No. 21-10486

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DARCY CORBITT, et al.,

Plaintiffs-Appellees,

v.

HAL TAYLOR, et al.

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Alabama
No. 2:18-cv-00091-MHT

BRIEF OF AMICUS CURIAE ALABAMA CENTER FOR LAW AND LIBERTY IN SUPPORT OF DEFENDANTS-APPELLANTS SEEKING REVERSAL

Matthew J. Clark
ALABAMA CENTER FOR LAW AND LIBERTY
2213 Morris Ave., Floor 1
Birmingham, AL 35203
Tel.: (256) 510-1828
matt@alabamalawandliberty.org

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for *Amicus Curiae* Alabama Center for Law and Liberty, represents that this organizations does not issue stock but has one parent company, the Alabama Policy Institute. Counsel further certifies that, to the best of his knowledge, the following persons and entities have an interest in this appeal:

ACLU of Alabama – Law firm for Plaintiffs/Appellees;

Alabama Center for Law and Liberty – *Amicus Curiae*;

Alabama Policy Institute – Parent corporation of *Amicus Curiae* Alabama Center for Law and Liberty;

American Civil Liberties Union Foundation – Law firm for Plaintiffs/Appellees;

Arkles, Gabriel – Counsel for Plaintiffs/Appellees;

Barnes, Noel – Counsel for Defendants/Appellants;

Boone, Brock – Trial counsel for Plaintiff;

Chynoweth, Brad – Counsel for Defendants/Appellants;

Clark, Destiny – Plaintiff/Appellee;

Clark, Matthew – Counsel for *Amicus Curiae*

Cooper, Leslie – Counsel for Plaintiffs/Appellees;

Corbitt, Darcy – Plaintiff/Appellee;

Davis, James – Counsel for Defendants/Appellants;

Doe, Jane – Plaintiff/Appellee;

Eastman, Jeannie – Defendant/Appellant;

Esseks, James – Counsel for Plaintiffs/Appellees;

Faulks, Latisha – Counsel for Plaintiffs/Appellees;

LaCour, Edmund – Counsel for Defendants/Appellants

Marshall, Randall – Trial counsel for Plaintiffs/Appellees;

Marshall, Steven – Attorney General of Alabama

Messick, Misty – Counsel for Defendants/Appellants;

Pregno, Deena – Defendant/Appellant;

Saxe, Rose – Counsel for Plaintiffs/Appellees;

Sinclair, Winfield – Counsel for Defendants/Appellants;

Southern Poverty Law Center – Trial counsel's firm for Plaintiffs/Appellees;

Taylor, Hal – Defendant/Appellant;

Transgender Legal Defense & Education Fund – Law firm representing Plaintiffs/Appellees;

Ward, Charles – Defendant/Appellant;

Welborn, Kaitlin – Counsel for Plaintiffs/Appellees;

Respectfully submitted,

/s/ Matthew J. Clark
Matthew J. Clark
ALABAMA CENTER FOR LAW AND LIBERTY

2213 Morris Avenue, Floor 1
Birmingham, AL 35203
(256) 510-1828
matt@alabamalawandliberty.org

Counsel for Amicus Curiae

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Alabama Center for Law and Liberty is a nonprofit law organization based in Birmingham, Alabama, that advocates for limited government, free markets, and strong families. The ACLL has an interest in this case because it believes that construing the Constitution according to the original intent of its framers is key to preserving limited government. It also believes that there are only two sexes, male and female.

SUMMARY OF THE ARGUMENT

The district court held that intermediate scrutiny applied because Policy Order 63 subjected Appellees to a sex-based classification. However, the district court never claimed that Policy Order 63 *discriminated* on the basis of sex, and for good reason: Policy Order 63 does not discriminate on the basis of sex because it subjects both sexes to the same rule. In every Supreme Court decision where the Court has held that a sex-based distinction violates the Equal Protection Clause, it also held that the government discriminated on the basis of sex. Because the essential element of sex discrimination was not present in this case, the district court's decision is due to be reversed.

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[1] All parties have consented to the filing of this brief. Rule 29, Fed. R. App. P. Counsel for a party did not author this brief in whole or in part, and no such counsel or party made any monetary contribution to fund the preparation or submission of this brief. No person or entity other than *Amicus Curiae* and their counsel made a monetary contribution to fund the preparation or submission of this brief.

Failing to include the element of discrimination such claims could have disastrous results. For instance, applying the district court's logic to the 2020 Census results, every American who had a race-based classification made about them would have standing to sue if they were offended by the government's classification, even if no racial discrimination occurred. Likewise, the Alabama Department of Corrections, who keeps track of inmates according to race and sex, could be sued if an inmate were offended by how the government classified their race or sex, even if no discrimination occurred.

Finally, the district court's opinion comports neither with the original intent of the Fourteenth Amendment nor with controlling Supreme Court and Eleventh Circuit precedent. The Framers of the Fourteenth Amendment intended for it to secure every person's God-given natural rights, which does not include changing one's sex. The Supreme Court likewise has held that sex is an immutable characteristic assigned at birth. Finally, this Court has held that the Equal Protection Clause protects a person's right to *act* in ways that do not conform to their gender, but it has not held that a person has the right to change their *status*. In other words, a male may have the right to behave like a female, but it does not follow that his sex changes as a result.

ARGUMENT

I. Policy Order 63 Does Not Violate the Equal Protection Clause Because It Does Not Discriminate on the Basis of Sex

A. Controlling Precedent Requires the Presence of Sex-Based Discrimination to Invoke Intermediate Scrutiny

In its decision below, the district court reasoned not that Policy Order 63 *discriminated* on the basis of sex, but rather that Policy Order 63 was a *sex-based classification*. Dist. Ct. Op. 3. The district court avoided discussing whether Policy Order 63 discriminated between the sexes for good reason: it doesn't. However, based simply on the fact that Policy Order 63 made a sex-based classification, the district court held that intermediate scrutiny was warranted. In doing so, the district court failed to acknowledge that unconstitutional sex-based classifications must involve an element of discrimination in order to invoke the heightened scrutiny that the Equal Protection Clause requires.

As the district court noted, the Supreme Court's sex-discrimination cases began with *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973). In that case, a female member of the military sought to claim her husband as a "dependent" for the purposes of obtaining better quarters allowances, medical benefits, and dental benefits. 411 U.S. at 678. At the time, federal law allowed only male servicemembers to claim their spouses as dependents. *Id.* at 678-79. The question before the Court was "whether this difference in treatment constitutes an

unconstitutional discrimination against servicewomen in violation of the Due Process Clause of the Fifth Amendment." *Id.* at 679 (emphasis added).[2] In determining whether sex-based discrimination was unconstitutional, the Court reasoned that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Id.* at 688. Applying that principle to the case before it, the Court concluded that "by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband." *Id.* at 690-91.

While the Court reasoned that "classifications" based on sex were subject to a higher scrutiny, the question presented clearly set the context for the rule of law that the Court announced. The facts of the case and the question presented both involved not only sex-based classification but also sex-based discrimination. The Court further reasoned that the statutory scheme at issue "necessarily commands dissimilar treatment for men and women who are . . . similarly situated, and therefore involves the very kind of arbitrary legislative choice forbidden by the

[2] "While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is so unjustifiable as to be violative of due process." *Frontiero*, 411 U.S. at 680 (cleaned up).

Constitution." *Id.* at 690 (cleaned up). Thus, the Court's holding was based not only on sex-based classifications but also on sex-based discrimination.

Sex discrimination was present in subsequent Supreme Court decisions as well. Four years after *Frontiero*, the Court decided *Craig v. Boren*, 429 U.S. 190 (1976), which announced that intermediate scrutiny would be the standard of review in sex-discrimination cases brought under the Equal Protection Clause. 429 U.S. at 197. In *Craig*, the Court considered the constitutionality of a statute that allowed a certain kind of beer to be bought by females when they turned 18 but not males until they turned 21. *Id.* at 191-92. After announcing the standard of intermediate scrutiny, the Court held that the statute "invidiously discriminates against males 18-20 years of age." *Id.* at 204. Again, the Court focused not only on whether there was a sex-based classification but whether such *classification* led to invidious sex-based *discrimination*. The district court's analysis relied on *Craig* but failed to note that discrimination played a core role in the Court's reasoning. Dist. Ct. Op. 21, 42.

Even in *United States v. Virginia*, which arguably was the most shocking sex-discrimination case brought under the Equal Protection Clause, the Court could not reach its conclusion without addressing the element of discrimination.[3] In that

[3] The district court relied on *Virginia* ten times in its opinion, but it never addressed the element of discrimination that was so central to *Virginia*'s reasoning. *See* Dist. Ct. Op. 15-16, 19, 21, 24, 34, 41, 42.

case, the Court considered whether the Virginia Military Institute's policy of excluding women (who were capable of living up to all of VMI's other requirements) violated the equal opportunity guaranteed by the Equal Protection Clause. *United States v. Virginia*, 518 U.S. 515, 530 (1996). The Court restated the standard in sex-discrimination cases as follows:

> To summarize the Court's current directions for cases of official *classification* based on gender: Focusing on the *differential treatment* or *denial of opportunity* for which relief is sought, the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.' The burden of justification is demanding and it rests entirely on the State…. The State must show "at least that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" The justification must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.

Virginia, 518 U.S. at 532-33 (cleaned up). After analyzing VMI's reasons for not admitting females, the Court concluded that VMI's exclusion of women violated the Equal Protection Clause. *Id.* at 534.

Once again, the Court examined not only whether the case presented a sex-based classification, but rather whether involved "differential treatment" or "denial of opportunity" – i.e. whether it involved discrimination or not. The finding of unjustifiable discrimination was central to the Court's analysis. It did not engage in a mere academic discussion of whether the law classified the sexes differently, but

instead it examined whether women were denied opportunities because of their biological sex.

As far as *Amicus Curiae*'s research shows, every time the Supreme Court has held that a sex-based classification violates the Equal Protection Clause, it also found discriminatory treatment based on sex.[4] Consequently, it is not enough, as the district court supposed, to hold that a sex-based classification automatically triggers intermediate scrutiny. Instead, that element of discrimination has always been present.

To use an analogy from the Supreme Court's Commerce Clause jurisprudence, the Court held in 1942 that Congress has the power to regulate intrastate activities that in the aggregate substantially affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 124 (1942). Relying on this principle, Congress passed the Gun-Free School Zone Act of 1990, which made it a federal criminal offense for "any individual knowingly to possess a firearm at a place that the

[4] In addition to *Fronteiro*, *Craig*, and *Virginia*, *see J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982); *Kirchberg v. Feenstra*, 450 U.S. 455, 460-61 (1981); *Wengler v. Druggist Mut. Ins. Co.*, 446 U.S. 142, 150 (1980); *Califano v. Westcott*, 443 U.S. 76, 79-80 (1979); *Orr v. Orr*, 440 U.S. 268, 270-71 (1979); *Turner v. Dep't of Employment Security of Utah*, 423 U.S. 44, 44-47 (1975); *Stanton v. Stanton*, 421 U.S. 7, 8, 17-18 (1975); *Taylor v. Louisiana*, 419 U.S. 522, 523, 537-38 (1975); *Reed v. Reed*, 404 U.S. 71, 77-78 (1971); *see also Sessions v. Morales-Santana*, 137 S.Ct. 1678, 1686 (2017) (holding that federal statutory law that discriminated based on sex violated the equal protection component of the Fifth Amendment); *Califano v. Goldfarb*, 430 U.S. 199, 201-02 (1977) (same); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 637-39 (1975) (same).

individual knows, or has reasonable cause to believe, is a school zone." *United States v. Lopez*, 514 U.S. 549, 551 (1995). The Court held that this law exceeded Congress's authority under the Commerce Clause, reasoning that such power, even under *Wickard*, extends only to *economic* activities that in the aggregate substantially affect interstate commerce. *Lopez*, 514 U.S. at 560. Although this principle had been present in the Supreme Court's precedents at least as far back as *Wickard*, the Supreme Court had to underscore this point because it appears to have been forgotten. The Court then held that the Act "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Id.* at 561.

Lopez did not overrule any previous Supreme Court decisions; it only recognized an essential element of its jurisprudence that Congress had overlooked in passing that law. In the same way, in this case, the district court failed to note an essential element of the Supreme Court's Equal Protection jurisprudence: the element of sex-based discrimination. Appellees cannot invoke intermediate scrutiny without discrimination anymore than Congress could invoke the aggregation principle without economics in *Lopez*.

B. Policy Order 63 Does Not Discriminate on the Basis of Sex Because It Applies Equally to Both Men and Women.

In this case, Policy Order 63 required a person's sex on his or her driver's license to correspond with his or her genitalia. This does not discriminate on the

basis of sex because it applies equally to men and women. Consequently, Policy Order 63 does not involve the sex-based discrimination necessary to trigger the Equal Protection Clause's intermediate scrutiny.

Appellees may counter that Policy Order 63 does discriminate on the basis of sex because it discriminates against transgender people. But this, of course, presumes that there are more than two sexes or that a person's sex can change. But as the Supreme Court has held, "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth[.]" *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). There are real, physical differences that separate the sexes, as the Supreme Court itself has recognized. *See Virginia*, 518 U.S. at 533. These differences are based on biology, not bigotry. *See* Ryan T. Anderson, *When Harry Became Sally: Responding to the Transgender Movement* 81 (2019) (noting that a person's biological sex is determined by the "presence of an XX or XY chromosomal composition.").[5]

The only way in which Policy Order 63 deviates from this traditional understanding of sex is allowing a person who was born as one sex to be recognized as the other if that person in question had his or her genitals altered.

[5] Dr. Anderson's book caught national attention when Amazon decided to "cancel" the book because of its viewpoint. *See* Jeffrey A. Tractenberg, *Amazon Won't Sell Books Framing LGBTQ+ Identities as Mental Illness*, The Wall Street Journal, https://www.wsj.com/articles/amazon-wont-sell-books-framing-lgbtq-identities-as-mental-illnesses-11615511380 (last updated March 11, 2021).

Regardless of whether such surgeries should have been performed in the first place, ALEA recognizes that in some cases it has happened. But rather than subjecting individuals seeking a driver's license to a DNA test, ALEA decided to classify a person's sex according to their genitals, which is the primary physical difference between men and women. *See* Anderson, *supra*, at 81-82. Consequently, Policy Order 63 bears a rational relationship to the State's legitimate interests of informing law enforcement officers on how to proceed with arrests, searches, and booking, as well as medical treatment if necessary. *See* Doc. 54 at 49. Consequently, this Court must reverse the judgment of the district court.

II. The District Court's Interpretation of the Equal Protection Clause Would Yield Absurd Results if Applied in Other Contexts.

As argued above, the district court's reasoning departed from the orthodox method of evaluating Equal Protection claims. Instead of requiring proof of discrimination, the district court held that a government's sex-based classification, by itself, is enough to trigger heightened scrutiny. Assuming this logic applied to all other forms of Equal Protection claims, the district court's analysis would yield truly absurd results.

A. Race

As this brief was being written, the U.S. Census Bureau released the results of the 2020 Census.[6] On the census forms, the Census Bureau asked a series of questions asking the recipients to identify their race and ethnicity.[7] The Census Bureau allowed each individual to select the race or ethnicity with which they identified, but it provided definitions for each race and would fill in the answers if a person declined to respond.[8] Thus, the Census Bureau classified every American according to race.

According to the district court's logic, every American who answered the 2020 Census would have the right to sue the Census Bureau if they were offended by its race-based classifications. If no element of sex-based discrimination is required to bring a sex-based claim, then by the same logic, no element of racial discrimination is required to bring a race-based claim, either. If the mere act of classifying a person according to his or her sex is enough to invoke the Equal Protection Clause's intermediate scrutiny, then the mere act of classifying a person according to his or her race should be enough to invoke the Equal Protection

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[6] *See* Press Release, 2020 Census Apportionment Results Delivered to the President, United States Census Bureau (Apr. 26, 2021), https://www.census.gov/newsroom/press-releases/2021/2020-census-apportionment-results.html.

[7] *See 2020 Census Questions: Race*, United States Census Bureau, https://2020census.gov/en/about-questions/2020-census-questions-race.html (last visited Apr. 27, 2021).

[8] *Id.*

Clause's strict scrutiny as well. Consequently, 331,449,281 Americans would have standing to sue the federal government for the simple act of taking notice of their race.[9] If the district court's logic stands, then the federal government would go bankrupt.

The state governments would go bankrupt as well. For instance, the Alabama Department of Corrections (ADOC) runs a website that allows an internet user to lookup any inmate in the system. On the search page, the ADOC reports that there are 24,651 inmates in the system.[10] Of those inmates, 12,540 are black males; 9,816 are white males; and 192 are "other males."[11] Likewise, 547 are black females; 1551 are white females; and 5 are "other females."[12] According to the district court's logic, by merely classifying individuals according to their race and sex, the ADOC created 24,651 race-based claims under the Equal Protection Clause.

B. Sex

As noted above, the ADOC provides classifies inmates not only according to their race but also according to their sex. Based on the numbers above, the ADOC reports that there are 22,548 males and 2,103 females in the system. Consequently,

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[9] *See* Press Release, *supra* note 6 (noting the number of Americans according to the census).
[10] *Search for Inmates*, Alabama Department of Corrections, http://www.doc.state.al.us/InmateSearch (last visited Apr. 27, 2021).
[11] *Id.*
[12] *Id.*

24,651 people have been subjected to a sex-based classification, creating 24,651 sex-based claims under the Equal Protection Clause according to the district court's logic. These claims would not even require transgender inmates to claim that they should be given hormone treatment[13] or sent to a correctional facility corresponding to the other sex.[14] All they would have to do is show that they were subjected to a sex-based classification, and the government would have a lawsuit on its hands.

C. Anticipatory Rebuttals

Appellees may object that the analysis is not that simple because plaintiffs in such cases would have had to suffer an injury in order to have standing. This is true, but in order to have standing, plaintiffs would merely have had to demonstrate the kind of injuries Appellees suffered here. In regards to sex discrimination, all a plaintiff would have to do is show the kind of psychological pain (or offense) Appellees have suffered in order to have standing. See Dist. Ct. Op. 7-8.[15] This

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[13] *See* Mary Margaret Olohan, *Over 250 Male California Inmates Request Transfer to Women's Facilities*, The Daily Signal (Apr. 7, 2021), https://www.dailysignal.com/2021/04/07/over-250-male-california-prison-inmates-request-transfer-to-womens-facilities.

[14] *See Keohane v. Fla. Dep't of Corr.*, 952 F.3d 1257 (11th Cir. 2020) (rejecting transgender inmate's claim that failure to administer hormone therapy constituted cruel and unusual punishment).

[15] In addition to psychological pain, the District Court recognized that a person would have to have surgery to match the sex listed on their driver's license and that they could face harassment or violence from people who did not like their transgender status. Dist. Ct. Op. 7-10. However, any one of these three grounds

could come from simply knowing that they were included in the head count of males or females. Thus, if a plaintiff could prove that the government included him or her in a headcount of one sex or another and suffered psychological distress because of that, then under the district court's logic, they would have standing to sue, regardless of whether the government subjected them to a form of sex discrimination or not.

Likewise, the only injury that a person would have to cite in order to bring a racial-classification claim under the Equal Protection Clause is the psychological trauma that the government classified him or her as a race that does not comport with how he or she identifies. This, of course, would mean that being "transracial" would become an issue just as being "transgender" is now. However, there have been real instances of this. For instance, civil rights activist Rachel Dolezal was accused in 2015 of using "blackface as a performance" after her birth parents revealed that she "grew up as a blonde white woman with adopted black family in Mississippi." Alan Yuhas, *Rachel Dolezal Defiantly Maintains, "I Identify as Black" in TV Interview*, The Guardian, https://www.theguardian.com/us-news/2015/jun/16/rachel-dolezal-today-show-interview (last visited May 7, 2021). When asked how she reconciled a picture of herself as a blonde, freckled teenager with being black, Dolezal replied, "I was actually identified when I was doing

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could satisfy the injury requirement of standing according to the district court, and therefore psychological injury alone could suffice. *See* Dist. Ct. Op. 10.

human rights work in north Idaho as first *trans-racial*." *Id.* (emphasis added). *See also* Garin Flowers, *"Transracial" Man, Born White, Says He Feels Filipino*, USA Today (Nov. 13, 2017), https://www.usatoday.com/story/news/nation-now/2017/11/13/transracial-man-born-white-says-he-feels-filipino/858043001 (reporting on white man who identified as Filipino and noting that he is "part of a small but growing number of people who call themselves transracial. The term once referred only to someone (or a couple) of a one race adopting a child of another, but now it's becoming associated with someone born of one race who identifies with another.").

If a person who is born male but identifies as female has standing to sue because the government classifies him according to his biological sex rather than perceived sex, then it follows that a person who is born white but identifies as black (or vice versa) has standing to sue because the government classifies him according to his born race instead of his perceived race. If he suffers the same kind of psychological harm that the transgender person does, then regardless of whether he has suffered a form of discrimination or not, the government's sex-based classification of that individual would give him or her the right to sue.

D. Conclusion

"To fail to acknowledge even our most basic biological differences … risks making the guarantee of equal protection superficial, and so disserving it." *Nguyen*

v. INS, 533 U.S. 53, 73 (2001). The government routinely takes notice of a person's biological sex without subjecting them to sex-based discrimination, and it has never resulted in liability until now. Affirming the district court's error would only blow the door open to thousands, if not millions, of lawsuits by people who identify as something other than what the government says about them. Consequently, the district court's decision is due to be reversed.

III. The District Court's Interpretation of the Equal Protection Clause Does Not Comport with the Fourteenth Amendment's Original Intent or Controlling Precedent

A. Original Intent

The Fourteenth Amendment's Equal Protection Clause states, "nor shall any State … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. There is nearly universal agreement that the immediate object of the Fourteenth Amendment was to outlaw the Black Codes and constitutionalize the Civil Rights Act of 1866. *See* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1, 5 & n.16 (2011). However, the text of the Equal Protection Clause does not limit the denial of equal protection only to black people; it instead provides that no state may "deny to any *person* within its jurisdiction the equal protection of the laws." Thus, it becomes necessary to inquire as to what its framers meant to determine its scope.

The Heritage Foundation described the jurisprudence of the Fourteenth Amendment's framers this way:

> "The framers' jurisprudence tended to lump together rights flowing from citizenship and personhood under the rubric of 'civil rights,' and to speak of them in religious or natural law and natural rights terms. In Section 1 of the Fourteenth Amendment, the framers attempted to create a legal bridge between their understanding of the Declaration of Independence, with its grand declarations of equality and rights endowed by a Creator God, and constitutional jurisprudence."

David Smolin, *Equal Protection*, in *The Heritage Guide to the Constitution* 400 (1st ed. 2005). The Heritage Foundation says further:

> "[T]his general language [in the Equal Protection Clause] reflected anti-slavery Republican jurisprudence, which drew links between the Declaration of Independence, natural law and natural rights, and constitutional jurisprudence. From an originalist constitutional perspective, application of the Equal Protection Clause to rights or issues beyond the scope of the 1866 Civil Rights Act can rest upon the broader principles enacted by the framers—their jurisprudence of equality linking the Declaration of Independence to the Constitution."

Id. at 401.

The Heritage Foundation's thesis should be tested by evaluating the positions of the Fourteenth Amendment's major framers, which include Thaddeus Stevens, John Bingham, and Jacob Howard, as well as the public's response.

1. Thaddeus Stevens

"At the time of the framing of the Fourteenth Amendment, Thaddeus Stevens was the most powerful politician in America." Aaron J. Walker, *"No*

Distinction Would Be Tolerated": Thaddeus Stevens, Disability, and the Original Intent of the Equal Protection Clause, 19 Yale L. & Pol'y Rev. 265, 269 (2000). One commentator has described him as "the primary Framer of the Fourteenth Amendment" because he "could command solid party votes even individuals in the party disagreed." *Id.* at 273. It has been observed that Stevens allowed John Bingham to write Section 1 of the Fourteenth Amendment for political reasons, but Stevens had the final say. *Id.* at 274.

Stevens looked both to the Bible and to the Declaration of Independence to inform his views of what constituted discrimination. Walker, *supra*, at 278.[16] Stevens introduced the first draft of the Fourteenth Amendment to the House of Representatives on April 30, 1866. 2 *The Reconstruction Amendments: The Essential Documents* 10 (Kurt T. Lash, ed., Univ. of Chicago Press 2021). On the day he introduced the Amendment, Stevens said, "Our fathers had been compelled to postpone the principles of their great Declaration, and wait for their full establishment till a more proprietous time. That time ought to be present now." *Id.* at 158 (reproducing *Cong. Globe*, 39th Cong., 1st Sess., 2458-59 (May 8, 1866)). Commenting on the rights protected by Section 1, Stevens said,

> I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted,

[16] Even on his tombstone, he declared that the principle that he had advocated throughout his life was "EQUALITY OF MAN BEFORE HIS CREATOR." *Id.* at 285.

> in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.

Id. at 159. Thus, as for Thaddeus Stevens, the principal framer of the Fourteenth Amendment, there is no question that he believed he was taking the principle of God-given rights enunciated in the Declaration of Independence to their logical conclusion.

2. John Bingham

John Bingham is often the subject of Fourteenth Amendment analysis, with Justice Hugo Black even calling him the "Madison of the first section of the Fourteenth Amendment." Walker, *supra*, at 268-69 (cleaned up). Perhaps this view of Bingham gives him too much credit in light of Stevens's influence, *see* Walker, *supra*, at 274, but the fact remains that Bingham wrote Section 1 of the Amendment and was its standard-bearer in the House. Moreover, "[o]nce John Bingham's version of the Fourteenth Amendment emerged from committee, it was treated primarily as providing constitutional authority for the Civil Rights Act of 1866, and it received relatively little comment." Smolin, *supra*, at 400.

In debating what would become Section 2 of the Fourteenth Amendment, which would require blacks to be taken fully into account in apportioning representatives, Bingham explained, "I am for the proposed amendment from a

sense of right—that absolute, eternal verity which underlies your Constitution. So it was proclaimed in your imperishable Declaration by the words, all men are created equal; that they are endowed by their Creator with the rights of life and liberty…." *The Reconstruction Amendments*, *supra*, at 59 (reproducing *Cong. Globe*, 39th Cong., 1st Sess., 422-35 (Jan. 25, 1866)). Thus, like Stevens, Bingham believed he was taking the principle of God-given equality stated in the Declaration of Independence to its logical conclusion.

3. Jacob Howard

Senator Jacob Howard introduced the Fourteenth Amendment in the Senate. *Id.* at 185. As to the Equal Protection Clause, Senator Howard explained the following:

> The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? Ought not the time to be now passed when one measure of justice is to be meted out to a member of one caste while another and a different measure is meted out to the member of another caste, both castes being alike citizens of the United States, both bound to obey the same laws, to sustain the burdens of the same Government, and both

> equally responsible to justice and to God for the deeds done in the body?

Id. at 188 (reproducing *Cong. Globe*, 39th Cong., 1st Sess., 2764-67 (May 23, 1866). Senator Howard's comments reflect the view that all men are equal under God and therefore should be treated equally, a fundamental principle from the Declaration of Independence.

4. Public Response and Ratification

Calabresi and Rickert note that there are generally two types of originalists: (1) those who discern the text's meaning by the intent of the framers, or (2) those who look to the original public meaning, i.e. what a reasonable person reading the Constitution would have understood at the time of its ratification. Calabresi & Rickert, *supra*, at 8-9. Justice Scalia fell into the latter camp. *Id.* However, even Justice Scalia viewed the statements of constitutional framers as relevant to discerning original public meaning because their views, "like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood." Antonin Scalia, *A Matter of Interpretation* 38 (new ed. 2018). Consequently, their statements are relevant to understanding the original public meaning.

In his new work, Professor Lash gives an overview of the ratification process but does not discuss the specific issue at hand in that summary. *See The Reconstruction Amendments*, *supra*, at 227-33. He does note, however, that in the

1866 elections, the Republicans "prevailed in a landslide election and received what they viewed as a mandate to secure the ratification of the Fourteenth Amendment." *Id.* at 228. Given that the Fourteenth Amendment was a product of Republican jurisprudence that linked the natural rights of the individual to the Constitution itself, Smolin, *supra*, at 401, their landslide victories probably were a mandate for those Republican ideas. Given the wide-spread knowledge that the Republicans were trying to take the principles in the Declaration of Independence to their logical conclusion, there is no reason to believe that the People viewed the Equal Protection Clause as anything less than what Stevens, Bingham, and Howard did.

5. Conclusion and Application

In light of the primary sources discussed above, the Heritage Foundation's thesis is correct. The Framers of the Fourteenth Amendment intended to take the Declaration of Independence's principle of equality under God to its logical conclusion. It is impossible to understand the scope of the Equal Protection Clause without that backdrop. Various theories of "equality" dominate today's debates, not only in political circles but also in legal circles. But without a proper understanding of what "equal protection" meant to those who wrote it and those who ratified it, the concept of equal protection can become whatever the judiciary wants it to mean.

Consequently, the district court's interpretation of the Equal Protection Clause cannot be sustained. The Framers of the Fourteenth Amendment intended for the judiciary to interpret it against the backdrop of natural law, not against the tenants of natural law. When politics have not been involved, the overwhelming scientific consensus is that sex is determined by a person's chromosomes: XX produces a female, and XY produces a male. *See* Anderson, *supra*, at 78 (citing T.W. Sadler, *Langman's Medical Embryology* 40 (2004); William J. Larsen, *Human Embryology* 519 (2001); and Keith L. Moore & T.V.N. Persaud, *The Developing Human: Clinically Oriented Embryology* 35 (2003)). Determining a person's biological sex ordinarily does not require the examination of chromosomes, because the person's genitalia normally corresponds to his or her chromosomes. *Id.* at 78-82. Thus, the laws of nature teach that there are two sexes, or, in other words, "male and female He created them." *Genesis* 1:27.[17] The district court used the Equal Protection Clause to create a right that neither the framers or the people intended, and therefore it cannot stand.

B. Controlling Precedent

The district court's holding cannot be reconciled with the precedents of the United States Supreme Court or the Eleventh Circuit, either. The district court's

[17] The phrase "laws of nature and of nature's God" in the first paragraph of the Declaration of Independence reflected the view that natural law could be discerned in two ways: reason and revelation. *See* 1 William Blackstone, *Commentaries* *38-42; *see also* 2 John Locke, *Of Civil Government* § 136 n. (1689).

opinion rests on the premise that sex is fluid rather than fixed. But the Supreme Court has held that "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth[.]" *Frontiero*, 411 U.S. at 686. Departing from this principle would require overruling Supreme Court precedent, which this Court is not at liberty to do. *See W. Ala. Women's Ctr. v. Williamson*, 900 F.3d 1310, 1329-30 (11th Cir. 2018).

The Supreme Court's recent decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2019), which is the only case in which the Supreme Court has recognized some level of transgender rights, does not warrant a different result. In that case, the Supreme Court held that an employer violates Title VII's prohibition of sex discrimination when it fires an employee because they are transgender. *Bostock*, 140 S. Ct. at 1737. Purportedly relying on the textualist theory of statutory interpretation, Justice Gorsuch, writing for the Court, reasoned that firing a transgender person involves firing him or her "for traits or actions [the employer] would not have questioned in members of a different sex," which necessarily means the employer ran afoul of Title VII's prohibition of sex discrimination. *Id.*; *see also id. at* 1755-56 (Alito, J., dissenting) (describing the Court's opinion as a "pirate ship" sailing "under a textualist flag" but actually representing "a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should 'update' old statutes so that they better reflect the current values of society.").

Bostock is distinguishable because the rules of statutory analysis and constitutional analysis are different. As Justice Scalia explained, because the Constitution lacks the specificity and length of a statutory code, the object of constitutional interpretation is to determine "the original meaning of the text." Scalia, *supra*, at 37-38. This is different than statutory interpretation, where the court should "not inquire what the legislature meant" but rather "only what the statute means." *Id.* at 23 (cleaned up). Thus, while the Supreme Court essentially conceded that Congress did not mean for Title VII to apply to gender identity, it held that the statute so applied anyway. *Bostock*, 140 S. Ct. at 1737. Constitutional analysis, in contrast, is much different, which is perhaps why the district court did not even cite *Bostock*. In light of the views of the Fourteenth Amendment's framers, the Equal Protection Clause could not protect a right to change one's sex.

Appellees may object that interpreting the Equal Protection Clause according to the intent of its framers would violate the Establishment Clause because it involves a discussion of natural law, which in turn involves God. However, in 2014, the Supreme Court held: "Any [Establishment Clause] test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change." *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014). There is no question that such analysis was accepted both by the Framers of the Constitution and survived through the passage

of the Fourteenth Amendment. Even if the framers' view of natural law has not "withstood the critical scrutiny of time and political change," the view that the Constitution should be interpreted according to the intent of its framers has. Applying that view here means that the Equal Protection Clause should not be construed to confer a new right contrary to the intent of its framers.

Finally, this Court's decision in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), is distinguishable. In *Glenn*, this Court held that a government violates the Equal Protection Clause when it fires a person "on the basis of his or her gender non-conformity." 663 F.3d at 1316. The Court reasoned that *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality) held that discriminating against a person because their behavior did not comport with sex-stereotypes violates the Equal Protection Clause. Applying *Price Waterhouse* to the case before it, this Court reasoned that "[a] person is defined as transgender precisely because of the perception that his or her *behavior* transgresses gender stereotypes," and therefore *Price Waterhouse* prohibits discrimination against transgender people. *Glenn*, 663 F.3d at 1316 (emphasis added).

Amicus respectfully submits that, in light of the Equal Protection Clause's original intent, *Glenn* should be reconsidered at an opportune time. In the meantime, however, *Glenn* held only that the government violates the Equal Protection Clause when it discriminates against a person for gender non-

conforming *behavior*. It did not hold, however, that the government violates the Equal Protection Clause simply for recognizing one's *status*, as Policy Order 63 does. As Chief Judge Pryor noted in a later case, "The doctrine of gender nonconformity is, and always has been, behavior based. Status-based protections must stem from a separate doctrine …." *Evans v. Ga. Reg. Hosp.*, 850 F.3d 1248, 1260 (11th Cir. 2017) (William Pryor, J., concurring). Thus, under this Court's precedent, the Equal Protection Clause protects a transgender person's right to *behave* in a certain way, but it does not protect the right to change their *status*, which is what Appellees sought to do in this case.

CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

/s/ Matthew J. Clark
Matthew J. Clark
ALABAMA CENTER FOR LAW AND LIBERTY
2213 Morris Avenue, Floor 1
Birmingham, AL 35203
(256) 510-1828
matt@alabamalawandliberty.org
Counsel for Amicus Curiae

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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 6,500 words.

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/s/ Matthew J. Clark
Matthew J. Clark
Counsel for Amicus Curiae

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I certify that on May 19, 2021, I electronically filed this document using the Court's CM/ECF system, which will serve notice of such filing on the following:

Counsel for Appellants/Defendants

Edmund G. LaCour, Jr.
Brad A. Chynoweth
James W. Davis
Misty Shawn Fairbanks Messick
Winfield J. Sinclair
ALABAMA ATTORNEY GENERAL'S OFFICE
501 Washington Avenue
Montgomery, AL 36104
334-242-7300
Edmund.LaCour@AlabamaAG.gov
Brad.Chynoweth@AlabamaAG.gov
Jim.Davis@AlabamaAG.gov
Misty.Messick@AlabamaAG.gov
Winfield.Sinclair@AlabamaAG.gov

Noel Steven Barnes
ALABAMA LAW ENFORCEMENT AGENCY
201 S. Union St., Ste. 300
Montgomery, AL 36104
334-517-2889
Noel.Barnes@alea.gov

Counsel for Appellees/Plaintiffs

Leslie Cooper
James D. Esseks
Rose A. Saxe
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., Fl. 18
New York, NY 10004
212-549-2633
lcooper@aclu.org
jesseks@aclu.org
rsaxe@aclu.org

LaTisha Faulks
Kaitlin Welborn
AMERICAN CIVIL LIBERTIES UNION OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106
334-265-2754
tgfaulks@aclualabama.org
kwelborn@aclualabama.org

Gabriel Arkes
TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND
520 8th Ave., Ste. 2204
New York, NY 10018
646-862-9396
garkles@transgenderlegal.org

Randall C. Marshall
LAW OFFICE OF RANDALL C. MARSHALL
6611 Bristle Cone Ct.
Lolo, MT 59847
rmarshall@aclualabama.org

/s/ Matthew J. Clark
Matthew J. Clark
Counsel for *Amicus Curiae*