because it did not compel citizens entering the building to carry the flag, salute the flag, or "support

whatever cause it may represent." 891 F.2d at 1566; *see also Coleman v. Miller*, 117 F.3d 527, 531 (11th Cir. 1997) (per curiam) (holding that the "fact that [plaintiff] may on some occasions be required to enter public buildings that fly the Georgia flag [which at the time incorporated the confederate flag] does not infringe upon his First Amendment rights because entering public buildings does not manifest any particular attitude or belief and does not associate [plaintiff] with the flag's message"). The distinction here is plain. The State requires its citizens to carry a driver license that has a gender marker of the government's choosing and to which some of those citizens object. The government cannot make "an individual, as part of [her] daily life . . . an instrument for fostering public adherence to an ideological point of view [she] finds unacceptable," *Wooley*, 430 U.S. at 715, which is precisely what the State seeks to do here.

However important, the government's power to express itself is not a matter of constitutional right, but is instead a privilege which must be exercised while respecting individuals' First Amendment and other constitutional rights.[17] This privilege does not permit the State to compel a citizen to carry its message, as that "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Wooley*, 430

[17] "[T]he government itself does not have First Amendment rights of its own to use as a sword against nongovernmental parties, as the Constitution protects us from the government and not vice versa." Norton, *supra*, at 27.

U.S. at 715 (quoting *Barnette,* 319 U.S. at 642). In the event that in an attempt to speak its own views, the State compels an individual to serve as a mouthpiece or billboard for the State's views, the citizen's constitutional right must prevail, for "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642. The State argues that Plaintiffs seek "to use the State's licenses as means for expressing their own viewpoints." Appellant Br. at 39. Not so. Rather, Plaintiffs object to being compelled to carry a message that is abhorrent to them, and fundamentally inconsistent with their known gender. Appellee Br. at 48–49. Plaintiffs' First Amendment rights take precedence over the purported administrative convenience of the State.

In the alternative, the State could remove the gender marker from all licenses to avoid either side being required to convey a message with which it disagrees. *See Corbitt*, 2021 WL 142282, at *9 n.6 (noting that the State has the option of removing sex designations from Alabama driver licenses, since these designations are not required under State law). As of now, the State has not offered to do so, and Plaintiffs have requested other relief which leaves intact the State's requirement for including a gender marker on all driver licenses.

### D. Being Forced To Endorse The State's Contrary View Of Gender Is Not An Incidental Burden On Speech

Policy Order 63 is not a regulation of conduct that merely imposes an incidental burden on expression—it is a speech regulation. *See United States v. Albertini*, 472 U.S. 675, 689 (1985); *United States v. O'Brien*, 391 U.S. 367, 382 (1968). The State argues that "if" Policy Order 63 implicates Plaintiffs' First Amendment rights, any constitutional harm is "plainly incidental" to the State's "uncontroversial requirement that its drivers carry licenses." Appellant Br. at 37 (citing *Rumsfeld v. F. for Acad. & Inst. Rts., Inc.*, 547 U.S. 47, 62 (2006) ("*FAIR*")). But, the issue is not whether the State can require drivers to carry a license; the issue is whether it can require transgender individuals to display on that license a gender marker that is inconsistent with their gender identity. As demonstrated above, the gender marker, like any disclosure that involves the publication and display of words and text, is speech, and the government's requirement that individuals carry and display this speech against their will is presumptively unconstitutional unless narrowly tailored to serve a compelling state interest, which is not the case here. *See Reed*, 576 U.S. at 163 ("[C]ontent-based laws [are] those that target speech based on its communicative content [and] are presumptively unconstitutional [unless] the government proves that they are narrowly tailored to serve compelling state interests.").

The State's reliance on *FAIR*, 547 U.S. 47 (2006), is misplaced. In *FAIR*, the Supreme Court upheld the Solomon Amendment, a law passed by Congress which conditioned the receipt of certain federal funding to institutions of higher learning upon their allowing military recruiters equal access to their campuses. *Id*. at 70. The Court rejected the argument that the "forced inclusion and equal treatment of military recruiters" violated the schools' freedom of speech, *id.* at 53, because the act of allowing military recruiters on campus involved conduct, not speech or expression, *id*. at 64–65. There, the Court held that the First Amendment permits Congress to regulate certain conduct by requiring universities to provide military recruiters with the same access to campus facilities as they provide other employers—even though this law also regulated speech by requiring universities to send emails or post notices on recruiters' behalf. *Id.* at 60–63. As the Court explained, the "incidental burden" analysis is only relevant where speech is not the target of the regulation and instead is incidentally affected by the conduct being regulated. *Id*. at 65–67 (citing *O'Brien*, 391 U.S. at 376). The State's assertion that "*FAIR* is fatal to Plaintiffs' claim," Appellant Br. at 39, is based on the flawed premise that the object of the State's regulation is conduct, not speech. But Policy Order 63 directly compels Plaintiffs to endorse the State's contrary perception of their gender. As discussed above, when the government requires an individual to

present identification that serves entirely to communicate information about that individual, it compels that individual's expression. *See* discussion *supra* Part I.A.

## II. The Compulsion To Disclose Highly Intimate Information Violates Plaintiffs' Right To Informational Privacy

The speech that Policy Order 63 compels is highly intimate information. The Supreme Court has acknowledged the existence of an "individual interest in avoiding disclosure of personal matters." *See Whalen v. Roe*, 429 U.S. 589, 598–99 (1977). This Court accordingly has recognized the constitutional right to "informational privacy." *See Burns v. Warden, USP Beaumont*, 482 F. App'x 414, 417 (11th Cir. 2012); *Padgett v. Donald*, 401 F.3d 1273, 1280 (11th Cir. 2005); *see also Hester v. City of Milledgeville*, 777 F.2d 1492, 1497 (11th Cir. 1985); *Strange v. J-Pay Corp.*, No. 20-11437, 2021 WL 1526423, at *2 (11th Cir. Apr. 19, 2021).[18] To state a claim for a violation of this right, it is enough for Plaintiffs to show that "the information disclosed [is] extremely intimate in nature" or involves "medical conditions or procedures that have an inherent potential to provoke discrimination, hostility, or intolerance." *Ezzard v. Eatonton-Putnam Water & Sewer Auth.*, Case No. 5:11-CV-505, 2013 WL 5438604, at *15 (M.D. Ga. Sept. 27, 2013). Both privacy interests are implicated by Policy Order 63.

[18] This right is "incorporated in the due process protected by" the Fourteenth Amendment. *See Plante v. Gonzalez*, 575 F.2d 1119, 1127 (5th Cir. 1978) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

For transgender women such as Plaintiffs who choose *not* to have genital gender confirmation surgery, Policy Order 63 publicly outs them as transgender to anyone who sees that they are women but are marked as male on their license. The natural consequences are that the person viewing the license will know the physical anatomy of the license holder's genitalia and that the person is transgender. This plainly impinges on one's privacy in a most invasive way and bears no rational relationship to any legitimate government purpose.

Several lower courts have recognized that information about one's gender identity or status as a transgender person falls within the zone of constitutionally protected informational privacy. *See, e.g.*, *Love v. Johnson*, 146 F. Supp. 3d 848, 855–56 (E.D. Mich. 2015); *John Doe v. Wash. State Dep't of Corrs.*, Case No. 4:21-CV-5059-TOR, 2021 WL 2453099, at *6 (E.D. Wash. May 17, 2021) (holding plaintiffs were likely to succeed on the merits of a due process claim based on the disclosure of their transgender status); *Ray v. Himes*, Case No. 2:18-cv-272, 2019 WL 11791719, at *7–9 (S.D. Ohio Sept. 12, 2019) (holding the state's policy of refusing to change the sex on a birth certificate to reflect an individual's gender identity required plaintiffs to disclose their transgender status and implicated their constitutional right to informational privacy); *see also Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) ("[F]orced disclosure of a transgender person's most private information is not justified by

any legitimate government interest."). One such court held that the plaintiffs' privacy rights were violated by a policy requiring an amended birth certificate[19] in order to obtain state identification with an accurate gender marker because the release of that personal information could lead to bodily harm and the information was of a sexual or personal nature. *Love*, 146 F. Supp. 3d at 854–56. So too here. Alabama's policy provokes the same dangers associated with outing a person's transgender status and implicates the same highly intimate information regarding a person's gender and genitalia.

For individuals who *do* choose to have genital gender confirmation surgery, Policy Order 63 compels them to disclose to the state that they received genital surgery in order to change their gender marker. Medical information is widely treated as falling within the zone of privacy. *See, e.g.*, *A.L.A. v. W. Valley City*, 26 F.3d 989, 990–91 (10th Cir. 1994) (holding that plaintiff had legitimate expectation of privacy with respect to HIV status); *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) ("[T]here are few matters that are quite so personal as the status of one's health, and few matters the dissemination of which one would

[19] At issue in that case, under Michigan law, individuals seeking to change the gender listed on their state IDs were required to procure a birth certificate listing the same gender. Certain plaintiffs were required to undergo genital surgery to amend their birth certificate; other plaintiffs could not change their ID because their state of birth did not allow amendments to the gender on their birth certificate. *Love*, 146 F. Supp. 3d at 851.

prefer to maintain greater control over.") (internal citations omitted). And, as Plaintiffs have detailed in their papers, the disclosure of such medical information carries with it the potential to provoke discrimination or hostility. Pls.' Mot. Summ. J. at 45–47; *see also* Appellee Br. at 43; *Ezzard*, 2013 WL 5438604, at *15 (recognizing certain medical conditions or procedures, including being HIV-positive, carry social stigma and, if disclosed, may provoke intolerance); *Powell*, 175 F.3d at 111 (acknowledging that being transgender "is likely to provoke both an intense desire to preserve one's medical confidentiality, as well as hostility and intolerance from others").

Policy Order 63 forces Plaintiffs to disclose information that is inherently private and intimate, and that compromises their safety.[20] Thus, not only does Policy Order 63 impermissibly compel speech, it compels the disclosure of constitutionally protected private information that, in many situations, could

[20] Although some "private" information may lose its protected status when shared with third-parties or on social media, courts have recognized that individuals do not automatically forfeit their reasonable expectation of privacy whenever they share private information with certain groups of people over the internet so long as they retain a "subjective" expectation of privacy. *See, e.g.*, *United States v. Chavez*, 423 F. Supp. 3d 194, 201–05 (W.D.N.C. 2019) (holding an individual maintained a protected expectation of privacy in his non-public Facebook content). The Supreme Court has similarly signaled that such intimate information warrants heightened protection. *See* Scott Skinner-Thompson, *Outing Privacy*, 110 Nw. U. L. Rev. 159, 192, 207–09 (2015) (describing courts' tendency to privilege intimate information including concerning medical or sexual issues).

expose transgender individuals to serious threats to their physical safety and well-being.

## CONCLUSION

For the foregoing reasons, and those stated by Plaintiffs, the judgment of the District Court should be affirmed.

Dated: August 2, 2021
New York, New York

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. Rule 32-4, this brief contains 6,247 words.

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

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 2, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Carmine D. Boccuzzi, Jr.
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**APPENDIX**

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