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

APPENDIX VOLUME IV

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June 2, 2021

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DARCY CORBITT, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. 2:18-cv-91-MHT-GMB
	)	
HAL TAYLOR, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Alabama Law Enforcement Agency (ALEA) policy preventing transgender people from changing the sex designation on an Alabama driver's license unless they have had genital surgery puts transgender people in an impossible position. A driver's license is an extension of everyday life for Alabamians. Getting groceries, keeping a job, attending public civic events, going to church, and visiting loved ones are just a small sample of life in Alabama that is difficult or impossible to access without driving. Many people also use a driver's license for identification when requesting or amending government records, qualifying for professional licenses, applying for a job, buying alcohol, picking up prescriptions, checking in to a hotel, traveling by plane, and more. A license that shows the wrong sex designation is a license that transgender people cannot use without sacrificing their health, privacy, dignity, autonomy, integrity, and safety.

As a practical matter, transgender people in Alabama have three "options." One, they can go without a driver's license, and lose the ability to support themselves and otherwise participate in public life. Two, they can carry and show a license with the wrong sex designation, conveying an inaccurate message about their gender that they find abhorrent; revealing them to be transgender to strangers who might harass, discriminate against, or even attack them; and compromising their dignity and fundamental sense of self. Three, if they have the financial means and are medically able to do so, they can undergo sterilizing surgical procedures and provide information about that surgery to a government agency, violating their bodily integrity and privacy.

Policy Order 63 facially applies only to transgender people. It deprives Plaintiffs of equal protection of the law, conditions their access to a government benefit on forfeiting their rights to maintain their privacy and make their own decisions about their medical care, and

forces them to convey an ideological message with which they disagree. This policy is not justified by any legitimate government interest, much less any important or compelling government interest. Indeed, most states do not require transgender people to provide proof of surgery or an amended birth certificate to update the sex designation on a driver's license. The undisputed facts show that Policy Order 63 is arbitrary, and based solely on uninformed opinions about transgender people that Defendants hold. Defendants' personal opinions about what being a man or a woman means cannot justify infringement of Plaintiffs' fundamental rights or the guarantee of equality under the law.

STATEMENT OF FACTS

Policy Order 63

1. The Driver's License Division of the Department of Public Safety, a department of the Alabama Law Enforcement Agency (ALEA), has responsibility for issuing Alabama driver's licenses. *See* Ala. Code § 32-2-5. Defendants are ALEA officials. Answer ¶ 13-16, ECF No. 40.

2. ALEA's Policy Order 63 provides for changing the sex designation on a driver's license only "due to gender reassignment surgery," and requires applicants to submit "[a]n amended state certified birth certificate and/or a letter from the physician that performed the reassignment procedure." Policy Order 63 (D2), attached as Pls.' Ex. 1. Defendants have no alternative procedure in place for a transgender person whose surgeon has died or retired from practice. Eastman 30(b)(6) Dep. 61:14-20, attached as Pls.' Ex. 2.

3. Defendants interpret the policy to require what they refer to as "complete" gender reassignment, by which they mean that a transgender person must receive at least penile and vaginal surgery before changing the sex designation on a driver's license. *Id.* at 53:9-54:1;

66:19-22; 67:4-18; Pregno 30(b)(6) Dep. 85:12-20, attached as Pls.' Ex. 3; Spencer Dep. 61:10-20; 63:13-17, attached as Pls.' Ex. 4.

4. Defendant Deena Pregno, in her capacity as Chief of the Driver's License Division within ALEA, issued the most recent version of Policy Order 63. Policy Order 63; Pregno Dep. 26:9-11.

5. Policy Order 63 was developed by ALEA administrators, including Chief Pregno and Defendant Jeannie Eastman, in consultation with ALEA's legal department, and without any consultation with transgender people, experts in transgender health, ALEA's own Medical Advisory Board, or medical professionals of any kind. Pregno Dep. 39:18-40:18; 47:16-21.

6. The policy was purportedly originally developed to create a formal written policy that maintains consistency with the state's policy for sex designation changes on birth certificates. Pregno Dep. 45:3-13.

7. It was purportedly revised to provide "more latitude" to transgender people while maintaining consistency with the state birth certificate policy. *Id*. 47:4-6. Instead of requiring both a letter from a surgeon who performed surgery on an applicant *and* an amended birth certificate, in 2015 the agency changed its policy to require a surgeon's letter *or* an amended birth certificate. Policy Order 63 of 2012 (D1), attached as Pls.' Ex. 5; Policy Order 63 (D2).

8. According to Defendants, Policy Order 63 was not created or revised for any other purpose. *Id*. 45:10-13; 47:21-23.

9. No Alabama statute requires individuals to provide an amended birth certificate or proof of surgery to change an Alabama driver's license or non-driver identification card to document a person's correct gender.

10. While a statute requires surgery to correct the gender on a person's Alabama birth certificate, that statute does not apply to driver licenses or non-driver identification cards. Ala. Code § 22-9A-19(d); *see also* Pregno Dep. 43:17-20.

11. No Alabama statute refers to gender on driver's licenses or non-driver identification cards. A statute requires that a license contain a color photograph, name, birthdate, address, signature, and "description of the licensee." Ala. Code § 32-6-6.

12. Defendants permit applicants to change other descriptive characteristics listed on driver's licenses, such as height, weight, and hair color, without measurements or medical documentation. Pregno Dep. 71:12-20. For instance, if someone has lost significant weight, Defendants do not require proof of gastric bypass surgery—nor do they require the person to step onto a scale. They simply take the applicant's word for these characteristics.

13. Defendants have issued no written guidance explaining how to apply Policy Order 63 or defining "gender reassignment surgery." Eastman Dep. 45:10-12.

14. The records of people who have applied to change the sex designation on their licenses reflect some inconsistencies in how ALEA has applied Policy Order 63.[1]

15. Several people's applications were granted despite not specifying anything about genitals or genital surgery. Eastman Dep. 94:2-95:22; Letter from Christine McGinn, D.O., Papillon Center, to Whom It May Concern (June 22, 2015) (D1170) attached as Pls.' Ex. 6; Letter from Harold M. Reed to Vital Statistics (May 16, 2017) (D1154) attached as Pls.' Ex. 7; Letter from Daniel A. Medalie, M.D., MetroHealth, to Whom It May Concern (Aug. 1, 2014) (D1166) attached as Pls.' Ex. 8; Affidavit from Charles E. Garramone, D.O. to Whom It May Concern (Nov. 30, 2015) (D1174) attached as Pls.' Ex. 9.

[1] Most of the records Defendants produced were of successful applications. While they were able to produce some records of unsuccessful applications, they explained that there was no way to search for applications that had been denied. Eastman Dep. 10:21-11:7. Thus, records of most unsuccessful applications likely were not produced.

16. At least two people's applications were granted despite the medical provider not using the word "complete" to characterize the individual's surgery. Letter from Harold Reed, M.D., F.I.C.S. to Whom It May Concern (May 7, 2009) (D1139) attached as Pls.' Ex. 10; Letter from Christine McGinn, Pls.' Ex. 6.

17. One person's application was denied despite reflecting that the author performed surgery to "irreversibly correct [the applicant's] anatomical male appearance," because the surgeon's letter was not on letterhead and the surgeon did not use the word "complete." Letter from William J. Hedden, M.D. to Whom It May Concern (May 23, 2013) (D1226) attached as Pls.' Ex. 11.

18. One person's application was denied because the letter, while stating that the applicant had "completed gender reassignment," did not state that the physician who wrote the letter had performed surgery. Letter from Jerry Gurley, M.D., FACOG, FACS to Whom It May Concern (May 3, 2010) (D1250) attached as Pls.' Ex. 12.

19. Sometimes, when a surgeon's letter does not include the word "complete," ALEA calls the applicant's physician without the person's knowledge or consent, and without a warrant or court order, to obtain additional information about the person's medical history. *See e.g.* Letter from Stephen Steinmetz, M.D., F.A.C.S., to Whom It May Concern (Nov. 9, 2016) (D226) attached as Ex. 13; Eastman Dep. 37:17-41:10. ALEA makes these calls despite the language of its own policy, which indicates calls to physicians are only necessary when there is some doubt as to the authenticity of the letter. Policy Order 63; Eastman Dep. 32:6-33:10.

20. The federal government allows transgender people to change the sex designation listed on their identification documents to match their gender identity without proof of any particular form of medical care. The U.S. Department of State requires a letter from a medical

provider stating that the applicant has had "appropriate clinical treatment for gender transition to the new gender" in order to obtain a passport with the correct gender. U.S. Dep't of State, 7, Foreign Affairs Manual 1300 Appendix M (2016), attached as Pls.' Ex. 14.

21. The U.S. Office of Personnel Management, the Veterans Health Administration, the United States Citizenship and Immigration Services, Department of Defense, and the Social Security Administration have similar policies. *See* U.S. Office of Pers. Mgmt., The Guide to Personnel Recordkeeping, 4.14-15 (2017), attached as Pls.' Ex. 15; Dept. of Veteran Affairs., VHA Directive 2013-003 (4)(b)(1)(b) (2017), attached as Pls' Ex. 16; U.S. Citizenship and Immigration Servs., Adjudicator's Field Manual, 10.22 (2012), attached as Pls.' Ex. 17; Soc. Sec. Admin., Program Operations Manual System, 10212.200 (2013), attached as Pls.' Ex. 18.

22. To change the gender marker on a driver's license, most states accept a form filled out by any medical professional, and do not require documentation of any specific form of medical or surgical treatment. Am. Ass'n of Motor Vehicle Adm'r., Resource Guide on Gender Designation on Driver's Licenses and Identification Cards (2016), attached as Pls.' Ex. 19. The American Association of Motor Vehicle Administrators notes that modernized policies do not require surgery, *id*. at 3, and recommends consultation with outside interest groups and medical advisory boards in updating policies, *id.* at 4.

23. An increasing number of U.S. jurisdictions, including Minnesota, California, Oregon, and the District of Columbia, do not require any provider certification at all, and instead rely on self-attestation from the applicant, similar to what Alabama currently requires to update other descriptive characteristics. *See* Driver and Vehicle Servs., Div. Minnesota Dep't of Pub. Safety, Self-Designated Descriptors, attached as Pls.' Ex. 20; 2017 Cal. Legis. Serv. Ch. 853 (S.B. 179); Oregon Driver and Motor Vehicle Servs., Changing Your Sex Identifier on Your

Driver License or ID Card (last visited Feb. 2, 2019), attached as Pls.' Ex. 21; District of Columbia Dep't of Motor Vehicles, Procedure for Establishing or Changing Gender Designation on a Driver License of Identification Card (2017), attached as Pls. Ex. 22. Only eleven states require surgery, an amended birth certificate, or a court order to change the sex designation on a driver's license. National Center for Trans Equality, *How Trans-Friendly is the Driver's License Gender Change Policy in Your State?* attached as Pls.' Ex. 23.

24. Defendants allow transgender people to receive a driver's license that correctly reflects their gender identity without having had any form of surgery if they move to Alabama for the first time after having updated their gender marker on their passport and their license in another state that does not require surgery. Defendants do not routinely inquire about transgender status. Woodruff Dep. 87:2-6, attached as Pls.' Ex. 24. Defendants do not require applicants for a driver's license to show a birth certificate if they have other suitable identification. ALEA, Document Requirements and Fees, attached as Pls.' Ex. 25; Eastman Dep. 127:14-16. Transgender people moving to Alabama for the first time could present documents that showed only their gender identity, and Defendants would issue a license reflecting that gender, regardless of their surgical status. Woodruff Dep. 87:2-89:10.

25. Defendants also permit transgender people born in a state other than Alabama that permits sex designation changes on birth certificates without surgery to change the sex designation on their Alabama driver's license without surgery, because those transgender people can produce an amended birth certificate consistent with the policy. Policy Order 63; Eastman Dep. 59:13-18. These are the only two circumstances under which Alabama permits transgender people to have the correct sex on their driver's license without surgery.

26. Defendants have asserted that Policy Order 63 serves governments interests in identification, application of sex-specific law enforcement and corrections policies to transgender people, provision of emergency medical care, and disclosure of information about people's genitals. Pregno Dep. 55:9-56:6.

27. Defendants have no reason to believe that their interests in identification differ from those of other states. *Id.* at 71:8-9.

28. Defendants are aware of no circumstances where the sex designation on a driver's license would influence the emergency medical care provided to an individual. *Id.* at 101:10-102:7.

29. In support of the interest in law enforcement and corrections policies, Defendants offered the opinion of Donald Leach, an experienced jail administrator who lacks medical expertise. Leach report attached as Pls.' Ex. 26; Leach Dep. 145:4-12 attached as Pls.' Ex. 27.

30. Defendants' expert stated that correctional and law enforcement agencies have an interest in receiving information about sex on a driver's license, but did not express any opinion about what the best definition of sex would be to serve law enforcement or correctional interests. Leach Dep. 32:9-13.

31. Defendant's expert explained that using the sex designation on a driver's license, regardless of the policy for when that designation can be changed, assists agencies because it reduces their liability risk. *Id.* at 53:13-54:6. He testified that a policy reflecting a person's gender identity would satisfy the same law enforcement and correctional interests that Policy Order 63 does. *Id.* at 32:14-19.

32. Defendants' expert also testified that in his experience running a Kentucky jail, he rarely employed sex-based policies, and he recommends other correctional and law enforcement

agencies apply sex-based policies to transgender people based on the individual transgender person's preference, rather than based on surgical history, genitalia, or driver's license sex designation. *Id.* at 98:8-15; 110:21-111:8; 112:8-15.

Plaintiffs

A. Darcy Corbitt

33. Plaintiff Darcy Corbitt currently lives in Alabama. Decl. of Darcy Corbitt, attached as Pls.' Ex. 28 ("Corbitt Decl."), at ¶ 4; Corbitt Dep. 13:1-8 attached as Pls.' Ex. 29. Ms. Corbitt is a transgender woman. *Id.* at 23:4-16. Ms. Corbitt was assigned male at birth. *Id.* at 8:21-23.

34. Ms. Corbitt's earliest memory is identifying as a woman and finding out that that identification was not consistent with how others saw her. *Id.* at 22:17-22. When she was sixteen years old, she received an Alabama driver's license with a male sex designation. *Id.* at 19:2-4.

35. When Ms. Corbitt was twenty years old, she learned for the first time that there was a term that explained how she felt—"transgender"—and that there was a future for her. *Id.* at 24:2-13. Around that same time, in or around 2013, Ms. Corbitt received a diagnosis of gender dysphoria. *Id.* at 30:1-8.

36. In May 2013, Ms. Corbitt began her social transition, which included introducing herself consistently as "Darcy" and asking people who already knew her to call her by that name. *Id.* at 25:2-11; 28:4-29:4.

37. Ms. Corbitt completed a legal name change on July 22, 2013, changing her first and middle names from the traditionally masculine names she was originally given to "Darcy Jeda." Name Change Order for Darcy Jeda Corbitt (redacted), attached as Pls.' Ex. 30.[2] When

[2] Because their previous legal names are not material to this case, and because seeing those names is painful to them, Plaintiffs have redacted those names from relevant exhibits. Should the Court wish to view unredacted versions of these documents, Plaintiffs respectfully request that they be permitted to file those unredacted versions under seal.

the court granted her name change, it made Ms. Corbitt "feel somewhat normal for the first time in [her] life to have…a legal identity that was closer to who [she] was as a person." *Id.* at 25:2-21.

38. Ms. Corbitt moved to North Dakota in 2015. *Id.* at 11:20-12:1. While living in North Dakota, Ms. Corbitt began updating the gender listed for her in government records. She used a letter from her health care provider that indicated she had "appropriate clinical treatment for gender transition to the female gender" and that all documents "including but not limited to Passport, Driver's License, Birth Certificate and Work Identification should reflect the new gender." Letter from Jennifer Demma to Whom it may concern, attached as Pls.' Ex. 31. Ms. Corbitt's North Dakota driver's license, United States passport, and Social Security records now reflect her gender as female. Corbitt Dep. 21:9-11; 79:4-10; Corbitt driver's license (redacted), attached as Pls.' Ex. 32, Corbitt passport (redacted), attached as Pls.' Ex. 33.

39. When Ms. Corbitt received a license and passport that accurately reflected her female gender, she was moved to tears. Corbitt Decl., at ¶ 6. In the weeks that followed, she felt like a burden had lifted from her shoulders. She felt as if she were a "full participant in life and that my government was accepting me as a human being worthy of being treated equally and with dignity." *Id*. Ms. Corbitt no longer had to avoid making large purchases, ordering alcohol in restaurants, or doing any other activities that required identification. *Id.* at ¶ 7. "When I show my driver's license, I no longer feel embarrassed, ashamed, or afraid." *Id*.

40. In the summer of 2017, Ms. Corbitt returned to Alabama to attend graduate school at Auburn University, where she is pursuing a Ph.D. in developmental psychology. Corbitt Dep. 13:7-21. In August 2017, Ms. Corbitt visited the Lee County Driver License Office to obtain an Alabama license to replace her North Dakota license. She presented her North Dakota license

and her U.S. passport. At first, the clerk in the office referred to Ms. Corbitt correctly as a woman and treated her with courtesy and respect, maintaining friendly conversation. *Id.* at 41:11-43:21.

41. The clerk asked Ms. Corbitt whether she had ever had a license in Alabama before. *Id.* at 41:11-43:21. She said that she had. *Id.* at 41:11-43:21. When the clerk reviewed agency records from when Ms. Corbitt lived in Alabama previously, Ms. Corbitt perceived her demeanor to change abruptly. She became quiet and brusque. *Id.* at 41:11-43:21. She asked whether Ms. Corbitt's weight had changed. *Id.* at 41:11-43:21. Ms. Corbitt updated her weight and her address without being asked for any additional documentation. *Id.* at 41:11-43:21.

42. The clerk prepared paperwork to issue Ms. Corbitt an Alabama driver license. The clerk asked Ms. Corbitt to review the papers and sign to verify that the information was accurate. Ms. Corbitt saw that the clerk had listed her gender as male on the papers and explained that she could not verify them, because the gender information was not accurate. *Id.* at 41:11-43:21.

43. The clerk said that she knew the sex designation was not accurate, but that she could not update it. Ms. Corbitt said she needed to find out how to update it, because she did not need an inconsistency with her other identity documents. *Id.* at 41:11-43:21.

44. The clerk called over her supervisor, and then called ALEA's Montgomery office. *Id.* at 43:16-44:7. Each time, she referred to Ms. Corbitt's transgender status out loud.[3] "There was someone to the right of me and to the left of me. The person to the right of me was a woman and she looked at me very pityingly. The people on the left were two men, and they looked at me

[3] Ms. Corbitt vividly recalls the clerk referring to her as a "he" and an "it." Corbitt Dep. at 43:16-44:7. In an e-mail about the incident, the sergeant at the Lee County Driver's License office intentionally misgenders Ms. Corbitt as well. *See* Email from Ronni Fetty to Darin Holifield (Aug. 16, 2017) (D977), attached as Pls.' Ex. 34. A statement from the clerk who interacted with Ms. Corbitt suggests possible dispute over whether and by whom Ms. Corbitt was misgendered in the office. Statement of Examiner Teresa Smith (Feb. 9, 2018) (D978), attached as Pls.' Ex. 35 (denying misgendering Ms. Corbitt). Any dispute on this point, however, is not material.

with disgust. There was also a state trooper present who looked at me and I was afraid of the way she was looking at me. I didn't know what it meant. I felt very afraid." *Id.* at 44:8-46:19.

45. The clerk said that Ms. Corbitt would need to get an amended birth certificate or a doctor's note saying that she had had surgery before the license could be updated. *Id.* at 46:8-46:12. Ms. Corbitt left with her North Dakota license and without an Alabama license. She ran to her car because she was afraid the men who had overheard the conversation were going to physically attack her. *Id.* at 46:13-19.

46. Ms. Corbitt could only have gotten an Alabama driver's license if she had lied about who she was. *Id.* at 47:7-9.

47. The humiliating way she was treated at the driver's license office has had a significant impact on Ms. Corbitt. She has lost sleep and has had to miss work hours because of the incident. *Id.* at 36:21-23; 37:1-11.

48. Ms. Corbitt, while she remains as a student in Alabama, can continue to use her North Dakota license, but if she found a job in her home state after graduation, she would have to give up driving or lie about who she is and put herself at risk. *Id.* at 47:4-9, 64:3-10; 36:19-38:13; Corbitt Decl., at ¶ 15.

49. Ms. Corbitt would have liked to consider relocating to Alabama permanently after completing her studies if she could find a position in her field in the state. Corbitt Decl., at ¶ 12. Auburn University would be an attractive place for her to work after graduation. Corbitt Dep. 17:3-19. Because of Policy Order 63, Ms. Corbitt does not believe it would be possible for her to remain in the state permanently without sacrificing her integrity, safety, privacy, autonomy, and dignity. Corbitt Decl., at ¶ 12.

50. Ms. Corbitt finds it "very difficult" "to navigate the world not having a driver's license in the state where I live." Corbitt Dep. 37: 12-15. If she had to have a license that listed her sex designation as male, it would out her to her employers. *Id.* at 37:19-23. She fears that employers and third parties "will not take kindly to a trans person working" there. *Id.* at 38:1-2. Ms. Corbitt also finds it "incredibly insulting to be treated differently than other people in my state." *Id.* at 38:3-6.

51. Ms. Corbitt has received death threats for speaking out on transgender issues in the past. Corbitt Decl., at ¶ 11. Currently, Ms. Corbitt is being stalked. *Id.* at 69:14-20. She suspects the person stalking her is targeting her because she is transgender. Corbitt Decl., at ¶ 11. While Ms. Corbitt does not keep her transgender status secret in all circumstances, she wants to be able to keep it confidential in situations where she would be at significant risk, like if she were pulled over by a police officer on a dark country road or carded for buying an alcoholic beverage. Corbitt Dep. 58:1-21.

52. In those situations where Ms. Corbitt does voluntarily disclose her transgender status, like educational events about transgender issues or her own social media accounts, she can control the narrative, unlike situations where she must show her driver's license. *Id.* at 59:11-21.

53. It is Ms. Corbitt's "closely held religious belief that God has created [her] as a transgender woman." Corbitt Decl., at ¶ 13. She believes that rejecting her identity as a transgender woman would be tantamount to rejecting God. She does not feel that surgery is right for her at this time. Corbitt Dep. 60:14-21; Corbitt Decl., at ¶ 14.

B. Destiny Clark

54. Plaintiff Destiny Clark resides in Alabama. Clark Dep. 12:23-13:5, attached as Pls.' Ex. 36. Ms. Clark is transgender and female. She was assigned male at birth, and she knows herself to be female. *Id.* at 8:20-13; 14:13-15; 15:16-19. She first realized she was female when she was five or six years old. *Id.* at 14:16-15:15.

55. Ms. Clark grew up in Saint Clair County. *Id.* at 9:1-4. She moved away as a young adult, but returned to care for her father when he was ill. Decl. of Destiny Clark, attached as Pls.' Ex. 37 ("Clark Decl."), at ¶ 3. Ms. Clark currently works two jobs and volunteers for various organizations. Clark Dep. 11:20-23; 59:17-23.

56. Ms. Clark first met and spoke with another transgender person when she was twenty one years old. After talking to that person, she finally felt like she knew who she was and could be who she was. *Id.* at 19:20-20:14. Ms. Clark was diagnosed with gender dysphoria for the first time sometime around 2010. *Id.* at 15:19-26:9.

57. Ms. Clark completed a legal name change of her first name, which was traditionally masculine, to her current first name, Destiny, in 2015. Name Change Order (redacted) attached as Pls.' Ex. 38. Ms. Clark has corrected her gender with the Social Security Administration. Clark Dep. 35:20-36:12.

58. Ms. Clark has tried to change the gender listed on her Alabama license three times. *Id.* at 36:17-20. First, Ms. Clark went to the Pell City driver license office in Saint Clair County. There, a clerk told her that they could not help her, and she would have to contact Montgomery. *Id.* at 37:7-15.

59. Second, Ms. Clark contacted the Medical Unit of ALEA in Montgomery, where she spoke to Defendant Jeannie Eastman. Ms. Eastman advised her to send over her medical

documentation. Ms. Clark did so, but Ms. Eastman declined to change the sex designation on her license. *Id.* at 37:13-22.

60. Third, after Ms. Eastman had breast augmentation surgery, a form of gender-affirming surgery, Ms. Clark again contacted Ms. Eastman. Ms. Clark sent a letter from her surgeon to Ms. Eastman. When Ms. Clark did not hear back from Ms. Eastman, she called Ms. Eastman's office. She then learned that Ms. Eastman had contacted her surgeon without her permission to get more information about her medical care, and had again denied her application to change the sex designation on her driver's license. Letter from Robert Bolling, M.D. to Whom It May Concern (Jan. 18, 2017) (D169) attached as Pls.' Ex. 39. Ms. Eastman stated that Ms. Clark needed to have "full surgery." Clark Dep. 41:15-42:13. Ms. Clark does not want or need any additional surgery. *Id.* at 43:1-4.

61. Ms. Clark's license still designates her as male. Clark driver's license (redacted) attached as Pls.' Ex. 40. She is typically perceived as female, including by strangers. Clark Decl. at ¶ 1. As a result, Ms. Clark experiences a high level of anxiety going about her daily life. *Id.* at ¶ 7. Ms. Clark is afraid to produce her license in public.

62. Once, when Ms. Clark got pulled over by an officer at night, the demeanor of the officer changed when the officer realized that Ms. Clark was transgender because of her driver's license. While in that situation the officer became rude but did no more than frighten her, Ms. Clark worries that next time, it could be worse. Clark Dep. 33:6-14; 34:3-7.

63. Ms. Clark avoids ordering alcohol at a restaurant unless she knows the bartender personally. *Id.* at 33:15-19. If she wants to buy alcohol in a store, she asks her boyfriend to buy it for her so she will not have to show her driver's license. Clark Decl., at ¶ 9.

64. While voting, Ms. Clark was humiliated when the clerk misgendered her in front of around fifty people. This made her afraid about voting because someone could follow her out and attack her. "If someone would have heard the polling person call me sir and refer to me with male pronouns and they wanted to cause a ruckus outside of the polling place, it's a danger to myself." Clark Dep. 33:20-23; 34:1-9.

65. Ms. Clark does not have a passport. She has never needed one, because she has never traveled outside of the country. *Id.* at 71:7-12. Ms. Clark has worked in the food industry for over thirteen years and she has never had anyone verify their age with a passport. *Id.* at 79:11-15.

66. Ms. Clark sometimes discloses that she is transgender, such as when speaking or performing at events for the LGBTQ community, and on her Facebook page. When she posts about being transgender online, she understands that she may receive hate mail, but she assesses the risk of physical violence to be low. "They can't necessarily come through the computer screen and punch me in the face." *Id.* at 80:1-10.

67. When she performs at LGBTQ community events, Ms. Clark also assesses the risk of physical harm to herself as low. Because many LGBTQ people attend those events, she believes that people would quickly come to her aid if anyone tried to hurt her. *Id.* at 81:15-82:6.

68. By contrast, when she has to show her driver's license to someone, the other person is usually physically close to her, and there usually are not many people around she can count on to defend her. Ms. Clark considers the risks in those situations to be high. "[T]hey could commit violence right there, beat me up, shoot me, do something." *Id.* at 82:7-20.

C. Jane Doe

69. Jane Doe proceeds in this case under a pseudonym to protect her safety and privacy. Protective Order, ECF No. 41. Ms. Doe grew up in Alabama. Doe Dep. 11:1-6, attached as Pls. Ex. 41. She moved away as an adult, but moved back in 2005 when her mother became sick. *Id.* at 14:20-15:6.

70. Ms. Doe is transgender. She was assigned male at birth, and she knows herself to be female. *Id.* at 10:15-23. She knew that something was different when she was around six or seven years old, and she identified as a woman beginning in high school. *Id.* at 19:7-12.

71. When Ms. Doe was a young adult, people at her job heard a rumor that Ms. Doe was a cross-dresser. *Id.* at 21:13-17. They attacked her in a way that caused her serious physical injury, and could have cost her her life. Decl. attached as Pls.' Ex. 42. After that experience, she decided that she had to keep her female and trans identity a secret. Doe. Dep 21:5-12.

72. Later in her life, Ms. Doe began seeking treatment, and she was diagnosed with gender identity disorder (now called gender dysphoria.) *Id.* at 25:6-10; 26:3-5. Ms. Doe changed her given first name, which was traditionally masculine, to her current first name, which is traditionally feminine. Doe name change order attached as Pls.' Ex. 43. She also updated her passport and social security records to reflect her female sex. Doe dep. 29:15-17; 32:21-33:1.

73. Doe has tried many times to change the sex on her license, but has been unsuccessful. *Id.* at 39-40. Ms. Doe initially was not even permitted to change her name on her license despite having a court order. The clerk told her that because her sex was listed as male, they would not take her photograph while she was wearing makeup. *Id.* at 38:10-39:6. She then went to another office, where they changed her name, but told her that she did not have the correct paperwork to change her sex designation, and she should contact Montgomery. *Id.* at 40:4-10.

74. Ms. Doe then traveled to Montgomery and offered medical documentation of her gender to ALEA. *Id.* at 41:5-21; Letter Certifying Applicant's Gender Change (P6) Attached as Pls.' Ex. 44. ALEA did not accept the documentation, and told Ms. Doe that she had to amend the gender marker on her birth certificate first. Ms. Doe then went to the Department of Vital Statistics, where she offered the same letter. The clerk at that office told her that she had to have a court order instead. Doe Dep. 43:22-44:7.

75. Ms. Doe then heard that her passport might be enough to change the sex designation. *Id.* at 45:1-17. She called ALEA in Montgomery to ask if she could use her passport and a letter from her primary care physician to change the sex designation on her license. *Id.* The person she spoke to advised her to bring her documentation to a local office. *Id.* Ms. Doe did so, but again was not allowed to change the sex designation on her license. *Id.* at 46:13-21.

76. She then called ALEA in Montgomery again, and was told that she could only change the sex designation on her license if she took a letter saying she had had "the full surgery" to a judge, got a court order and used it to amend her birth certificate, and took her birth certificate to ALEA to amend her driver's license. *Id.* at 47:19-22; 48:12-49:5. Ms. Doe has not had any gender-affirming surgery because she cannot afford this treatment. Doe Decl., at ¶ 20.

77. Ms. Doe does not want people to know that she is transgender. *Id.* at 49:14-21. Ms. Doe tries to minimize the situations where she uses her driver's license. For example, she uses her passport to check into hotels, although one hotel worker asked for her license instead. *Id.* at 36:5-10; 79:13-18.

78. Still, Ms. Doe has experienced discrimination because of the sex designation on her driver's license. During a traffic stop, a police officer saw the feminine name and male sex designation on Ms. Doe's license and inferred that Ms. Doe was transgender. Doe Dep. 35:3-18.

The police officer informed Ms. Doe's employer, and Ms. Doe's employer reacted poorly. She resigned because she believed she was about to be fired. Doe Decl., at ¶ 15; Doe Dep. 35:3-18.

79. Once, while visiting her credit union, Ms. Doe had to show her driver's license to the teller. The teller responded by telling Ms. Doe that she was "going to hell," saying that she could not "condone this," and refusing to serve her. Doe Dep. 78:11-79:4. Ms. Doe has also faced harassment and negative remarks because her driver's license has outed her to restaurant and bar staff when she has wanted to order a drink. Doe Dep. 35:19-23; 36:1-4; Doe Decl., at ¶ 17.

80. On February 6, 2018, Plaintiffs filed this constitutional challenge to Policy Order 63 seeking injunctive relief.[4] On July 16, 2018, Plaintiffs filed their First Amended Complaint, which Defendants answered on August 8, 2018. First Amended Complaint, ECF No. 38; Answer to First Amended Complaint, ECF No. 40. Plaintiffs and Defendants completed discovery January 11, 2019.

Transgender People, Safety, and Treatment for Gender Dysphoria

81. Transgender people have a gender identity—a fundamental sense of self in terms of sex—that is different from the sex they were assigned at birth. Gorton Decl., at ¶ 15, attached as Pls.' Ex. 45. Transgender women are women who were assigned a male sex at birth and know themselves to be women. *Id.* at ¶ 16; Clark Dep. 15:20-16:1. Transgender men are men who were assigned a female sex at birth and know themselves to be men. Gorton Decl., at ¶ 17. Transgender people are a diverse group, hailing from all walks of life.

82. Roughly 0.3% of adults are transgender. Gary J. Gates, Williams Inst., How Many People are Lesbian, Gay, Bisexual, and Transgender? 1 (2011), attached as Pls.' Ex. 46.

[4] Originally, Ms. Corbitt, Ms. Clark, and John Doe brought this action. John Doe voluntarily withdrew at the same time Jane Doe joined this action through the First Amended Complaint.

Transgender people experience significant discrimination and violence. *Id.* ¶ 30; Sandy E. James, et. al, The Report of the 2015 U.S. Transgender Survey at 89-90 (2016) ("USTS"), attached as Pls.' Ex. 47. at 12; 14, 198 (one in six respondents in major national survey of transgender people who had ever been employed had lost a job because of their gender; more than half of respondents who had interacted with a police officer in the past year had experienced some form of mistreatment; nearly half of respondents had been sexually assaulted). Already in 2019, a transgender woman has been murdered in Alabama. *Alabama Woman Becomes First Known Transgender Person Killed This Year in U.S.*, New York Times, (last visited January 23, 2019) attached as Pls.' Ex. 48. Police refused to identify the victim as a woman and did not acknowledge that she was transgender, disrespecting her in death and delaying broader awareness of the incident, in part because of her "legal documents." *Id.*; *HRC Mourns Dana Martin, the First Known Transgender Person Killed in 2019*, Human Rights Campaign, (last visited January 23, 2019), attached as Pls.' Ex. 49.

83. Showing ID that does not match one's gender presentation can trigger anti-trans violence and discrimination. According to a 2015 report, 25% of transgender people were verbally harassed, 16% denied services or benefits, 9% asked to leave a location or establishment, and 2% assaulted or attacked after showing identification with a name or gender marker that did not match their gender. USTS at 89-90. Twenty-eight percent of transgender respondents from Alabama had at least one of these experiences. U.S. Trans Survey of 2015: Alabama State Report, attached as Pls. Ex. 50. Additionally, transgender people with ID that reflects the wrong gender sometimes avoid situations where they will need to produce ID, such as "travelling by plane, applying for employment, employing for public benefits, filling prescriptions, purchasing alcohol, applying to and attending college, checking into a hotel,

renting a car, voting, opening and using a checking account, using a credit or bank card, travelling internationally, and number other things that most of us take for granted." Gorton Decl., at ¶ 28.

84. Many transgender people experience gender dysphoria (GD). Gender dysphoria is a condition characterized by clinically significant distress associated with an incongruence between one's gender identity, one's body, and other people's perceptions of one's gender. Gorton Decl., at ¶ 19. Treatment for gender dysphoria may include social transition, hormone treatment, and one or more surgical treatments. *Id.* at ¶ 20; 21; 23.

85. The Plaintiffs' expert, Dr. R. Nicholas Gorton, is prepared to testify at trial that changing the sex designation on a driver's license, in and of itself, "has profound health benefits for patient with gender dysphoria as well as significant social, legal, and safety implications for transgender people navigating the world in accordance with their gender identity." *Id.* at ¶ 25. In fact, having an identity document with the correct sex designation has been associated with a "large reduction" in suicidal thinking and suicide attempts. "The magnitude of this improvement is greater than treating depressed suicidal patients with common antidepressants" *Id.* at ¶ 27.

86. Dr. Gorton would also testify that, while one or more surgical procedures may be necessary to treat gender dysphoria, some people with gender dysphoria do not need surgical treatment to relieve their symptoms. "It should be remembered that the goal of treatment of GD is to relieve the dysphoria, not to accomplish a laundry list of treatments that may in fact be ill advised in some patients." *Id.* at ¶ 36. Because of other conditions, surgery can be particularly risky for some transgender people. *Id.* at ¶ 38-40. Depending on what is necessary to relieve that individual's gender dysphoria and what the risks of surgical intervention would be for them, surgery may be medically contraindicated. Gorton Dep. 45:16-20, attached as Pls.' Ex. 51.

87. Dr. Gorton also notes that most genital surgeries for treatment of GD, and all genital surgeries for treatment of GD in transgender women, result in "permanent infertility. While this is an unfortunate though acceptable side effect to many transgender people for their treatment, just as it might be for people with cancer, it should only be undertaken when the health benefits of treatment outweigh the risks." Gorton Decl., at ¶ 43.

88. Dr. Gorton concludes that "it is scientifically inaccurate, clinically inappropriate, and unethical to require a set of medical and surgical procedures to define who should be provided with appropriate identity documentation." *Id.* at ¶ 46. According to a 2015 study, only around 25% of transgender people have had any form of surgery, and the types of surgery range widely. *Id.* at ¶ 33; USTS at 101. Only around 2% of transgender men have had surgery that involves creation of a penis (metaoidioplasty or phalloplasty). USTS at 101.

89. Dr. Gorton would testify that gender identity is a component of sex, and that even when speaking exclusively about genital anatomy, "penis or vagina" is a vast oversimplification. Gorton Decl., at ¶ 24; 37; 51. People born with intersex conditions, people who have suffered traumatic injuries to their genitals, and people who have undergone certain treatments for cancer, gender dysphoria, and other conditions may have genital anatomy not considered typical for male or female, and may not have genitalia considered typical for the sex they were assigned at birth. *Id.* Defendants' expert Donald Leach, while lacking medical expertise, concurs with Dr. Gorton on these points. Leach Dep. 19:11-21:11.

90. Dr. Gorton would also testify that it is not sensible to ask a surgeon whether a person has had all of the treatment they need for GD. A surgeon operating on a single body site would not know what other or further treatment, if any, the person would need to relieve their symptoms. Gorton Decl., at ¶ 41.

91. Defendants have produced no evidence to dispute any of Dr. Gorton's statements.

Alabama Driver Licenses

92. Alabama law makes it a crime to drive without carrying a license. See Ala. Code § 32-6-1; Ala. Code § 32-6-18. Drivers must comply with requests from law enforcement officers to show their driver license. *See* Ala. Code § 32-6-9; *Sly v. State*, 387 So. 2d 913, 916 (Ala. Crim. App.), writ denied, 387 So. 2d 917 (Ala. 1980). Drivers must also show their license to others involved in traffic accidents. Ala. Code § 32-10-2. A driver's license will create a presumption that one is not unlawfully present in the United States if questioned by a law enforcement officer. Ala. Code § 31-13-12.

93. Alabamian adults have little choice but to drive. Even in Alabama's largest city of Birmingham, the public transportation system has been ranked second worst in the entire country. Jeremy Gray, Birmingham area's transit use deemed 2nd worst in US, al.com, September 23, 2011, attached as Pls.' Ex. 52. Alabama also lacks adequate bike lanes and other infrastructure for cycling. The League: Bicycle Friendly America: Bicycle Friendly State Report Card 1 (2017), attached as Pls.' Ex. 53 ("According to federal data, very few people commute by bike in Alabama and those who do experience some of the least safe conditions in the United States.").

94. Additionally, Alabama law permits or requires a driver's license to be used as proof of permission to drive, identity, age, residence, veteran status, or lawful presence in the United States in a wide range of circumstances. For example, a driver's license is necessary or sufficient to meet a requirement for many jobs, professions, and commercial activities. *See e.g.* Ala. Code § 8-19A-5 (application for license to do telemarketing); Ala. Admin. Code 580-2-9-.17(6) (criterion for a case manager in a mental illness community program); Ala. Code § 16-27-4 (application to become school bus driver); Ala. Admin. Code 540-X-16App.A (application for

special purpose license to practice medicine or osteopathy); Ala. Admin. Code 540-X-7App.B (application for physician assistant license); Ala. Admin. Code 560-X-35-.02(12)(e)(2) (Medicaid reimbursement as personal care attendant); Ala. Admin. Code 822-X-1-.05 (accreditation for lead hazard reduction); Ala. Code § 45-8-241.01; Ala. Code § 45-1-200 (application for license to do door-to-door sales); Ala. Admin. Code 790-X-2-.01 (application for real estate license); Ala. Admin. Code 20-X-5-.01 (application for alcoholic beverage license); Ala. Admin. Code 810-5-12-.01 (application for motor vehicle dealer license); Ala. Admin. Code 620-XApp.A Form3 (application for nursing home administrator license); Ala. Admin. Code 360-X-7-.02 (qualification as certified fire apparatus operator); Ala. Code § 9-12-113(f) (qualification for commercial fishing); Ala. Admin. Code 20-X-5-.03 Ala. Code § 16-5-54 (eligibility for salary supplement to certain teachers).

95. A driver's license may or must be used for important aspects of civic participation, family life, and access to education. *See, e.g.*, Ala. Admin. Code 660-5-29-.02 (to qualify as a foster parent); Ala. Code § 31-13-28 (to register to vote); Ala. Code § 17-9-30 (to vote); Ala. Admin. Code 300-4-3-.01(4)(e) (to show eligibility for Alabama student grant program); Ala. Admin. Code 250-X-5-.12 (to show eligibility for barber and cosmetology school); Ala. Code § 16-64-3 (to show residency for in-state tuition rates at institutions of higher learning); Ala. R. J. Admin. Rule 40 (driver's license records used to form master juror list).

96. Alabama law also calls for driver's licenses in a range of situations relevant to healthcare and significant life events. *See* Ala. Code § 22-19-60 (to make anatomical gift upon death); Ala. Code § 20-2-190(5)(a) (to purchase pseudoepinephrine over the counter); Ala. Admin. Code 580-9-44-.29(14)(iii) (to receive opioid maintenance therapy); Ala. Admin. Code 262-X-4-.02(13)(b)(1) (to show eligibility to receive crime victim's compensation).

97. Finally, Alabama law conditions participation in various recreational activities on proof of status that a driver's license can supply. *See* Ala. Code § 9-11-53.1 (application for saltwater fishing license); Ala. Code § 9-11-53 (application for freshwater fishing license); Ala. Code § 9-11-44 (application for hunting license); Ala. Code § 28-11-2 (purchase tobacco products); Ala. Code § 8-17-222 (purchase fireworks); *McLeod v. Cannon Oil Corp.*, 603 So. 2d 889 (Ala. 1992) (purchase alcohol); Ala. Code § 9-14-8 (free entrance to state parks upon presentation of driver's license with veteran designation).

ARGUMENT

I. Policy Order 63 Violates the Equal Protection Clause

Defendants' policy facially discriminates against transgender people. Defendants deprive transgender people, and only transgender people, of access to an accurate, usable driver's license without documentation of undergoing surgeries they may not want, need, or be able to afford, and that are wholly irrelevant to their ability to drive. Defendants have offered no justification that would even satisfy rational basis review, much less the heightened scrutiny accorded discrimination on the basis of sex and transgender status.

A. Defendants Discriminate Against Transgender People by Denying Them Driver's Licenses Matching Their Gender.

The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. 14, §1. The goal of the Equal Protection Clause is to ensure that "all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 76 (1971); *see also City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

Policy Order 63 facially discriminates based on sex and transgender status. It establishes the only process for individuals to change the sex designation on their driver's license. The policy explicitly concerns sex, and prevents *only* transgender people from obtaining an accurate and safe driver's license without undergoing surgery and producing documentation of surgery to the government. Defendants treat transgender people differently than similarly-situated cisgender[5] people.

B. Defendants' Policy Receives Heightened Scrutiny Because It Classifies Based On Sex.

Defendant's policy warrants at least heightened scrutiny. Classifications based on transgender status are necessarily classifications based on sex, and the Supreme Court has long subjected classifications on the basis of sex to heightened scrutiny. *United States v. Virginia*, 518 U.S. 515, 555 (1996), quoting *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) ("'A]ll gender-based classifications . . . warrant heightened scrutiny.'")

The Eleventh Circuit has ruled that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination . . . that is subject to heightened scrutiny under the Equal Protection Clause." *Glenn v. Brumby*, 663 F.3d 1312, 1319; *see also EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018), *cert. pet. filed* (discrimination against a transgender woman is necessarily based on "notions of how sexual organs and gender identity ought to align," which is "impermissible sex stereotyping."); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) ("[D]iscrimination against transgender individuals is a form of gender-based discrimination subject to intermediate scrutiny."). Classifications based on transgender status are sex-based classifications because they are premised on transgender people's nonconformance with sex stereotypes, as well as

[5] Cisgender is a term that refers to a person whose sense of personal identity and gender corresponds with their sex assigned at birth. It refers to anyone who is not transgender. Gorton Decl., at ¶ 18.

transgender people's identification with a sex other than their assigned sex at birth. *See Glenn*, 663 F.3d at 1316 ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. 'The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.'") (citation omitted).

Policy Order 63 classifies people based on their transgender status for purposes of sex designations on licenses, and is therefore a sex-based classification. Alabama's Policy Order 63 specifically targets transgender people based on their nonconformity to sex stereotypes, and identification with a sex other than their sex assigned at birth. They are the only group that cannot get a license that reflects the sex with which they identify. The policy only applies to transgender individuals, as Defendants are well aware. Eastman Dep. 42:20-43:6. Moreover, Policy Order 63 facially governs sex designations, and it requires surgery on genitals, a sex-related characteristic. Eastman Dep. 91:10-14. As Policy Order 63 applies only to transgender people, and as it concerns sex designations and sex-related characteristics, it is a sex-based classification that warrants heightened scrutiny.

C. The Policy Requires Heightened Scrutiny Because It Discriminates Against Transgender People, a Group That is at Least Quasi Suspect.

Additionally, transgender people are at least a quasi-suspect class, and classifications based on transgender status should receive at least intermediate scrutiny. To determine whether a classification should be subject to heightened scrutiny, the Supreme Court examines four factors: (1) a history of discrimination against those with the characteristic; (2) the lack of relevance of the characteristic upon which the classification is based; (3) the immutability of the characteristic; and (4) the minority status or political powerlessness of those with the

characteristic. *See Frontiero v. Richardson*, 411 U.S. 677, 684-88 (1973) (plurality opinion) (identifying factors and concluding that classifications based on sex warrant heightened scrutiny); *see also Windsor v. United States*, 699 F.3d 169, 181-82 (2d Cir. 2012) (concluding classifications based on sexual orientation warrant heightened scrutiny), *aff'd*, 570 U.S. 744 (2013). Based on the Supreme Court's four-factor test, transgender status is a suspect class. *See Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *9 (W.D. Wash. Apr. 13, 2018), appeal filed and stay of preliminary injunction granted.

First, transgender people have suffered a history of discrimination. *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ*., 858 F.3d 1034, 1051 (7th Cir. 2017), cert. denied, 138 S. Ct. 1260, (2018) ("There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity"); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) ("[T]ransgender people as a class have historically been subject to discrimination"); *Brocksmith v. United States*, 99 A.3d 690, 698 (D.C. 2014) ("[T]he hostility and discrimination that transgender individuals face in our society today is well-documented."); *Adkins v. City of New York*, No. 14-cv-7519, 2015 WL 7076956, at *3 (S.D.N.Y Nov. 16, 2015) ("[T]his history of persecution and discrimination [against transgender people] is not yet history."); *Kerrigan v. Commissioner of Public Health*, 957 A.2d 407, 446 (Conn. 2008) (The "bigotry and hatred" faced by transgender people is "akin to, and, in certain respects, perhaps even more severe than, those confronted by some groups that have been accorded heightened judicial protection."); Gorton Decl., at ¶ 29 ("Unfortunately, transgender people when they are outed as being transgender face starkly increased rates of interpersonal violence.").

Second, the classification of transgender status, like other protected statuses, '"bears no relation to the ability to perform or contribute to society'" *Frontiero*, 411 U.S. at 686; *see also Karnoski*, 2018 WL 1784464, at *10 ("Discrimination against transgender people clearly is unrelated to their ability to perform and contribute to society."); *Adkins* 2015 WL 7076956, at *3 (finding no indication that transgender people are "any less productive than any other member of society."). The Plaintiffs in this case, for example, contribute to their communities through their work, volunteer service, and care for their families.

Third, transgender identity is immutable, because it is based on characteristics outside of individual control. *See Glenn*, 663 F.3d at 1316; *Karnoski v. Trump*, 2018 WL 1784464, at *10 (noting '"medical consensus that gender identity is deep-seated, set early in life, and impervious to external influences'") (citation omitted); Gorton Decl., at ¶ 11 (noting that gender identity is "a product of the central nervous system").

Finally, the Supreme Court considers to what extent a group is "a minority or politically powerless." *Bowen v. Gillard*, 483 U.S. 587, 602 (1987). Transgender people share "characteristics that define [them] as a discrete group," *id.* at 602, and only make up approximately 0.3% of the adult population. Gates, *supra*, at 1. Transgender people are also comparatively politically powerless, and are therefore subject to "the discriminatory wishes of the majoritarian public." *Windsor*, 699 F.3d at 185; *see also Karnoski*, 2018 WL 1784464, at *11 (noting that "[t]here are no openly transgender members of the United States Congress or the federal judiciary"). As transgender people belong to a politically powerless minority, classifications that single transgender people out for differential treatment call for heightened scrutiny.

Based on the Supreme Court's four-factor test, transgender status is at least a quasi-suspect class in its own right, and classifications based on transgender status should be analyzed using heightened scrutiny.

D. Defendant's Policy is Not Narrowly Tailored to a Compelling State Interest, Nor Is It Substantially Related to Achieving an Important Government Objective.

The Defendants' actions fail both strict and intermediate scrutiny. Under strict scrutiny, a classification violates equal protection unless the government can show that the classification is "narrowly tailored to further a compelling government interest." *Shaw v. Reno*, 509 U.S. 630, 643 (1993). Under intermediate scrutiny, Defendants must demonstrate that the classification is "substantially related" to achieving an "important government objective." *Craig v. Boren*, 429 U.S. 190, 197 (1976). To adequately defend the policy against intermediate scrutiny, Defendants must "demonstrate an 'exceedingly persuasive justification'" for their action. *United States v. Virginia*, 518 U.S. at 533. Post-hoc rationalizations cannot survive heightened scrutiny. *See id.* at 533 ("The justification must be genuine, not hypothesized or invented post hoc in response to litigation."); *Glenn*, 663 F.3d at 1321 (noting hypothetical justifications cannot satisfy heightened scrutiny).

To be permissible, disparate treatment of a quasi-suspect class must have a factual basis not rooted in overly broad generalizations, and the factual basis relied upon to justify the policy must be substantially related to a governmental objective. *Craig*, 429 U.S. at 204 (relationship between gender and traffic safety "too tenuous" to support gender-based classification); *United States v. Virginia*, 518 U.S. at 533 (justifications may not rely on "overbroad generalizations" about gender). Policy Order 63 does not serve an important governmental objective, let alone a compelling state interest. Moreover, the discriminatory means employed by Defendants through

Policy Order 63 are not substantially related, let alone narrowly tailored, to achieving the Defendant's stated objectives.

Courts in Alaska, Idaho, Michigan, and Puerto Rico have all held that policies barring transgender people from obtaining identity documents matching their gender identity lack any adequate government justification. *See Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1142 (D. Idaho 2018); *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015); *K.L. v. State, Dept. of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL 2685183, at *6-8 (Alaska Super. Mar. 12, 2012). Policy Order 63 similarly lacks any sufficient justification.

Chief Pregno testified that Defendants took very little into account when creating and revising Policy Order 63. Defendants claim that Policy Order 63 was motivated by a desire to "stay consistent with . . . the State of Alabama's birth certificate procedure." Pregno Dep. 48:10-12. Consistency is not an important or compelling government interest, though. At most it might amount to administrative convenience, which on its own is not an important government objective. *See Craig*, 429 U.S. at 198; *Stanley v. Illinois*, 405 U.S. 645, 656 (1972); *Frontiero*, 411 U.S. at 690.

Defendants failed to explain any way in which consistency with the state birth certificate law served any interest beyond the interest in consistency itself. When asked why consistency mattered, the only response the agency could offer was circular, repeating that it wanted to mirror the state birth certificate policy. Pregno Dep. 42:23-43:16. In fact, Defendants' policy creates inconsistencies between Plaintiff's licenses and their federal identification documents, like passports and Social Security records, and between their licenses and the sex they, and those in their lives, know them to be. The agency could offer no reason why consistency with the state

birth certificate policy was more important than consistency with federal policies. Pregno Dep. 107:1-18 (when asked why they did not consider consistency with federal records, the defendant responded "We just didn't."). Defendants prioritized rough consistency with the state birth certificate policy over consistency with federal passport and social security policies, most other states' driver's license policies, medical recommendations, and transgender people's own gender identities, for no reason that it articulated at the time or could articulate during a 30(b)(6) deposition.

The only other interests Defendants asserted were wanting a formal written policy rather than an unwritten, informal policy, and then, in the revision, allowing "more latitude" for transgender people to change the sex on their driver's licenses. Pregno Dep. 41:9-19; 35:10-15. Formalizing a policy in writing does not rise to the level of an important or compelling interest, and, more importantly, has nothing to do with the content of the policy. It is that content, which prevents transgender people from getting driver's licenses that they can use safely unless they have had surgery and provide proof of it to the government, that Plaintiffs challenge, not the existence of a written policy in and of itself. And it is not an important or compelling interest to provide "more latitude" while still keeping a corrected and useful license out of reach for most transgender people. To the extent making corrected driver's licenses meaningfully available to transgender Alabamians was the goal, the means to achieve that goal—a surgery requirement—is not remotely well suited to achieving it.

Perhaps most importantly, Defendants have also offered no explanation for how their interests differ from those of the majority of other states that do not require surgery to change the sex designation on a license. Thus, even if the interests the Defendants identified were compelling or important, it would be hard to imagine why the Defendants need Policy Order 63

to advance them when most other states in the United States have found a way to satisfy their interests without a comparable policy. *See Love*, 146 F. Supp. 3d at 857 (noting that "[a]t least 25 of the states and the District of Columbia do not require a transgender person to undergo surgery to change the gender on his or her driver's license or state ID card" and stating "[t]he Court seriously doubts that these states have any less interest in ensuring an accurate record-keeping system").

E. Policy Order 63 Can Not Withstand Even Rational Basis Review.

Even if Policy Order 63 received no more than rational basis review, Plaintiffs would still prevail. While Defendants have offered various post hoc rationalizations for Policy Order 63, they have not identified and cannot identify any legitimate government interest rationally related to the surgery requirement in Policy Order 63. *See Romer v. Evans*, 517 U.S. 620, 632-33 (1996). The policy is arbitrary and motivated by animus, and thus fails rational basis review. Defendants state that its interests are providing information to law enforcement for identification purposes; providing information to law enforcement and correctional agencies to assist them in applying sex-specific policies to transgender arrestees and prisoners; assisting in the provision of emergency medical care; and disclosing information about people's genital anatomy. The first three interests, while legitimate, are not rationally related to Policy Order 63. The last one is not legitimate.

1. *Policy Order 63 is arbitrary and based on animus*

Policy Order 63 is based solely on the uninformed feelings of decision makers about transgender people. It is also arbitrary in its design and application.

Policy Order 63 disadvantages a conspicuously narrow group of people, singling out transgender people for special requirements and bureaucratic hurdles. To hold a driver's license

that accurately reflects their gender, transgender (and only transgender) Alabamians are required to undergo surgery. The policy makes no sense scientifically or in terms of the realities of transgender people's lives. While imposing a major medical requirement, Defendants did not consult with any medical professionals in developing their policy. Defendants made no reference at any time in explaining the reasons for or implementation of the policy to transgender people's actual medical needs. The policy's requirements disregard medical reality: a large proportion of transgender people have not undergone genital surgery. Gorton Decl., at ¶ 33. Some transgender people do not need any surgery, and no single transgender person receives all forms of possible surgical treatment. Gorton Decl., at ¶ 36. The point of medical treatment is not to produce a body that matches others' expectations, but rather to relieve suffering and prolong life. And what medical care someone has received does not dictate how they should be treated. Gorton Decl., at ¶ 34.

Multiple transgender people have complained about the policy to administrators, including Defendants, explaining that it was outdated and offensive, and administrators sent and received emails from the American Association of Motor Vehicle Administrators and others showing that most states do not have similar requirements. Woodruff Dep. 56:21-57:5; Email from Brian Duke to Jeannie Eastman (Sept. 26, 2016) (D381) attached as Pls. Ex. 54; Email from Nona Short to Deena Pregno and Rufus Washington (Sept. 26, 2016) (D337), attached as Pls. Ex. 55; American Association of Motor Vehicle Administrators, Resource Guide on Gender Designation on Driver's Licenses and Identification Cards (Sept. 2016) (D338-380) attached as Pls. Ex. 56; Email correspondence between Redacted and Jeannie Eastman (Jan. 3, 2018) (D1110-D1114), attached as Pls. Ex. 57. Yet Defendants took no steps to confer with experts in the field of transgender health, representatives of Alabama transgender communities, or even

their own Medical Advisory Board when creating or revising their policy, and the policy still stands. Eastman Dep. 129:6-21. Instead, Defendants have clung to a policy based on their own conviction that "not just everybody" should be able to change the sex on their driver's license, even knowing that it has only been transgender people who have sought to change the sex designation on their driver's license. Eastman Dep. 42:12-43:6.

In fact, it is the personal opinions of administrators about gender and transgender people that form the basis for the policy. When explaining why she requires "complete" surgery from applicants to satisfy the policy (which does not itself contain that requirement in writing), Ms. Eastman stated, "Well, I don't see how a person could be a -- I mean -- let me think which way -- I mean, if you -- how can you change your sex if you don't have the top and bottom done?" Eastman Dep. 53:19-23. When asked, "Where are you getting this from? Correct me if I'm wrong. It sounds like this is coming from you, right?" Ms. Eastman answered, "Yes, I said that." Eastman Dep. 54:4-7. Ms. Eastman is also one of the only people aside from Chief Pregno involved in developing the current version of the policy. Pregno Dep. 46:13-19.

When trying to explain the agency's reasons for adopting the policy, Chief Pregno used the same language for describing her own personal opinions about transgender people as for the official reasons behind the policy. Pregno Dep. 86:19 ("That's who they are physically" when describing reason for policy); 115:19 ("They are physically a male" when describing her personal feelings about a transgender woman who has not had surgery). She does not believe that transgender women are women unless they have surgery that obliterating a penis and creating a vagina. She can base her belief on nothing concrete—she just feels that transgender people are not who they know themselves to be, not even who their doctors say they are, unless they have undergone a form of surgery that they may not want, need, or be able to afford and that results in

permanent loss of fertility. She is welcome to her personal opinion about what it means to be a man or a woman, but she has chosen to give that opinion force of law through Policy Order 63, prioritizing it over the safety, dignity, privacy, health, and autonomy of transgender people and even the interests she claims Policy Order 63 ought to serve. "[A] classification of persons undertaken for its own sake" is "something the Equal Protection Clause does not permit." *Romer*, 517 U.S. at 635.

Additionally, Policy Order 63 is arbitrary. By design, it has a vastly different impact on people depending on where they were born. The alternative to submitting a letter from a surgeon, under Policy Order 63, is submitting an amended birth certificate. Someone born in Idaho can change the sex designation on their birth certificate by signing a form before a notary attesting that the sex designation on the birth certificate does not match their gender identity. Idaho Department of Health and Welfare, Instructions to Change the Indicator of Sex on an Idaho Birth Certificate to Reflect Gender Identity, attached as Pls.' Ex. 58. Someone born in Connecticut must submit a letter from a doctor, nurse practitioner, or psychologist stating that they have "undergone surgical, hormonal or other treatment clinically appropriate for the applicant for the purpose of gender transition." Conn. Gen. Stat. Ann. § 19a-42. Someone born in Alabama must have a court order showing 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" to change the sex designation on a birth certificate. Ala. Code § 22-9A-19. Someone born in Tennessee can never change the sex designation on their birth certificate no matter what. Tenn. Code Ann. § 68-3-203(d). Thus, depending solely on where someone is born, this alternative avenue of relief may be available for someone who has had no treatment for gender dysphoria; non-surgical treatment for gender dysphoria; or surgical treatment for gender dysphoria as well as a name change—or it

may not be available at all. ALEA has not offered any rationale for how its interests vary based on where someone was born.

The Defendants' interpretation of the policy to require use of the word "complete" by the certifying surgeons creates an arbitrary effect as well. While decision makers intend this requirement to prevent people from changing the sex designation on their license without having had at least penile and vaginal surgery, the sex designation on a license can be changed whenever the surgeon happens to use the term "complete." No evidence suggests that surgeons or physicians understand the term "complete" to mean what Defendants think it means, and the undisputed expert testimony shows that surgeons would not be in an appropriate position to assess whether a person's course of treatment has been sufficient to alleviate their gender dysphoria. Gorton Decl., at ¶ 41.

2. *Policy Order 63 undermines the ability to identify holders of Alabama driver's licenses*

Defendants claim the government interest served by Policy Order 63 is to assist officers "to identify the subject that they're dealing with." Pregno Dep. 55:9-56:6. Identification is a legitimate government interest, and listing a sex designation on a license may bear a rational relationship to that interest—but Policy Order 63 does not. In fact, Policy Order 63 works against law enforcement interests in identification, because it prevents transgender people from updating their licenses with the sex consistent with their identity and other people's perceptions.

In other jurisdictions where agencies have raised this justification for similar policies, courts have consistently rejected it. The Eastern District of Michigan recognized that the state's refusal to correct the sex designation on transgender plaintiffs' driver's licenses "[bore] little, if any, connection to Defendant's purported interests" in maintaining accurate identity documents. *Love*, 146 F. Supp. 3d at 856. Alaska's Superior Court held that the state's refusal to correct a

transgender woman's driver's license not only failed to "further[]…the state's interest in accurate document[s] and identification" but, in fact, created a risk of "inaccurate and inconsistent identification documents." *K.L.*, 2012 WL 2685183, at *7. Identity documents bearing a transgender person's birth-assigned sex "inaccurately describe the discernable appearance of the [document] holder by not reflecting the holder's lived gender expression of identity," *id.*, creating problems for the document's owner and all those who need to see it. *See also F.V.*, 286 F. Supp. 3d at 1142 (birth certificate policy prohibiting sex designation changes lacked rational basis); *Arroyo Gonzalez*, 305 F. Supp. 3d at 333 (birth certificate policy prohibiting sex designation changes was "not justified by any legitimate government interest").

Under most situations where law enforcement officers seek to identify whether the person presenting a driver's license is actually its holder, the person's surgical history, genitalia, and reproductive organs are irrelevant. *See* Pregno Dep. 67:20-68:1; Leach Dep. 54:21-57:13. Policy Order 63 means that transgender women who have a female identity, typically female appearance, and typically feminine clothing and mannerisms must present ID with a male sex designation to police officers, and that transgender men who have a male identity, typically male appearance, and typically masculine clothing and mannerisms must present ID with a female sex designation. It is not plausible, nor would it be lawful, for law enforcement to routinely use genitalia, reproductive organs, or other intimate body parts for identification purposes. *See* Leach Dep. 54:21-57:13. Even Chief Pregno acknowledged the possibility that Policy Order 63 could hinder identification, rather than help with it. Pregno Dep. 68:21-69:16. Defendant's expert acknowledged that a transgender man who had not had surgery could even be arrested and charged with possession of a fraudulent instrument if he presented a license with a female sex designation on it. Leach Dep. 36:18-38:3 (describing a person being arrested for possession of a

fraudulent instrument for presenting a license with a sex designation the officer did not believe could be accurate based on external appearance); 57:19-58:10 (stating that the same thing could happen to a transgender man).

For this same reason, an Alaska court found that a state policy barring changes to the sex designation on a driver's license violated the Alaska Constitution:

> [b]y 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. Thus, when such individuals furnish their license to third-persons for purposes of identification, the third person is likely to conclude that the furnisher is not the person described on the license.

K.L., 2012 WL 2685183, at *7.

Everyone in the Plaintiffs' lives know them to be women, and they are typically accurately perceived to be women by strangers. Clark Decl., at ¶ 10; Doe Dep. 50:5-9; Corbitt Decl, at ¶ 2. The male sex designation on their licenses thus makes it more, not less, difficult for others to identify Ms. Clark and Ms. Doe as the holders of their own licenses, as it would for Ms. Corbitt if she had to acquire an Alabama license. That sex designation would also make it more difficult to identify them as crime suspects or missing persons were such a situation to arise.

The only anecdote ALEA offered about how Policy Order 63 advanced the interest of identification actually only showed that ALEA has an interest in maintaining *internal* records of the changes they make to sex designations on licenses, something Plaintiffs do not challenge. In that situation, according to Chief Pregno, human remains were found. Pregno Dep. 58:21-60:6. The person who had died had a license listing her as female and her name as J-----.[6] Based on the autopsy, she had female-typical genitalia. *Id.* When the District Attorney's office "ran her"—

[6] Out of courtesy to the deceased and her family, Plaintiffs omit her name from this memorandum, although it is available in the deposition transcript.

presumably by searching for matches with fingerprints in a criminal database—they found a match with the record of someone listed as a man named C-----. *Id.* The District Attorney called ALEA, and ALEA informed the District Attorney that J---- had changed her name and sex designation with ALEA, and was previously known as C----- and listed as male. *Id.* That information was presumably useful to the District Attorney in confirming the identity of the deceased. Notably, however, the exact same thing would have happened if instead of Policy Order 63, Defendants permitted transgender people to change the sex designations on their licenses without proof of surgery. If, for example, ALEA changed the sex designation of a license upon receipt of a simple form where applicants could attest to their own gender, like the District of Columbia requires, the exact same interest would have been served. District of Columbia Dep't of Motor Vehicles, *supra,* Ex. 22.

At the end of the day, recording the updated accurate sex of transgender people, regardless of whether they have had surgery, provides more and better information to law enforcement agencies. Policy Order 63 is not rationally related to a government interest in identification.

3. *Policy Order 63 is not rationally related to applying sex specific policies in correctional or law enforcement contexts*

The claimed interest in providing information about sex to law enforcement and corrections agencies for purposes of applying various sex-based policies to transgender driver's license holders also bears no rational relationship to Policy Order 63. Chief Pregno disclaimed any knowledge of how law enforcement or correctional agencies apply sex-specific policies to transgender people. Pregno Dep. 79:2-11. When asked how ALEA knew that Policy Order 63 assists law enforcement or correctional officers in applying their policies, she said, "Well, it

just—it just does." Pregno Dep. 79:12-14. When asked to explain how it does, her response was circular, stating (inaccurately) that Policy Order 63 gives officers information about "physically what—who that person is and how the officer should handle them." When asked how she knew that officers wanted to know about genitals, rather than about other characteristics, she said, "I'm going off the information that we use based on the identifiers on the license." Pregno Dep. 80:12-17. The mere fact that ALEA has opted to require surgery under Policy Order 63 does not provide any rational basis to believe that that is a requirement useful to law enforcement.

Defendant's expert, Donald Leach, testified that Policy Order 63 would provide information that law enforcement and correctional agencies may or may not use to apply their sex-based policies. He did not express any opinion about what the best definition of sex would be for law enforcement purposes. Leach Dep. 32:9-13. He testified that a policy reflecting a person's gender identity would achieve the same law enforcement and correctional interests that Policy Order 63 does. *Id.* at 32:14-19. He also testified that in his experience running a Kentucky jail, he rarely employed sex-based policies, and he recommends that other correctional and law enforcement agencies apply sex-based policies to transgender people based on the transgender person's preference, rather than based on their surgical history, genitalia, or driver's license sex designation. *Id.* at 98:8-15; 110:21-111:8; 112:8-15. In short, Defendants' expert believes that having a sex designation on a license can serve law enforcement and corrections purposes, but provides absolutely no support for the surgery requirement of Policy Order 63.

In describing criteria for placing transgender people in men's or women's facilities consistent with the Prison Rape Elimination Act, the regulations for prisons and jails do not mention anatomy or identity documents, and the regulations for immigration detention prohibit placing transgender people in men's or women's facilities based "solely on the identity

documents or physical anatomy of the detainee." 6 C.F.R. § 115.42(b). Rather, agencies must consider the transgender person's gender identity, health and safety needs, and own opinion about the best placement. 6 C.F.R. § 115.42(b)-(c); 28 C.F.R. § 115.42(c)-(e). PREA regulations also refer to permissible and impermissible ways to learn about a transgender person's genitals. "If the detainee's genital status is unknown, it may be determined during conversations with the detainee, by reviewing medical records, or, if necessary, by learning that information as part of a broader medical examination conducted in private by a medical practitioner." 28 C.F.R. § 115.115. Identity documents are not mentioned, and indeed, a driver's license would not be a sensible way for a law enforcement or correctional agency to ascertain this information about a transgender person if it were needed even in Alabama. *See* Gorton Decl., at ¶ 51. ("Because of intersex conditions, traumatic injuries, and medical treatments for various conditions, a significant number of people assigned a female sex at birth who have not undergone genital [sex reassignment surgery] nonetheless do not have female-typical genital anatomy or other female-typical anatomy, and a significant number of people assigned a male sex at birth who have not undergone genital [sex reassignment surgery] nonetheless do not have male-typical genital anatomy or other male-typical anatomy.").

If anything, Policy Order 63 acts contrary to the interest law enforcement and correctional agencies are meant to serve: public safety. In explaining why a policy preventing transgender people from amending the sex designation on their birth certificates did not meet even rational basis review, a district court explained the policy "exposes transgender individuals to a substantial risk of stigma, discrimination, intimidation, violence, and danger." *Arroyo Gonzalez*, 305 F. Supp. 3d at 333.The same is true of Policy Order 63.

4. *Policy Order 63 is not rationally related to the interest of providing emergency medical care.*

Defendants asserted a government interest in providing emergency medical care. While that is a legitimate interest, it is not rationally related to requiring surgery prior to changing the sex designation on a driver's license. Indeed, Defendants were not aware of any situation in which the sex designation on a license would assist anyone in providing emergency medical care to anyone. Pregno Dep. 101:10-102:7. But requiring people to undergo surgery regardless of whether they want or need it is counter to the interests of promoting health. Gorton Decl., at ¶ 34 ("The care of transgender people, like all other patients, must be individualized. No one would suggest that all diabetics need treatment with insulin, and in the same way not all people with [gender dysphoria] need [hormone replacement therapy] or [sex reassignment surgery].").

5. *Revealing information about people's genital anatomy is not a legitimate government interest*

To the extent Defendants suggest that they have an interest in revealing information about a person's genitalia to anyone who sees a license, that is not a legitimate government interest. Sharing sensitive information about intimate parts of a person's body for no other reason than to do so cannot justify government action even under rational basis review.

II. Defendants' Policy Violates Plaintiffs' Due Process Right to Privacy.

Policy Order 63 violates the Plaintiffs' due process right to privacy. The policy forces transgender people to disclose that their assigned sex at birth differs from their gender identity—that is, it forces them to disclose that they are transgender—every time they must produce a driver's license. Because many transgender people have gender dysphoria, a condition associated

with an incongruence between sex assigned at birth and gender identity, and because surgery is required to change the sex designation on a license, the policy also forces disclosure of medical information. The incorrect driver's license reveals highly intimate information and puts Plaintiffs at risk of bodily harm.

The "constitutionally protected 'zone of privacy'" includes an "individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977). The former Fifth Circuit agreed that a "constitutional right to privacy" was "incorporated in the due process protected by the Fourteenth Amendment." *Plante v. Gonzalez,* 575 F.2d 1119, 1127 (5th Cir.1978) (*citing Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)).[7] The Eleventh Circuit has recognized a right to "informational privacy." *Burns v. Warden, USP Beaumont*, 482 F. App'x 414, 417 (11th Cir. 2012); *see also Hester v. City of Milledgeville*, 777 F.2d 1492, 1497 (11th Cir. 1985). The concept of informational privacy the Eleventh Circuit recognizes is broad; no showing of downstream consequences from the disclosure need to be made. *Plante*, 575 F.2d at 1135. ("When a legitimate expectation of privacy exists, violation of privacy is harmful without any concrete consequential damages. Privacy of personal matters is an interest in and of itself, protected constitutionally[.]")

The right to informational privacy particularly encompasses information that is sexual, medical, or about mental health. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2323 (2016), *as revised* (June 27, 2016) (sexual, medical); *United States v. Kravetz*, 706 F.3d 47, 63 (1st Cir. 2013) (medical, mental health); *United States v. Brice*, 649 F.3d 793, 796 (D.C. Cir. 2011) (medical, mental health); *Aid for Women v. Foulston*, 441 F.3d 1101, 1124 (10th Cir. 2006) (sexual, medical); *Livsey v. Salt Lake Cty.*, 275 F.3d 952, 956 (10th Cir. 2001) (sexual,

[7] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (decisions from former Fifth Circuit binding in Eleventh Circuit).

medical); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) (sexual); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 580 (3d Cir. 1980) (medical); *Hirschfeld v. Stone*, 193 F.R.D. 175, 183 (S.D.N.Y. 2000) (sexual, medical).

The federal courts that have addressed whether one's transgender status counts as protected information have consistently answered yes. Indeed, there is hardly anything that is more intimate or that involves more core aspects of one's personhood. *See e.g. Arroyo Gonzalez,* 305 F. Supp. 3d at 334; *Love*, 146 F. Supp. 3d at 855 *Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D. Conn. 1975). Just being transgender "is likely to provoke both an intense desire to preserve one's medical confidentiality, as well as hostility and intolerance from others." *Powell v. Schriver*, 175 F.3d 107, 111-12 (2d Cir. 1999). "The excruciatingly private and intimate nature of transsexualism,[8] for persons who wish to preserve privacy in the matter, is really beyond debate." *Id.* "Much like matters relating to marriage, procreation, contraception, family relationships, and child rearing, there are few areas which more closely intimate facts of a personal nature than one's transgender status." *Arroyo Gonzalez,* 305 F. Supp. 3d at 333 (citations omitted).

Defendants' Policy Order 63 violates Plaintiffs' privacy. The information disclosed here—transgender status—is exactly the sort of information courts have consistently found to be constitutionally protected.

While direct negative consequences of disclosure need not be shown to establish a constitutional violation, the potential consequences here shed light on the high stakes for Plaintiffs and other transgender people. The personal safety and bodily integrity of transgender people becomes threatened when the government forces this information to be disclosed. *See Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992) (noting that there is "social stigma attached to

[8] Plaintiffs note the term "transsexualism" is outdated and that, modernized, *Powell* addresses transgender people.

being transgender"); *Whitaker ex rel. Whitaker* 858 F.3d at 1051; *In re E.P.L.*, 891 N.Y.S.2d 619, 621 (N.Y. Sup. Ct. 2009). As this Court noted in granting John Doe's motion to proceed under a pseudonym, "transgender status [is] a paradigmatic circumstance for which courts have allowed anonymous pleading" Order, (Doc. 10) (citing *Frank*, 951 F.2d at 324). One's transgender status is a matter that can be "highly sensitive and [of a] personal nature, [a] real danger of physical harm, or where . . . injury" could occur. *Frank*, 951 F.2d at 324.

Ms. Doe has already been denied services by a bank teller who told her she was going to hell after she saw Ms. Doe's license. Ms. Doe also lost her job after the incongruence between her name and her sex designation outed her to a police officer. Ms. Clark fears getting beaten up after voting. Ms. Corbitt literally ran to her car because she feared attack after she was humiliated and outed in an ALEA office. These fears are unfortunately well founded. According to a 2015 report, twenty-five percent of transgender people were verbally harassed, 16% denied services or benefits, 9% asked to leave a location or establishment, and 2% assaulted or attacked after showing identification with a name or gender marker that did not match their gender. USTS at 82 (2016). Just six days into 2019, a transgender woman was murdered in Alabama. *Alabama Woman Becomes First Known Transgender Person Killed This Year in U.S.*, New York Times, (last visited January 23, 2019).

The court in *Love* found "'no reason to doubt that where disclosure of this [highly intimate] information may fall into the hands of persons' harboring such negative feelings, the … Policy creates a very real threat to Plaintiffs' personal security and bodily integrity." *Love*, 146 F. Supp. at 856 (quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998); *see also Powell*, 175 F.3d at 111 (given the "hostility and intolerance" towards transgender people,

"the Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism.").

While two of the Plaintiffs have disclosed that they are transgender through their advocacy on transgender issues, as well as on their Facebook pages, this disclosure does not diminish their right to privacy. Voluntarily sharing this personal information with a select group of people who have come specifically to learn about transgender issues or who are transgender themselves, or to people who seek out their social media page, is not the same as sharing information involuntarily to a stranger at a grocery store, school, or traffic stop. *See* Clark Dep. 33:6-14; 34:3-7. In those situations, Plaintiffs are more likely to be face-to-face with someone whose reaction to this information they cannot predict, in a situation where they do not have friends or allies nearby. *See* Corbitt Dep. 41:11-43:21.Dealing with hate messages sent through social media or offensive reactions from an audience member when surrounded with other transgender people does not carry nearly the same level of immediate material threat.

Also, crucially, in settings like an LGBT event or Facebook page, it is the Plaintiffs' own choice whether and how to disclose this exquisitely private information. When giving a speech or sharing a post on social media, Plaintiffs make the disclosure of their own volition and on their own terms, often providing education about what it means to be transgender and affirming their own womanhood. *See* Corbitt Dep. 58:1-21; 59:11-21; Clark Dep. 80:1-10, 21:15-82:20. When showing their driver's licenses, there is nothing except a bald misstatement of their sex contrasted with their physical appearance and identity in circumstances under which they would *never have otherwise disclosed*. Further, even if the Court were to find that Ms. Corbitt's and Ms. Clark's information is not private, there would be no reason to find the same as to Ms. Doe. The undisputed evidence shows that Ms. Doe tries to prevent disclosure of her transgender

identity, and it has been her driver's license that has kept her from being able to do so. Doe Dep. 35:3-18; 49:14-21; 50:21-51:8.

It is no answer that Defendants put Plaintiffs in the position of having to make the disclosure themselves, rather than sharing this information more directly. "'[W]hat the state may not do directly it may not do indirectly.'" *Lebron v. Sec'y, Fla. Dep't of Child & Fam.*, 710 F.3d 1202, 1217 (11th Cir. 2013) quoting *Bailey v. Alabama*, 219 U.S. 219, 244(1911) (receipt of public assistance could not be conditioned on giving up right to free from unreasonable searches). The government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests. . . ." *Perry v. Sindermann*, 408 U.S. 593, 597, (1972) (continued government employment could not be conditioned on giving up right to free speech). Avoiding the unconstitutional violation of their privacy rights would require Plaintiffs to give up the use of their driver's licenses, which would mean, among other things, that Ms. Doe and Ms. Clark could no longer drive legally in the state of Alabama, and Ms. Corbitt would not be able to do so if she stayed in Alabama after graduating. *See* Statement of Facts ¶ 92-97.

The intrusion on Plaintiffs' privacy cannot be justified when weighed against the purported government interests. *See* Section I.D. Because Plaintiffs have shown that Defendants' policy discloses their intimate information, this Court should rule in favor of Plaintiffs' due process privacy claim.

III. Defendants have deprived Plaintiffs of Due Process of Law by Conditioning Receipt of a Benefit on Giving up the Constitutional Right to Refuse Medical Treatment

Policy Order 63 unjustifiably intrudes on Plaintiffs' fundamental right to bodily integrity and to make one's own important personal decisions. *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (acknowledging fundamental right to bodily integrity and to receive abortion, use contraception, and refuse unwanted lifesaving medical treatment); *Whalen v. Roe*, 429 U.S.

589, at 599–600 (recognizing an "interest in independence in making certain kinds of important decisions"). As the Supreme Court has stated, "[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." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992); *see also Arroyo Gonzalez*, 305 F. Supp. 3d, at 334 ("The right to identify our own existence lies at the heart of one's humanity.").

Part of the liberty protected by the Fourteenth Amendment is the right to refuse medical treatment. *See Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) ("[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment[]"); *Washington v. Harper*, 494 U.S. 210, 221 (1990) (recognizing "significant liberty interest in avoiding the unwanted administration of antipsychotic drugs. . . ."). This liberty takes on special importance when the medical intervention impacts procreation. *See Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (describing procreation as involving "one of the basic civil rights of man" and finding law unconstitutional that imposed sterilization on people convicted of certain crimes); *Planned Parenthood of Se. Pennsylvania*, 505 U.S. at 851 ("Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education…. These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

Because the right to refuse healthcare is fundamental, any infringement on it is subject to strict scrutiny. *See Washington v. Glucksberg*, 521 U.S. at 721 ("[T]he Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests *at all*, no matter what

process is provided, unless the infringement is narrowly tailored to serve a compelling state interest") (*quoting Reno v. Flores*, 507 U.S. 292, 302 (1993)).

Here, the government requires transgender Alabama residents to undergo surgery that results in permanent sterilization as a condition to obtain a government benefit without anything approaching the procedural safeguards, powerful reasons, or narrow tailoring the Supreme Court has required in comparable cases. It is undisputed that virtually all forms of genital surgery for transgender people, and all forms of genital surgery for transgender women like Plaintiffs, have the effect of sterilization, which brings this requirement into an area of especially great constitutional concern. Gorton Decl. at ¶ 43. Strict scrutiny applies. The government has offered no justification that can satisfy any level of scrutiny, let alone approaching the level of a compelling interest, as described above in section I.D. Unlike with compulsory vaccines in *Jacobson*, for example, no one else's life depends on whether and which gender-affirming surgeries transgender people have received. *See Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 28 (1905). Also, as explained above, the policy is not narrowly tailored to any of the interests Defendants have offered.

To make decisions about whether to obtain any form of gender-affirming surgery, and which type or types of surgery to obtain if so, transgender people must weigh the risk of complications, the benefit of relief from gender dysphoria, the impact on their reproductive capacity, their financial resources for obtaining and recovering from surgery, the support or censure they may receive from the people closest to them, and their relationship to their own body and gender. They make these decisions in consultation with their medical and mental health providers, often with the family members and loved ones closest to them, and sometimes only after considerable introspection and prayer. These decisions are profoundly intimate, and touch

on core aspects of individual autonomy and bodily integrity sacred to the Constitution in a way that few other choices do. Policy Order 63 withholds an accurate, usable driver's license from transgender people unless they choose to have what the state considers sufficient medical treatment, have the means to get that treatment, and provide proof to the government of having received it. For that reason, it violates the constitution.

IV. Policy Order 63 Violates the First Amendment Because It Compels Plaintiffs to Endorse the State's Message About Sex

The Supreme Court has repeatedly struck down laws forcing people to express a viewpoint that they disagree with, including through the forced disclosure of information. *See Janus v. Am. Fed'n of State, Cty., and Mun. Emps*., 138 S. Ct. 2448, 2464 (2018) ("Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning."); *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). As the Supreme Court has just affirmed, "the people lose when the government is the one deciding which ideas should prevail." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2375 (2018).

Compelling any speech, whether ideological or factual, violates the Constitution. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797–98 (1988) ("These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech"). However, courts show special concern over speech that expresses or is closely tied to political, ideological, or moral positions. *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1565 (11th Cir. 1990) (quoting *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943)) ("Restrictions on government speech seem to spring from one ideal: 'If 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.'").

Here, Defendants compel Plaintiffs, as well as transgender people in Alabama more generally, to carry and show driver's licenses that convey Defendants' viewpoint about the Plaintiffs' sex, as well as about the meaning of sex generally. Policy Order 63 is based on and represents an anti-transgender ideology that Defendants hold: that a person's sex should only be evaluated based on the sex associated with their external genitalia at birth unless they have had sex reassignment surgery, regardless of the sex they identify with. This view is a controversial one among the public, a minority one among States, and a rejected one within the medical community. *Everything You Need to Know About the Debate Over Transgender People and Bathrooms*, Time (July 28, 2015), attached as Pls.' Ex. 59; National Center for Transgender Equality, *supra*, Ex. 23; Gorton Decl., at ¶ 53. Indeed, the undisputed testimony from both experts is that "sex" includes components other than the ones Defendants take into account. Gorton Decl. ¶ 10; Leach Dep. 11:15-12:17.

The ideological view about gender and transgender people espoused through Policy Order 63 and the sex designation Defendants compel Plaintiffs to carry on their driver's licenses is one with which the Plaintiffs emphatically disagree. Corbitt Dep. 47:4-9; Clark Dep. 32:9-16; Doe Decl., at ¶ 24 While Defendants may choose to embrace this ideology about sex and express it on behalf of the government to the extent doing so does not conflict with other constitutional protections, the First Amendment does not allow them to force the Plaintiffs to endorse that message by repeatedly communicating it to others with their driver's license. *See Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015), quoting *Wooley* at 715 ("[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."). "Government communication is legitimate as long as the government does not abridge an individual's 'First Amendment right to avoid becoming the courier for such message.'" *N.A.A.C.P.*, 891 F.2d at 1566 *quoting Wooley v. Maynard*, 430 U.S. at 717. In *N.A.A.C.P.*, the Eleventh Circuit ruled that Alabama had not compelled speech when it flew the Confederate flag, because "Alabama does not compel its citizens to carry or post the flag themselves." *Id.* With respect to driver's licenses, Alabama directly compels its citizens to carry its written message about their gender. *See supra* Statement of Facts ¶ 92-97.

Ms. Clark and Ms. Doe try to minimize the situations where they need to show identification because of Policy Order 63, but nonetheless have had to produce their driver's licenses on numerous occasions despite their aversion to the message it communicates. Doe Dep. 50:21-51:15; 79:13-18; 78:11-21; 35:3-36:11; Clark Dep. 33:3-34:11; 35:2-11; 46:18-47:18; 79:3-23. Ms. Corbitt, while a student, can continue to use her North Dakota license, but if she found a job in her home state after graduation, she would have to give up driving or lie about who she is. Corbitt Dep 47:4-9; Corbitt Dep. 64:3-10; Corbitt Dep. 36:19-38:13. She would have to repeatedly endorse that lie, one that is repugnant to her, not only in order to get a license at all, but each and every time she carried it with her or had to show it to someone.

Even as Policy No. 63 forces Plaintiffs and others to endorse Defendants' viewpoint concerning the meaning of sex, it simultaneously prohibits Plaintiffs from conveying their own constitutionally-protected message about their identity and sex. Forcing Ms. Clark and Ms. Doe to repeatedly communicate through their driver's license that they are male prevents them from exercising their right to express their true female identity. *See, e.g., Doe v. Bell*, 754 N.Y.S.2d 846, 851 (Sup. Ct. 2003) (expression of gender was protected message). It forces Plaintiffs and

other transgender individuals to repeatedly and publicly contradict something at the very core of their personal identity, as well as their moral, political, and religious beliefs. And it may have a chilling effect on their participation in public life more broadly:

> Forcing disclosure of transgender identity chills speech and restrains engagement in the democratic process in order for transgender[] [people] to protect themselves from the real possibility of harm and humiliation. The Commonwealth's inconsistent policies not only harm the plaintiffs before the Court; it also hurts society as a whole by depriving all from the voices of the transgender community.

Arroyo Gonzalez, 305 F. Supp. 3d, at333.

The unconstitutionality of forcing this speech is underscored because only Plaintiffs and other transgender individuals are targeted by this compulsion of their speech. Cisgender people are not similarly compelled, because their driver's licenses match who they are, and do not convey a message with which they disagree. Courts should be "deeply skeptical" when "'the State has left unburdened those speakers whose messages are in accord with its own views.'" *Nat'l Inst. of Family & Life Advocates*, 138 S. Ct. at 2378.

CONCLUSION

For the foregoing reasons, this Court should grant summary judgment in favor of Plaintiffs on all counts in their Complaint.

Respectfully submitted this 8th day of February 2019.

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CERTIFICATE OF SERVICE

I certify that on February 8, 2019, I filed the foregoing electronically using the Court's CM/ECF system, which will serve all counsel of record.

s/ Brock Boone

DOC. 52-1

Exhibit 1

ALABAMA LAW ENFORCEMENT AGENCY
DRIVER LICENSE DIVISION
301 SOUTH RIPLEY STREET/ P.O. BOX 1471 / MONTGOMERY, AL 36102-1471
PHONE 334.242.4400 / ALEA.GOV

ROBERT BENTLEY
GOVERNOR

SPENCER COLLIER

SUBJECT: CHANGING SEX ON A DRIVER LICENSE DUE TO GENDER REASSIGNMENT

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.

IF THE INDIVIDUAL INITIALLY REPORTS TO AN EXAM OFFICE FOR THE GENDER CHANGE:

1. The Examiner is to review the document(s) presented for authenticity and contact the medical unit in order to make the necessary system change.
2. If a physician letter is presented, there is no need to contact the physician unless there is some doubt as to the authenticity of the letter. Many of the surgeries are performed in other countries.
3. After the system changes are completed, the Examiner will then scan the documents presented into the driver record, and issue the person a corrected duplicate license (if not renewal time) for the duplicate fee.
4. The documents presented are to be given back to the applicant.

IF THE REQUEST IS MAILED TO THE MEDICAL UNIT: The medical unit will:

1. Review the document(s) for authenticity. The letter does NOT have to be submitted by the physician's office, the subject may send it in.
2. Make the necessary system updates (changing gender) and place a comment referencing the changes in the driver history.
3. The document(s) presented will be mailed back to the subject along with a letter informing the subject to report to either a probate office/license commissioner or an Examining office to purchase another license.
4. The letter to the subject and the document(s) presented are to be scanned into the driver history.

DOC. 52-46

Exhibit 46

How many people are lesbian, gay, bisexual, and transgender?

the Williams INSTITUTE

by Gary J. Gates, Williams Distinguished Scholar

April 2011

Executive Summary

Increasing numbers of population-based surveys in the United States and across the world include questions that allow for an estimate of the size of the lesbian, gay, bisexual, and transgender (LGBT) population. This research brief discusses challenges associated with collecting better information about the LGBT community and reviews eleven recent US and international surveys that ask sexual orientation or gender identity questions. The brief concludes with estimates of the size of the LGBT population in the United States.

Key findings from the research brief are as follows:

- An estimated 3.5% of adults in the United States identify as lesbian, gay, or bisexual and an estimated 0.3% of adults are transgender.
- This implies that there are approximately 9 million LGBT Americans, a figure roughly equivalent to the population of New Jersey.
- Among adults who identify as LGB, bisexuals comprise a slight majority (1.8% compared to 1.7% who identify as lesbian or gay).
- Women are substantially more likely than men to identify as bisexual. Bisexuals comprise more than half of the lesbian and bisexual population among women in eight of the nine surveys considered in the brief. Conversely, gay men comprise substantially more than half of gay and bisexual men in seven of the nine surveys.
- Estimates of those who report any lifetime same-sex sexual behavior and any same-sex sexual attraction are substantially higher than estimates of those who identify as LGB. An estimated 19 million Americans (8.2%) report that they have engaged in same-sex sexual behavior and nearly 25.6 million Americans (11%) acknowledge at least some same-sex sexual attraction.
- Understanding the size of the LGBT population is a critical first step to informing a host of public policy and research topics. The surveys highlighted in this report demonstrate the viability of sexual orientation and gender identity questions on large national population-based surveys. Adding these questions to more national, state, and local data sources is critical to developing research that enables a better understanding of the understudied LGBT community.

Introduction

Increasing numbers of population-based surveys in the United States and across the world include questions designed to measure sexual orientation and gender identity. Understanding the size of the lesbian, gay, bisexual, and transgender (LGBT) population is a critical first step to informing a host of public policy and research topics. Examples include assessing health and economic disparities in the LGBT community, understanding the prevalence of anti-LGBT discrimination, and considering the economic impact of marriage equality or the provision of domestic partnership benefits to same-sex couples. This research brief discusses challenges associated with collecting better information about the LGBT community and reviews findings from eleven recent US and international surveys that ask sexual orientation or gender identity questions. The brief concludes with estimates of the size of the LGBT population in the United States.

Challenges in measuring the LGBT community

Estimates of the size of the LGBT community vary for a variety of reasons. These include differences in the definitions of who is included in the LGBT population, differences in survey methods, and a lack of consistent questions asked in a particular survey over time.

In measuring sexual orientation, lesbian, gay, and bisexual individuals may be identified strictly based on their self-identity or it may be possible to consider same-sex sexual behavior or sexual attraction. Some surveys (not considered in this brief) also assess household relationships and provide a mechanism of identifying those who are in same-sex relationships. Identity, behavior, attraction, and relationships all capture related dimensions of sexual orientation but none of these measures completely addresses the concept.

Defining the transgender population can also be challenging. Definitions of who may be considered part of the transgender community include aspects of both gender identities and varying forms of gender expression or non-conformity. Similar to sexual orientation, one way to measure the transgender community is to simply consider self-identity. Measures of identity could include consideration of terms like transgender, queer, or genderqueer. The latter two identities are used by some to capture aspects of both sexual orientation and gender identity.

Similar to using sexual behaviors and attraction to capture elements of sexual orientation, questions may also be devised that consider gender expression and non-conformity regardless of the terms individuals may use to describe themselves. An example of these types of questions would be consideration of the relationship between the sex that individuals are assigned at birth and the degree to which that assignment conforms with how they express their gender. Like the counterpart of measuring sexual orientation through identity, behavior, and attraction measures, these varying approaches capture related dimensions of who might be classified as transgender but may not individually address all aspects of assessing gender identity and expression.

Another factor that can create variation among estimates of the LGBT community is survey methodology. Survey methods can affect the willingness of respondents to report stigmatizing identities and behaviors. Feelings of confidentiality and anonymity increase the likelihood that respondents will be more accurate in reporting sensitive information. Survey methods that include face-to-face interviews may underestimate the size of the LGBT community while those that include methods that allow respondents to complete questions on a computer or via the internet may increase the likelihood of LGBT respondents identifying themselves. Varied sample sizes of surveys can also increase variation. Population-based surveys with a

larger sample can produce more precise estimates (see SMART, 2010 for more information about survey methodology).

A final challenge in making population-based estimates of the LGBT community is the lack of questions asked over time on a single large survey. One way of assessing the reliability of estimates is to repeat questions over time using a consistent method and sampling strategy. Adding questions to more large-scale surveys that are repeated over time would substantially improve our ability to make better estimates of the size of the LGBT population.

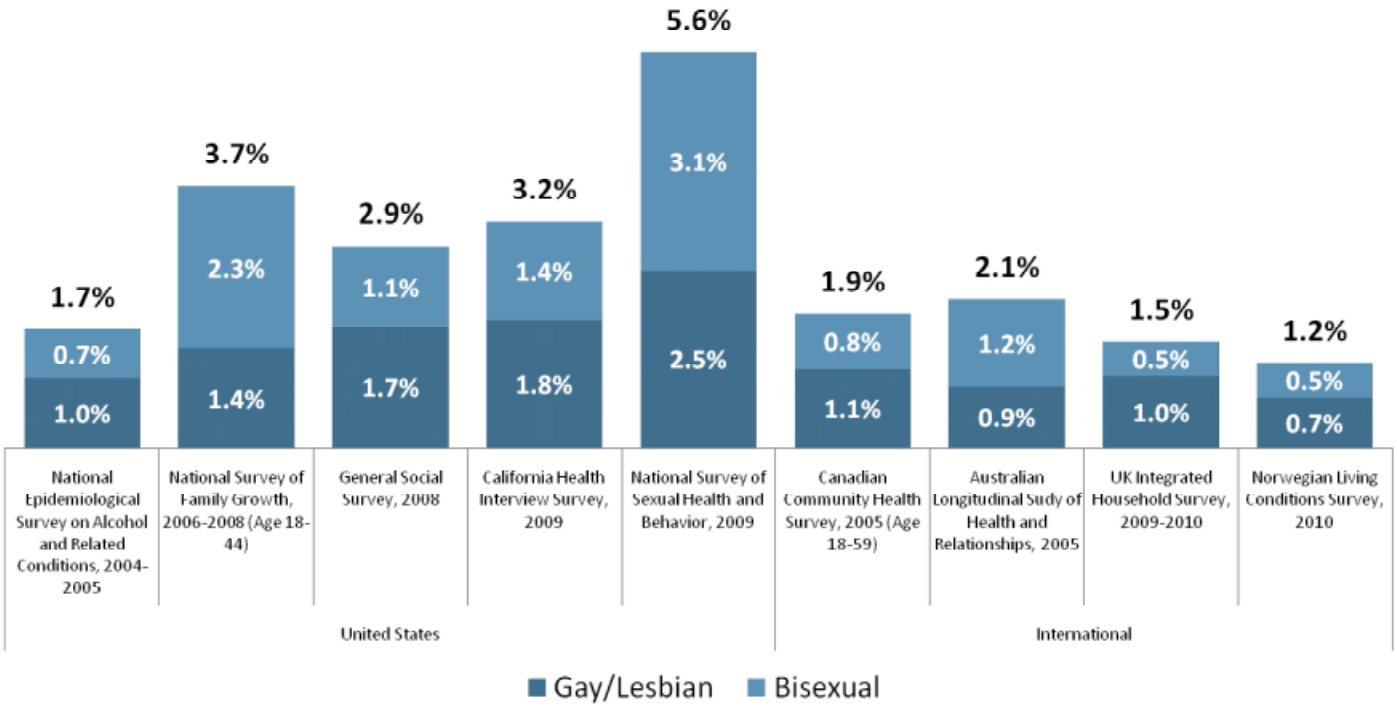
How many adults are lesbian, gay, or bisexual?

Findings shown in Figure 1 consider estimates of the percentage of adults who self-identify as lesbian, gay, or bisexual across nine surveys conducted within the past seven years. Five of those surveys were fielded in the United States and the others are from Canada, the United Kingdom, Australia, and Norway. All are population-based surveys of adults, though some have age restrictions as noted.

The lowest overall percentage comes from the Norwegian Living Conditions Survey at 1.2%, with the National Survey of Sexual Health and Behavior, conducted in the United States, producing the highest estimate at 5.6%. In general, the non-US surveys, which vary from 1.2% to 2.1%, estimate lower percentages of LGB-identified individuals than the US surveys, which range from 1.7% to 5.6%.

While the surveys show a fairly wide variation in the overall percentage of adults who identify as LGB, the proportion who identify as lesbian/gay versus bisexual is somewhat more consistent (see Figure 2). In six of the surveys, lesbian- and gay-identified individuals outnumbered bisexuals. In most cases, these surveys were roughly 60% lesbian/gay versus 40% bisexual. The UK Integrated Household Survey found the proportion to be two-thirds lesbian/gay versus one-third bisexual.

Figure 1. Percent of adults who identify as lesbian, gay, or bisexual.



The National Survey of Family Growth found results that were essentially the opposite of the UK survey with only 38% identifying as lesbian or gay compared to 62% identifying as bisexual. The National Survey of Sexual Health and Behavior and the Australian Longitudinal Study of Health and Relationships both found a majority of respondents (55% and 59%, respectively) identifying as bisexual.

The surveys show even greater consistency in differences between men and women

Figure 2. Percent of adults who identify as gay/lesbian versus bisexual.

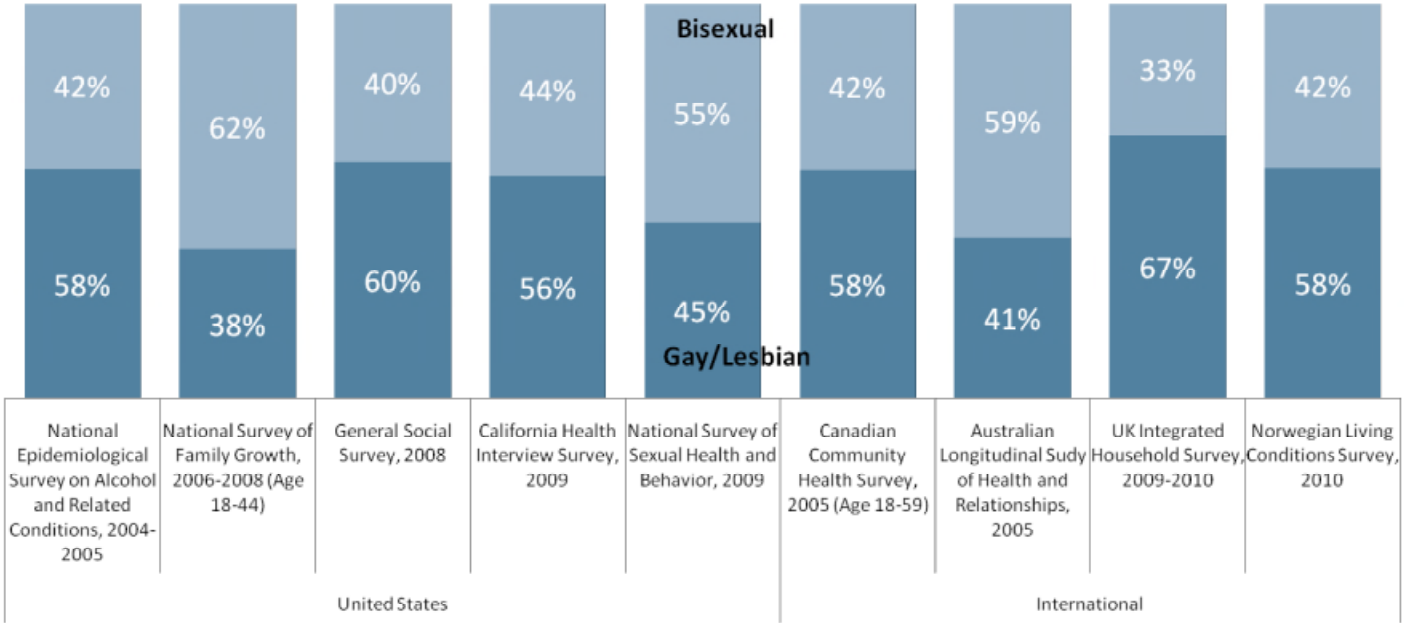
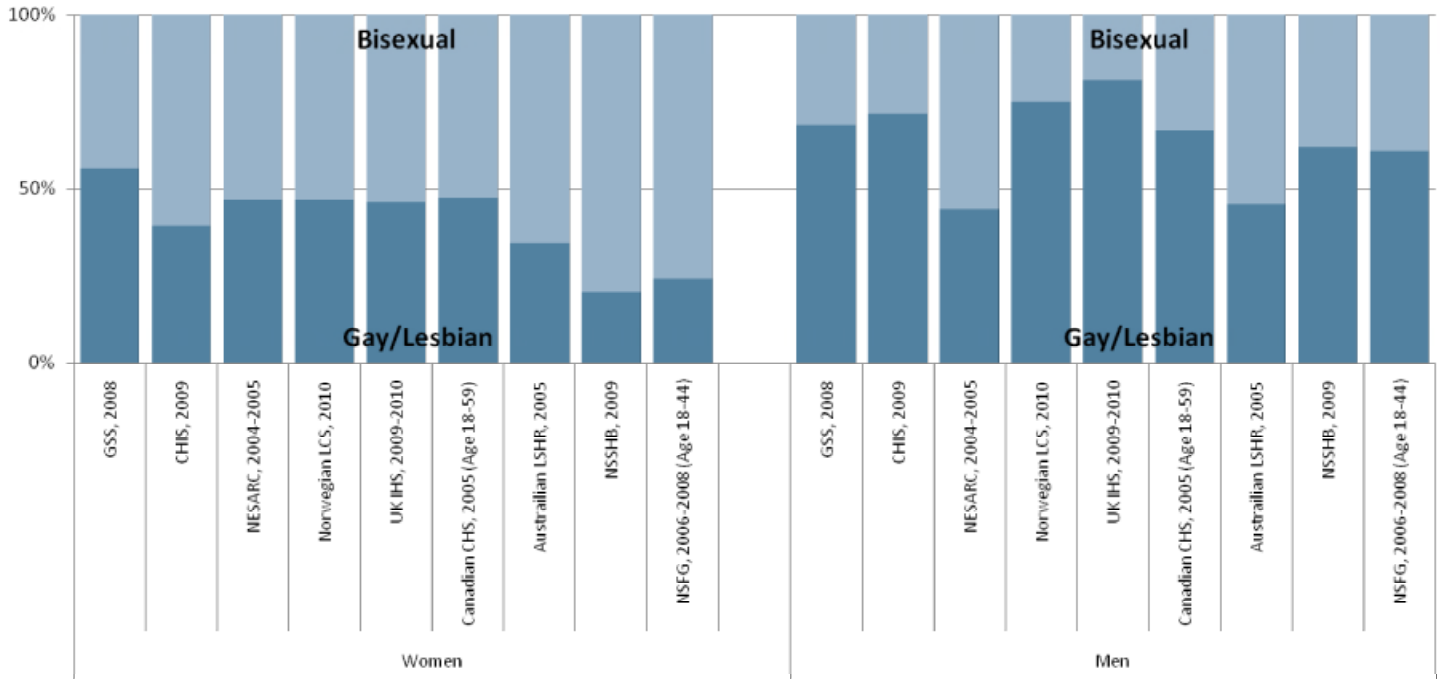
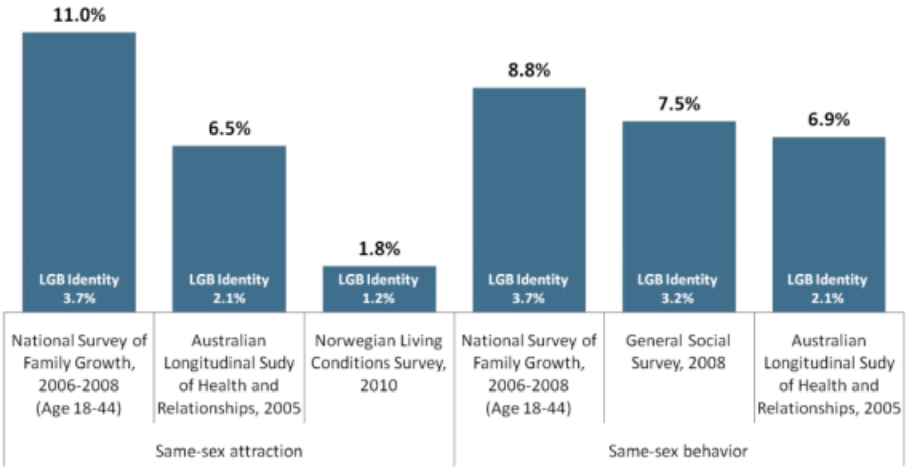


Figure 3. Percent of adults who identify as lesbian/gay versus bisexual, by sex.



associated with lesbian/gay versus bisexual identity. Women are substantially more likely than men to identify as bisexual. Bisexuals comprise more than half of the lesbian and bisexual population among women in eight of the nine surveys considered (see Figure 3). Conversely, gay men comprise substantially more than half of gay and bisexual men in seven of the nine surveys.

Figure 4. Percent of adults who report any same-sex attraction and behavior.



Four of the surveys analyzed also asked questions about either sexual behavior or attraction. Within these surveys, a larger fraction of adults report same-sex attractions and behaviors than self-identify as lesbian, gay, or bisexual (see Figure 4). With the exception of the Norwegian survey, these differences are substantial. The two US surveys and the Australian survey all suggest that adults are two to three times more likely to say that they are attracted to individuals of the same-sex or have had same-sex sexual experiences than they are to self-identify as LGB.

How many adults are transgender?

Population-based data sources that estimate the percentage of adults who are transgender are very rare. The Massachusetts Behavioral Risk Factor Surveillance Survey represents one of the few population-based surveys that include a question designed to identify the transgender population. Analyses of the 2007 and 2009 surveys suggest that 0.5% of adults aged 18-64 identified as transgender (Conron 2011).

The 2003 California LGBT Tobacco Survey found that 3.2% of LGBT individuals identified as transgender. Recall that the 2009 California Health Interview Survey estimates that 3.2% of adults in the state are LGB. If both of these estimates are true, it implies that approximately 0.1% of adults in California are transgender.

Several studies have reviewed multiple sources to construct estimates of a variety of dimensions of gender identity. Conway (2002) suggests that between 0.5% and 2% of the population have strong feelings of being transgender and between 0.1% and 0.5% actually take steps to transition from one gender to another. Olyslager and Conway (2007) refine Conway's original estimates and posit that at least 0.5% of the population has taken some steps toward transition. Researchers in the United Kingdom (Reed, et al., 2009) suggest that perhaps 0.1% of adults are transgender (defined again as those who have transitioned in some capacity).

Notably, the estimates of those who have transitioned are consistent with the survey-based estimates from California and Massachusetts. Those surveys both used questions that implied a transition or at least discordance between sex at birth and current gender presentation.

How many lesbian, gay, bisexual and transgender people are there in the United States?

Federal data sources designed to provide population estimates in the United States (e.g., the Decennial Census or the American Community Survey) do not include direct questions regarding sexual orientation or gender identity. The findings shown in Figure 1 suggest that no single survey offers a definitive estimate for the size of the LGBT community in the United States.

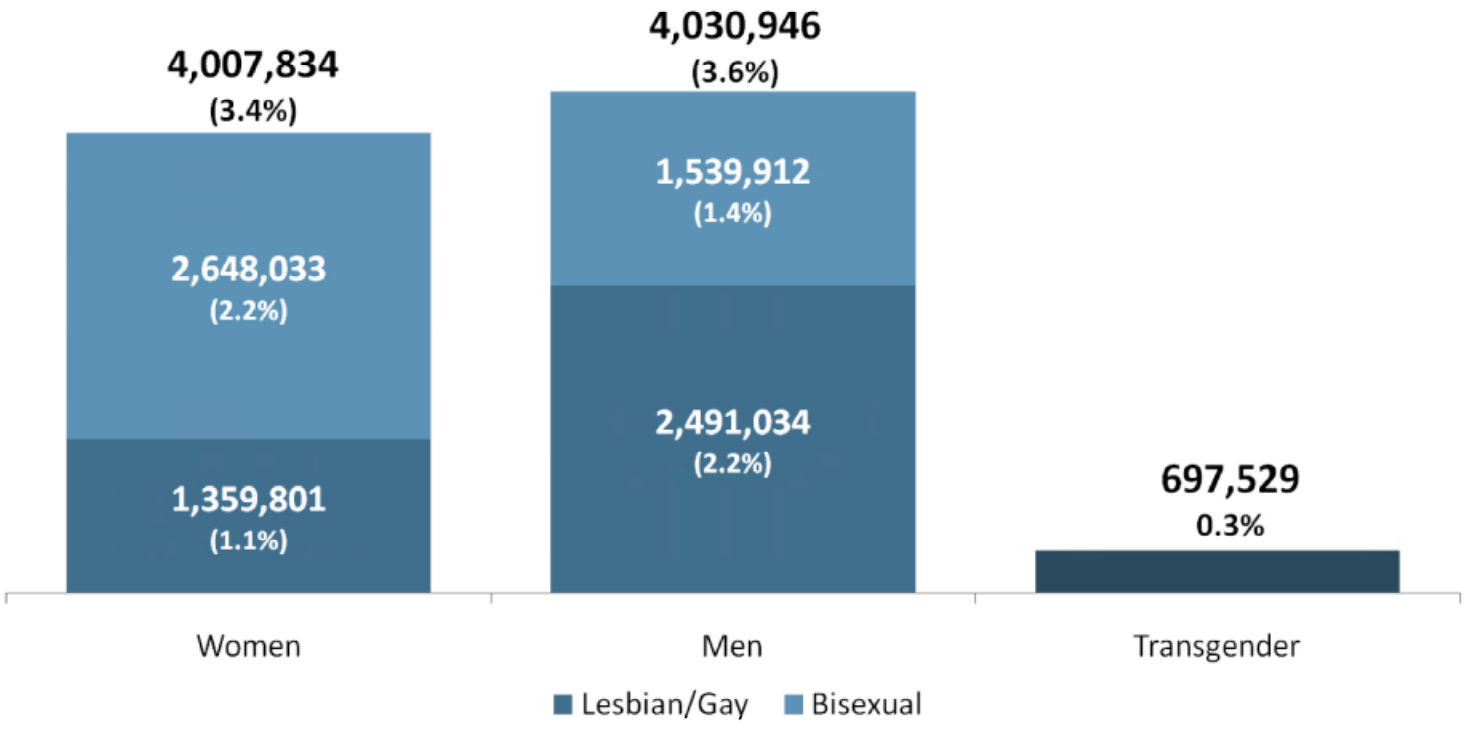
However, combining information from the population-based surveys considered in this brief offers a mechanism to produce credible estimates for the size of the LGBT community. Specifically, estimates for sexual orientation identity will be derived by averaging results from the five US surveys identified in Figure 1.

Separate averages are calculated for lesbian and bisexual women along with gay and bisexual men. An estimate for the transgender population is derived by averaging the findings from the Massachusetts and California surveys cited earlier.

It should be noted that some transgender individuals may identify as lesbian, gay, or bisexual. So it is not possible to make a precise combined LGBT estimate. Instead, Figure 5 presents separate estimates for the number of LGB adults and the number of transgender adults.

The analyses suggest that there are more than 8 million adults in the US who are LGB, comprising 3.5% of the adult population. This is split nearly evenly between lesbian/gay and bisexual identified individuals, 1.7% and 1.8%, respectively. There are also nearly 700,000 transgender individuals in the US. Given these findings, it seems reasonable to assert that approximately 9 million Americans identify as LGBT.

Figure 5. Percent and number of adults who identify as LGBT in the United States.



Averaging measures of same-sex sexual behavior yields an estimate of nearly 19 million Americans (8.2%) who have engaged in same-sex sexual behavior.[1] The National Survey of Family Growth is the only source of US data on attraction and suggests that 11% or nearly 25.6 million Americans acknowledge at least some same-sex sexual attraction.[2]

By way of comparison, these analyses suggest that the size of the LGBT community is roughly equivalent to the population of New Jersey. The number of adults who have had same-sex sexual experiences is approximately equal to the population of Florida while those who have some same-sex attraction comprise more individuals than the population of Texas.

The surveys highlighted in this report demonstrate the viability of sexual orientation and gender identity questions on large-scale national population-based surveys. States and municipal governments are often testing grounds for the implementation of new LGBT-related public policies or can be directly affected by national-level policies. Adding sexual orientation and gender identity questions to national data sources that can provide local-level estimates and to state and municipal surveys is critical to assessing the potential efficacy and impact of such policies.

[1] This estimate uses data from the National Survey of Family Growth and the General Social Survey.
[2] Since the NSFG data only survey 18-44 year olds, this estimate assumes that patterns in this group are the same for those aged 45 and older. It may be that older adults are less likely to report same-sex attraction. If so, this estimate may somewhat overstate same-sex attraction among all adults.

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About the Author

Gary J. Gates, PhD is the Williams Distinguished Scholar at the Williams Institute, UCLA School of Law. He studies the demographic and economic characteristics of the LGBT population.

About the Institute

The Williams Institute on Sexual Orientation and Gender Identity Law and Public Policy at UCLA School of Law advances law and public policy through rigorous, independent research and scholarship, and disseminates its work through a variety of education programs and media to judges, legislators, lawyers, other policymakers and the public. These studies can be accessed at the Williams Institute website.

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DOC. 54

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DARCY CORBITT, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CASE NO. 2:18-cv-91-MHT-GMB**
	)	
HAL TAYLOR, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

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Table of Contents

Defendants Hal Taylor, Charles Ward, Deena Pregno, and Jeannie Eastman submit this brief in support of their motion for summary judgment.

A. Statement of Facts

1. The Alabama Law Enforcement Agency and Alabama Driver Licenses

The Alabama Legislature created the Alabama Law Enforcement Agency ("ALEA") as an agency within the Executive Branch of State government in 2013. *See* Ala. Act. 2013-67 § 1. ALEA is comprised of the Department of Public Safety and the State Bureau of Investigations. *See* Ala. Code § 41-27-1. Defendant Hal Taylor serves as the Secretary of ALEA and is "the appointing authority and executive head of the agency and the appointing authority and department head of the Department of Public Safety and State Bureau of Investigations." Ala. Code § 41-27-2. Defendant Colonel Charles Ward serves as the Director of the Department of Public Safety. *See* Ala. Code 41-27-6. Defendant Deena Pregno serves as the Chief of the Driver License Division of ALEA. (Pregno Depo. at 7, 22). She has served as Chief of the Driver License Division since January 2015 and reports to Colonel Ward as her supervisor. (Pregno Depo.. at 22; Woodruff Depo. at 32). Defendant Jeannie Eastman serves as Supervisor over the Commercial Driver License ("CDL") Division as well as the Medical Unit of ALEA. (Eastman Depo. at 17).

Prior to the creation of ALEA in 2013, the Department of Public Safety was a separate entity and was responsible for issuing driver licenses. (Woodruff Depo. at 12-14). It currently performs this function as a Department within ALEA. (*Id.* at 12; Pregno Depo. at 44). The Alabama Code states that driver licenses issued by the Department of Public Safety "shall 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* (Pregno Depo. at 11-12). In addition to the statutorily-mandated photograph, name, birthdate, and address,

the "description" of the bearer of an Alabama driver license, as implemented by ALEA, consists of the license bearer's height, weight, eye color, hair color, and a designation of the bearer's sex as male or female ("M" or "F"). (Pregno Depo. at 65-66, 88; *see also*, Clark Depo., DX 2; Doe Depo., DX 18).

It is a policy of ALEA to maintain consistency between the information contained on a driver license and that contained on an Alabama birth certificate. (Pregno Depo. at 41-43, 103-04, 111-12, 123-25). Alabama birth certificates are regulated by the Office of Vital Statistics within the State Board of Health. *See* Ala. Code § 22-9A-2. The State Registrar of Vital Statistics is tasked with issuing regulations regarding vital statistics and maintaining custody of records regarding vital statistics. *See* Ala. Code § 22-9A-3. The State Board of Health, as implemented by the State Registrar, "shall by rule determine the items or information to be contained on certificates of birth . . . ." Ala. Code § 22-9A-6(a). By rule Alabama birth certificates include the following identifying information: "date, time, and location of birth; name of child; *sex*; plurality and birth order if not single; mother's information such as name, residence, and date and place of birth; father's information . . . ; attendant's information; and information for legal purposes such as certificate number and date filed." Ala. Admin. Code § 420-7-1-.03(3)(a)(1) (emphasis added). The same regulation orders additional information to be collected for research purposes, but this information does not appear as identifying information on the birth certificate itself. *Id.* § 420-7-1-.03(3)(a)(2). This information includes "demographic information on the parents such as race, ethnicity, and education," etc. *Id.* Neither race nor ethnicity appear on Alabama driver licenses or birth certificates. *See* Ala. Admin. Code § 420-7-1-.03(3)(a)(1); (Clark Depo., DX 2).

2. Policy Order 63: Creation, Implementation, and State Interests

ALEA Policy Order 63 governs when an individual may change the sex designation on an Alabama driver license for situations other than typographical error. (Pregno Depo. at 24-26; Woodruff Depo. at 66). Policy Order 63 was first put in writing and formally issued on September 1, 2012. (Pregno Depo. at 24; *see also* Woodruff Depo., PX 7 at D1). Prior to Policy Order 63, the Department of Public Safety had an unwritten procedure for allowing drivers to change the sex designation on their license. (Pregno Depo. at 27-28; Woodruff Depo. at 48-49). Under the pre-2012 unwritten procedure, the Department of Public Safety would change the sex designation on a driver license if the licensee provided a letter from a physician stating that the physician had performed sex reassignment surgery on the licensee and that the surgery had been completed. (Woodruff Depo. at 49-50). Under the pre-2012 unwritten procedure, the Department of Public Safety required both an amended birth certificate and a physician's letter stating that sex reassignment surgery had been completed, but that, in practice, a physician's letter stating that sex reassignment surgery had been completed was sufficient. (Pregno Depo. at 29-30). Amending an Alabama birth certificate to change the sex designation also requires proof of sex reassignment surgery. *See* Ala. Code § 22-9A-19(d); (Pregno Depo. at 124).

Policy Order 63 was formally issued on September 1, 2012. (Pregno Depo. at 24). The 2012 version of the policy states the following:

> It is the policy of the Director of the Driver License Division that individuals 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.

(Woodruff Depo., PX 7). Policy Order 63 was created to establish a formal procedure for handling requests to change the sex designation on driver licenses. (Pregno Depo. at 41). Policy Order 63

was based on the state statute for amending a birth certificate to change the sex, a process that also requires proof of sex reassignment surgery. (Pregno Depo. at 42, 124); *see also* Ala. Code § 22-9A-19(d). The surgery requirement for amending Alabama birth certificates has been in effect since 1992. *See* Ala. Act 92-607 § 19(d); *see also Id.* § 31 (stating the 1992 amendments would become effective immediately upon approval by the governor). The 2012 version of Policy Order 63 required all medical documentation to be sent to the Medical Unit prior to authorizing a sex designation on a driver license. (Woodruff Depo. at 66).

The version of Policy Order 63 that is currently in effect was revised in late 2015 or early 2016. (Pregno Depo. at 25-26). 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.

(Woodruff Depo., PX 7 at D2). This current version of Policy Order 63 allows licensees to change the sex designation on their license with either a certified copy of an amended birth certificate documenting the sex designation change or proof from the physician performing the gender reassignment surgery on the physician's letterhead rather than providing both documents. (Pregno Depo. at 29-30). The current policy also authorizes driver license examiners in field offices to change the sex designation on a driver license upon receipt of the correct documentation rather than requiring all such changes to go through the Medical Unit. (Woodruff Depo. at 66-68). Thus, the current policy contains instructions for implementation separately to field examiners and employees of the Medical Unit. (Woodruff Depo., PX 7 at D2).

Prior to depositions, Plaintiffs served an interrogatory asking Defendants to identify "any and all procedures that constitute 'gender reassignment surgery,' 'sexual reassignment surgery,' or 'the reassignment procedure' for purposes of changing the sex designation on an Alabama driver's license." (Eastman Depo., PX 23). After lodging certain objections, Defendants responded as follows:

> Without waiving these objections, defendants state that to change the sex designation on an Alabama driver license, Policy Order 63 requires proof of sexual reassignment surgery that includes an irreversible surgical change of sex characteristics, including genital reassignment.

(*Id.*). The next interrogatory asked Defendants the criteria by which it was determined whether an individual had had sex reassignment surgery, to which Defendants responded by quoting Policy Order 63's language requiring "[a]n 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." (*Id.*). The interrogatory response then added that the "process may also involve a member of ALEA's Medical Unit contacting the office of the physician on the letter to confirm the required procedure was performed." (*Id.*).

Eastman testified in her deposition in her capacity as a 30(b)(6) representative as to these responses and Policy Order 63's surgery requirement. (Eastman Depo. at 62-64). She testified that for purposes of Policy Order 63 the terms "sex reassignment surgery," "reassignment procedure," and "gender reassignment surgery" were interchangeable. (*Id.* at 62). She testified that, in layman's terms, complete sex reassignment surgery consisted of both "top" and "bottom" surgery. (*Id.* at 68-69). The Medical Unit does not maintain any specific list of procedures that constitute sex reassignment procedures. (*Id.* at 66). Rather, the Medical Unit relies on the documentation from the physician that performed the procedure stating that sex reassignment surgery had been

completed. (*Id.* at 67-68). Eastman testified that whenever she or anyone from the Medical Unit had contacted a doctor's office to confirm whether a sex reassignment procedure had been performed, no one at the doctor's office had ever inquired as to what was meant by "sex reassignment procedure" or "sex reassignment surgery." (*Id.* at 151-52). She stated this experience was similar to when she called a doctor's office to follow up about documentation as to other medical conditions, such as when was the last time someone had a seizure. (*Id.* at 152-53). She testified that the individuals she spoke with at doctor's offices indicated they understood the medical condition about which she was inquiring. (*Id.* at 153).

Eastman testified that the best evidence of the documentation the Medical Unit considered sufficient to satisfy Policy Order 63 is contained in the medical documentation for individuals who had requested and been granted a change to the sex designation of their driver licenses, which was produced in connection with this lawsuit. (Eastman Depo. at 152). Eastman and Jerrolynn "JJ" Spencer are the two Medical Unit employees responsible for reviewing medical documentation to ensure it is compliant with Policy Order 63. (*Id.* at 19-20). Spencer testified as to doctor's letters submitted in connection with sex change requests on licenses and why they were or were not considered policy-compliant. (Spencer Depo. at 48, 52-57, 66-68, 73-74). For instance, Spencer testified that a doctor's letter that stated "[s]ex reassignment surgery has been completed on [a given date] and [patient's name redacted] is not of the sex recorded on the original records," was sufficient to meet Policy Order 63's criteria for changing the sex designation on a license. (*Id.* at 48, 52; *Id.*, PX 15). By contrast, a doctor's letter that stated the patient "has had appropriate treatment for gender transition male to female," contains a handwritten note by Spencer indicating she contacted the office to determine whether sex reassignment surgery had been performed. (*Id.* at 66-67; *Id.*, PX 18). Spencer's note states, "[n]o surgery performed per px [telephone

conversation] w/ dr office." (*Id.*). Spencer could not recall if follow-up documentation was provided, but testified that "based on this letter alone," which stated only that "appropriate treatment" had been provided, the request to change the sex designation on the driver license would have been denied. (*Id.* at 66-67). The medical records also document at least one case of an individual who changed the sex designation on a driver license due to reassignment surgery resulting from an intersex condition (Klinefelter's syndrome), rather than the individual being transgender. (D1165).

Prior to depositions, Plaintiffs served an interrogatory asking Defendants to describe "any and all government interests Defendants assert that Policy Order 63 serves, as well as how those government interests are furthered by Policy Order 63." (Eastman Depo., PX 23). After lodging certain objections, Defendants responded as follows:

> Without waiving these objections, and subject to the right to supplement these responses, defendants state that Policy Order 63 serves the State's interests in providing an accurate description of the bearer of an Alabama driver license. An Alabama driver license provides identification for law enforcement and administrative purposes, including, but not limited to, purposes related to arrest, detention, identification of missing persons or crime suspects, and the provision of medical treatment. Policy Order 63 furthers these interests by providing a uniform understanding of what physical characteristics underlie the sex designation on a driver license. Policy Order 63 serves the State's interests in maintaining consistency between the information contained on a driver license and that contained on a birth certificate since obtaining an amended birth certificate to change a sex designation requires proof that the individual's sex has been changed by surgical procedure. *See* Ala. Code § 22-9A-19(d).

Id. Chief Pregno testified in her capacity as ALEA's 30(b)(6) representative that this interrogatory response accurately stated the State's interests in Policy Order 63 and how the policy was related to those interests. (Pregno Depo. at 57-58).

ALEA, through the above interrogatory and its 30(b)(6) representative, stated one of its interests in Policy Order 63 was to maintain consistency between the information on an Alabama birth certificate and a driver license. (Pregno Depo. at 42-43, 106-07). Chief Pregno testified that the 2012 version of Policy Order 63 "was established based on the state statute for changing the gender on a birth certificate." (*Id.* at 42). The sex designation on an Alabama birth certificate is the "default" for establishing the sex designation on the same individual's driver license. (Woodruff Depo. at 90-92). Amending an Alabama birth certificate requires proof of sex reassignment surgery. (Pregno Depo. at 124). ALEA maintains a similar consistency between the information on licenses and birth certificates in other contexts, such as when an individual's name changes. (*Id.* at 104). Policy Order 63 also serves the State's interests in maintaining a paper trail that documents the reasons why an individual's sex designation might differ between a birth certificate and driver license. (*Id.* at 103); (*see also* Woodruff Depo. at 90-92). Although the federal Real ID Act requires a sex designation to appear on the face of state driver licenses, ALEA controls the information that goes onto an Alabama driver license but does not control the information that goes onto federal identity documents, such as a United States passport. (*Id.* at 51-52, 122). Thus, Policy Order 63 is not intended to maintain consistency between Alabama driver licenses and federal identity documents. (*Id.* at 106).

In addition to the State's interests in consistency with birth certificates, Chief Pregno testified that ALEA is primarily a law enforcement organization, and that an Alabama driver license is an identification document issued for law enforcement purposes. (*Id.* at 55-56, 123). She elaborated in her own words on the State's interests in Policy Order 63 as an identity document:

> As I stated earlier, we are a law enforcement agency, and we are preparing and issuing an identification document. This document is used by law enforcement officers to identify the subject that they're dealing with. It also identifies possible criminal activity or the

> identification of a possible criminal activity. It gives them [i.e. law enforcement officers] a description so they can confirm the person that they—the person in the license is actually the person that they are dealing with. It gives them 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.

(*Id.* at 55-56). Policy Order 63 allows ALEA to define and control information about the physical characteristics of subjects law enforcement officers may encounter. (*Id.* at 122). As an example, Chief Pregno testified that a district attorney's office contacted ALEA regarding the identity of a deceased individual the medical examiner had identified as female based on the presence of female genitalia. (*Id.* at 59-60). Although the district attorney had identified the victim as a male based on a criminal database search, ALEA was able to confirm that the same individual was a female at the time of death based on documentation of a sex change contained in information in its driver license records. (*Id.* at 59-61). Policy Order 63 thus serves identification purposes not only for verifying an individual's current identity, but in linking up identities of individuals over time. (*Id.*).

Although ALEA does not necessarily require documentation of changes to other physical characteristics appearing on a license such as height, weight, or eye color, driver license examiners are trained not to allow individuals to change these descriptions to anything they want based only on the licensee's self-report. (Woodruff Depo. at 131-33). Examiners are trained to allow licensees to make changes to these other physical descriptors only if the change is "something observable that's reasonable." (*Id.* at 132). For instance, Plaintiff Darcy Corbitt testified in her deposition that when she went to obtain an Alabama license in the Opelika field office, the license examiner asked her if her weight had changed and she reported that it had. (Corbitt Depo. at 42).

Chief Pregno testified that Policy Order 63 provides information about the definition of "sex" as used on the license to law enforcement officers to allow them to formulate search, seizure,

and booking policies. (Pregno Depo. at 64, 73-86, 120-21). ALEA does not formulate search, seizure, or booking policies for State law enforcement and corrections officers. (*Id.* at 82, 120-21). However, ALEA does provide information to law enforcement and corrections officers by means of the information contained on a driver license so each state agency can formulate its own search, seizure, and booking policies based on this information. (*Id.*). State law requires the bearer of an Alabama driver license to provide it to law enforcement officers or court personnel upon request. (*Id.* at 54; 122-23). Chief Pregno testified that in controlling the information that goes onto a driver license, ALEA, as a law enforcement organization, has in mind the law enforcement officers to whom the bearer of the license is required to display the license. (*Id.* at 123).

a. Defendants' Expert: Donald L. Leach, II

Defendants disclosed Donald L. Leach, II, as an expert in correctional administration to testify as to the State's interests in Policy Order 63 in a correctional setting. (*See* Leach Depo., PX 38) (expert report). Leach has been a certified instructor of correctional curriculum since 1985 and has assisted in developing policies for jails throughout the country and conducting training for jail administrators. (*Id.* at p. 1). In his expert report, Leach offered the following opinion: "there is a governmental interest in having a standardized definition of sex, such as that established in Policy Order 63, for law enforcement and administrative purposes as expected by a reasonable correctional administrator so there is consistency in the development, and application, of administrative and operational policies and procedures." (*Id.* at p. 13).

In his report, Leach stated that he used a three-fold definition of "sex" for purposes of correctional administration. (Leach Depo., PX 38 at p. 15). Sex can refer to one's physiognomy (physical characteristics), gender identity (how one perceives oneself and which may or may not correspond to an individual's physiognomy), or sexual preference (which sex one is sexually

attracted to). (*Id.*; *see also* Leach Depo. at 11-16). Since the term "sex" can mean different things to different people, for purposes of correctional administration, it is important to have a baseline definition of this term just as it is with the terms "juvenile" and "adult," which are given precise legal meaning by legislatures and courts. (*Id.* at p. 16). Policy Order 63 chooses to define sex in terms of physiognomy. (*Id.* at 15). Since "there are many custodial policies, procedures and practices that are based on the definition of 'sex,'" it is important for jails to develop an internal "data dictionary" including definitions of key terms such as "sex." (*Id.*). The State provides such a baseline by defining "sex" in terms of physiognomy on Alabama driver licenses, and this provides a foundation for corrections administrators to develop search, housing, supervision, and medical care policies that take an inmate's sex into account. (*Id.* at 16-17). Although there are a variety of correctional practices that may be applied to transgender inmates or inmates based on their sex depending on the level of risk an administrator is willing to accept, a foundation for the development of any policy is a clear definition of "sex" to serve as a reference point for staff. (*Id.* at 16).

In his deposition, Leach testified that the information contained on a driver license is "probably one of the . . . foremost pieces of information that's used when booking an individual," and that most jails in the country use the information on an inmate's driver license to identify the inmate during booking (Leach Depo. at 34-35). As an example, Leach recounted a case of an individual with the outward appearance of a man pulled over in Michigan whose driver license designated him as a female. (*Id.* at 36-37). The individual had sex reassignment surgery in this 30s to become a female but in his 60s decided to revert back to male and quit taking hormones. (*Id.*). The individual's license alerted the jail administrator that the man had female genitalia due to the prior surgery but identified as a male. (*Id.* at 38-39). Although the jail administrator decided to

classify the inmate with the male population, he made this decision with the information as to the man's physiognomy provided by his license. (*Id.* at 38-40).

Leach testified that a definition of sex in terms of physiognomy, such as that provided by Policy Order 63, was important for Fourth Amendment purposes in a correctional setting because a search should not be more intrusive than necessary. (Leach Depo. at 49-50). For instance, knowing an inmate's sex, defined as physiognomy, allows a correctional administrator to formulate a search policy that takes into account the inmate's sex and the sex of the officer conducting the search and to determine whether cross-gender searches are appropriate. (*Id.* at 49-50, 102). Leach testified that in his opinion it would be overly-intrusive to search an inmate just to find out what kind of genitalia the inmate possessed. (*Id.* at 79). An identity document, such as a driver license, was one way a jail administrator could determine the genitalia of an inmate without conducting an overly-intrusive search. (*Id.* at 85). Leach gave an example of the privacy concerns that can arise by reference to a lawsuit filed by a Florida woman who was misgendered by jail medical staff because she was undergoing hormone replacement therapy for menopause and was consequently housed with the male prison population. (*Id.* at 106-07).[1]

Although there are a variety of acceptable sex-based correctional policies depending on the level of risk a correctional administrator is willing to tolerate, Leach testified that a correctional administrator in Alabama could lower levels of risk by formulating policies based on the sex designation on an Alabama driver license. (Leach Depo. at 53-54, 72-73). This is because it would be reasonable for a correctional administrator to create jail policies based on the way the State defined "sex" on a driver license. (*Id.*). For instance, an administrator that "operationalized decision-making for searches" based on the sex on the inmate's license because the State provided

[1] *See De Veloz v. Miami-Date Cnty.*, 2018 WL 6131780, __ F. App'x __ (11th Cir. Nov. 21, 2018).

a definition through its policy for designating sex on licenses acts reasonably and can gain a degree of legal cover for such a policy. (*Id.* at 56-57, 72-73).

b. Plaintiffs' Expert: Dr. Nicholas Gorton

Plaintiffs disclosed Dr. Nicholas Gorton as an expert witness in this case. (*See* Gorton Depo., Ex. 2) (expert report). Dr. Gorton is a physician licensed to practice in California. (*Id.* at 2). Although there is no separate certification for the treatment of transgender individuals, Dr. Gorton's primary care practice specializes in the treatment of transgender patients. (*Id.*; Gorton Depo. at 12-14).

Gorton stated in his report that "[t]ransgender people who are diagnosed with Gender Dysphoria may, as part of their prescribed medical treatment plan, change their legal name and their gender marker on official documents such as driving license, passport, birth certificate, and social security card." (Gorton Depo., Ex. 2 at 4). Gorton's report discussed the effects of "misgendering" transgender individuals, which he defined as "when transgender people are addressed either accidentally or intentionally with the wrong pronoun or with the patient's prior name." (*Id.*). Gorton's report stated that misgendering transgender individuals can have negative mental health consequences. (*Id.*). Gorton stated in his report that not all transgender individuals diagnosed with gender dysphoria need sex reassignment for treatment of this condition but that medical treatments may vary for individuals. (*Id.* at 5). Gorton's report concludes that Policy Order 63 "provides no medical or scientific justification" and that the "most clinically appropriate" policy would be to allow transgender individuals to "submit a form where they certify their gender, [and] the genders allowed are three: male, female, and none or non-binary, and their identity document is changed based on the patients [sic] affirmation." (*Id.* at 8). The report states "the next best option

is to rely on certification by any of a range of medical or mental health providers who are treating patients with GD [gender dysphoria]." (*Id.*).

Gorton's report stated, and his deposition testimony confirmed, that the only materials he considered in forming his opinion were the complaint in this case, Policy Order 63, and research articles he had published. (Gorton Depo. at 24-26). Gorton did not examine any of the plaintiffs in this suit, examine their medical records, or review their deposition testimony in forming his opinions. (*Id.* at 24-25). Gorton did not know whether any of the plaintiffs in this case had been diagnosed with gender dysphoria. (*Id.* at 33). Gorton admitted that the only basis he had for applying the conclusion of his report that Policy Order 63 "compromises the mental health and physical safety" of transgender individuals to Plaintiffs was that this conclusion applies to "transgender people in general, which I'm assuming they're part of that group since they're the plaintiffs." (*Id.* at 34); (*see also Id.* at 34-35).

Gorton estimated that the percentage of the population that could be diagnosed with gender dysphoria is "probably in the 1 to 500 range – or 1 in 500 range." (Gorton Depo. at 23). Not all transgender individuals have gender dysphoria. (*Id.*). Gorton admitted that for 99% of the population, the sex designation on their identity documents of "M" or "F" was accurate. (*Id.*).

3. Plaintiffs

a. Plaintiff Darcy Corbitt

Plaintiff Darcy Corbitt was born in Louisiana, and her sex at birth was male. (Corbitt Depo. at 8; *Id.*, DX 9). Corbitt grew up in Auburn, Alabama. (*Id.* at 9). Corbitt first obtained an Alabama driver license when she was sixteen in 2008. (*Id.* at 18; *Id.*, DX 9). Corbitt obtained her driver license at this time while still under her name at birth, and the license designated her sex as male. (*Id.* at 18-19, 24-25).

Corbitt's current gender identity is female, and she identifies herself as a transgender woman. (Corbitt Depo. at 23). Corbitt testified that she fully identified as a transgender woman and began living as Darcy on her twenty-first birthday, May 11, 2013. (*Id.* at 25, 27). Two months after Corbitt began living as Darcy, she obtained an order from the Lee County Probate Court legally changing her name on July 22, 2013. (*Id.* at 25-26; *Id.*, DX 12). She then went to the driver license office in Lee County to update the name on her license. (*Id.* at 26). She testified that the "clerk at that driver's license office was very – very nice and he congratulated me on my new name." (*Id.* at 26-27). She also updated her name on her car title and with the Social Security Administration. (*Id.* at 27).

Corbitt's Alabama driver license designated her as male both before and after her name change in July 2013. (Corbitt Depo. at 19, 29). She possessed an Alabama driver license until she moved to North Dakota in the fall of 2015, at which time she obtained a North Dakota driver license that designated her sex as male. (*Id.* t 19). In November 2016, Corbitt changed the sex designation on her North Dakota license to female. (*Id.* at 20). In January 2017, Corbitt obtained a United States passport that designates her sex as female. (*Id.* at 21). She currently holds her North Dakota driver license and U.S. passport that designate her as female. (*Id.* at 21-22). Corbitt possessed a passport card and passport book at one time, but currently possesses only a passport book. (*Id.* at 40).

In August 2017, Corbitt moved back to Auburn to pursue graduate studies. (Corbitt Depo. at 13). She went to the driver license office in Lee County to obtain an Alabama license at that time. (*Id.* at 41). The license examiner asked Corbitt if she had ever been licensed in Alabama before, and after she stated she had, she provided the examiner with her social security number. (*Id.* at 42). The license examiner took Corbitt's photograph and asked Corbitt if her weight had

changed, and she responded that it had. (*Id.*). She updated this information and her address, and the examiner handed her a printout of the information that would go on her license and asked Corbitt to verify its accuracy. (*Id.* at 42-43). Corbitt told the examiner that the "M" for sex on the license was not accurate. (*Id.* at 43). The examiner stated she would not update the sex designation because Corbitt was currently in the driver license database as male. (*Id.*). The examiner's supervisor advised the examiner to contact Montgomery to find out what was required to change the sex designation, and the examiner called and spoke to someone in Montgomery. (*Id.* at 43-44). After the telephone call, the examiner advised Corbitt that she "would need to either get an amended birth certificate from the state where I was born or a doctor's note indicating that I had had surgery before the license could be updated." (*Id.* at 46). Corbitt told the examiner she "refused" to surrender her North Dakota license and stated "I will see you in court" before leaving. (*Id.*). In a response to a request for admission, Corbitt admitted that she does not meet the requirements of Policy Order 63 for changing the sex designation on an Alabama license. (Response to Request for Admission 1).

Corbitt was asked to explain in her own words how Policy Order 63, which prevents her from obtaining an Alabama license with a female sex designation, has harmed her. (Corbitt Depo. at 36). Corbitt stated that Policy Order 63 caused her emotional harm based on her embarrassing experience at the Lee County driver license office in August 2017 when she attempted to change her license. (*Id.* at 36-37). She testified that it is impractical to use an out-of-state license and that if she did obtain an Alabama license with her sex designated as male, this would "out" her as transgender to her employers. (*Id.* at 37). She also stated that it was "insulting" to not be allowed to transfer her out-of-state license to keep the same sex designation based on her prior driver license record in Alabama. (*Id.* at 38).

Corbitt typically carries her license in her wallet, which is concealed inside a bag. (Corbitt Depo. at 64). She testified that she does not display or waive her driver license about but displays it when she is required. (*Id.* at 64-65). Corbitt could recall two encounters with Alabama law enforcement officers, and on both occasions the officers asked her to present her driver license. (*Id.* at 65-67, 69-70). She presented her license to an Alabama law enforcement officer in 2014 after a traffic stop that resulted in a ticket. (*Id.* at 66-67). On the second occasion, she contacted police to report she was the victim of a crime, and the investigating officer required Corbitt to show her driver license in connection with that report. (*Id.* at 69-70). Corbitt agreed that it was important for the investigating officer to verify her identification and to have accurate information about her to investigate her complaint. (*Id.* at 70).

Corbitt admitted that in a variety of other contexts she could use her passport, which designates her as a female, as a government identification document. (Corbitt Depo. at 61-64). Corbitt admitted that she could use her passport to prove her age for a variety of purposes, such as purchasing alcohol. (*Id.* at 61-62). She admitted she could use it to establish her eligibility to work. (*Id.* at 62-63). She also admitted that she could use her passport or student ID to vote and that she "usually" uses her passport as a photo ID to vote in Alabama. (*Id.* at 63-64).

Corbitt voluntarily and publicly discloses her status as a transgender individual. (Corbitt at 49-60, 72-75). Corbitt maintains a 501(c)(3) nonprofit foundation called the Darcy Jeda Corbitt Foundation "to promote the health and global well-being of transgender individuals through free online education, support, and financial assistance." (*Id.* at 50-51). She maintains a public Facebook page for this foundation and makes publicly-viewable posts relevant to her status as a transgender individual on this page. (*Id.* at 51-53). Through her Facebook page Corbitt solicits donations for her foundation and advocates for the rights of transgender individuals in a forum that

can be viewed publicly. (*Id.* at 53). Corbitt has spoken publicly as an advocate for transgender individuals and stated she did so "professionally," meaning she received compensation for this public activity. (*Id.* at 53-54). She maintains Twitter, Instagram, and YouTube accounts in her name and makes posts related to her status as a transgender individual on these accounts. (*Id.* at 56). Corbitt was featured in a February 7, 2014 Al.com article entitled, "'I've always been Darcy': Transgender Auburn University student to be honored at Montgomery LGBT vigil." (*Id.* at 72; *Id.*, DX 15). Corbitt stated that her transgender status is "not a secret." (*Id.* at 58). Corbitt admitted that she publicly disclosed her transgender status through her social media accounts. (*Id.* at 59). Corbitt admitted that she voluntarily accepts any risk created by disclosing her status as transgender through social media. (*Id.* at 60).

b. Plaintiff Destiny Clark

Plaintiff Destiny Clark was born in Alabama, and her sex at birth was male. (Clark Depo. at 8; *Id.*, DX 1). Clark grew up in St. Clair County, Alabama and obtained an Alabama driver license when she turned sixteen. (*Id.* at 9, 16). Clark obtained this license prior to changing her name, and the sex designation on her license at that time was male. (*Id.* at 16-17). Clark moved from St. Clair County to reside in Birmingham from approximately 2004 to 2009, then lived in North Carolina from approximately 2010 to 2011. (*Id.* at 9-10). In 2011, Clark returned to St. Clair County where she has resided continuously until the present. (*Id.* at 11). She has maintained an Alabama driver license designating her sex as male from the time she first obtained one at sixteen until the present. (*Id.* at 16, 26).

Clark identifies herself as a transgender female. (Clark Depo. at 15-16). Clark testified that she first identified herself as a transgender woman when she was twenty-one, but that she kept this identity private until she was approximately twenty-six or twenty-seven. (*Id.* at 20-22). Clark

described her identification as a transgender woman as involving a mental and physical process. (*Id.* at 30-31). She explained that she has always understood herself to be female. (*Id.* at 31). In April 2015, when she was twenty-nine, she legally changed her name to Destiny Clark. (*Id.* 14, 16; *Id.*, DX 3). She testified that her physical transition to female involved hormone therapy and was complete when she received breast augmentation in March 2016. (*Id.* at 22-24, 27-31, 40). Clark testified that she possessed an Alabama driver license designating her as male throughout this time and that it had bothered her ever since she first received her license at sixteen. (*Id.* at 32).

Clark testified that she tried three times without success to change the sex designation on her driver license. (Clark Depo. at 36). She tried the first time shortly after she completed her legal name change in April 2015. (*Id.* at 36-37). Although Clark's recollection was hazy, she recalled that she had a telephone conversation with Eastman at this time and that it resulted in the denial of her request to change the sex on her license. (*Id.* at 37, 39-40). After her breast augmentation procedure in March 2016, Clark attempted a second time to change the sex on her license. (*Id.* at 39-40). Clark submitted a letter from her physician dated January 15, 2016, and marked as received in the Medical Unit on March 25, 2016. (Clark Depo. at 44; Eastman Depo. at 154, DX 27). The letter from the physician states:

> I have knowledge of Ms. Clark's medical condition and have performed a thorough physical examination of her.
>
> Based on my thorough physical examination of Ms. Clark. I confirm that she has met the requirements of the Alabama Department of Public Safety's policy for changing the gender designation on her driver's license from male to female.

(Eastman Depo. DX 27 [D283]). Eastman testified that this letter was insufficient to satisfy Policy Order 63 because it stated only that the doctor performed a "thorough physical examination" but did not state that the doctor had performed surgery on Clark. (Eastman Depo. at 155-56). Clark

sent a second letter from the same doctor to Eastman dated March 31, 2016 that purported to state Clark had received certain surgical procedures. (*Id.* DX 27 [284]). The letter was marked as received in the Medical Unit the same day. (*Id.*). The letter contains a handwritten note from Eastman stating "must present ltr from Dr. that performed surgery or amended birth certificate. 3/31/16 JTE." (*Id.*). Eastman testified that this letter did not satisfy Policy Order 63 because it was not from the physician that performed the surgery. (*Id.* at 90-92, 156-57).

Clark attempted a third time to change the sex on her license in 2017 and this time sent a letter dated January 18, 2017, from the doctor that performed her breast augmentation surgery. (Clark Depo. at 41, 45; Eastman Depo. DX 27 [D285]). The letter states "I performed a surgical procedure related to gender transformation on March 2, 2016," which Clark confirmed was her breast augmentation surgery. (Clark Depo. at 41; Eastman Depo. DX 27 [D285]). This letter contains another handwritten note that states "Per px [telephone call] w/Dr. office, Dr. did not perform complete gender reassignment surgery. Must have ltr stating complete surgery has been performed or amended birth cert. 2/3/17 JTE." (Eastman Depo. DX 27 [D285]). Eastman testified that she called the physician's office because the letter did not comply with Policy Order 63 since it stated only that "a surgical procedure" was done. (Eastman Depo. at 156). Therefore, she called the doctor's office to confirm whether complete gender reassignment surgery had been performed, and the doctor's office advised her that it had not. (*Id.* at 93-94, 96, 156). No one at the doctor's office asked her what she meant by "gender reassignment surgery." (*Id.*). In a response to a request for admission, Clark admitted that she does not meet the requirements of Policy Order 63 for changing the sex designation on an Alabama license. (Response to Request for Admission 2; Supplemental Response to Interrogatory 16).

Clark was asked to explain in her own words how her inability to change the sex on her license had harmed her. (Clark Depo. at 33). Clark testified that she tried not to show her license, that it had caused a police officer to treat her differently during a traffic stop, that she tries to avoid drinking socially because she has to show her license, and that when she recently showed her license to vote the poll worker treated her rudely. (*Id.* at 33-34). Clark carries her license in her pocketbook in her purse. (Clark Depo. at 65). She does not display her license publicly and limits the disclosure of her driver license. (*Id.*).

Clark does not currently possess a United States passport and was unaware that the other two plaintiffs in this suit currently possess passports designating their sex as female. (Clark at 66). However, Clark has all of the required documents to obtain a passport and testified that she could afford both a passport book and a passport card. (*Id.* 68, 70). She stated she would like to obtain a passport with her sex designated as female on it. (*Id.* at 72). Clark acknowledged that if she possessed a passport designating her sex as female she could prove her age to purchase alcohol with it. (*Id.* at 73-74). She agreed that in many situations she had a choice about what government identification she could display. (*Id.* at 75).

Clark is open about her transgender status and describes herself as a "trans activist." (Clark Depo. at 56). Clark makes publicly-viewable posts on her Facebook page in connection with her work as a trans activist for the purpose of publicizing these activities. (*Id.* at 56-59). Clark is a member of two organizations involved in transgender and LGBTQ activism. (*Id.* at 59). She is President of Central Alabama Pride and a queen for the Magic City Sisters of Perpetual Indulgence. (*Id.*). Clark's photograph and a description of her activities as President of Central Alabama Pride can be publicly viewed on that organization's website. (*Id.* at 60-61; *Id.*, DX 6). Clark agreed that her work with Central Alabama Pride involved her publicly disclosing her transgender status and

that she is "open" about being transgender. (*Id.* at 60-61). Clark acknowledged that she voluntarily accepts the risks involved in publicly disclosing her transgender status. (*Id.* at 64).

c. Plaintiff Jane Doe

Plaintiff Jane Doe was granted leave by the Court to proceed anonymously in this suit. (Doe Depo. at 8-9; *Id.*, DX 16 [Doc. 41]). Jane Doe's sex at birth was male. (*Id.* at 9). Jane Doe is a transgender female. (*Id.*). Doe obtained an Alabama driver license when she was sixteen that designated her sex as male. (*Id.* at 17-18). She understood herself to be a transgender woman around the age of nineteen. (*Id.* at 20-21). Doe received medical treatment related to her transgender status. (*Id.* at 23, 25-26). Doe began publicly living as a woman in May 2017. (*Id.* at 27-28).

After a time living out of state, Doe has possessed an Alabama driver license designating her sex as male continuously since 2005. (Doe Depo. at 30-31). Doe possesses a United States passport that designates her sex as female. (*Id.* at 32). In order to change her sex designation on her passport, Doe submitted a letter from her doctor stating only that she was "undergoing clinical treatment for intended gender transition to the new gender" with a box marked 'X' for "female." (*Id.* at 33-34; *Id.* DX 20). Doe attempted to use this same letter to change the sex on her Alabama driver license but was told this was insufficient. (*Id.* at 42-44). Although she apparently received less than clear explanations about what was required to change the sex on her license, she was finally told in April 2017 that she needed to have medical documentation of "the full surgery" to change the sex on her license. (*Id.* at 48). Doe made no further attempts to change the sex on her license, and in response to requests for admission she admitted she does not meet the requirements of Policy Order 63 for changing the sex designation on an Alabama license. (Response to Request for Admission 3).

Does was asked to explain in her own words how being unable to change the sex on her license harmed her. (Doe Depo. at 35). Doe stated that she was required to show her license to a police officer investigating a traffic accident she was involved in and that the officer realized the female name on the license and sex designation were "incongruent." (*Id.* at 35). She also stated that showing her license was a problem when ordering drinks in public and that she had had problems trying to use her passport as a form of identification at hotels. (*Id.* at 35-36).

Doe keeps her driver license in her wallet and places a credit card in front of it to hide it from view. (Doe Depo. at 69). Doe was not sure whether she could use a passport to prove her age to purchase alcohol but admitted that, if this were an acceptable form of identification, she would prefer to use it for that purpose because her name and sex designation match on that document. (*Id.* at 69-70). Doe acknowledged she could use her passport to establish her eligibility to work. (*Id.* at 70). She was not aware she could use her passport as a form of identification to vote, but stated that she would prefer to use it as a form of photo ID going forward. (*Id.* at 70-71). Doe has had contact with Alabama law enforcement officers on at least four occasions and on each occasion she was required to show her driver license. (*Id.* at 71-72). She had also been involved in two motor vehicle accidents and was required to display her license to law enforcement officers on those occasions. (*Id.* at 73).

Doe's friends know that she is transgender and she is open as a transgender woman at her current job. (Doe Depo. at 50-51). Doe maintains a Facebook page in her name. (*Id.* at 52). Doe acknowledged in her deposition that she had posted multiple Facebook profile pictures that associated her picture with a message supporting transgender causes and that these posts could be seen by the public. (*Id.* at 53-63). Doe acknowledged that she posted these messages with her profile picture because she was a transgender individual, she wished to raise awareness of

transgender issues, and that a person viewing her Facebook page could accordingly publicly identify her as transgender. (*Id.* at 54-55, 57, 62). One of Doe's posts was in connection with a "tabling" event for a local transgender activist group. (*Id.* at 58-59). Doe participated in the tabling event in a public park in a city where a banner was displayed designating the group as a transgender advocacy group. (*Id.* at 59-60). Doe admitted that members of the public could see her at the event and could associate her with the transgender message displayed on the banner. (*Id.* at 59-60, 65-66). Does stated that her Alabama driver license discloses her transgender status but then conceded that her driver license does not disclose anything about her transgender status that she does not voluntarily disclose on Facebook. (*Id.* at 68).

B. Argument

1. Plaintiffs Corbitt and Clark's Claims Are Barred by the Statute of Limitations

Plaintiff Corbitt and Clark knew or should have known that Policy Order 63's surgery requirement prevented her from changing the sex on her Alabama license outside the two-year statute of limitations period for a claim brought pursuant to 42 U.S.C. § 1983 in Alabama. Corbitt began living full time as Darcy in 2013. She obtained a legal change of name and obtained an Alabama driver license in her female name in 2013 that designated her sex as male. Clark had been living publicly as a transgender woman when she obtained a legal change of name in April 2015. Shortly after Clark's legal change of name in April 2015, she attempted to also change the sex designation on her Alabama driver license and Eastman denied her request. Thus, Policy Order 63 prevented Corbitt and Clark from changing the sex designation on their Alabama licenses in 2013 and 2015, respectively. Their claims are time-barred.

"All constitutional claims brought under § 1983 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). In Alabama, the applicable statute of limitations for a § 1983 claim is the two-year limitation set out in § 6-2-8(*l*) of the Alabama Code. *See Jones v. Prueit & Mauldin*, 876 F.2d 1480, 1483 (11th Cir. 1989) (*en banc*). For purposes of a § 1983 claim, "the statute of limitations 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) (quoting *Rozar v. Mullis*, 85 F.3d 556, 561-62 (11th Cir. 1996)). "Thus Section 1983 actions do not accrue until the plaintiff knows *or has reason to know* that he has been injured." *Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987) (emphasis added).

Here, it should have apparent to Corbitt and Clark that the facts supporting a cause of action existed when they updated their Alabama licenses to include their female names after their legal change of name. Corbitt updated her Alabama driver license to match her legal name as a woman shortly after her name change in July 2013. (Corbitt Depo. at 25-27; *Id.*, DX 12). But her driver license continued to designate her sex as male at that time. (*Id.* at 19, 29). Clark changed her legal name to match her female identity in April 2015, and attempted to change not only the name but also the sex on her driver license at that time. (Clark Depo. at 14, 16; *Id.*, DX 3; *Id.* at 36-37). Clark testified that Eastman informed her she did not meet the requirements to change the sex on her license and did not allow the change in 2015. (*Id.* at 37, 39-40). Policy Order 63's surgery requirement for changing the sex designation on a driver license was in effect at that time. (Pregno Depo. at 24-26; Woodruff Depo. PX 7). Since Corbitt and Clark filed suit on February 6, 2018 (doc. 1), any cause of action that accrued prior to February 6, 2016, is time-barred. But Corbitt and Clark knew or should have known that Policy Order 63 prevented them from changing the sex on

their licenses after they had changed the names on their licenses to their legal female names in 2013 and 2015. Thus, they are due to be dismissed from this suit.

The statute of limitations analysis in the parole reconsideration cases of *Brown* and *Lovett v. Ray*, 327 F.3d 1181 (11th Cir. 2003), are on point both as to when Corbitt and Clark's cause of action accrued and whether the "continuing violations" doctrine applies to toll their claims. In *Lovett*, a parole board notified an inmate in 1998 that his parole would not be reconsidered until 2006. *Lovett*, 327 F.3d at 1182. The court held that the inmate knew *or should have known* at that time that Georgia law had been changed to reduce the frequency of parole consideration and that his suit filed in 2001 was past the two-year statute of limitations. *Id.* at 1182-83. In *Brown*, the parole board informed the inmate in 1995 that his parole would be reconsidered in 2000, but the inmate waited until 2002 to file suit claiming a three-year period for parole reconsideration applied. *Brown*, 335 F.3d at 1260. As in *Lovett*, the court held the inmate should have known in 1995 that Georgia had changed its law that year to delay parole reconsideration for up to eight years rather than three. *Id.* at 1261-62. Since it was "the decision in 1995 that forms a potential basis" for the inmate's claim, "[i]t was also at this point that [the inmate] *could have discovered the factual predicate of his claim*." *Id.* (emphasis added).

Both *Lovett* and *Brown* declined to apply the "continuing violations" doctrine to toll the running of the inmates' claims. *Brown*, 335 F.3d at 1261-62; *Lovett*, 327 F.3d at 1183. "The critical distinction in the continuing violation analysis . . . is whether the plaintiff[] complain[s] of the present consequence of a one time violation, which does not extend the limitations period, or the continuation of that violation into the present, which does." *Lovett*, 327 F.3d at 1182 (quoting *Knight v. Columbus*, 19 F.3d 579, 580-81 (11th Cir. 1994)). In both cases, the parole boards' decision not to reconsider the inmates' parole until a later date was a one-time violation, and the

statute of limitations ran from the date on which the parole reconsideration policy was applied rather than for the entire period in which the inmates' reconsideration was delayed. *Brown*, 335 F.3d at 1261; *Lovett*, 327 F.3d at 1183. The inmate in *Brown* made the additional argument that, though he was informed in 1995 that his parole would be reconsidered again in 2000, he suffered a "separate and distinct" injury when his parole was denied in 2001 and his reconsideration was reset to 2007. *Brown*, 335 F.3d at 1261. The court rejected this argument as well, holding that it should have been apparent to the inmate in 1995 that Georgia no longer reconsidered parole every two years and that each time a parole reconsideration hearing was set in the future did not constitute a distinct and separate injury. *Id.* at 1261-62.

In this case, as in *Lovett* and *Brown*, neither the continuing violation nor separate and distinct injury arguments save Corbitt and Clark's claims from the statute of limitations argument. In each case, the alleged injury was the issuance of an Alabama driver license in Corbitt and Clark's legal female names with a male sex designation. *See Brown*, 335 F.3d at 1261-62 ("It was . . . at this point that [Corbitt and Clark] could have discovered the factual predicate of [their] claim."). Though they continue to feel the effects of this act, they do not suffer a continuing violation every time they present or renew their Alabama licenses. Corbitt may argue she surrendered her 2013-issued Alabama license when she obtained a North Dakota license, and suffered a separate and distinct injury when she returned to Auburn and was denied an Alabama license with a female sex designation in August 2017. But this argument fares no better than that of the inmate in *Brown*, because the factual basis of Corbitt's claim should have been apparent in 2013, and she did not suffer a separate and distinct injury in 2017 any more than the inmate in *Brown* when he received a new date for parole reconsideration. Accordingly, all claims brought by Corbitt and Clark should be dismissed as barred by the statute of limitations.

2. Defendants' Are Entitled to Summary Judgment on Plaintiffs' Right to Privacy Claim in Count I

Plaintiffs allege in Count I that Policy Order 63 "force[s] Ms. Clark and Ms. Doe to disclose highly personal information—that they are transgender—to each person who sees their driver license," and that Policy Order 63 "condition[s] Ms. Corbitt's receipt of an Alabama driver license on being forced to make such disclosures." Doc. 38 ¶ 108. Plaintiffs state that the alleged disclosure of their transgender identities from the male sex designation on their driver licenses violates their right to informational privacy under the Substantive Due Process Clause of the Fourteenth Amendment. *Id.* ¶¶104-10. However, a sex designation, like the other personal information contained on an Alabama driver license, is not the sort of confidential information protected by the Fourteenth Amendment. Nor do Plaintiffs' licenses "disclose" that they are transgender to the public. Alabama law requires Plaintiffs to display their licenses only under limited circumstances, *i.e.* to law enforcement officers, and Plaintiffs retain the discretion to limit the disclosure of their licenses by using passports for other identification purposes. Finally, Plaintiffs publicly disclose their transgender identity through various social media and public activism and thus cannot claim that Policy Order 63 results in the nonconsensual disclosure of confidential information.

Although the contours of the right are vague, the Supreme Court has recognized a constitutional right to privacy in "the individual interest in avoiding disclosure of personal matters," and an "interest in independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). Plaintiffs apparently invoke the former right in this case. The Supreme Court again recognized an individual privacy interest in avoiding the disclosure of intimate matters in *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457-59 (1977), and most recently in *National Aeronautics and Space Administration v. Nelson*, 562 U.S. 134 (2011). In *Nelson*, the court followed *Whalen* in assuming that a constitutional right to informational privacy exists but

concluded the government's interest was sufficient to justify asking employees sensitive questions during background investigations. *See Nelson*, 562 U.S. at 147-56. The Eleventh Circuit has recognized such a right but limited its applicability to cases where a state official disclosed intimate personal information obtained under a pledge of confidentiality unless there was a legitimate state interest in the disclosure sufficient to outweigh the individual's privacy interest. *See James v. City of Douglas*, 941 F.2d 1539, 1543-44 (11th Cir. 1991).

Regardless of the precise contours of Plaintiffs' right to informational privacy, it is clear that their claims fail under the circumstances of this case. The Eleventh Circuit has squarely held that the disclosure of personal information contained in a driver license database is not the disclosure of the type of confidential information protected by the United States Constitution. *See Collier v. Dickinson*, 477 F.3d 1306, 1308 (11th Cir. 2007); *Pryor v. Reno*, 171 F.3d 1281, 1288 n.10 (11th Cir. 1999), *rev'd on other grounds*, 528 U.S. 1111 (2000). In *Collier*, the court held that the Florida Department of Highway Safety and Motor Vehicles ("DHSMV") did not violate the plaintiffs' constitutional right to privacy by *selling* their personal information provided to the DHSMV to obtain their driver licenses to mass marketers. *Collier*, 477 F.3d at 1307-08. The court relied on its decision in *Pryor v. Reno* for this conclusion. *Id.* In *Pryor*, the court held that personal information contained in motor vehicle records was not confidential information giving rise to a constitutional right to privacy. *Pryor*, 171 F.3d at 1288 n.10. The court in *Pryor* stated that *James* "acknowledged a constitutional right to privacy only for *intimate personal information given to a state official in confidence*." *Id.* The personal information contained on the face of Plaintiffs' driver licenses are matters of public record and are insufficient under *Collier* and *Pryor* to give rise to a constitutional right to informational privacy. *Cf. Snavely v. City of Huntsville*, 785 So. 2d 1162,

1168 (Ala. Crim. App. 2000) (holding that copies of criminal defendant's driving history maintained by Department of Public Safety were public records).

While an individual viewing Plaintiffs' licenses might infer that they are transgender from the photograph and sex designation, Policy Order 63 does not directly disclose Plaintiffs' transgender status from the face of the license. Further, any disclosure of Plaintiffs' transgender status is limited because Alabama law requires Plaintiffs to display their driver license only in limited circumstances.

The Alabama Code governs the contents of a driver license and when it, *rather than another form of government identification*, must be possessed or displayed. Alabama law provides that "[e]very licensee shall have his or her license in his or her immediate possession at all times when driving a motor vehicle and shall display the same, upon demand of a *judge of any court, a peace officer, or a state trooper*." Ala. Code § 32-6-9 (emphasis added). In *Sly v. State*, 387 So. 2d 913 (Ala. Crim. App. 1980), the Alabama Court of Criminal Appeals upheld a defendant's conviction for refusing a state trooper's request to see a driver's license because the trooper had a statutory right to request the license and the driver had a duty to display it. *Sly*, 387 So. 2d at 915-16. *See also Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cnty.*, 542 U.S. 177, 185 (2004) ("In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment."); *Id.* at 187 ("The principles of *Terry* permit a State to *require* a suspect to disclose his name in the course of a *Terry* stop.") (emphasis added). Chief Pregno testified that in controlling the information that goes onto a driver license, ALEA, as a law enforcement organization, has in mind the law enforcement officers to whom the bearer of the license is required to display the license. (Pregno Depo. at 123). Thus, the state requires every citizen to possess a

form of state identification that proves the citizen is authorized to operate a motor vehicle and that accurately identifies the citizen to judicial officials and law enforcement officers.

There is *no* requirement in Alabama law that Plaintiffs use an Alabama driver license, rather than a United States passport or passport card, when applying for a job, purchasing alcohol, voting, or otherwise providing proof of identity, age, or eligibility to work. Corbitt and Jane Doe currently possess passports designating their sex as female, and Clark testified that she could obtain a passport that designated her as female as well. A passport designating Plaintiffs' sex as female can be used to establish identity and proof of age for a wide variety of transactions. Alabama Alcoholic Beverage Control Board regulations provide that proof of age to legally purchase alcohol can be established not only with a driver's license of any state, but a military identification, passport, or government agency identification bearing a photograph and date of birth. *See* Ala. Admin. Code § 20-x-6-.09(1)(d). A passport or student identification card also serves as a valid photo identification for purposes of voting in Alabama. Ala. Code § 17-9-30(3), (5). Corbitt testified that she "usually" uses her passport as a photo ID to vote in Alabama. (Corbitt Depo. at 6-64). Doe was not aware she could use her passport to vote, but testified she would prefer to use her passport for voting going forward. (Doe Depo. at 70-71).

In sum, all Plaintiffs admitted they could use a passport designating their sex as female for a variety of everyday purposes and thus minimize the display of their Alabama license. Crucially, each Plaintiff admitted she had been required to display her Alabama driver license to a law enforcement officer in connection with a traffic stop, traffic accident, or to report a crime. Consistent with Alabama law, Plaintiffs are compelled to display their driver licenses only under limited circumstances and to a limited audience, *i.e.* law enforcement officials and court personnel. Given the state's interests in accurately identifying individuals for law enforcement purposes, any

potential disclosure of Plaintiffs' transgender status is outweighed by the government's legitimate interests, even assuming Plaintiffs had a right to informational privacy in the sex appearing on their license. *See James*, 941 F.2d at 1544 ("The inquiry is whether there is a legitimate state interest in disclosure that outweighs the threat to the plaintiff's privacy interest.").

Finally, Plaintiffs allege in Count I that Policy Order 63 injures them by forcing them disclose their private, confidential status as transgender and thus increase their risk of bodily harm. Doc. 38 ¶ 108. But even if Plaintiffs stated a claim for a violation of their due process rights, which they do not, they lack standing to assert their licenses force the disclosure of their transgender status because they publicly disclose this information by means of social media and through public advocacy. Thus, Plaintiffs cannot satisfy the "injury in fact" requirement for standing. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016).

Plaintiff Corbitt maintains Facebook, Twitter, Instagram, and YouTube accounts in her name and makes posts related to her transgender status on these accounts. (Corbitt Depo. at 51-53, 56). She maintains a nonprofit foundation in her name that engages in public advocacy for transgender rights, and she makes Facebook posts that associate her picture and transgender status with her organization. (*Id.* at 51-53). She was featured in an Al.com article entitled, "'I've always been Darcy': Transgender Auburn University student to be honored at Montgomery LGBT vigil." (*Id.* at 72; *Id.*, DX 15). She stated her transgender status is "not a secret." (*Id.* at 58). She admitted that she publicly disclosed her status as transgender through her social media accounts, and that she voluntarily accepts any risk created by disclosing this status through social media. (*Id.* at 59-60).

Plaintiff Clark is a self-described "trans activist." (Clark Depo. at 56). Clark also makes publicly-viewable posts on her Facebook page in connection with her work as a trans activist. (*Id.*

at 56-59). Clark is President of Central Alabama Pride, and a photograph of her in connection with this position appears on the organization's website along with a description of her activities. (*Id.* at 59-61; *Id.*, DX 6). Clark acknowledged that she is "open" about being transgender and that she voluntarily accepts the risks involved in publicly disclosing her transgender status. (*Id.* at 64).

Finally, Plaintiff Jane Doe also maintains a Facebook page in her name that she has used to post publicly-viewable messages in which she associates her photo with a message supporting transgender causes. (Doe Depo. at 52-63). Doe's friends know she is transgender and she is open as a transgender woman at her current job. (*Id.* at 50-51). Doe participated at a tabling event for a local transgender activist group in a public park where a banner was displayed designating the group as a transgender advocacy group. (*Id.* at 59-60). Doe admitted that members of the public could see her at the event and could associate her with the transgender message displayed on the banner. (*Id.* at 59-60, 65-66). Doe conceded that her driver license does not disclose anything about her transgender status that she does not voluntarily disclose on Facebook. (*Id.* at 68). Thus, even if Plaintiffs' driver licenses could conceivably disclose their transgender status, they lack standing to assert their licenses disclose information that they have kept private or confidential. For all of these reasons, Defendants are entitled to judgment as a matter of law on Count I.

3. Defendants Are Entitled to Judgment as a Matter of Law on Plaintiffs' Unwanted Medical Treatment Claim in Count II

Plaintiffs allege in Count II that Policy Order 63 violates their substantive due process rights to refuse unwanted medical treatment by "forc[ing] transgender people who live in Alabama either to undergo certain kinds of gender-confirming surgery to secure a correct driver license or endanger their health and safety with an incorrect driver license." Doc. 38 ¶ 114. However, ALEA has not "forced" Plaintiffs to receive medical treatment they do not want or even conditioned receipt of a driver license on their receiving such treatment. Plaintiffs currently possess, or have

the ability to possess, an Alabama driver license. Policy Order 63 merely prevents them from changing the sex on their licenses without proof of surgery. This policy is rationally related to the State's interest in maintaining consistency with changing the sex on birth certificates and providing a clear definition of "sex" as it appears on licenses for identification and law enforcement purposes.

The Supreme Court has assumed that the Due Process Clause of the Fourteenth Amendment "would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition." *Cruzan by Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 279 (1990). The Court later revisited *Cruzan* and framed its holding as follows: "We have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). But the Court in *Glucksberg* cautioned against expanding the rights included under substantive due process:

> But we ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended. By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore exercise the utmost care whenever we are asked to break new ground in this field lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.

Glucksberg, 521 U.S. at 720 (internal quotations and citations omitted).

In order to prevent this judicial usurpation of the democratic process, the Supreme Court has created a two-step analysis that constrains what rights a court may recognize as fundamental. "First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21 (internal quotation and

citations omitted). "Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest.'" *Glucksberg*, 521 U.S. at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)). As an example of the second step, the Court in *Glucksberg* held the lower court erred in formulating the right in question as "the right to die" rather than the more specific question before the Court, *viz.*, whether "the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in doing so." *Id.* at 723. The Court found under the first step in the analysis that such a right was not fundamental because it was not deeply rooted in this Nation's history and traditions. *Id.* at 723-28. The Court then concluded that since Washington's prohibition on physician-assisted suicide did not burden a fundamental substantive due process right, it need satisfy only rational basis review, a burden that was "unquestionably met." *Id.* at 728.

Here, Plaintiffs appear to assert a fundamental right to a driver license with a sex designation of the gender with which they identify without having a surgical change of sex characteristics that include genital reassignment. No such right is "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 U.S. at 720-21 (internal quotation and citations omitted). Thus, Policy Order 63's surgery requirement is subject only to rational basis review. *Id.* at 728. Policy Order 63's surgery requirement is rationally related to the State's interests in maintaining consistency between sex changes on a birth certificate and on a driver license, and in providing a clear definition of "sex" as it appears on a driver license for identification and law enforcement purposes.

More fundamentally, however, Policy Order 63 does not force or compel Plaintiffs to receive medical treatment they do not want within the framework of *Cruzan*. The question in that

case was whether the hospital could continue to physically maintain artificial feeding and hydration equipment for a patient in a persistent vegetative state against her parent and coguardians' wishes. *Cruzan*, 497 U.S. at 265. Courts have declined to apply the right recognized in *Cruzan* even in cases where the government *physically forces* an individual in custody to receive medical treatment the individual does not want. *See, e.g.*, *In re Soliman*, 134 F. Supp. 2d 1238, 1254-58 (N.D. Ala. 2001) (holding the force-feeding of a detainee on a hunger strike did not violate detainee's constitutional right to refuse unwanted medical treatment). In this case, ALEA has not physically forced Plaintiffs to receive sex reassignment surgery. It has not even conditioned receipt of a driver license on the receipt of such surgery. Thus, Plaintiffs cannot demonstrate the element of forcible compulsion required to state a claim for a violation of their right to refuse unwanted medical treatment.

For all of these reasons, Defendants are entitled to summary judgment on Count II.

4. Defendants Are Entitled to Summary Judgment on Plaintiffs' Compelled Speech Claim in Count III

Plaintiffs allege in Count III that the male sex designations on their driver licenses force them to "convey[] the state's ideological message that gender is determined solely by the appearance of external genitals at the time of birth unless modified through certain surgical procedures, a message with which Ms. Clark and Ms. Doe vehemently disagree." Doc. 38 ¶ 125. But Policy Order 63's criterion for changing the sex designation on a driver license neither conveys an ideological message nor compels Plaintiffs to express such a message. Plaintiffs retain a large degree of control over whether to display their license, and they are required to display it only in limited to circumstances to law enforcement officers or court personnel. Furthermore, the personal information contained on an Alabama driver license is government speech not protected by the

First Amendment because it is the means by which ALEA communicates to state law enforcement officers for law enforcement purposes.

The United States Supreme Court recognized that citizens have the right to be free from being compelled to express an ideological message with which they disagree in *Wooley v. Maynard*, 430 U.S. 705 (1977). In *Wooley*, the plaintiff challenged the requirement of the State of New Hampshire that his license tag display the state's motto, "Live Free or Die." *Wooley*, 430 U.S. at 713. The manner in which the Court framed the constitutional issue is significant:

> We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message *by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public*. We hold that the State may not do so.

Id. (emphasis added). The Court found that the New Hampshire statute "in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty." *Id.* at 715. The Court found the state could achieve its purpose of identifying vehicles without the use of the motto and that the motto conveyed a distinct ideological message. *Id.* at 716.

In contrast to the requirement in *Wooley* that citizens use private property to broadcast the state's ideological message to the public generally, the Seventh Circuit recently rejected a compelled speech claim brought by a Satanist who challenged the printing of "In God We Trust" on United States currency. *See Mayle v. United States*, 891 F.3d 680, 683 (7th Cir. 2018). The court dispensed with this claim as follows:

> Inscribing the motto on currency, Mayle argues next, violates the Free Speech Clause because the national motto conveys a religious message, which he is being forced to convey: that he "trusts" in a deity. But Mayle is not in any meaningful way affirming the motto by using currency. See *Wooley v. Maynard*, 430 U.S. 705, 717 n.15,

> 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). *He is not wearing a sign or driving a car displaying a slogan*. See *id.* at 717, 97 S.Ct. 1428. As the district court noted, *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 the recipient of cash in a commercial transaction could not reasonably think that the payer is proselytizing. If the recipient thought about it at all, *she would understand that the government designed the currency and is responsible for all of its content, including the motto. She would not regard the motto as Mayle's own speech*.

Mayle, 891 F.3d at 686 (emphasis added). The Eighth Circuit recently endorsed *Mayle*'s analysis in rejecting a similar compelled speech claim. *See New Doe Child #1 v. United States*, 901 F.3d 1015, 1024-25 (8th Cir. 2018) (holding that "the use or possession of U.S. money does not require a person to express, adopt, or risk association with any particular viewpoint" because "[t]he nature of currency is such that any expression thereon is distinctively the Government's own."). *Mayle*'s analysis regarding carrying currency is more analogous to carrying a state driver license as an identification document than displaying the state's motto on a private vehicle as in *Wooley*.

First, Alabama law does not require individuals to display their Alabama driver license to the general public. As noted above with respect to Plaintiffs' informational privacy claim, Alabama law requires license holders to display their Alabama driver license only under limited circumstances. Alabama law provides that "[e]very licensee shall have his or her license in his or her immediate possession at all times when driving a motor vehicle and shall display the same, upon demand of a *judge of any court, a peace officer, or a state trooper*." Ala. Code § 32-6-9 (emphasis added); *see also Sly*, 387 So. 2d at 915-16 (upholding conviction of motorist for refusing to display license to state trooper upon request). Law enforcement officers may request that a citizen provide a license for identification in the ordinary course of business and may *require* a citizen to present a license for identification if the officer has reasonable suspicion to believe the citizen is engaging in criminal activity. *See Hiibel*, 542 U.S. at 185-87. Plaintiffs all testified that

they carried their licenses concealed and typically displayed them only when required. *See Mayle*, 891 F.3d at 686 (stating "most people do not brandish currency in public—they keep it in a wallet or otherwise out of sight until the moment of exchange."). They testified that they do or could use a passport that designated them as female for identification purposes in a variety of contexts, such as purchasing alcohol, establishing eligibility to work, and voting. All three plaintiffs testified they had had contact with Alabama law enforcement officers in a variety of circumstances, and that the officers required them to display their driver licenses in each case.

Second, as in *Mayle* and unlike in *Wooley*, the sex designation on an Alabama driver license does not convey any ideological message by the State. *Compare Mayle*, 891 F.3d at 686 ("And the recipient of cash in a commercial transaction could not reasonably think that the payer is proselytizing. If the recipient thought about it at all, she would understand that the government designed the currency and is responsible for all of its content, including the motto. She would not regard the motto as Mayle's own speech."), *with Wooley*, 430 U.S. at 715 (holding the mandated use of "Live Free or Die" slogan on license plates "in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message or suffer a penalty."). Unlike the expression of rugged individualism conveyed by "Live Free or Die" in *Wooley*, the sex designation on an Alabama license is simply a physical description of the bearer of the licensee, just like the other physical descriptors of height, weight, date of birth, eye color, and hair color. Policy Order 63 defines "sex" on a license in terms of physiognomy by requiring sex reassignment surgery to change the physical sex characteristics to male and female, including genitalia. ALEA is a law enforcement organization, and its intent in choosing this definition of "sex" is to provide information to the law enforcement officers to whom citizens must display their licenses for identification and law enforcement purposes. (Pregno Depo. at 123). Plaintiffs' sex designations

on their licenses do not express the ideological message that they are somehow not "real" women, but rather communicate information to law enforcement officers about their physical description.

The State thus does not compel speech through the information contained on its driver licenses. Rather, an Alabama driver license, and the information displayed on it, is "government speech" not constrained by the First Amendment. *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015); *Pleasant Grove v. City of Summum*, 555 U.S. 460 (2009). Whether speech is government speech not subject to the First Amendment depends on (1) whether the medium of speech has historically been used by the state to communicate; (2) whether the speech is closely identified in the public mind with the state; and (3) whether the state maintains direct control over the message. *Walker*, 135 S. Ct. at 2248-49. Here, all three factors clearly support Defendants' claim that personal information on the face of a driver license, including the sex designation, is government speech.

First, the historical use of a driver license is unquestionably for state purposes, *viz.*, to ensure the motorist is legally authorized to drive and for identification purposes. Second, the personal information on a driver license is closely identified in the public mind with the state because, as were the Texas license plates in *Walker*, licenses "are, essentially, government IDs." *Walker*, 135 S. Ct. at 2249. "And issuers of ID 'typically do not permit' the placement on their IDs of 'message[s] with which they do not wish to be associated.'" *Id.* (quoting *Summum*, 555 U.S. at 471). Thus, a reasonable observer understands the term "sex" on a license to convey some message by the government. Third, the State, through ALEA, maintains direct control over the information on a driver license. Alabama law requires ALEA to issue a driver license that contains a color photograph of the licensee, the name, birthdate, address, and a "description" of the licensee. *See* Ala. Code § 32-6-6-. ALEA has exercised its control over the contents of a license by requiring

the "description" to include the license bearer's height, weight, eye color, hair color, and sex designation. (Pregno Depo. at 65-66). Chief Pregno testified that law enforcement officers are the "audience" to whom ALEA is communicating in determining the information that goes on a driver license. (*Id.* at 123).

In sum, the sex designation on Plaintiffs' driver licenses do not compel speech because they are not required to publicly display any ideological message with which they disagree by means of their license. The personal information on a driver license is government speech controlled by the government, to communicate with the government and is not subject to Plaintiffs' First Amendment challenge. *See Walker*, 135 S. Ct. at 2245 ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says."). Accordingly, Defendants are entitled to summary judgment on Count III.

5. Defendants Are Entitled to Summary Judgment on Plaintiffs' Equal Protection Claim in Count IV

Plaintiffs allege in Count IV that "Policy Order 63 and Defendants' practices are directed solely at transgender people and discriminate against them on the basis of sex, as well as on the basis of transgender status." Doc. 38 ¶130. Plaintiffs allege that Policy Order 63 fails to satisfy intermediate scrutiny under the Equal Protection Clause. *Id.* ¶¶132-134. However, Policy Order 63 does not discriminate on the basis of an individual's transgender status as Plaintiffs allege. Transgender individuals who meet Policy Order 63's requirements may change the sex designation on their license, and the policy thus treats similarly-situated individuals similarly. Even if it were subject to intermediate scrutiny, Policy Order 63 satisfies this level of review on the undisputed facts of this case.

a. Policy Order 63 Does Not Intentionally Discriminate Based on an Individual's Transgender Status

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons *similarly situated* should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (emphasis added). "When the basic classification is rationally based, uneven effects upon particular groups within a class are ordinarily of no constitutional concern." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). In *Feeney*, the Court considered whether a veteran's preference hiring statute, which unquestionably disproportionately favored men over women, violated equal protection. The court provided the following analysis:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionably adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender-based. If the classification itself, covert of overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution.

Id. at 274. In order to show a discriminatory purpose, a plaintiff must show that "the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279. Thus, the veterans' preference statute at issue in that case did not have to satisfy intermediate scrutiny, as would a sex-based classification, because it lacked the requisite discriminatory intent. *Id.* at 281.

While Policy Order 63 undoubtedly disproportionally applies to transgender individuals who wish to change the driver license on their sex, it lacks discriminatory intent because it treats similarly-situated individuals similarly, the classic requirement of equal protection. First, no policy

of ALEA prevents transgender individuals from obtaining a driver license so long as the individual meets all the same requirements of a non-transgender individual. With regard to the sex designation on a driver license, the sex on a birth certificate is the "default" sex for what is used on a driver license. This default results in a disparate impact on transgender individuals, whose gender identity does not match the sex assigned on their birth certificate. But it does not *solely* affect transgender individuals but also, for example, those with intersex conditions. The records contain an example of at least one individual who obtained a sex change on a driver license due to an intersex condition, Klinefelter's syndrome. (D1165). Second, for transgender individuals, Alabama law provides a means to change the sex on both birth certificates and driver licenses by providing proof of sex reassignment surgery. Transgender individuals who meet Policy Order 63's requirements may change their sex on their driver licenses, whereas those who do not cannot. The records are replete with transgender individuals who have met this requirement and obtained a change to the sex designation on their license.

Policy Order 63 simply provides a clear criterion for when an individual changes "sex" for purposes of physical identification for law enforcement. Policy Order 63 does not "discriminat[e] against a transgender individual because of her gender-nonconformity." *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011). In fact, Policy Order 63 provides an accommodation to allow transgender individuals to change the sex designation on their license. Plaintiffs cannot complain that because Policy Order 63 does not provide the accommodation of their choice that it invidiously discriminates against them based on their transgender status. Because Policy Order 63 lacks discriminatory intent against transgender individuals, Defendants are entitled to summary judgment on Plaintiffs' equal protection claim.

b. Even if Policy Order 63 Were a Sex-Based Classification Subject to Intermediate Scrutiny, It Satisfies This Level of Scrutiny

In *Glenn*, the Eleventh Circuit held that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." *Glenn*, 663 F.3d at 1317. Accordingly, the court held that the employer had to satisfy intermediate scrutiny, *i.e.*, the employer bore the burden of showing his action was "substantially related to a sufficiently important governmental interest." *Id.* at 1320. The employer in *Glenn* failed to make such a showing because his motive in terminating the employee was based purely on discriminatory animus. *Id.* at 1321. The employer told the transgender woman employee that her appearance and dress were "inappropriate," "unsettling," and "unnatural." *Id.* Under these circumstances, the court easily concluded that the employer's *post hoc* justification for the termination failed to satisfy intermediate scrutiny. *Id.* at 1321.

Plaintiffs assume that Policy Order 63 is a sex-based classification because it requires conformity between genitalia, whether those at birth or acquired through surgical means, and the sex designation on a driver license. Plaintiffs maintain that this classification discriminates against them because their gender does not conform to the genitals they were assigned at birth and they have not had sex reassignment surgery. Therefore, their male sex designations on their licenses constitute sex discrimination against them based on their gender non-conforming behavior.

Although Defendants dispute this characterization of Plaintiffs' claim to discrimination for the reasons set out above, even assuming intermediate scrutiny applies, Policy Order 63 satisfies this level of scrutiny. In order to satisfy intermediate scrutiny, defendants bear the burden of showing that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. *See United States v. Virginia*, 518 U.S. 515, 533 (1996). "The justification must be genuine, not

hypothesized or invented *post hoc* in response to litigation." *Id.* "And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.*

Although intermediate scrutiny is not satisfied by reliance on sex-based stereotypes and generalizations, the Supreme Court has also acknowledged that "[p]hysical differences between men and women, however, are enduring: [T]he two sexes are not fungible; a community made up exclusively of one [sex] is different from a community composed of both." *Id.* (internal quotation and citation omitted). The court also acknowledged the "[i]nherent differences' between men and women." *Id.* The Supreme Court has elsewhere stated that "gender specific terms can mark a permissible distinction," and that "[t]he equal protection question is whether the distinction is lawful." *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 64 (2001). "Here, the use of gender specific terms takes into account a *biological difference* between the parents." *Id.* (emphasis added). The court in *Nguyen* concluded:

> To fail to acknowledge even our most basic biological differences—such as the fact that a mother must be present at birth but the father need not be—risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real. The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.

Id. at 73. Thus, while intermediate scrutiny must do more than rely on stereotypical generalizations, it may also take into account "biological differences" between the sexes, such as the indisputable fact that for most people external genitalia at birth typically conform with a person's gender identity.

Policy Order 63 serves the important government interests in maintaining consistency between the sex designation on an Alabama birth certificate and an Alabama driver license. Policy Order 63 is substantially related to this interest because changing the sex on either document requires proof of gender reassignment surgery. Policy Order 63 serves the important government interest of providing information related to physical identification to law enforcement officers. Policy Order 63 is substantially related to this interest by providing a clear definition of "sex" in terms of physical sex characteristics of statewide applicability to allow law enforcement officers to form appropriate arrest, booking, and search procedures, as well as procedures for the provision of medical treatment.

Defendants presented undisputed evidence of these important government interests and the manner in which Policy Order 63 is substantially related to those interests. Alabama by statute requires proof of sex reassignment to amend a birth certificate. *See* Ala. Code § 22-9A-19(d); (Pregno Depo. at 124). This statutory requirement has been in effect since 1992. *See* Ala. Act 92-607 §§ 19(d), 31. Policy Order 63 was originally created based on the statutory process for amending a birth certificate. (Pregno Depo. at 42, 124). Policy Order 63 maintains consistency with birth certificates by changing the sex on a license upon the receipt of an amended birth certificate, which requires proof of sex reassignment surgery, or upon direct receipt of medical documentation of reassignment surgery. (Woodruff Depo., PX 7).

With respect to identification for law enforcement purpose, Chief Pregno testified that ALEA is a law enforcement organization, and that one purpose of a driver license is as an identification document for law enforcement purposes. (Pregno Depo. at 55-56). Although ALEA does not formulate search, seizure, or booking policies for State law enforcement and corrections officers, it provides information to law enforcement officers by means of the information contained

on a driver license so that each state agency can formulate its own search, seizure, and booking policies based on this information. (*Id.* at 82, 120-21). Policy Order 63 is substantially related to this important purpose because it provides a definition of "sex" in terms of physical sex characteristics that allow law enforcement officers to form appropriate search, seizure, and booking policies. (*Id.* at 65, 73-86, 120-21). Plaintiffs' own expert conceded that for *99%* of the population, the sex designation on their identity documents of "M" or "F" was accurate. (Gorton Depo. at 23). *See Carcano v. McCrory*, 203 F. Supp. 3d 615, 644 (M.D.N.C. 2016) (stating that on plaintiffs' own estimate less than 1% of the population was transgendered, and thus a policy based on sex on a birth certificate was substantially related to important government interests because sex on a birth certificate based on external genitalia was accurate for 99% of the population).

Defendants' expert witness, Don Leach, provided testimony about the substantial relationship between Policy Order 63's definition of "sex" in terms of physiognomy and the creation of appropriate policies and procedures in a correctional context for inmate searches, housing, supervision, and medical care. (Leach Depo., PX 38 at 16-17). Because there are many situations in which corrections officers must take an inmate's sex into account, it is important for jails to have "data dictionaries" that define key terms such as "sex" consistently to jail staff. (*Id.* at 15). ALEA provides a baseline definition of "sex" for correctional purposes on a statewide basis through Policy Order 63. (*Id.* at 16-17). Knowledge of an inmate's sex, including genitalia, is important for Fourth Amendment purposes in a correctional setting because a search should not be more intrusive than necessary, and corrections officers must develop appropriate procedures for cross-gender searches. (*Id.* at 49-50, 102). Corrections officers can determine an inmate's

physical sex, including genitalia, by means of a driver license shortly upon booking. (*Id.* at 34-35, 85).

Far from Leach's testimony being *post hoc* or based on stereotypes about gender, the relevance of his concerns about the State's interests in Policy Order 63 are supported by a decision of the Eleventh Circuit released after he issued his expert report in this case. (Leach Depo. at 106-07). *See De Veloz v. Miami-Date Cnty.*, 2018 WL 6131780, __ F. App'x __ (11th Cir. Nov. 21, 2018). In that case, a woman taking hormone replacement therapy due to menopause was misgendered by jail medical staff and mistakenly housed with the male jail population. *De Veloz*, 2018 WL 6131780, at *2-5. The court reversed the grant of qualified immunity to the staff that misclassified the plaintiff and held that they were deliberately indifferent. *Id.* at *7. The court noted that "no party disputes 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.* "It is abundantly clear to us that housing a *biological female* alongside 40 male inmates poses an outrageous risk that she will be harassed, assaulted, raped, or even murdered." *Id.* (emphasis added). Thus, *De Veloz* makes clear the importance of providing accurate information regarding an individual's sex for purposes of jail administration.

In sum, Policy Order 63 has neither the purpose nor effect of invidiously discriminating against transgender individuals. From its inception, it was intended to maintain consistency with birth certificates and accurately describe a license bearer's physical sex characteristics to law enforcement and corrections officers for law enforcement purposes. Defendants stated interests, and the relation Policy Order 63 bears to these interests, are not based on stereotypes regarding sex and gender but on the concrete realities involved in the identification of individuals for law enforcement purposes.

C. Conclusion

For the reasons stated above, Defendants are entitled to summary judgment as to all claims.

Respectfully submitted this 8th day of February, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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DOC. 58

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DARCY CORBITT, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. 2:18-cv-91-MHT-GMB
	)	
HAL TAYLOR, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

It is undisputed that Defendants require Plaintiffs to submit to sterilizing genital surgery before permitting them to obtain driver's licenses that list their sex as female. It is undisputed that a driver's license with a male sex designation does not accord with how Plaintiffs define themselves and exposes Plaintiffs to humiliation and other serious harm. It is also undisputed that the surgical requirement in Defendants' policy is not consistent with contemporary medical standards for treatment of gender dysphoria or scientific understandings of sex, and is not required for correctional or law enforcement purposes. Defendants argue in their motion for summary judgment that their policy nonetheless does not violate the Plaintiffs' rights under the U.S. Constitution. They are mistaken.

First, Defendants argue that the statute of limitations bars two Plaintiffs' claims. Their argument shows a misunderstanding of the nature of Plaintiffs' claims. The harm Plaintiffs allege arises from not being permitted to change the sex designation on their driver's licenses. It was well within the limitations period when the Plaintiffs were first aware, or should have become aware, that they would not be permitted to do so. Moreover, Defendants' actions continue to this day.

Defendants also argue that they have not violated the Plaintiffs' right to privacy. Here, Defendants not only misapply the law, but also mischaracterize the deposition testimony of Plaintiff Jane Doe. Ms. Doe endeavors to keep her trans identity private. At the very least, it is disputed whether Ms. Doe has made her transgender identity known publicly. But even to the extent some other people know that the Plaintiffs are transgender, they retain a right to privacy protecting them from forced disclosure of their transgender status in circumstances presenting

significant personal risk, such as when they need to show a driver's license in person to a stranger. Defendants argue that Plaintiffs should use passports instead of driver's licenses to avoid the violation of their privacy. No court has accepted that argument; the government may not condition access to a useable driver's license on the forfeiture of a constitutional right.

Competent adults have a fundamental right to refuse medical treatment, particularly if that treatment results in permanent sterilization. While genital gender-affirming surgery is a vital form of treatment for those transgender people who need it, not all transgender people do—and some who do nonetheless cannot obtain it. Defendants argue that because they do not literally bind Plaintiffs to an operating table and wield a scalpel, they do not infringe on the right to refuse medical care. But the government need not go so far to violate due process. The constitution does not permit the Defendants to present Plaintiffs with the choice to go without a valuable form of government identification, sacrifice their safety and dignity by using a form of identification with the wrong sex designation, or give up their bodily integrity and reproductive capacity.

Defendants also argue that their policy does not compel speech because no reasonable person would assume that someone who shows a driver's license endorses the message conveyed on that license. But the opposite is true. Any reasonable person would believe that someone presenting a driver's license was also representing that the information describing them on that license was true.

Finally, Defendants argue that their policy, which applies specifically to transgender people, somehow only incidentally affects transgender people and thus does not discriminate on the basis of sex, and that in any event their policy is justified. But in fact, their policy

deliberately targets transgender people, which is discrimination because of sex, and they have no reason for their policy that satisfies heightened scrutiny, or even rational basis.

SUPPLEMENTAL STATEMENT OF FACTS

The Plaintiffs

98. Ms. Corbitt arrived in Alabama from North Dakota in August 2017. Corbitt Dep. 13:7-10, Defs.' Ex. 2.

99. Ms. Corbitt went to the Lee County Driver License Office in August 2017 to obtain an Alabama driver's license. *Id.* at 41:3-6.

100. At that visit to the Lee County Driver License Office, the clerk refused to give Ms. Corbitt a driver's license with a female sex designation. *Id.* at 47:1-13.

101. That day in August 2017 was the first time Ms. Corbitt learned that Alabama would not issue her a license with a corrected sex designation. *Id.* at 46:8-12.

102. Ms. Clark began trying to change the sex designation on her license in April 2015. Clark Dep. 36:1-37:4, Defs.' Ex. 1.

103. When Ms. Clark tried to change the sex designation on her license in a local driver's license office, the clerk did not know the policy. She just told Ms. Clark to contact Montgomery. *Id.* at 37:7-15.

104. Ms. Eastman, in Montgomery, initially told Ms. Clark that the process was as easy as a keystroke. *Id.* at 37:7-22.

105. Ms. Eastman did not change Ms. Clark's sex designation at that time. Based on Ms. Eastman's statements after reviewing the letter from Ms. Clark's primary care physician,

Ms. Clark believed she would be able to change the sex designation on her license after she underwent surgery, which she was planning to do in the relatively near future. *Id.* at 39:10-19.

106. After Ms. Clark submitted her surgeon's letter, Ms. Eastman called her surgeon's office on February 3, 2017. Letter from Robert Bolling, M.D. to Whom It May Concern (Jan. 18, 2017) (D169), Pls.' Ex. 39.

107. Ms. Clark called Ms. Eastman's office when she did not hear back about her application. During that call, she learned that Ms. Eastman had contacted her surgeon's office and would not be changing the sex designation on her license. While Ms. Clark does not recall the exact date of that conversation, the very earliest it could have been was February 3, the same day Ms. Eastman contacted Ms. Clark's surgeon's office. Clark Dep. 41:17-42:7.

108. The Alabama Law Enforcement Agency (ALEA) has never publicized Policy Order 63 or made it publicly accessible online, except through electronic filing in this lawsuit.

109. It took Ms. Doe five tries contacting ALEA before she came to learn anything close to the actual policy. Doe Dep. 49:10-13, Defs.' Ex. 3.

110. Ms. Corbitt believes the sex designation on a driver's license would put her at risk if pulled over by a police officer on a dark country road. Corbitt Dep. 58:1-21. She was deeply frightened when her transgender status was publicly disclosed within the hearing of a state trooper and the trooper began looking at her in a way she could not interpret. *Id.* at 44:8-46:19.

111. When a police officer noticed the incorrect gender marker on Ms. Clark's license, the officer's demeanor shifted rapidly from friendly to rude. Clark Dep. 33:6-14; 34:3-7.

112. When a police officer noticed the incorrect gender marker on Ms. Doe's license, the officer disclosed that Ms. Doe was transgender to others, causing Ms. Doe to have leave her job to avoid being discriminatorily fired. Doe Decl., at ¶ 15, Pls.' Ex. 42; Doe Dep. 35:3-18.

113. Ms. Clark and Ms. Corbitt share that they are transgender at community events where people have come specifically to learn about transgender issues or are transgender themselves. They also disclose that they are transgender on their social media pages. Corbitt Dep. 59:11-21; Clark Dep. 80:1-82:6.

114. Plaintiffs are more likely to be alone and face-to-face with someone whose reaction to their transgender status they cannot predict when they must show their driver's licenses. *See* Corbitt Dep. 41:11-43:21; Clark Dep. 82:7-20.

115. In settings like an LGBT event or Facebook page, it is the Plaintiffs' own choice whether and how to disclose they are transgender. When giving a speech or sharing a post on social media, Plaintiffs make the disclosure of their own volition and on their own terms, often providing education about what it means to be transgender and affirming their own womanhood. *See* Corbitt Dep. 58:1-21; 59:11-21; Clark Dep. 80:1-10, 81:12-82:20.

116. Jane Doe does not identify herself as "trans out in public." Doe Dep. 49:18-21. An early experience of hate violence has shaped her decisions. Doe Decl. ¶ 8, 14.

117. People at work only know that Ms. Doe is transgender because her driver's license outed her to human resources. Doe Dep. 50:21-51:8.

118. Until her deposition, Ms. Doe had no idea that her profile picture on Facebook was publicly viewable even though her account settings are friends only. *Id.* 52:21-23, 64:3-5.

119. Facebook regularly changes privacy settings without notice to users, and many Facebook users do not fully understand what data on their Facebook profile is publicly accessible. Will Oremus, *Facebook Changed 14 Million People's Privacy Settings to "Public" Without Warning*, Slate (June 7, 2018), attached as Pls.' Ex. 60; Brian Barrett, *The Facebook Privacy Setting That Doesn't Do Anything At All*, Wired (March 27, 2018), attached as Pls.' Ex.

61; Alex Hern, *Facebook is Chipping Away at Privacy—and My Profile Has Been Exposed*, The Guardian (June 29, 2016), attached as Pls.' Ex. 62.

120. Ms. Doe's profile picture sometimes included "banners" with slogans like "Transpeople Won't Be Erased" or "Together Against Antisemitism." Doe Dep. 62:18-21; 77:4-11.

121. Ms. Doe is not Jewish. Doe Dep. 77:4-11.

122. During her deposition, at one point Ms. Doe answered "no" when answering a question about whether her driver's license disclosed anything about her transgender status that she did not disclose through Facebook. Doe Dep. 68:7-11.

123. She clarified later during that same deposition that in fact her license does convey that she is transgender, something that people cannot learn from her Facebook profile. Doe Dep. 75:16-76:11.

124. Ms. Doe once staffed an outreach table for her employer at a transgender community event. Doe Dep. 58:22-59:12.

125. No evidence suggests that the organization Ms. Doe was representing at the event has a reputation for employing an exclusively or primarily transgender workforce. 60:21-61:1.

126. Other people staffing tables at the event were not transgender. Doe Dep. 76:21-23.

127. Some of the people attending the event as participants were not transgender either. Doe Dep. 77:1-3.

128. The banner at the event read "TAKE" in large letters. *Id.* at 59:19-60:3.

129. TAKE stands for Transgender Awareness Knowledge and Empowerment. Doe Dep. 60:4-6.

130. Ms. Doe began her social transition in her forties. Doe Dep. 9:21-22 (birth date); 28:9-23 (beginning of social transition).

131. Ms. Doe's friends know that she is transgender because when they first met her, they perceived her to be a man, and now, they know that she is a woman. Doe Dep. 50:5-9.

132. Ms. Doe cannot afford gender-affirming surgery. Doe Decl. ¶ 20

133. For Ms. Corbitt, having gender-affirming surgery at this time would not accord with her religious beliefs. Corbitt Decl. ¶ 13-14, Pls.' Ex. 28.

134. Ms. Clark does not want surgery beyond what she has already had. Clark Dep. 43:1-4.

135. Ms. Corbitt needs a driver's license for entry into places she must go for work. Passports do not suffice. Corbitt Dep. 37:19-38:2.

136. Ms. Corbitt keeps her passport in her safety deposit box to prevent theft. Corbitt Dep. 62:3-12.

137. Ms. Doe has had her use of a passport questioned when she has tried to check into a hotel. Doe Dep. 79:13-18.

138. Ms. Clark has never gotten a passport. Clark Dep. 71:1-12.

Driver's Licenses, Birth Certificates, and Passports

139. One intersex person with a gender identity different from her assigned sex at birth was able to obtain a change of sex designation on an Alabama driver's license without submitting proof of surgery. Defs.' Ex. 16, (D1165).

140. An interest in law enforcement identification was not considered at the time Policy Order 63 was created or revised. Pregno Dep. 45:3-12; 47:4-23, Defs.' Ex. 5.

141. No federal or Alabama law or policy indicates that the sex designation on a license should be taken into account when deciding where to place transgender people in police lockups, jails, or prisons.

142. Defendants' expert stated that he would place transgender people based on where they preferred to be placed, not based on the sex designation on their license. Leach Dep. 98:8-15; 110:21-111:8; 112:8-15, Defs.' Ex. 9.

143. Reproductive capacity has no bearing on identification or ability to drive. *See* Pregno Dep. 67:20-68:1; Eastman Dep. 60:12-16, Defs.' Ex. 4.

144. State law requires drivers to carry a driver's license. Ala. Code § 32-6-9.

145. The purpose of a driver's license is to "prove you are who you say you are." Pregno Dep. 53:18-54:1.

146. One is guilty of a felony if one presents false identification. Ala. Code §§ 17-17-28; 13A-8-194.

147. Defendants' expert stated that a transgender man could be arrested for possession of a false instrument because of the disparity between a female sex designation on a driver's license and a masculine appearance. Leach Dep. 57:19-58:10.

148. People commonly use driver's licenses when "travelling by plane, applying for employment, applying for public benefits, filling prescriptions, purchasing alcohol, applying to and attending college, checking into a hotel, renting a car, voting, opening and using a checking account, using a credit or bank card, travelling internationally, and [doing a] number [of] other things that most of us take for granted." Gorton Decl. at ¶ 28, Pls.' Ex. 45.

149. Passports are valuable documents vulnerable to theft. Katharine Lagrave, *4 Ways People Steal Your Passport*, Conde Nast Traveler (Aug. 15, 2016), attached as Pls.' Ex. 63.

150. Obtaining a passport book costs $145. Department of State, United States Passport Fees (Feb. 20, 2018), attached as Pls.' Ex. 64.

151. Ms. Clark has worked in the food and beverage industry for over thirteen years, and she has "never had anyone to present a passport for age verification." Clark Dep. 79:3-15. She remarked that she would be "shock[ed]" if she ever saw a passport used to buy alcohol. *Id.* 79:19.

152. Currency is fungible. A single bill may change hands hundreds of times before it leaves circulation. Gottfried Leibbrandt, *How fast is that buck? The velocity of money,* Statistics of Payments, Swift Institute, (2012), attached as Pls.' Ex. 65.

153. In Arkansas, to change the sex designation on one's birth certificate, one must have a court order stating that sex has been changed "by surgical procedure." Ark. Code Ann. § 20-18-307(d).

154. To change the sex on a driver's license in Arkansas, one needs to indicate whether one prefers F, M, or X to be listed, with no medical documentation required. Email from Gayle Boliou, Supervisor, Driver Services, Department of Finance and Administration (Apr. 7, 2011, 3:38 p.m.), attached as Pls.' Ex. 66; Curtis M. Wong, *Arkansas Has Been Offering a Nonbinary Gender Option on State IDs for Years*, Huffington Post (Oct. 17, 2018), attached as Pls.' Ex. 67.

155. In the District of Columbia, one needs a signed statement from a medical provider stating that the applicant has "undergone surgical, hormonal or other treatment appropriate for the individual for the purpose of gender transition" to change the sex designation on a birth certificate. District of Columbia Department of Health, Gender Designation Policies, Procedures, and Instructions, attached as Pls.' Ex. 68.

156. To change the sex designation on a D.C. driver's license, one needs to fill out a form stating whether one wants M, F, or X to appear on one's license. District of Columbia Dep't of Motor Vehicles, Procedure for Establishing or Changing Gender Designation on a Driver License of Identification Card (2017), Pls.' Ex. 22.

157. In Massachusetts, one needs an affidavit from a medical provider stating that the applicant "has completed medical intervention, appropriate for the patient, for the purpose of permanent sex reassignment" to change the sex designation on a birth certificate. Registry of Vital Records and Statistics, Massachusetts Dep't of Pub. Health, Physicians Statement in Support of Amendment of a Birth Certificate Following Medical Intervention for the Purpose of Sex Reassignment (Apr. 1, 2016), attached as Pls.' Ex. 69.

158. To change the sex designation on a Massachusetts driver's license, one simply needs to submit an attestation of one's gender identity. Registry of Motor Vehicles, Massachusetts Gender Designation Change Form (last visited March 7, 2019), attached as Pls.' Ex. 70.

159. Birth certificates record information about time and place of birth, race, and parentage not included on driver's licenses. *See* Clark license, Pls.' Ex. 40; Clark birth certificate, Defs.' Ex. 11 (Dep. Defs.' Ex. 1, P10).

160. Driver's licenses record information about current address and driving restrictions not included on birth certificates. *See* Clark license, Pls'. Ex. 40; Clark birth certificate, Defs.' Ex. 11 (Dep. Defs.' Ex. 1, P10).

161. The Alabama agencies responsible for maintaining driver's licenses and birth records do not coordinate to share information when the name or sex designation on those

records change, nor do they compare information except when someone presents an Alabama birth certificate to apply for a driver's license. Pregno Dep. 105:7-106:10.

162. State statute creates a judicial procedure for changing the sex designation on a birth certificate and has created no comparable judicial procedure for changing the sex designation on a driver's license. Ala. Code § 22-9A-19.

163. Most states do not require surgery to change the sex designation on a license. *See Love v. Johnson*, 146 F. Supp. 3d 848, 857 (E.D. Mich. 2015); National Center for Trans Equality, *How Trans-Friendly is the Driver's License Gender Change Policy in Your State?*, Pls.' Ex. 23; American Association of Motor Vehicle Administrators, Resource Guide on Gender Designation on Driver's Licenses and Identification Cards (Sept. 2016), Pls.' Ex. 56.

164. Chief Pregno could think of no reason why Alabama's interests might differ from those of other states. Pregno Dep. 118:19-119:1.

Transgender People and Science

165. Sex refers not only to genitalia, but also to internal reproductive organs, hormone levels, secondary sex characteristics like breasts and facial hair, and the gender identity that arises from the central nervous system. Gorton decl. ¶ 10, 11.

166. Defendants' expert declined to express any opinion as to the most useful definition of sex for correctional purposes, and testified that a policy that reflected gender identity on a driver's license would also satisfy correctional interests. Leach Dep. 32:9-19.

167. High rates of police misconduct toward transgender people have been reported. Sandy E. James, et. al, The Report of the 2015 U.S. Transgender Survey 14 (2016) ("USTS"), Pls.' Ex. 47.

168. In 2017 alone, three transgender people were killed by police. *Violence Against the Transgender Community in 2017*, Human Rights Campaign, attached as Pls.' Ex. 71.

169. Transgender women placed in men's facilities experience high rates of sexual violence. U.S. Dep't of Justice, Bureau of Justice Statistics PREA Data Collection Activities, 2015 2 (June 2015), attached as Pls.' Ex. 72; Valerie Jenness et al, *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault 3* (2007), attached as Pls.' Ex. 73.

170. Intersex is "a group of conditions where individuals are born with chromosomal, physiological, or anatomic differences that do not fit the typical definitions of a male or female body." Gorton Decl. ¶ 24.

171. Transgender is "used to describe individuals whose sex assigned at birth is different than their gender identity." Gorton Decl. ¶ 15.

172. Most intersex people are not transgender. Some intersex people are transgender—that is, they have a gender identity different from the sex they were assigned at birth. InterACT: Advocates for Intersex Youth, Media Guide Covering the Intersex Community 2, attached as Pls.' Ex. 74 ("[S]ome people can be born with intersex traits and also identify as transgender.").

173. Defendants use the term "physiognomy" repeatedly in their briefing, as did their expert in his report and testimony. Doc. 54 at 10, 11, 15, 39, 50; Leach report at 15, 18, Pls.' Ex. 26; Leach Dep. 12, 13, 14, 19, 22, 50, 55, 70, 117, 118, 128, Defs.' Ex. 9.

174. Physiognomy refers to determining a person's ethnicity and character based on facial features. Gorton Decl. ¶ 42.

175. During the period of eugenics, "experts" in the United States and Germany claimed that physiognomy proved that people of African descent were less intelligent than

people of European descent, and that Jewish people were inherently deceitful. Gwen Sharp, *Physiognomy: Face, Bodies, and the "Science" of Human Character,* Sociological Images 6 (Jan. 30, 2015), attached as Pls.' Ex. 75; Marissa Alperin, *Constructing Jewish Bodies in Germany through Physical Culture and Racial Pseudo-Science 4* (2018), attached as Pls.' Ex. 76.

176. Gender-affirming genital surgery is an important form of healthcare for those transgender people who need it to treat their gender dysphoria. However, not all transgender people need genital surgery, and gender-affirming genital surgery for transgender women always ends fertility. Gorton Decl. ¶ 36, 43.

177. Defendants continue to prevent Plaintiffs from changing the sex designation on their driver's licenses, and continue to withhold from Plaintiffs a driver's license that they can use without compromising their health, integrity, safety, and dignity. *See* Policy Order 63, Pls.' Ex. 1.

ARGUMENT

I. Plaintiffs Brought Their Claims within the Statute of Limitations.

The Plaintiffs brought this action to challenge Policy Order 63's surgery requirement, which prevents each of them from obtaining an Alabama license that correctly designates their sex, thus depriving them of the ability to use this vital piece of identification without sacrificing their privacy, safety, health, integrity, and dignity. Plaintiffs' claims are timely. Each of their claims accrued well within the statute of limitations, because each of them learned that Defendants would not permit them to change the sex designation on their license well within two years of filing this lawsuit. Moreover, each Plaintiff suffers a continuing violation of her constitutional rights.

A. No Plaintiff's Claim Accrued More Than Two Years Before the Filing of the Complaint.

Defendants correctly assert that the applicable statute of limitations for a § 1983 claim is Alabama's general two-year limitations period. *Shows v. Morgan*, 40 F. Supp. 2d 1345, 1362 (M.D. Ala. 1999) ("All § 1983 actions commenced in Alabama are subject to the two-year limitations period set forth in the general provisions of the 1975 Code of Alabama § 6–2–38."). However, the statute of limitations begins to run only when the plaintiff has a 'complete and present cause of action.'" *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of California*, 522 U.S. 192, 195 (1997) (quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)). The statute does not begin to run before "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.'" *Rozar v. Mullis*, 85 F.3d 556, 561–62 (11th Cir. 1996); *see also Neeley v. Walker*, 67 F. Supp. 3d 1319, 1325 (M.D. Ala. 2014).

Defendants wrongly assert that Ms. Corbitt and Ms. Clark's claims are time-barred by the statute of limitations.[1] Ms. Corbitt and Ms. Clark filed suit on February 6, 2018 (Doc. 1). Ms. Corbitt's claim accrued, at the earliest, in August of 2017—only six months before the filing of this lawsuit. Ms. Corbitt arrived in Alabama from North Dakota in the summer of 2017. She went to the Lee County Driver License Office in August of 2017. Corbitt Dep. 41: 3-6. At that visit to the Lee County Driver License Office, the clerk refused to give Ms. Corbitt a driver's license with the correct sex designation. Corbitt Dep. 47:1-13. That was the first time Ms. Corbitt

[1] Defendants do not assert that Ms. Doe's claims are time barred.

sought a driver's license with an accurate sex designation, the first time she learned that Alabama would not issue her one, and thus, the first time she learned the facts underlying her claims. Corbitt Dep. 46: 8-12. Ms. Corbitt's claims are not time barred.

Ms. Clark's claims accrued, at the earliest, on February 3, 2017—only twelve months before the filing of this lawsuit. Ms. Clark first began trying to change the sex designation on her license in 2015, but did not receive a definitive response until February 2017. Indeed, in her first interaction with Defendant Jeannie Eastman in around April 2015, Ms. Eastman told Ms. Clark that the process was as easy as a keystroke. When Ms. Eastman did not change the sex designation on Ms. Clark's license, Ms. Clark reasonably believed she would be able to change the sex designation on her license after she underwent gender-affirming surgery, which she was planning to do in the relatively near future. It was only after she had surgery, submitted her paperwork, and learned on or after February 3, 2017 that Ms. Eastman had nonetheless refused to change the sex designation on her license that she had reason to believe she would not be able to obtain an accurate license that she could safely use. Clark Dep. 41:17-42:7. February 3, 2017 would thus be the earliest date of accrual, because that was on or before the date when the facts supporting her cause of action became apparent. *See Rozar*, 85 F.3d at 561–62. Thus, Ms. Clark's claims are not time barred.

Defendants claim that Ms. Corbitt and Ms. Clark should have known about Policy Order 63 long before they actually applied for corrected driver's licenses. But Policy Order 63 was not publicized, advertised, or available online until after this litigation commenced. Even people who work for ALEA do not know about Policy Order 63. For example, when Ms. Clark first tried to change the sex designation on her license, the clerk did not know the policy. She just told Ms.

Clark to contact Montgomery. Clark Dep. 37:7-15. It took Ms. Doe five tries contacting ALEA before she came to learn anything close to the actual policy. Doe Dep. 49:10-13.

Defendants argue that Ms. Corbitt and Ms. Clark should have become aware that they would be prohibited from changing the sex designation on their license when they changed the names on their licenses, before Ms. Corbitt had ever tried to change the sex designation on her license and before either of them had been informed that they would not be permitted to do so. Calculating the accrual of their claims from the date they changed their names is wholly arbitrary. When Ms. Corbitt and Ms. Clark changed their names, they did not receive any information about Policy Order 63 or how it would affect them. The injury of which they complain is not having a traditionally feminine name on a license with a male sex designation. The injury of which they complain is not being permitted to change the sex designation on their license to correspond to their actual sex, female.

In this way, their circumstances differ sharply from those of the plaintiffs in *Brown v. Ga. Bd. Of Pardons & Paroles*, 335 F.3d 1259, 1261 (11th Cir. 2003) and *Lovett v. Ray*, 327 F.3d 1181 (11th Cir. 2003). In *Lovett*, the defendants directly notified the plaintiff in 1998 that his parole would not be reconsidered until 2006. *Id.* at 1182. At that moment, he became aware of the facts supporting his cause of action, because he knew—having been specifically told—that Georgia would not reconsider his parole for another eight years, rather than the three he had expected. The situation was much the same in *Brown*. 335 F.3d at 1260. Unlike the plaintiffs in *Lovett* and *Brown*, Ms. Corbitt and Ms. Clark did not learn of the effects of Policy Order 63 the day they changed their names. Rather, they learned of those effects when they tried and were unable to change the sex designation on their licenses.

Even in circumstances making it much more likely that the plaintiff knows about the underlying policy, the statute of limitations still does not begin to run until the plaintiff learns about the government using that policy to cause injury to the plaintiff. In *Neeley*, the Alabama Legislature passed a law, referred to as Neeley's Law, specifically to keep the plaintiff from ever receiving parole consideration after the governor commuted her death sentence. 67 F.Supp. at 1323. Even with all of the media coverage of the law, and the fact that the law was created specifically to apply to the plaintiff and named after her, it still did not "justify the running of the statute of limitations" until the Board of Pardons specifically informed the plaintiff that the law "would apply… to her." *Id.* at 1326. There is absolutely no indication that Defendants applied their policy to Ms. Corbitt, or that they informed Ms. Corbitt of their policy, at the time when Ms. Corbitt changed her name on her driver's license. Nor did Ms. Clark have any reason to believe that she would not be able to change the sex designation on her license until the defendants informed her of that fact in 2017.

B. Defendants' Continue to Violate the Plaintiffs' Rights.

Even if the Court were to find that Ms. Clark's or Ms. Corbitt's claims somehow accrued prior to February 6, 2016, the surgery requirement of Policy Order 63 constitutes a continuing violation. When plaintiffs suffer a continuing violation of their rights, their claims are not barred under the statute of limitations. *See Lee v. Eleventh Judicial Circuit of Fla.*, 699 F. App'x 897, 898 (11th Cir. 2017); *Ctr. For Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006). This "Circuit distinguishes between the present consequence of a one time violation, which does not extend the limitations period, and the continuation of that violation into the present, which does." *City of Hialeah v. Rojas*, 311 F.3d 1096, 1101 (11th Cir.2002) (quotations omitted).

It has long been a principle of civil rights claims that unconstitutional laws cannot be insulated from challenge by the statute of limitations. *See Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). "The continuing violation doctrine permits a plaintiff to sue on an otherwise time-barred claim when additional violations of the law occur within the statutory period." *Robinson v. United States*, 327 F. App'x 816, 818 (11th Cir. 2007). For example, an ordinance offensive to the First Amendment cannot be "insulated from challenge by a statutory limitations period." *Nat'l Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1168 (4th Cir. 1991). When a "violation occurs as a result of a continuing policy, itself illegal, then the statute does not foreclose an action aimed at the company's enforcement of the policy within the limitations period." *Perez v. Laredo Junior College*, 706 F.2d 731, 733–734 (5th Cir. 1983).

"The critical distinction in the continuing violation analysis ... is whether the plaintiffs complain of the present consequence of a one-time violation, which does not extend the limitations period, or the continuation of that violation into the present, which does." *Knight v. Columbus, Ga.*, 19 F.3d 579, 580–81 (11th Cir.1994) (internal marks omitted); *see also Omanwa v. Catoosa County.*, 711 F. App'x 959, 962 (11th Cir. 2017). For example, a false arrest is not a continuing violation because it is a discrete wrong that happens on a particular day and then ends, rather than something that continues to occur over time. *See Parrish v. City of Opp, Ala.*, 898 F. Supp. 839, 843 n.2 (M.D. Ala. 1995). In *Lovett* and *Brown*, the violation was a "one time act with continued consequences," *Lovett*, 327 F.3d at 1183, because on a particular date the parole board set another specific date for a parole hearing. *Brown*, 335 F.3d at 1261.

When injury is caused not by a one-time act but by ongoing actions, the claim is not time barred. The Eleventh Circuit found that the continuing violation doctrine applied where a prisoner alleged facts permitting an inference that unconstitutional conditions, including

exposure to scabies and lack of treatment for a hernia, continued until a time within the limitations period. *Robinson*, 327 F. App'x at 818. Similarly, in *Eldridge v. Bouchard*, plaintiffs could bring a § 1983 lawsuit challenging a law they learned about well before the relevant limitations period because the law continued to result in their underpayment each pay period. 620 F. Supp. 678, 682 (W.D. Va. 1985).

In the instant case, the ongoing enforcement of Policy Order 63 constitutes a continuing violation. Unlike in a false arrest case, this was not a one-time act. It is blanket policy that not only prevented the Plaintiffs from obtaining an accurate, useable license on a single occasion in the past, but continues to prevent them from obtaining one today and every day in the future until Policy Order 63 no longer contains a surgery requirement. *See Perez*, 706 F.2d at 733 (limitations period had not begun to run even though plaintiff had made a specific request for more compensation, gotten denied, appealed the denial, and received a final determination on a particular date, because he continued to receive less compensation than he was entitled to). The two-year limitations period should not start to run until the "end of a continuing violation." *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526, 563 (N.D. Tex. 2000).

At each moment of every day, Defendants prevent Plaintiffs from changing the sex designation on their driver's licenses, and thus cause the constant violation of their rights to privacy, due process, free speech, and equal protection of the law. Because ALEA has not yet removed the surgery provision from Policy Order 63, the clock has not yet begun to run on the two-year statute of limitations for Plaintiffs.

II. Defendants Are Not Entitled to Summary Judgment on Plaintiffs' Right to Privacy Claim.

Defendants argue that Policy Order 63 does not violate Plaintiffs' right to privacy. First, Defendants state that a sex designation is "not the sort of confidential information protected by

the Fourteenth Amendment." Doc. 54 at 28. Second, Defendants state that Plaintiffs only have to reveal their license to law enforcement officers and court personnel, and they can use a passport for other things. *Id.* Third, Defendants state that Plaintiffs disclose their transgender status on social media and in public. *Id.* They are mistaken in each of their arguments.

A. Policy Order 63 Forces Plaintiffs to Disclose Their Transgender Identity When They Show Their Driver's Licenses, Which Violates Their Right to Privacy.

Plaintiffs and Defendants agree that there is a "constitutionally protected 'zone of privacy'" which includes an "individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 598-99 (1977); Doc. 51, page 44; Doc. 54, page 28. However, Defendants disregard the core of informational privacy—protecting information about sexual, medical, and mental health. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2323 (2016), *as revised* (June 27, 2016) (sexual, medical); *United States v. Kravetz*, 706 F.3d 47, 63 (1st Cir. 2013) (medical, mental health); *United States v. Brice*, 649 F.3d 793, 796 (D.C. Cir. 2011) (medical, mental health); *Aid for Women v. Foulston*, 441 F.3d 1101, 1124 (10th Cir. 2006) (sexual, medical); *Livsey v. Salt Lake Cty.*, 275 F.3d 952, 956 (10th Cir. 2001) (sexual, medical); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) (sexual); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 580 (3d Cir. 1980) (medical); *Hirschfeld v. Stone*, 193 F.R.D. 175, 183 (S.D.N.Y. 2000) (sexual, medical).

Defendants rely on *Collier*, a case that does not involve disclosure of transgender status or any other sort of intimate personal information. In *Collier*, the state of Florida, in violation of the Driver Privacy Protection Act ("DPPA"), released information in the form of mailing lists to mass marketers. *Collier v. Dickinson*, 477 F.3d 1306, 1308 (11th Cir. 2007). An Eleventh Circuit panel said that the district court did not err in finding no constitutional violation, based on a footnote from *Pryor v. Reno*, 171 F.3d 1281, 1288 n. 10 (11th Cir.1999), *rev'd on other grounds*,

528 U.S. 1111 (2000). In *Pryor*, the court held that the DPPA was a valid exercise of congressional power under the commerce clause, but noted in dicta that it was not a valid exercise of congressional enforcement powers under the Fourteenth Amendment. *Id.* The court stated that a constitutional right to privacy did exist for "*intimate personal information*," but not generally for motor vehicle records (records pertaining to "a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card"). *Id.* at 1288 n. 10, 1283 n.2.

The instant case is not about the DPPA or about the disclosure of mailing lists for mass marketing; it is about *intimate personal information*. The only similarity is that the three cases involve driver's licenses in some way. But here, the transgender Plaintiffs risk violence, harassment, and discrimination every time they have to reveal that they are transgender through showing their driver's licenses, in person, to a stranger, which is a concern not present in *Collier* or *Pryor*. Defendants do not deny that Plaintiffs' licenses let strangers know that they are transgender, which is exactly the sort of intimate information that is most confidential according to the federal courts. (Doc. 54, 30); *see e.g. Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 334 (D.P.R. 2018); *Love*, 146 F. Supp. 3d at 855; *Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D. Conn. 1975).

B. The Ability to Use a Passport in Some Circumstances Does Not Justify Violation of Plaintiffs' Privacy through Their Driver's Licenses

Defendants try to wave away the intimate nature of the disclosure and the danger it causes by declaring that "Alabama law requires Plaintiffs to display their driver license only in limited circumstances." In other words, Defendants' actions only result in legally-compelled disclosure of intimate information about Plaintiffs in circumstances that endanger them on

occasion, rather than all the time, and thus, in Defendants' estimation, the disclosure does not matter. Defendants cite no case law for this curious philosophy.

In fact, Defendants disregard all cases specific to the issue at hand. The personal safety and bodily integrity of transgender people becomes threatened when the government forces information about transgender status to be disclosed. *See Doe v. Frank*, 951 F.2d 320, 324 (11th Cir. 1992) (noting that there is "social stigma attached to being transgender"); *Whitaker ex rel. Whitaker* 858 F.3d 1034,1051 (7th Cir. 2017); *In re E.P.L.*, 891 N.Y.S.2d 619, 621 (N.Y. Sup. Ct. 2009). One's transgender status is a matter that can be "highly sensitive and [of a] personal nature," disclosure of which creates "real danger of physical harm." *Frank*, 951 F.2d at 324. Plaintiffs already experience this risk. Ms. Doe has been denied services by a bank teller who told her she was going to hell after she saw Ms. Doe's license. Doe Dep. 78:11-79:4. Ms. Doe has been harassed at restaurants and bars. Doe Dep. 35:19-23; 36:1-4; Doe Decl., at ¶ 17.

Even if the disclosure did only happen to law enforcement officers, that would still be too much. When a police officer noticed the incorrect gender maker on Ms. Doe's license, he disclosed that she was transgender to others, causing Ms. Doe to have to leave her job. Doe Decl., at ¶ 15; Doe Dep. 35:3-18. When a police officer noticed the incorrect gender marker on Ms. Clark's license, the officer's demeanor shifted rapidly from friendly to rude. Clark Dep. 33:6-14; 34:3-7. Ms. Corbitt was deeply frightened when her transgender status was publicly disclosed within the hearing of a state trooper and the trooper began looking at her in a way she could not interpret. Corbitt Dep. at 44:8-46:19. These fears are justified given an unfortunate record of police misconduct against transgender people. *See* USTS at 14; *Violence Against the Transgender Community in 2017*, Human Rights Campaign, attached as Pls.' Ex. 71.

Courts have consistently concluded that denying transgender individuals the ability to change their sex on a driver's license or birth certificate infringes on their right to privacy. *See Love*, 146 F. Supp. 3d 848 at 856 ("[B]y requiring Plaintiffs to disclose their transgender status, the Policy directly implicates their fundamental right of privacy"); *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles No. 3AN–11–05431 CI*, 2012 WL 2685183, *6 (Alaska Super. Ct. Mar. 12, 2012) ("[O]ne's transgender[] status is private, sensitive personal information"); *see also Arroyo Gonzalez*, 305 F. Supp. 3d at 333 ("forced disclosure of plaintiffs' transgender status violates their constitutional right to decisional privacy."). Courts find that these policies require individuals to use identification with a gender marker that conflicts with their lived sex, forcing them to reveal their transgender status to complete strangers, causing embarrassment and risk of bodily harm. *Love*, 146 F. Supp. 3d at 853; *see K.L.*, 2012 WL 2685183 at *7; *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1140 (D. Idaho 2018); *Arroyo Gonzalez*, 305 F. Supp. 3d at 333.

Defendants also suggest that transgender individuals in Alabama should start using passports as much as possible to avoid the unwanted disclosure of their transgender status. But Plaintiffs should not have to do so. Alabama may not condition access to a government benefit like a driver's license on giving up the right to privacy. *Lebron v. Sec'y, Fla. Dep't of Child & Fam.*, 710 F.3d 1202, 1217 (11th Cir. 2013). As more fully set forth in Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment, a driver's license functions as a valuable government benefit. Doc. 51, 23-25.

Moreover, as Defendants point out, the Plaintiffs can be—and have been—compelled to display their licenses to judges, peace officers, and state troopers under state law. Ala. Code § 32-6-9. They can also be compelled to show a license to other people if involved in a traffic accident. Ala. Code § 32-10-2. But that is only the tip of the iceberg. This Court recently held

that a state-issued photo ID is "a virtual necessity for most Americans[.]" *Doe 1 v. Marshall*, No. 2:15-CV-606-WKW, 2019 WL 539055, at *7 (M.D. Ala. Feb. 11, 2019) (citing *Wooley v. Maynard*, 430 U.S. 705, 715 (1977)) (internal citations omitted). Ms. Corbitt cannot obtain entry to spaces she must go for work with a passport. Corbitt Dep. 37:19-38:2. The sex designation on a driver's license could put a transgender Alabamian at risk if pulled over by a police officer "on a dark country road," (Corbitt Dep. 58:1-21) "travelling by plane, applying for employment, applying for public benefits, filling prescriptions, purchasing alcohol, applying to and attending college, checking into a hotel, renting a car, voting, opening and using a checking account, using a credit or bank card, travelling internationally, [or doing any] number [of] other things that most of us take for granted." Gorton Decl., at ¶ 28.

Passports are valuable documents vulnerable to theft in a way that licenses are not. Katharine Lagrave, 4 Ways People Steal Your Passport, Conde Nast Traveler (Aug. 15, 2016), attached as Pls.' Ex. 63. Ms. Clark testified that she has worked in the food and beverage industry for over thirteen years and has "never had anyone to present a passport for age verification." Clark Dep. 79:3-15. She remarked that she would be "shock[ed]" if she ever saw a passport used to buy alcohol. *Id.* 79:19. In *Doe1*, the state also argued that "Plaintiffs could use a passport," to which this Court responded that "a passport is a poor substitute for a state-issued ID. Passports are cumbersome and highly sought-after on the black market. They also cost money. A passport book is $145, and a passport card is $65." *Doe 1*, No. 2:15-CV-606-WKW at *8. Indeed, Ms. Corbitt keeps her passport in her safety deposit box to prevent theft; Ms. Doe has had her use of a passport questioned when she has tried to check into a hotel; and Ms. Clark has never gotten a passport. Corbitt Dep 62:3-12; Doe Dep 79:13-18; Clark Dep. 71:1-12.

Having a passport does not protect Plaintiffs from the government forcing "them to disclose their transgender status in violation of their constitutional right to informational privacy. Such forced disclosure of a transgender person's most private information is not justified by any legitimate government interest." *Arroyo Gonzalez*, 305 F. Supp. 3d at 333. Plaintiffs may not be forced to go without a driver's license to avoid violation of their constitutional rights.

C. Ms. Corbitt and Ms. Clark Retain a Privacy Interest in Deciding Whether and When to Disclose Their Transgender Identity.

Defendants argue that Ms. Corbitt and Ms. Clark lose all constitutional protection of their privacy with regard to their transgender status because they have disclosed that they are transgender to other people in some contexts. But the Constitution does not permit the government to violate the right to privacy of private parties just because they have not kept their intimate personal information completely secret. *See Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (citing *Katz v. United States*, 389 U.S. 347, 351-52 (1967)) (A "person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, 'what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.'"); *Ann-Margret v. High Soc. Magazine, Inc.*, 498 F. Supp. 401, 404 (S.D.N.Y. 1980) (a public figure "does not, simply by virtue of his or her notoriety, lose all rights to privacy[.]").

Telling one group of people something personal is not the same as being forced to tell the public at large. The Fifth Circuit recognized a substantial privacy interest in financial records including assets and sources of income. *See Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978).[2] That was true even though some people inevitably would already have access to that

[2] *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (decisions of Fifth Circuit from before Circuit split continue to be binding in Eleventh Circuit).

information—at a minimum, the IRS, financial institutions and employers, and probably also close family members, co-workers, business associates, lawyers, and accountants.

Sharing one's intimate personal information in a public context does not waive one's constitutional right to privacy. This Court ruled that a teacher did not lose her constitutional right to privacy because she answered "questions about her sexual relations before the Covington County Board of Education." *Drake v. Covington Cty. Bd. of Educ.*, 371 F. Supp. 974, 980 (M.D. Ala. 1974). The teacher had been fired for alleged immorality because she had gotten pregnant while unmarried. This Court found that the cancellation of her teaching contract violated the teacher's "constitutional right of privacy." *Id.* at 979. In reference to the teacher discussing her sexual relations publicly, the concurrence states, "While it is true that an individual may lose his tortious right of privacy by openly and publicly discussing a particular matter, courts indulge in every reasonable presumption against the waiver of constitutional rights." *Id.* at 980. "A waiver of constitutional rights in any context must, at the very least, be clear." *Fuentes v. Shevin*, 407 U.S. 67, 95 (1972); *see also Sedersten v. Taylor*, No. 09-3031-CV-S-GAF, 2009 WL 4802567, at *3 (W.D. Mo. Dec. 9, 2009) (finding that a person does not waive his or her constitutional rights by posting a comment online).

Defendants propose that Ms. Corbitt and Ms. Clark accept the risk of harm, death, and humiliation when showing their driver's licenses to strangers in bars, at airports, on dark country roads, at hotels, at car rental locations, at job locations, at pharmacies, at government offices, at colleges, at polling places, at banks, at any place where a credit or bank card might be used, at any location where there might be any interaction with court personnel, and at any location where there might be any interaction with law enforcement officials because they have shared that they are transgender through social media and at transgender or LGBTQ events. Making

tailored disclosures to a limited, friendly audience in person or to those who specifically search for one's name online is not the same as being forced to reveal one's transgender status in person to potentially hostile strangers. The latter is what Policy Order 63 forces on the Plaintiffs.

Plaintiffs did not waive their right to privacy when they chose to share personal information with a select group of people who chose to attend a transgender or LGBT-specific event, or to people who sought out their social media pages. *See* Corbitt Dep. 59:11-21; Clark Dep. 80:1-82:6; *Fuentes*, 407 U.S. 67 at 95. Like the teacher in *Drake*, Ms. Clark and Ms. Corbitt have made disclosures to a public audience—arguably a much friendlier and narrower audience than a public school board hearing; like the teacher in *Drake*, they have not lost their right to privacy. In the same way, one does not lose one's right to privacy in not having police conduct an unwarranted search of one's home because of having church meetings on Friday nights in one's living room. *See Carpenter*, 138 S. Ct. at 2217.

When Plaintiffs have to show their driver's licenses, they are more likely to be face-to-face with someone whose reaction to this information is unpredictable, in a situation where they do not have friends or allies nearby. *See* Corbitt Dep. 41:11-43:21; Clark Dep. 82:7-20. Dealing with hate messages sent through social media or offensive reactions from an audience member when surrounded with other transgender people does not carry nearly the same level of immediate material threat. Also, crucially, in settings like an LGBT event or Facebook page, it is the Plaintiffs' own choice whether and how to disclose their private information. *See* Corbitt Dep. 58:1-21; 59:11-21; Clark Dep. 80:1-10, 81:12-82:20.

The Constitution does not permit the government to force the Plaintiffs to disclose their transgender status in circumstances where they would never have otherwise done so just because they do not keep this information completely secret.

D. Jane Doe Does Not Share Her Transgender Identity Publicly.

While even if she had deliberately disclosed her transgender identity to the public she still would not have waived her privacy rights, Ms. Doe tries to avoid letting other people know that she is transgender. Unlike Ms. Clark and Ms. Corbitt, and in part because of her experience of hate violence, Ms. Doe chooses to keep her trans identity as private as possible. Doe Decl. ¶ 8, 14. The Defendants wildly mischaracterize Ms. Doe's testimony. The deposition transcript makes clear that Ms. Doe endeavors to keep her trans identity private, and that when she has not succeeded in doing so, it has usually been her driver's license that has caused her identity to become exposed. At most, these facts are disputed and do not warrant summary judgment for Defendants.

First, Jane Doe states that she does not identify herself as "trans out in public, however, I have been identified as a transperson." Defendants mischaracterize Ms. Doe's testimony in their brief, stating "Doe's friends know she is transgender and she is open as a transgender woman at her current job." Doc. 54, 33. Ms. Doe is a middle-aged woman who only recently socially transitioned. Her friends know that she is trans because when they first met her, they perceived her to be a man, and now, they know that she is a woman. Doe Dep. 50:5-9. The only way her friends would not know she is trans is if all her friends had abandoned her when she transitioned, and she had to make entirely new friends. Thankfully, that did not come to pass.

People at work only know that Ms. Doe is transgender because of her driver's license. Ms. Doe explains, "when I had to go through HR and my driver's license was incongruent with—the gender marker and name was off. So working with insurance trying to figure out how they were going to file the insurance it came out obviously that I was trans—a trans individual." *Id.* 50:21-51:8. Thankfully, this employer did not discriminate against her. But involuntary

disclosure of trans identity through her driver's license is not the same as publicly broadcasting her trans identity because she wishes to do so.

As for Ms. Doe's Facebook page, Ms. Doe had no idea that her profile picture was publicly viewable even though her account was otherwise set to friends only. "They shouldn't be able to see anything I post. I don't post public." Doe Dep. 52:21-23. "Again, I didn't know the public would have that readily available to my posts." Doe Dep. 64:3-5. Many Facebook users do not fully understand what data on their Facebook profile is publicly accessible. Will Oremus, Facebook Changed 14 Million People's Privacy Settings to "Public" Without Warning, Slate (June 7, 2018), attached as Pls.' Ex. 60; Brian Barrett, The Facebook Privacy Setting That Doesn't Do Anything At All, Wired (March 27, 2018), attached as Pls.' Ex. 61; Alex Hern, Facebook is Chipping Away at Privacy—and My Profile Has Been Exposed, The Guardian (June 29, 2016), attached as Pls.' Ex. 62. No evidence suggests that Ms. Doe had any knowledge that her profile picture could be viewed by the public.

But regardless, the only way in which her picture alluded to transgender identity was through including slogans as "banners," such as "Transpeople Won't Be Erased." Doe Dep. 62:18-21. That is not the same as disclosing one's transgender identity. In fact, Ms. Doe also had a "banner" on her profile picture that states, "Together Against Antisemitism," although Ms. Doe is not Jewish. Doe Dep. 77:4-11. When someone tweets "#BlackLivesMatter," that statement alone does not disclose the race of the tweeter—people of all races have tweeted that message. If someone updates a Facebook status saying, "End HIV Stigma," someone reading that Facebook page still would not know whether the poster was living with HIV. And if the poster were in fact living with HIV, they would still have a constitutional right to privacy preventing the government from disclosing that information to others without sufficient justification. While Ms.

Doe at one point misspoke when answering a question about whether her driver's license disclosed anything about her transgender status that she did not disclose through Facebook, she clarified later during that same deposition that her license does convey that she is transgender, something that people cannot learn from her Facebook profile. Doe Dep. 75:16-76:11. Defendants' brief includes the misstatement and omits the clarification.

Grasping at straws, Defendants also claim that Ms. Doe publicly revealed that she is a transgender woman by staffing an outreach table for her employer at a transgender community event. Other people staffing tables at the event were not transgender. Doe Dep. 76:21-23. Many of the people attending the event were not transgender. Doe Dep. 77:1-3. The banner at the event read "TAKE." *Id.* at 59:19-60:3. One would have to approach close enough to read the smaller print to find out that TAKE stands for Transgender Awareness Knowledge and Empowerment. *Id.* at 60:4-6. There is no reason to assume that anyone would know that Ms. Doe was transgender simply because her work brought her to that location.

Defendants' arguments imply that to retain any right to privacy with regard to her transgender status, Ms. Doe would have to shun the transgender community completely, and avoid endorsing any message acknowledging the humanity of transgender people. The constitution contains no such requirement. The "constitutional right to privacy does not [force plaintiffs] to keep secret matters that are of an intimate or personal nature." *Drake*, 371 F. Supp. at 981 n.4.

III. Defendants Are Not Entitled to Summary Judgment Because They Have Conditioned a Government Benefit on Plaintiffs Giving up Their Right to Refuse Medical Care

Policy Order 63 also infringes on Plaintiffs' fundamental right to refuse medical care. Defendants attempt to reformulate the right at stake and argue that it is not fundamental. But the right is not to obtain "a driver license with a sex designation of the gender with which they

identify without having a surgical change of sex characteristics that include genital reassignment." Doc. 54 at 35. Rather, the right is that of a competent adult to refuse sterilizing surgery. *See* Gorton Decl. ¶ 43. This right is fundamental. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990); *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942).

Defendants also assert that they do not condition a driver's license on receipt of such surgery. It is true that Ms. Clark and Ms. Doe currently have Alabama driver's licenses, and that Ms. Corbitt could obtain one were she willing to attest to a painful lie, give up her accurate and safely useable out-of-state license, and sacrifice her dignity. What none of the Plaintiffs have, and what none of them can get while Policy Order 63 stands, is an Alabama driver's license that accurately states their sex, or that they can use without putting themselves in danger of harassment, discrimination, and violence and contradicting their fundamental sense of self. They could only obtain that benefit, a benefit available to Alabama drivers who are not transgender without condition, if they underwent surgery that would permanently end their reproductive capacity, that may not be in their medical best interests, that they may not be able to afford (Ms. Doe cannot), that they may not want (Ms. Clark does not), and that may not accord with their understanding of what God wants for them at this time (for Ms. Corbitt, it does not). Doe Decl. ¶ 20; Clark Dep. 43:1-4; Corbitt Decl. ¶ 13-14.

Defendants note that some courts have found force feeding of detainees acceptable. Courts have also, however, found that detainees have diminished rights as compared to people who are not in detention, like Plaintiffs. *See e.g. Turner v. Safley*, 482 U.S. 78, 89 (1987).

But it is notable that even in those situations where people are both incarcerated and not competent to make their own decisions, they still cannot be subjected to treatment against their

will unless procedural safeguards are in place, the government proves that treatment is medically appropriate, and the government proves that no less restrictive means are available to accomplish government objectives. *See e.g.*, *Sell v. United States*, 539 U.S. 166, 180-81 (2003) (holding that the government may only forcibly medicate someone who is not otherwise competent to stand trial for a crime if important governmental interests are at stake; the involuntary treatment will significantly further those interests; and involuntary treatment is necessary to further those interests and in the person's best medical interest); *United States v. Diaz*, 630 F.3d 1314, 1331 (11th Cir. 2011) (holding government bears burden of proof by clear and convincing evidence to impose treatment on someone under *Sell*); *Washington v. Harper*, 494 U.S. 210, 221 (1990) (requiring individualized showing that prisoner has a serious mental illness, is dangerous to self or others because of that serious mental illness, and that involuntary medication would be in the applicant's medical interests). In the case cited by Defendants, the court found involuntary treatment necessary to preserve the life of the detainee. *In re Soliman*, 134 F. Supp. 2d 1238, 1257 (N.D. Ala. 2001). Defendants have made no showing here that treatment with genital surgery is necessary to preserve the lives of Plaintiffs, or even that it would be medically appropriate.

That Defendants have not literally physically forced sterilizing surgery on Plaintiffs against their will is no answer. "'[W]hat the state may not do directly it may not do indirectly.'" *Lebron.*, 710 F.3d at 1217, quoting *Bailey v. Alabama*, 219 U.S. 219, 244 (1911).

IV. Defendants Are Not Entitled to Summary Judgment Because Their Policy Compels Speech

Defendants argue that they are entitled to summary judgment because the sex designations on licenses constitute government speech, and Plaintiffs only need to show their licenses to others in limited circumstances. They are mistaken.

It is true that the sex designation on a driver's license is government speech. But that is the beginning, not the end, of the analysis. While the government is entitled to speak on its own behalf, it may not compel anyone to endorse, carry, or associate themselves with a message with which they disagree. In *Walker*, the plaintiff was trying to make the state government issue a new sort of specialty license plate that conveyed the plaintiff's message, not objecting to a message the government forced the plaintiff to carry. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2252–53 (2015). As the Supreme Court explained in that case, "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 of private persons . . . [W]e have recognized that the First Amendment stringently limits a State's authority to compel a private party to express a view with which the private party disagrees." *Id.*

Defendants contend that "Plaintiffs sex designations on their licenses do not express the ideological message that they are somehow not 'real' women, but rather communicates information to law enforcement officers about their physical description." Doc. 54 at 39-40. But a male sex designation does express the message that Plaintiffs are not "real" women. It is difficult to imagine any more direct way to express that ideology, or to compel individuals to endorse it. Even if the sex designation were merely "information," as Defendants assert, that would not save it from constitutional infirmity. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797–98 (1988) ("These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech").

Indeed, Defendants appear to concede that the sex designation on a license is speech with which the Plaintiffs disagree, but contest whether Plaintiffs are compelled to associate with the

message. Defendants argue that under most circumstances, Plaintiffs do not need to show a driver's license. But the government is not permitted to compel individuals to speak at all; it is no defense to say that the government only compels the Plaintiffs to speak sometimes or to some audiences. One could as easily have argued that the plaintiff in *Wooley,* who objected to bearing the message "Live Free or Die" on his license plate, could opt not to drive or to leave his car in a garage. *Wooley*, 430 U.S. at 713. And even if Plaintiffs were never *required* to show their driver's licenses, the government may not condition receipt of a benefit on giving a constitutional right. As described more fully above, that Ms. Corbitt and Ms. Doe have passports and Ms. Clark is eligible to obtain one is beside the point.

Defendants also argue that a reasonable person would not associate Plaintiffs with the message about their sex contained on their driver's licenses. But that is simply not so. A reasonable person would assume that, when showing a driver's license, the license holder represents that the information on the license is an accurate description. At the least, Plaintiffs have produced sufficient evidence to permit a reasonable factfinder to so find.

While Defendants assert that the facts of this case more closely resemble *Mayle* than *Wooley*, the opposite is true. In *Wooley*, the Court found that drivers had the right to avoid becoming a courier for the message "Live Free or Die" through bearing it on a license plate. In *Mayle,* the court found that a reasonable person would not associate someone with the message "In God We Trust" when using U.S. currency. Currency is wholly fungible by design and function; a single bill may change hands hundreds of times before it leaves circulation. Gottfried Leibbrandt, *How fast is that buck? The velocity of money,* Statistics of Payments, Swift Institute, (2012), attached as Pls'. Ex. 65. Its primary purpose is not expressive, and it makes no statement specific to any individual holder of currency. It may well be that "the recipient of cash in a commercial

transaction could not reasonably think that the payer is proselytizing." *Mayle v. United States*, 891 F.3d 680, 686 (7th Cir. 2018), *cert. denied*, No. 18-583, 2019 WL 113170 (U.S. Jan. 7, 2019). By contrast, unlike a dollar bill that hundreds or thousands of people use, each driver's license is unique to each individual, and the viewer of a driver's license would have every reason to believe that the presenter of the license represents the contents to be true. One is guilty of a felony if one presents false identification. Ala. Code §§ 17-17-28; 13A-8-194. Defendants' expert stated that a transgender man could be arrested for possession of a false instrument because of the disparity between a female sex designation and a masculine appearance. Leach Dep. 57:19-58:10.

A driver's license is a non-fungible document one must carry at all times while driving. Ala. Code § 32-6-9(a). Its primary purpose is expressive. Indeed, its purpose is to convey a message identifying and describing the individual who carries it—in Chief Pregno's words, to "prove you are who you say you are." Pregno Dep. 53:18-54:1. That 99% of people who carry Alabama licenses agree with its message about their gender does not negate the right of transgender people "to refuse to foster…an idea they find morally objectionable." *Wooley*, 430 U.S. at 715. Here, Alabama literally "compel[s] its citizens to carry" a license with a message that offends the Plaintiffs' beliefs—indeed, their very sense of self. *See N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1566 (11th Cir. 1990).

V. Defendants Are Not Entitled to Summary Judgment Because They Have Discriminated Against Transgender People Without Adequate Justification.

Policy Order 63 facially discriminates on the basis of sex. It serves no important government interest, nor is it even rationally related to a legitimate government interest.

A. Defendants Have Discriminated Against Plaintiffs Because of Sex.

Defendants argue that Policy Order 63 does not discriminate on the basis of sex or transgender status and merely has a disparate impact on transgender people. But a reasonable

fact-finder could conclude that when Defendants created and enforced a policy that prevents transgender people from changing their sex designation without undergoing genital surgery, they were acting on the basis of sex and transgender status.

Defendants downplay the intent behind the policy by asserting that it only disproportionately impacts transgender people. In fact, it only applies to transgender people. It is true that the record shows that one intersex person was able to obtain a change of sex designation on a driver's license. Defs.' Ex. 16, (D1165). Most intersex people are not transgender—that is, they identify with the sex they were assigned at birth. Some intersex people are transgender—that is, they identify with a sex other than the one they were assigned at birth. Interestingly, though, Defendants' brief suggests that they view intersex and transgender as mutually exclusive groups. Doc. 54 at 43 ("But it does not *solely* affect transgender individuals but also, for example, those with intersex conditions."). To the extent they do not see any intersex people as transgender, that may explain why the record shows that Defendants approved a change of sex designation for an intersex applicant without proof that the applicant had undergone surgery. Defs.' Ex. 16, (D1165). Rather than disprove discrimination against transgender people, that fact tends to show deliberate targeting of transgender people.

People who are not transgender in Alabama can get a driver's license that accurately reflects their gender and that they can use without contradicting their fundamental sense of self and exposing themselves to risk of violence. They can do this regardless of whether they have ever had any sort of surgery. They can do this without permanently losing their fertility. *See* Gorton Decl. ¶ 43. They can even do this if they do not have genital anatomy typical for their gender, as sometimes happens for those who are born with intersex conditions, undergo

treatment for cancer or certain other conditions, or experience traumatic injury to the genital area. *See* Gorton Decl. ¶ 51.

By design, Defendants' policy subjects *only transgender people* to a requirement that they undergo genital surgery (or amend the sex designation on a birth certificate, which typically also requires surgery) and share proof of that surgery with the government before they can obtain a driver's license that accurately reflects their sex and that they can use safely. No 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.

B. Policy Order 63 Cannot Survive Heightened Scrutiny.

Defendants claim that their policy survives heightened scrutiny. They are mistaken. Defendants quote portions of the opinions in *United States v. Virginia*, 518 U.S. 515 (1996), and *Nguyen v. INS*, 533 U.S. 53 (2001), out of context to defend their policy. The portion of *United States v. Virginia* quoted by Defendants does acknowledge differences between men and women, but goes on only to state that those differences can justify affirmative action programs for women. *Virginia*, 518 U.S. at 533. Defendants have produced no evidence to suggest they discriminate against transgender people to create affirmative action programs, nor would any such evidence be credible on these facts.

In *Nguyen v. I.N.S.*, the Court accepted different statutory treatment of a U.S. citizen parent who gives birth to a child compared to a U.S. citizen parent who does not give birth for purposes of determining whether a child receives U.S. citizenship. In that case, the Court held that proof of the parent-child relationship was an important government interest, and that it made sense not to require the same proof from parents who literally give birth to their children—making parentage obvious—as from parents who contribute genetic material but do not give

birth. *Nguyen*, 533 U.S. at 62. The context here could hardly be more different. Whether one can or has given birth simply has no relevance to identification or ability to drive.

Defendants offer two government interests to justify their policy. First, they offer the interest of maintaining consistency with the state birth certificate policy. But they provide no explanation at all of why that interest is important.

Many states do not have a consistent policy for changing sex designation on driver's licenses and birth certificates. For example, in Arkansas, to change the sex designation on one's birth certificate, one must show a court order stating that sex has been changed "by surgical procedure." Ark. Code Ann. § 20-18-307(d). But to change the sex designation on one's driver's license, one simply needs to indicate whether one prefers F, M, or X to be listed, with no medical documentation required. Email from Gayle Boliou, Supervisor, Driver Services, Department of Finance and Administration, re Forms Request (Apr. 7, 2011), attached as Pls.' Ex. 66; Curtis M. Wong, Arkansas Has Been Offering a Nonbinary Gender Option on State IDs for Years, Huffington Post (Oct. 17, 2018), attached as Pls.' Ex. 67.

In the District of Columbia, one needs a signed statement from a medical provider stating that the applicant has "undergone surgical, hormonal or other treatment appropriate for the individual for the purpose of gender transition" to change the sex designation on a birth certificate. District of Columbia Department of Health, Gender Designation Policies, Procedures, and Instructions, attached as Pls.' Ex. 68. But to change the sex designation on a D.C. driver's license, one simply needs to fill out a form stating whether one wants M, F, or X to appear on one's license. District of Columbia Dep't of Motor Vehicles, Procedure for Establishing or Changing Gender Designation on a Driver License of Identification Card (2017), Pls.' Ex. 22.

Similarly, in Massachusetts, one needs an affidavit from a medical provider stating that the applicant "has completed medical intervention, appropriate for the patient, for the purpose of permanent sex reassignment" to change the sex designation on a birth certificate. Registry of Vital Records and Statistics, Massachusetts Dep't of Pub. Health, Physicians Statement in Support of Amendment of a Birth Certificate Following Medical Intervention for the Purpose of Sex Reassignment (Apr. 1, 2016), attached as Pls.' Ex. 69. But to change the sex designation on a driver's license, one simply needs to submit an attestation of one's gender identity. Registry of Motor Vehicles, Massachusetts Gender Designation Change Form, attached as Pls.' Ex. 70.

Neither during depositions nor now in briefing have Defendants offered the slightest rationale for why consistency between these two standards matters to the government. No evidence suggests that Alabama has unique interests in maintaining consistency between birth certificate and driver's license standards. Chief Pregno could think of no reason why Alabama's needs might differ from those of other states. Pregno Dep. 118:19-119:1.

The importance of this interest is also belied by the state's own law and policy. Birth certificates and driver's licenses inevitably have numerous inconsistencies. For example, birth certificates record information about parentage and place of birth not included on driver's licenses. Driver's licenses record information about current address and driving restrictions not included on birth certificates. It is possible for people to amend the name on their birth certificate but not the name on their driver's license or vice versa. Pregno Dep. 105:14-18. It is possible for people to amend the sex designation on their birth certificate but not the sex designation on their driver's license or vice versa. Pregno Dep. 105:19-23. State statute creates a judicial procedure for changing the sex designation on a birth certificate and has created no comparable judicial procedure for changing the sex designation on a driver's license. Ala. Code § 22-9A-19. If

consistency between birth certificates and driver's licenses were truly an important government interest, Alabama has done a poor job serving it.

Second, Defendants assert an interest in law enforcement identification. However, it is undisputed that this interest is post hoc. According to the 30(b)(6) testimony of Chief Pregno, who issued the most recent version of the policy, law enforcement identification was not considered at the time the policy was created or revised. Pregno Dep. 45:3-12; 47:4-23.

Defendants claim that their expert's testimony about this interest is not post hoc because of an Eleventh Circuit decision issued late in 2018. Defendants misunderstand the meaning of post hoc. What is relevant for constitutional purposes is why the government actually created Policy Order 63 at the time it created it, not what happens later. *Virginia*, 518 U.S. at 533; *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011).

Even if somehow consideration of law enforcement identification were appropriate under heightened scrutiny, Policy Order 63 does not substantially further that interest. Policy Order 63 makes law enforcement identification of individuals more difficult, because it prevents them from having access to the most up-to-date and salient information about a person's sex. *K.L.*, 2012 WL 2685183, at *7; *F.V.*, 286 F. Supp. 3d at 1142; *Arroyo Gonzalez*, 305 F. Supp. 3d at 333. Moreover, most states in the country achieve their interests in law enforcement identification without resort to a surgical requirement for changing the sex designation on a license. *Love*, 146 F. Supp. 3d at 857 (noting "[a]t least 25 of the states and the District of Columbia do not require a transgender person to undergo surgery to change the gender on his or her driver's license or state ID card"). Alabama's interests in law enforcement identification of license holders are no different than the rest of the country. Pregno Dep. 118:19-119:1.

C. Policy Order 63 Does Not Survive Even Rational Basis Review.

Policy Order 63 is subject to heightened scrutiny. Even if it were not, though, it would still violate the Equal Protection Clause for the reasons more fully set out in the Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment. Doc. 51, 33-43. The policy does not further an interest in identification.

It is true, as Defendants point out, that most people are not transgender. But that does not give ALEA a rational basis for requiring that transgender people undergo surgery before correcting the sex designation on their license. Defendants cite *Carcaño v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016). In that case, a district court granted transgender Plaintiffs a preliminary injunction preventing a law from going into effect that would have prevented anyone from using restrooms designated for a sex other than the one listed on their birth certificate, finding that the law was likely to violate Title IX. *Id.* at 622. However, the court noted in dicta that the law was not likely to violate the Equal Protection Clause because it applied to everyone and worked fine for the vast majority of people, because the vast majority of people are not transgender. *Id.* This reasoning is faulty, non-binding, and distinguishable. Plaintiffs challenge Policy Order 63's requirement that transgender people must undergo surgery before correcting the information on their driver's licenses. This requirement applies exclusively to transgender people, so it is irrelevant how many non-transgender people there are as compared to transgender people. Meanwhile, Defendants make no attempt to distinguish the cases that address the actual issue in this case, nor could they. *F.V.*, 286 F. Supp. 3d at 1140; *Arroyo Gonzalez*, 305 F. Supp. 3d at 333; *Love*, 146 F. Supp. 3d at 853; *K.L.*, 2012 WL 2685183 at *7. The well-reasoned opinions in these cases establish that surgery policies for driver's licenses or birth certificates do not serve the state's interest in identification.

Defendants use the term "physiognomy" throughout their briefing, as did their expert in his report and testimony. The use of this term demonstrates Defendants' and Defendants' expert's profound misunderstanding of the relevant facts and science. Physiognomy is a pseudoscience. It refers to determining a person's ethnicity and character based on facial features. Gorton Decl. ¶ 42. During the period of eugenics, "experts" in the United States and Germany claimed that physiognomy proved that people of African descent were less intelligent than people of European descent, and that Jewish people were inherently deceitful. Gwen Sharp, *Physiognomy: Face, Bodies, and the "Science" of Human Character,* Sociological Images 6 (Jan. 30, 2015), attached as Pls.' Ex. 75; Marissa Alperin, *Constructing Jewish Bodies in Germany through Physical Culture and Racial Pseudo-Science 4* (2018), attached as Pls.' Ex. 76.

The repeated use of the term in Defendants' brief is particularly chilling in the context of this case, where they defend a policy requiring Plaintiffs to undergo a sterilizing surgical procedure before receiving a driver's license that they can use without risking a variety of negative outcomes, ranging from employment discrimination to physical attack. *See* USTS at 89-90 (describing mistreatment transgender people experience when presenting identification inconsistent with their gender presentation); *c.f. In re Opinion of the Justices*, 230 Ala. 543, 547 (1935) (advising that an Alabama bill providing for expanded sterilization of people deemed mentally unfit would violate state and federal due process protections). In both ways, the state's position harkens back to an era when the state identified people it deemed undesirable and subjected them to involuntary sterilization.[3] While what the state does here is thankfully not

[3] Two hundred twenty-four people deemed mentally deficient were subjected to involuntary sterilization in Alabama under a 1919 law. Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 States: Alabama* (2012), attached as Pls.' Ex. 77. Multiple attempts were made to expand the

nearly as direct as past atrocities, ultimately its basis is just as spurious, and it causes very real harm to a group with little political power.

Even if Defendants had used the terms anatomy and physiology, their understanding of sex would remain oversimplified at best. Sex is not restricted to genitalia, but also includes internal reproductive organs, hormone levels, secondary sex characteristics like breasts and facial hair, and the gender identity that arises from the central nervous system. Defendants' expert, a former correctional administrator, does not have the qualifications to counter Plaintiffs' expert, a medical doctor with extensive clinical and research expertise in transgender health, on these points.

It is true that Defendants' expert testified that it is helpful for correctional agencies to have information about some aspect of sex on a driver's license. But he never testified that it was any more useful to have information about genital anatomy than gender identity, or that surgical status mattered more than gender identity. To the contrary, he explicitly declined to express any opinion as to the most useful definition of sex for correctional purposes, and testified that a policy that reflected gender identity on a driver's license would also satisfy correctional interests. Leach Dep. 32:9-19.

The fact that jails sometimes misclassify women, putting them in danger, undermines rather than supports Defendants' argument. In *De Veloz v. Miami-Dade Cty.*, a woman who is not transgender was placed in a male facility because jail staff wrongly assumed she was a transgender woman. No. 17-13059, 2018 WL 6131780, at *4 (11th Cir. Nov. 21, 2018). If anything, this case shows that jail staff do not consider the sex designation on driver's licenses in

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law to authorize sterilization of "sexual perverts" and "homosexuals" in the 1930s. *Id.* Involuntary sterilization occurred in Alabama as recently as 1973. *Id.*

making classifications; in *De Veloz*, jail staff made the placement solely because the woman in question took estrogen, not because of the sex designation on her license. *Id.* And in fact, the risks that the woman in that case experienced are shared by transgender women placed in men's facilities against their will. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 830 (1994) (transgender woman beaten and raped within weeks of placement in the general population of a maximum security men's prison); *Giraldo v. Dep't of Corr. & Rehab.*, 85 Cal. Rptr. 3d 371, 375 (Cal. Ct. App. 2008) (transgender woman raped repeatedly in men's prison); *Shaw v. D.C.*, 944 F. Supp. 2d 43, 52 (D.D.C. 2013) (transgender woman "intimately and inappropriately touched" by male staff in male facility).

No federal or Alabama law or policy indicates that the sex designation on a license should be taken into account when deciding where to place transgender people in police lockups, jails, or prisons. Defendants' own expert stated that he would place transgender people based on where they preferred to be placed, not based on the sex designation on their license. Leach Dep. 98:8-15; 110:21-111:8; 112:8-15. Policy Order 63 does not improve jail safety in any way. Nor is it rationally related to any other legitimate state interest.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' motion for summary judgment on all counts.

Respectfully submitted this 8th day of March 2019.

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CERTIFICATE OF SERVICE

I certify that on March 8, 2019, I filed the foregoing electronically using the Court's CM/ECF system, which will serve all counsel of record.

s/ Brock Boone

DOC. 60

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DARCY CORBITT, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CASE NO. 2:18-cv-91-MHT-GMB**
	)	
HAL TAYLOR, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Defendants Hal Taylor, Charles Ward, Deena Pregno and Jeannie Eastman file this response in opposition to Plaintiffs' motion for summary judgment (doc. 50).

A. Response to Plaintiffs' Statement of Facts

Defendants largely do not dispute Plaintiffs' statement of facts, although Defendants dispute their legal relevance and materiality for the reasons set out in the argument section below. Accordingly, in response to Plaintiffs' Statement of Facts, Defendants reincorporate their Statement of Facts set out in their initial brief. Doc. 54 at 1-24. In addition, Defendants dispute or add clarification to the following specific facts cited in Plaintiffs' brief.

Plaintiffs state that Defendants "permit applicants to change other descriptive characteristics [i.e. aside from sex] listed on driver's licenses, such as height, weight, and hair color, without measurements or medical documentation." Doc. 51 at 4 ¶12. Defendants dispute this statement to the extent it implies Defendants allow individuals to self-certify these descriptive characteristics to be anything whatsoever but require medical documentation only for sex changes on licenses. First, no one can change the name on their driver license without providing a court order. (Doc. 48-5 at 31-32). Second, Alabama Law Enforcement Agency ("ALEA") driver license examiners are trained not to allow individuals to change the descriptions of other physical characteristics to anything whatsoever based only on the licensee's self-report. (Doc. 48-7 at 131-33). Examiners are trained to allow licensees to make changes to these other physical descriptors only if the change is "something observable that's reasonable." (*Id.* at 132). For instance, Plaintiff Darcy Corbitt testified in her deposition that when she went to obtain an Alabama license in the Opelika field office, the license examiner asked her if her weight had changed and she reported that it had. (Doc. 48-2 at 42). Thus, while Defendants do not require medical documentation or

measurement of all other physical descriptors on a license, they do not allow licensees to self-report any physical description they want.

Plaintiffs cite examples of medical records accepted as sufficient for a sex change under Policy Order 63 despite not containing express references to genital reassignment surgery or "complete" gender reassignment surgery. Doc. 51 at 4-5 ¶¶ 14-18. Despite Plaintiffs' attempt to show Defendants have not consistently applied Policy Order 63, each Plaintiff was informed by an ALEA employee what documentation was required to change the sex designation on a driver license and could not supply the relevant documentation because they had not had sex reassignment surgery. (Doc. 48-14; Doc. 48-2 at 42-46; Doc. 48-1 at 36-45; Doc. 48-4 at 155-56; Doc. 48-3 at 48). Further, Defendants submitted the medical documentation of all third parties who successfully changed the sex designation on their license, and the records speak for themselves as to the consistency of the documentation accepted by Defendants. (Doc. 48-18). Plaintiffs' attempt to portray Defendants' application of Policy Order 63 as inconsistent is both inaccurate and a red herring insofar as it was accurately applied to Plaintiffs.

Plaintiffs cite to a 2016 American Association of Motor Vehicle Administrators Resource Guide as proof that most states do not require documentation of any specific form of medical or surgical treatment to change sex on a license. Doc. 51 at 6 ¶22. However, this same document shows that *nine* states, including Alabama, do have a surgery requirement. (Doc. 52-19 at ECF p. 28).

Defendants note that Plaintiffs do not dispute their expert Donald Leach's qualifications or his testimony that jail administrators must take sex into account in forming certain policies and that a uniform definition of sex, such as that provided by Policy Order 63, is useful for these purposes. Doc. 51 at 8-9. Rather, Plaintiffs cite Leach's testimony that a jail administrator could

use different definitions of "sex" than that in Policy Order 63 and some of his statements regarding sex-based policies given Leach's own, personal level of risk-tolerance. *Id.* at 8-9 ¶¶ 31-32.

Plaintiffs' Amended Complaint contains several allegations that Corbitt was referred to as a "he" or "it" by an ALEA employee in Lee County, Alabama in August 2017 when she went to get an in-state license. Doc. 38 ¶¶ 69-71. Corbitt testified about this exchange at her deposition. (Doc. 48-2 at 41-43). However, Plaintiffs submitted a statement from the examiner who interacted with Corbitt in which the examiner denies misgendering Corbitt and acknowledge the statement "suggests possible dispute over whether and by whom Ms. Corbitt was misgendered in the office." Doc. 51 at 11 n.3. Plaintiffs then state "[a]ny dispute on this point, however, *is not material*." *Id.* (emphasis added). Defendants agree that any dispute over whether the examiner misgendered Corbitt in August 2017 is immaterial to the claims and defenses in this lawsuit.

Defendants object to Plaintiffs' introduction of two news articles regarding the January 2019 murder of a transgender woman in Alabama. Doc. 51 at 20 ¶ 82; (Docs. 52-48; 52-49). Plaintiffs state that police "refused to identify the victim as a woman and did not acknowledge that she was transgender, disrespecting her in death and delaying broader awareness of the incident, in part because of her 'legal documents.'" Doc. 51 at 20 ¶ 82. Plaintiffs did not disclose these news articles in their initial disclosures, and Defendants have had no opportunity to investigate the relevance of the victim's identity documents to the murder investigation. Defendants request that the Court not consider these materials as these articles constitute pure hearsay and cannot be reduced to an admissible form at trial. Plaintiffs have produced no admissible evidence that Policy Order 63 impedes investigators' ability to solve murders involving transgender victims. To the contrary, Chief Pregno testified that ALEA was able to identify a transgender homicide victim at the request of a district attorney. (Doc. 48-5 at 59-61). The victim was identified as a female by

the medical examiner based on the presence of female genitalia due to sex reassignment surgery, and ALEA was able to link the victim's identity to her prior identity with its documentation of her sex change in its driver license records. (*Id.*).

Finally, Plaintiffs cite numerous provisions of Alabama law that "permit or require" a driver license for a variety of activities. Doc. 51 at 23-25 ¶¶ 94-97. However, most, if not all, of the provisions cited also allow individuals to use another form of identification, such as a United States passport, to engage in the given activity. Further, Plaintiffs present no proof that they wish to, for instance, apply for a real estate license or receive accreditation for lead hazard reduction. Doc. 51 at 24 ¶ 94. If any Plaintiff wished to apply for a real estate license or to receive accreditation for lead hazard reduction, she could do so using a United States passport. *See* Ala. Admin Code § 790-X-2-.01(2)(e); *Id.* 822-X-1-.05(d)(4). Plaintiffs currently possess, or have the ability to possess, a passport designating their sex as female. (Doc. 48-2 at 21; Doc. 48-1 at 68, 70; Doc. 48-3 at 32). Plaintiffs testified in their depositions that in nearly all of the situations in which they believed they would be harmed by having to display an Alabama license designating their sex as male, they could use a passport designating their sex as female instead. (Doc. 48-2 at 36-38, 61-64; Doc. 48-1 at 33-34, 72-74; Doc. 48-3 at 35-36, 69-71).

B. Argument

1. Policy Order 63 Does Not Violate Plaintiffs' Right to Privacy

Defendants argued in their initial brief that under binding precedent there is no constitutional right to informational privacy in the personal information contained in motor vehicle records. Doc. 54 at 29-30. Defendants further argued that while people viewing Plaintiffs' licenses might infer they are transgender by viewing the sex designation and Plaintiffs' appearance, the licenses do not disclose Plaintiffs' transgender status in the manner required to amount to a

violation of the Due Process Clause, especially given Plaintiffs' ability to limit disclosure by using alternative forms of identification. *Id.* at 30-32.

Plaintiffs rely on persuasive precedent to argue that Policy Order 63 directly discloses their transgender status, and that this information is of a highly personal and sensitive nature. Doc. 51 at 45. However, the question in Count I is whether Policy Order 63 forces Plaintiffs to disclose their transgender status in a manner that amounts to a due process violation under the binding precedent in this circuit.

The only binding precedent cited by Plaintiffs regarding the right to informational privacy is *Hester v. City of Milledgeville*, 777 F.2d 1492, 1497 (11th Cir. 1985). Doc. 51 at 44.[1] In *Hester*, firefighters were required to take a polygraph test that involved answering "control questions" of a highly sensitive nature, such as whether they had ever done anything that would have discredited the department or resulted in their dismissal. *Hester*, 777 F.2d at 1496-97. The court held that given the limited nature of the questions and the limited disclosure required, the control questions did not violate the firefighters' due process rights. *Id.* In *James v. City of Douglas*, 941 F.2d 1539 (11th Cir. 1991), the plaintiff alleged that she provided a videotape of herself engaging in sexual activity with someone to police under a promise of confidentiality in connection with a request to investigate threats she had received. *James*, 941 F.2d at 1540-41. Members of the police department who were not involved with the investigation viewed the tape for their own gratification. *Id.* The court held that "a state official may not disclose intimate personal information

[1] Plaintiffs also cite the unreported decision of *Burns v. Warden, USP Beaumont*, 482 F. App'x 414, 417 (11th Cir. 2012). However, in that case the court held the inmate stated a claim for First Amendment retaliation but did not consider whether the inmate stated a right to privacy claim. *Burns*, 482 F. App'x at 417. Plaintiffs also cite dicta in *Doe v. Frank*, 951 F.2d 320 (11th Cir. 1992), listing transsexuality as a condition justifying allowing a plaintiff to proceed anonymously. *Doe*, 951 F.2d at 324. This case is irrelevant to the question of whether Plaintiffs' licenses disclose they are transgender under the circumstances required to amount to a due process violation.

obtained under a pledge of confidentiality unless the government demonstrates a legitimate state interest," and that the police officers viewing the video for their own personal gratification was not such an interest. *Id.* at 1543-44. Thus, *James* involved the *direct disclosure* of highly personal information for no legitimate government interest whatsoever.

In *Pryor v. Reno*, 171 F.3d 1281 (11th Cir. 1999), *rev'd on other grounds*, 528 U.S. 1111 (2000), the court distinguished *James* in holding that personal information contained in motor vehicle records was not confidential information giving rise to a constitutional right to privacy. *Pryor*, 171 F.3d at 1288 n.10 (distinguishing *James* because it "acknowledged a constitutional right to privacy only for intimate personal information given to a state official in confidence."); *see also Collier v. Dickinson*, 477 F.3d 1306, 1308 (11th Cir. 2007) (holding state department of motor vehicles did not violate constitutional right to privacy by selling personal information in motor vehicle records to mass marketers).

Here, the sex designation on Plaintiffs' driver licenses is not confidential information on which they can state a claim for a right to informational privacy. Their driver licenses, along with their birth certificates designating their male name and sex are public records, as are the orders from probate judges changing their male birth names to their current female names. All of these records, in a sense, "disclose" their transgender status by documenting their transition from the male gender to female. But though one can infer Plaintiffs are transgender from the personal information contained in these records, they do not disclose intimate personal information given to a state official in confidence. *See James*, 941 F.2d at 1544. Plaintiffs' driver licenses do not state "transgender" on the front. No Defendant or employee of Defendants has received Plaintiffs transgender status in confidence and disclosed it for no legitimate reason. Because there is no expectation of privacy in the personal information contained in these records, *Pryor* and *Collier*

are the more applicable cases. That is, disclosing personal information contained in driving records does not constitute the disclosure of confidential information acknowledged as actionable in *James*, even if an individual could indirectly infer Plaintiffs were transgender through this information.[2]

2. Policy Order 63 Does Not Unconstitutionally Compel Plaintiffs to Receive Medical Treatment

In response to Plaintiffs' argument in support of their claim that Policy Order 63 unconstitutionally compels them to receive medical treatment, Defendants incorporate their argument as to this claim in their initial brief. Doc. 54 at 33-36. Policy Order 63 simply does not implicate any fundamental right of Plaintiffs. Nor does the surgery requirement for changing the sex designation on a driver license implicate the "unconstitutional conditions" doctrine because Defendants do not *condition* receipt of a driver license on having sex reassignment surgery. *See Lebron v. Sec'y of Fla. Dept. of Children & Families*, 772 F.3d 1352, 1374-75 (11th Cir. 2014) (holding state could not condition receipt of welfare benefits on requirement that individuals submit to suspicionless drug testing in violation of Fourth Amendment rights). Plaintiffs currently possess, or could possess, Alabama driver licenses, even though these licenses designate their sex as male in the absence of proof of sex reassignment surgery. Defendants reserve the right to make additional argument as to this claim in reply.

3. Policy Order 63 Does Not Compel Speech

In response to Plaintiffs' argument in support of their claim that Policy Order 63 unconstitutionally compels speech, Defendants incorporate their argument as to this claim in their

[2] Defendants also maintain that Plaintiffs lack standing to assert their transgender status is confidential for the reasons already set out and reserve the right to restate this argument in a reply brief. Doc. 54 at 32-33.

initial brief. Doc. 54 at 36-41. Since Defendants argue a government-speech rather than compelled-speech paradigm is applicable, the parties are speaking past one another at this point and so Defendants reserve argument on this claim for their reply. However, they raise two points in this opposition brief.

First, Plaintiffs spend the bulk of their argument on this point on the factual message/ideological message distinction. Doc. 51 at 51-54. But the dispositive issue is not the content of the message but *who* is doing the speaking. Defendants argue it is the State who speaks under the three factors set out in *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2248-49 (2015). Since a "government entity has the right to speak for itself," it "is entitled to say what it wishes" and "to select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-68 (2009). While Defendants maintain that "sex" on a driver license as defined by Policy Order 63 is not the same type of ideological message as "Live Free or Die," it is certainly a message that the State selects and wishes to convey to law enforcement officers for identification purposes. The information contained on a driver license would be of little value if the State did not convey some distinct meaning it wished to convey regardless of the individual meanings the bearers of the licenses might wish to convey.

This leads to Defendants' second point. If Plaintiffs are correct that the sex designation as defined by Policy Order 63 on a driver license is compelled speech, then this sex designation is a content-based speech restriction that must satisfy *strict scrutiny*. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). If that is so, then the speech restriction is permissible only if it is the least restrictive means to achieving a compelling government interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). But if that is true for a state's choice of how to define "sex" for purposes of identification on a driver license, then it would also be true for all other

information such as the licensee's name, date of birth, height, weight, hair color, and eye color. Under Plaintiffs' theory, if any individual citizen disagreed with the "message" conveyed by this information, the State would have to satisfy strict scrutiny to continue using the personal information. There are any number of citizens who might regard this personal information as forcing them to convey a message about themselves with which they disagree. Since the State would be unlikely to satisfy strict scrutiny with respect to any one piece of identifying information, Plaintiffs' theory of compelled speech would require the State to discontinue the use not only of driver licenses but any other identity document. Or, it could continue to do so, but only if each citizen were allowed to define the meaning of the terms on his or her document or select which items would appear based on his or her personal ideology. In sum, if Plaintiffs prevail on their compelled speech claim, it would have the odd result of compelling *the State* to express *their* message on documents traditionally created and controlled by the government as a medium of speech for the government. The Supreme Court could not have intended this result in *Wooley v. Maynard*, 430 U.S. 705 (1977). Therefore, Defendants are entitled to summary judgment on Plaintiffs' compelled speech claim.

4. Policy Order 63 Does Not Violate Plaintiffs' Equal Protection Rights

a. Policy Order 63 is Subject to Rational Basis Review and Satisfies This Level of Scrutiny

Defendants argued in their initial brief that Policy Order 63 does not discriminate based solely on sex or transgender status and thus does not trigger the intermediate scrutiny applied to sex-based classifications. Doc. 54 at 42-43. Policy Order 63 provides a criterion for changing the sex on a driver license (other than to correct a typographical error) that applies equally to transgender and non-transgender individuals. A transgender individual whose gender does not match the sex initially assigned on his or her birth certificate must provide an amended birth

certificate or proof of sex reassignment surgery. A non-transgender individual who wishes to change his or her sex—whether due to an intersex condition such as Klinefelter's syndrome, a bad-faith attempt to manipulate a government identity document, or for any other reason—must meet the exact same criterion by providing an amended birth certificate or proof of surgery. Transgender individuals may otherwise enjoy the privilege of possessing an Alabama driver license and operating a motor vehicle on the same terms as non-transgender individuals.

However, Plaintiffs argue as follows:

> Policy Order 63 facially discriminates based on sex and transgender status. It establishes the only process for individuals to change the sex designation on their driver's licenses. The policy explicitly concerns sex, and prevents *only* transgender people from obtaining an accurate and safe driver's license without undergoing surgery and producing documentation of surgery to the government. Defendants treat transgender people differently than similarly-situated cisgender people.

Doc. 51 at 26 (footnote omitted). They elsewhere argue that Policy Order 63 "classifies people based on their transgender status for purposes of sex designations on licenses," and that the policy "specifically targets transgender people based on their nonconformity to sex stereotypes, and identification with a sex other than their sex assigned at birth," and that transgender individuals "are the only group that cannot get a license that reflects the sex with which they identify." *Id.* at 27. But this is not so for the reasons stated above: similarly-situated transgender individuals or non-transgender individuals with intersex conditions (*see* Doc. 48-18 at D1165) may change their sex designation if they meet Policy Order 63's criterion whereas those who cannot may not change their sex designation. The records produced by Defendants provide numerous examples of transgender individuals or individuals with intersex conditions who have successfully changed the sex designation on their license by satisfying Policy Order 63. (*See* Doc. 48-18). Thus, Policy Order 63 falls under the "general rule that legislation is presumed to be valid and will be sustained

if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. at 440 (1985).

Nevertheless, Plaintiffs argue that even if Policy Order 63 is subject only to rational basis review, it cannot satisfy even this level of constitutional scrutiny because it is arbitrary and based on animus. Doc. 51 at 33-43. Plaintiffs' argument fails to properly apply rational basis review to Policy Order 63. Rational basis review is "a paradigm of judicial restraint" and does not provide "a license for courts to judge the wisdom, fairness, or logic of legislative choices." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993). The question before a court applying rational basis review is whether the government's policy is rationally related to a legitimate state interest. *See Heller v. Doe*, 509 U.S. 312, 320 (1993). Under this standard, a government policy "is accorded a strong presumption of validity" and "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* at 319-20; *see also Beach Commc'ns*, 508 U.S. at 315 (stating "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated" the state actor). This is true "even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale seems tenuous." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

The Supreme Court, in its most recent application of rational basis review, stated the following:

> Given the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny. On the few occasions where we have done so, a common thread has been that the laws at issue lack any purpose other than a "bare ... desire to harm a politically unpopular group." *Department of Agriculture v. Moreno*, 413 U.S. 528, 534, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). In one case, we invalidated a local zoning ordinance that required a special permit for group homes for the intellectually disabled, but not for other facilities such as fraternity houses or hospitals. We did so on the ground that the

> city's stated concerns about (among other things) "legal responsibility" and "crowded conditions" rested on "an irrational prejudice" against the intellectually disabled. *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448–450, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (internal quotation marks omitted). And in another case, this Court overturned a state constitutional amendment that denied gays and lesbians access to the protection of antidiscrimination laws. The amendment, we held, was "divorced from any factual context from which we could discern a relationship to legitimate state interests," and "its sheer breadth [was] so discontinuous with the reasons offered for it" that the initiative seemed "inexplicable by anything but animus." *Romer v. Evans*, 517 U.S. 620, 632, 635, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996).

Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018). Plaintiffs attempt to fit Policy Order 63 into the extremely rare instance of a policy that lacks any conceivable rationale other than a bare desire to harm a politically unpopular group. *See* Doc. 51 at 33-43.

Policy Order 63 serves the legitimate government interest in maintaining consistency between the sex designation on an Alabama birth certificate and an Alabama driver license. It is rationally related to this interest because changing the sex on either document requires proof of sex reassignment surgery. Policy Order 63 serves the legitimate government interest of providing information related to physical identification primarily for law enforcement purposes. It is rationally related to this interest by providing a clear definition of "sex" in terms of physical sex characteristics of statewide applicability to allow law enforcement officers to form appropriate arrest, booking, and search procedures, as well as procedures for the provision of medical treatment.

Defendants have presented undisputed evidence that Alabama requires proof of sex reassignment surgery to amend a birth certificate to change a sex designation, and that this statutory requirement regarding birth certificates has been in effect since 1992. *See* Ala. Code § 22-9A-19(d); Ala. Act 92-607 §§ 19(d), 31; *see also* Doc. 48-18 at D1162, D1199, D1225 (containing

court orders approving sex changes to birth certificate and making finding petitioner had submitted proof of sex reassignment surgery). Defendants have presented undisputed evidence that, not only does Policy Order 63 bear a conceivable rational relationship to maintaining consistency with changing the sex on a birth certificate, but that the *actual origin* of Policy Order 63's surgery requirement was the statutory surgery requirement for changing birth certificates. (*See* Doc. 48-5 at 42, 124). Since birth certificates and driver licenses are both important identity documents, it is rational for the State to require the physical identifier of "sex" to mean the same thing on each document and to have the same criterion for changing the sex designation on each document.

Plaintiffs counter that this rationale is arbitrary because Defendants accept out-of-state amended birth certificates to satisfy Policy Order 63's requirements even if the jurisdiction allows a change to the sex designation on a birth certificate without proof of surgery. Doc. 51 at 36-37. But Defendants are required to extend full faith and credit to the nonjudicial records, such as birth certificates, of other states provided they are properly certified. *See* 28 U.S.C. § 1739; Ala. Code § 12-21-71; *Harrison v. State*, 560 So. 2d 1124, 1126-27 (Ala. Crim. App. 1989) (recognizing that Ala. Code § 12-21-71 adopted the federal statute regarding full faith and credit for nonjudicial records); *Pittman v. Pittman*, 19 So. 2d 723, 723-24 (Ala. 1944). Further, it would be administratively burdensome for ALEA employees to research each jurisdiction's sex-change policy every time they received an out-of-state amended birth certificate and to accept only those amended birth certificates from jurisdictions with a surgery requirement. Thus, Defendants' acceptance of other jurisdictions' amended birth certificates is rationally related to legitimate government interests and does not undermine their interest in maintaining consistency with Alabama birth certificates.

Policy Order 63 is rationally related to the State's interest in providing information related to physical identification to law enforcement officers by means of a driver license. Defendants have already set out the basis in the record as to why Policy Order 63 supports this interest in arguing the policy satisfies intermediate scrutiny, and they hereby reincorporate this argument. *See* Doc. 54 at 46-48. Clearly, if Policy Order 63 satisfies intermediate scrutiny, it satisfies the much less exacting standard of rational basis review. In response, Plaintiffs selectively quote responses from Chief Pregno's deposition and testimony from Defendants' expert Don Leach in which he stated other definitions of sex could be used for correctional purposes. *See* Doc. 51 at 40-41. Chief Pregno sufficiently articulated the State's interest in providing information to State law enforcement officers through a uniform definition of "sex" on driver licenses to allow agencies to develop appropriate arrest, booking, and search procedures. (Doc. 48-5 at 55-56, 65, 82, 120-21). Leach's concession that other definitions of "sex" could be used is irrelevant to his expert testimony that Alabama's choice to provide a uniform definition of sex by means of a driver license provides valuable information on which corrections administrators can create appropriate corrections policies. (Doc. 48-9, PX 38 at 16-17; *Id.* at 49-50, 102, 34-35, 85). The question is not whether Defendants could have made other policy choices, but whether the policy choice they did make is rationally related to a legitimate government purpose. *See Beach Commc'ns,* 508 U.S. at 313 ("[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."). Policy Order 63 unquestionably satisfies this standard.

b. Policy Order 63 Does Not Unlawfully Discriminate Based on Sex and, Even Assuming Intermediate Scrutiny Applies, Satisfies This Level of Scrutiny

Defendants argued in their initial brief that "while intermediate scrutiny must do more than rely on stereotypical generalizations, [equal protection analysis based on sex] may also take into account 'biological differences' between the sexes, such as the indisputable fact that for most

people external genitalia at birth typically conform with a person's gender identity." Doc. 54 at 45. That is, the Supreme Court has recognized that sex is an immutable characteristic and that the government does not violate the Equal Protection Clause when it bases distinctions on real biological differences between men and women. *See Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 64, 73 (2001); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) ("[S]ex, like race and national origin, is an immutable characteristic determined solely by the accident of birth."). Thus, even if Policy Order 63 involves a sex-based classification, it does not constitute invidious sex-based discrimination because it simply classifies driver license holders as male or female for identification purposes based on their physical sex characteristics, including genitalia, whether those assigned at birth or acquired through surgical means.

Plaintiffs rely on the Eleventh Circuit's holding that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender." *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011). Doc. 51 at 26. However, the Eleventh Circuit has subsequently drawn a distinction between status-based and conduct-based protections. *See Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1254-55 (11th Cir. 2017). In *Evans*, the court held in the context of a Title VII claim that the plaintiff's status as a lesbian could not serve as the basis for a sex discrimination claim because her status as a lesbian was not based on gender non-conformity under *Glenn*. *Evans*, 850 F.3d at 1254-57. In a concurrence, Judge William Pryor revisited earlier precedent and clarified that "*Price Waterhouse* and *Glenn* concerned claims that an employee's *behavior*, not status alone, deviated from a gender stereotype held by an employer." *Evans*, 350 F.3d at 1259 (Pryor, J., concurring). The concurrence noted that the employee in *Glenn* "was born a biological male" but was fired after beginning to transition to a woman and appearing at work dressed as a woman, which her employer said was

"unsettling," "unnatural," and "not appropriate." *Id.* at 1260 (quoting *Glenn*, 663 F.3d at 1314, 1320-21). It was thus the employee in *Glenn*'s *behavior* that triggered heightened scrutiny, not her status as a biological male beginning a transition to the female gender. The concurrence clarified that the "doctrine of gender nonconformity is, and always has been, behavior based" and that it "is not and cannot be an independent vehicle for relief because the only status-based classes that provide relief are those enumerated within Title VII." *Id.*

Here, Policy Order 63 is based on a person's status, not their behavior, and therefore no Equal Protection violation exists since *Nguyen* and *Frontiero* acknowledge that basing a distinction on biological or physical differences between men and women is permissible, especially where, as here, the distinction is simply the definition of the terms "male" and "female" themselves based on reference to physical characteristics. *See also United States v. Virginia*, 518 U.S. 515, 533 (1996) (stating that "[p]hysical differences between men and women, however, are enduring."). If, for instance, Defendants refused to grant driver licenses to individuals born as biological males but who dressed or presented as women, this would constitute sex-based discrimination based on gender nonconforming behavior under *Glenn*. However, Policy Order 63 does not impose any disability or restraint on Plaintiffs due to gender nonconforming behavior. It simply sets the sex on a driver license based on the sex assigned on a birth certificate unless an individual can provide proof of sex reassignment surgery. The policy requires a change in the physical "status" from male to female by surgical means but is not based on any requirement that individuals behave in a way that corresponds with their sex at birth. Policy Order 63 simply provides a definition of "sex" and is thus distinguishable from *Glenn* and permissible under *Nguyen* and *Frontiero*.

Setting aside the status/conduct distinction, the persuasive authorities cited by Plaintiffs are not only distinguishable but actually provide indirect support for Policy Order 63. *See* Doc. 51 at 31). The cases Plaintiffs cite from other jurisdictions in which courts invalidated policies preventing transgender individuals from changing the sex on their identity documents are telling, because all of those cases except one involved policies in which transgender individuals were *completely barred* from changing their sex designation. *See Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 330 (D.P.R. 2018) ("Pursuant to its Birth Certificate Policy, Puerto Rico categorically requires that birth certificates reflect the sex assigned at birth and prohibits transgender persons from correcting the gender marker in their birth certificates so that these accurately reflect the persons' sex, as determined by their gender identity."); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1135 (D. Idaho 2018) ("[T]he Court finds [the] policy of *categorically and automatically* denying applications submitted by transgender individuals to change the sex listed on their birth certificates is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.") (emphasis added); *K.L. v. State, Dept. of Admin. Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL 2685183, at *8 (Alaska Super. Mar. 12, 2012) ("[T]he Court concludes that the absence of *any procedure* allowing licensees to change the sex designation on their license impermissibly interferes with K.L's right to privacy.") (emphasis added); *but see Love v. Johnson*, 146 F. Supp. 3d 848, 856-57 (E.D. Mich. 2015) (holding Michigan's policy changing sex designation based only on birth certificate was unconstitutional because it completely barred sex change for plaintiffs from states that did not allow sex changes on birth certificates and required surgery to change birth certificate for in-state plaintiffs). *Love* is distinguishable in that the court held the policy burdened a fundamental right to privacy and so failed to satisfy *strict scrutiny*.

Love, 146 F. Supp. 3d at 856-57.[3] *Love* did not address whether Michigan's policy discriminated based on sex.

Plaintiffs would have a stronger case for invidious sex discrimination if Alabama provided no means to change the sex designation on a driver license since. That is, a policy that uses sex initially assigned on a birth certificate for government identification documents and prevents any subsequent change would categorically prohibit transgender individuals from changing their sex designation to conform to their gender. Such a policy would arguably assume that individuals' gender-based behavior must always conform to the sex assigned on their birth certificate and would discriminate "against a transgender individual because of her gender-nonconformity." *Glenn*, 663 F.3d at 1317. But Policy Order 63 is not such a policy because it provides a criterion for changing the sex on driver licenses from that assigned on a birth certificate either by amending the birth certificate (through proof of surgery) or providing direct documentation of surgery. Although Plaintiffs disagree with the surgery criterion chosen by Defendants, they cannot rely on the cases cited above to support the application of heightened scrutiny because all of those except *Love* involved policies that allowed *no* opportunity for a transgender individual to change the sex on an identity document.

Finally, even assuming Policy Order 63 must satisfy intermediate scrutiny, Plaintiffs apply an erroneous intermediate scrutiny analysis more akin to a strict scrutiny analysis that focuses almost entirely on the narrowness of the tailoring to the State's justifications. Doc. 51 at 30-33. To satisfy intermediate scrutiny for a sex-based classification, the government must show the classification is substantially related to an important government interest. *See United States v.*

[3] For the reasons already argued as to Count I, Policy Order 63 does not burden a fundamental right to privacy under Eleventh Circuit precedent. Therefore, the strict scrutiny analysis in *Love* is inapplicable.

Virginia, 518 U.S. 515, 533 (1996). However, rather than focusing on the narrowness of the tailoring to the government's interest, the Supreme Court has identified two criteria for whether a policy satisfies intermediate scrutiny: (1) "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation"; and (2) "it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* Policy Order 63 satisfies both criteria on the undisputed facts of this case.

First, the justification for Policy Order 63 based on consistency with Alabama birth certificates and the provision of a physical description of individuals for law enforcement purposes is not *post hoc*. Plaintiffs do not dispute that Policy Order 63's actual origin traces back to the surgery requirement for changing sex on a birth certificate. Doc. 51 at 31-32. Rather, Plaintiffs argue that maintaining consistency between the criterion for changing sex on a birth certificate and a driver license is not an important government interest. Doc. 51 at 31. Plaintiffs argue that Defendants' 30(b)(6) deponent could not adequately articulate the importance of maintaining this consistency and that the consistency between birth certificates and driver licenses creates inconsistency between these State identification documents and federal identification documents, such as passports. Doc. 51 at 31-32. But Chief Pregno testified that ALEA controls the information that goes onto a driver license but does not control the information that goes onto federal identity documents, such as passports. (Doc. 48-5 at 122). Maintaining a uniform criterion for changing sex on birth certificates and driver licenses is related the State's important government interest in using identity documents to provide physical descriptions of individuals and, with respect to ALEA's control over driver licenses, providing a uniform understanding of "sex" on a driver license for law enforcement. (*See* Doc. 48-5 at 55-56).

Although Plaintiffs dispute the importance of this governmental interest, they do not create a genuine dispute of material fact about the State's actual justification for Policy Order 63. The State's position is thus unlike the employer in *Glenn* who could not satisfy intermediate scrutiny by providing other conceivable reasons for terminating the employee since he had indisputably terminated the employee because he found her gender-nonconforming behavior "inappropriate," "unsettling," and "unnatural." *Glenn*, 663 F.3d at 1320-21. The interests articulated by the State in Policy Order 63, *i.e.*, consistency between State-created identity documents and identification for law enforcement purposes, are not *post hoc* in response to litigation but the actual interests that motivated the policy under the undisputed facts of the case.

Second, Policy Order 63 does not rely on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. In *Frontiero*, the Supreme Court stated that "what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society." *Frontiero*, 411 U.S. at 686. As an example, the Court noted its prior decision in *Reed v. Reed*, 404 U.S. 71 (1971), in which it invalidated an Idaho statute that created a preference for men to be appointed administrators of estates over women. *Id.* at 682-83. The Court rejected the Idaho Supreme Court's rationale that the legislature could legitimately assume "in general men are better qualified to act as an administrator than are women," and held that "by ignoring the individual qualifications of particular applicants, the challenged statute provided dissimilar treatment for men and women who are similarly situated." *Id.* (internal quotation and citation omitted).

Here, Policy Order 63 does not rely on the sort of stereotypical sex-based generalizations intermediate scrutiny is intended to eliminate. Rather, it relies on the indisputable fact of physical

and biological differences between the male and female sex—differences that the Supreme Court has stated governments may take into account without invidiously discriminating based on sex. *See Virginia,* 518 U.S. at 533 ("Physical differences between men and women, however, are enduring."); *Nguyen*, 533 U.S. at 64 ("Here, the use of gender specific terms takes into account a biological difference between the parents."); *Frontiero,* 411 U.S. at 686. The policy uses the sex on a birth certificate, which is based on external genitalia at birth, as the default in setting the sex on a driver license—a policy that Plaintiffs' expert admitted was accurate for 99% of the population. (Doc. 48-8 at 23). For the 0.3% of the population that is transgender and for whom their gender does not align with their sex at birth, Policy Order 63 provides a means to change their sex designation on a driver license through proof of sex reassignment surgery. (*See* Doc. 52-46) (containing Plaintiffs' exhibit estimating 0.3% of adults are transgender).

Policy Order 63 defines "sex" in a way that correlates "male" and "female" with physical characteristics, including genitalia. It does so for purposes of providing a physical description for identification and law enforcement purposes and does not involve the kind of stereotypes and generalizations that intermediate scrutiny must screen out. On the contrary, Plaintiffs do not dispute the testimony presented by the State that law enforcement and corrections officials must take sex differences into account for a variety of purposes related to search, seizure, and booking. *See Veloz v. Miami-Dade Cnty.,* No. 17-13059, 2018 WL 6131780, at *7, __ F. App'x __ (11th Cir. Nov. 21, 2018) ("It is abundantly clear to us that housing a biological female alongside 40 male inmates poses an outrageous risk that she will be harassed, assaulted, raped, or even murdered.").

Plaintiffs' intermediate scrutiny argument focuses primarily on whether Defendants could achieve their important government objectives by adopting a different criterion for permitting sex

changes on driver licenses. Doc. 51 at 31-33. But "[n]one of [the Supreme Court's] gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance." *Nguyen*, 533 U.S. at 70. Rather, the inquiry is whether the State's justifications are *post hoc* in response to litigation and based on overbroad generalizations about the abilities of males and females. The justifications provided for Policy Order 63 are neither and it thus satisfies intermediate scrutiny, assuming this level of scrutiny applies.

c. Transgender Individuals Are Not a Suspect or Quasi Suspect Class Entitled to Heightened Scrutiny

Plaintiffs argue that independently of *Glenn*'s holding that intermediate scrutiny applies to transgender individuals based on gender-nonconforming behavior, transgender individuals constitute a suspect class for equal protection purposes. Doc. 51 at 27-30. But the Eleventh Circuit has already resolved the question of the level of scrutiny that applies to transgender individuals based on gender-nonconforming behavior. *See Glenn*, 663 F.3d at 1315-20. Plaintiffs' claims in this case are based on the fact that their sex-based-on-genitalia and gender do not align, and that Policy Order 63 accordingly invidiously discriminates against them. If this claim is cognizable under the Equal Protection Clause, it can be based only on sex discrimination due to gender nonconformity. This claim fails for the reasons set out above. Defendants are accordingly due to be granted summary judgment on Plaintiffs' equal protection claim.

C. Conclusion

For the reasons stated above, Plaintiffs' motion for summary judgment should be denied and Defendants' motion for summary judgment should be granted.

Respectfully submitted,

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I hereby certify that on March 8, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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DOC. 61

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DARCY CORBITT, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CASE NO. 2:18-cv-91-MHT-GMB
	)	
HAL TAYLOR, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN REPLY TO DEFENDANTS' OPPOSITION TO

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Plaintiffs incorporate by reference their statement of facts and arguments from their memorandum of law in support of their motion for summary judgment and memorandum of law in opposition to Defendants' motion for summary judgment.

I. Policy Order 63 Violates the Equal Protection Clause.

A. Policy Order 63 is Subject to Heightened Scrutiny.

Defendants argue that the concurrence in *Evans* altered the meaning of *Glenn* and eliminates the need for heightened scrutiny in this case. The Eleventh Circuit held in *Glenn* that discriminating against someone for being transgender is discrimination on the basis of sex under the Equal Protection Clause. It reached that conclusion because "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes." *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011). A concurrence in a later case cannot alter the majority opinion in *Glenn,*[1] but even if it could, the distinction Judge Pryor drew would be functionally irrelevant: there is no air between gender nonconforming behavior and transgender status. "'[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.' There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." *Glenn*, 663 F.3d at 1316 (internal citations omitted). The *Glenn* majority and *Evans* concurrence both agree that discriminating against a transgender person who is socially transitioning is discrimination because of sex. *Glenn,* 663 F.3d at 1321 ("his decision to fire Glenn was based on 'the sheer fact of the transition'"); *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1260 (11th Cir.), cert. denied, 138 S.

[1] Furthermore, "a prior decision of the circuit (panel or en banc) could not be overruled by a panel but only by the court sitting en banc. The Eleventh Circuit decides in this case that it chooses, and will follow, this rule." *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981).

Ct. 557, 199 L. Ed. 2d 446 (2017) ("Glenn's claim was successful because Glenn was fired after choosing to 'beg[i]n to take steps to transition.'").

Social transition is exactly what is at stake here. *See* Gorton Decl. ¶ 23, 25. Plaintiffs use female-typical names and pronouns, have female-typical appearances, have updated their sex designations to reflect female on other records and documents, have sought to do so on their driver's licenses, and are prevented from doing so precisely because Defendants do not want to allow them to take this gender-related action that does not accord with Defendants' stereotypes about how people should behave based on their genital anatomy. *See* Pls.' Statement of Facts ¶¶ 3, 36-38, 45, 57-61, 72-73, 77.[2] If gender nonconforming conduct is necessary in addition to transgender identity to make out an equal protection claim based on sex, it is certainly present here. When government officials refuse to allow a transgender person to obtain an identity document that reflects her lived sex because she has not submitted proof of genital surgery, that action has everything to do with sex. *See Glenn*, 663 F.3d at 1314 (describing evidence of constitutionally impermissible motive including employer's statement that "it's unsettling to think of someone dressed in women's clothing with male sexual organs inside that clothing"). Defendants' actions here are motivated by their views on sex in virtually every meaning of that word—gender stereotypes, gender identity, sex-related appearance and behavior, genital anatomy, assigned sex at birth, and sex designation. When the government takes an action that injures someone because of sex, that action is subject to heightened scrutiny, without exception.

Defendants argue that they do not discriminate on the basis of sex because they apply Policy Order 63 to everyone. But it is only transgender people who seek to change the sex designation on their driver's license, and it is only people Defendants perceive to be transgender

[2] Plaintiffs mistakenly used the wrong name at the beginning of paragraph 60 in their statement of facts. It was Ms. Clark, not Ms. Eastman, who had gender-affirming surgery in the form of breast augmentation.

who are subject to Policy Order 63 when they do so. Defendants have produced no evidence to suggest that anyone has ever attempted to change a sex designation on a license in a "bad-faith attempt to manipulate a government document," and may not rely on pure speculation in an attempt to evade heightened scrutiny. Also, contrary to Defendants' assertion, *see* Doc. 60 at ECF 12,[3] the only evidence with regard to people with intersex conditions shows that an intersex individual was permitted to change the sex designation on a license without surgery or an amended birth certificate.[4] Defs.' Ex. 16, (D1165). It is reasonable to infer that Policy Order 63 was not applied to that person because ALEA did not perceive the person to be transgender. *See* Doc. 60 at ECF 12 (referring to the intersex person as "non-transgender"). By comparison, Plaintiffs were not permitted to change the sex designation on their licenses with proof that they had gender dysphoria; they were told they had to produce evidence of having had "full" (genital) surgery or an amended birth certificate. Pls.' Statement of Facts ¶¶ 3, 45, 60, 76. But even if Defendants also applied their discriminatory policy to people with intersex conditions, another group perceived as inherently not matching gender norms, that would not make the discrimination any less because of sex, or any more justified.

Defendants also attempt to salvage their policy by comparing the way they manage other descriptors on driver's licenses. They claim that they only allow someone to change other information on a driver's license if it seems plausible based on the person's appearance. Again, that is not comparable to what Defendants do for sex designations. In fact, it is undisputed that the ALEA clerk told Ms. Corbitt that the clerk "never would have known" that Ms. Corbitt was

[3] Where the ECF page number differs from the document page number, Plaintiffs use the ECF page number.
[4] Klinefelter's syndrome is a type of intersex condition that occurs when a person is born with XXY chromosomes instead of XY (male typical), XX (female typical), XO (Turner's Syndrome), or another pattern of chromosomes. The document used to change the applicant's sex designation from male to female indicates that the person had XXY chromosomes, consistent with Klinefelter's. It is not a letter from a surgeon stating that sex reassignment surgery has been completed or an amended birth certificate.

transgender had she not seen the record of her previous license. Corbitt Dep. 43:5-7. While relying on a clerk's subjective perceptions (and sex-based stereotypes) would also be constitutionally suspect, the fact that ALEA opts not to use the same method for sex designations as it uses for other descriptive information further shows deliberate disadvantaging of transgender people.

B. Describing Genital Anatomy on a Driver's License is Not an Important Government Interest.

Defendants next argue that even if they do discriminate on the basis of sex, that discrimination is acceptable because it is based on "real" "immutable" differences between men and women. But discriminating on the basis of sex is not an excuse for discriminating on the basis of sex. To justify discrimination on the basis of sex, the government bears the burden of proving that the action substantially furthers an important government interest.

Defendants misunderstand the nature and role of immutability in Equal Protection analysis. Sex is an immutable characteristic because it is an "accident of birth" and forms a core part of one's personhood. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *see also Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 329 (D.P.R. 2018); *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1095 (9th Cir. 2000), overruled on other grounds by *Thomas v. Gonzales*, 409 F.3d 1177 (9th Cir. 2005). Some sex-based characteristics, like genital and reproductive anatomy, can be changed. *See* Gorton Decl. ¶ 51. Others, like gender identity, cannot. *See* Br.of Amici Curiae Am. Acad. of Pediatrics, Am. Psychiatric Assoc., Am. College of Physicians, and 17 Additional Medical and Mental Health Organizations in Support of Respondent, *Gloucester Cty. Schl. Bd. v. G.G.*, 2017 WL 1057281 at *8 (U.S. 2017) ("Every person has a gender identity, which cannot be altered voluntarily."). But just because genital and reproductive anatomy *can* change does not mean that the government may *force* people to change it to avoid discrimination.

Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 Tex. L. Rev. 343, 383 (1981) ("The constitutional value of personal autonomy with respect to one's body precludes giving constitutional significance to the possibility of escaping discrimination through a sex-change operation; the free exercise clause precludes similar pressure to undergo religious conversion."). And most importantly, the fact that sex is immutable is part of the reason why discrimination on this basis is subject to heightened scrutiny—not a justification for discrimination. *See Frontiero*, 411 U.S. at 686; *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991).

In *Nguyen*, heavily relied on by Defendants, the important government interest was supplying proof of relationship to a U.S. citizen parent for naturalization purposes. *Nguyen v. INS*, 533 U.S. 53, 62 (2001). That justified discriminating on the basis of reproductive anatomy—a sex-related characteristic—because those who give birth have an obvious parental relationship to the child. Defendants' arguments again boil down to a bald assertion unsupported by any evidence that describing a person's genital anatomy on their driver's license is an important government objective simply because they say it is.[5]

C. No Court Has Found Sufficient Justification for a Policy Preventing Transgender People from Changing Their Sex Designation on Identification

Defendants attempt to minimize the salience of the cases that address the same issue presented here by disregarding the reasoning from those cases. Four recent cases have addressed policies preventing transgender people from changing the sex designation on their driver's licenses and birth certificates. *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015); *Arroyo*

[5] Additionally, Defendants' argument that their policy is not arbitrary because they are obligated to extend full faith and credit to the nonjudicial records of other states falls somewhat flat, given that they do not extend full faith and credit to nonjudicial records in the form of sex designations on the licenses of people from out of state. North Dakota already made a determination that Ms. Corbitt's sex designation should be listed as female for purposes of a driver's license, yet ALEA declined to honor that determination. Pls.' Statement of Facts ¶¶ 38, 45.

Gonzalez,, 305 F. Supp. 3d (D.P.R. 2018) *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018); *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles*, *No. 3AN–11–05431 CI*, 2012 WL 2685183 (Alaska Super. Ct. Mar. 12, 2012); *see also Darnell v. Lloyd*, 395 F. Supp. 1210, 1214 (D. Conn. 1975) (holding that a transgender woman had stated a claim that the state government "violates the equal protection clause by granting some requests for birth certificate changes while denying Darnell's request to make her certificate reflect the asserted fact that she is now female"). All of them have found in favor of the transgender individuals. Defendants attempt to distinguish the cases by pointing out that some states would not allow any changes to sex designations and that the court in *Love* ruled on the privacy claim rather than the equal protection claim. But in each of those four cases, the courts found that the government had not shown any legitimate government interest in their policies, and in none of them did the court rely on the surgical status of the transgender litigants.

Defendants argue that three of these cases are distinguishable because they "involved policies in which transgender individuals were *completely barred* from changing their sex designation." Doc. 60 at ECF 19. As a preliminary matter, Defendants are mistaken as to the policy in *K.L.* The policy there was nearly identical to Policy Order 63 and the policy in *Love*: it permitted changes in sex designations on driver's licenses when an applicant provided "verification from a doctor that a surgical change was performed." *K.L.*, 2012 WL 2685183, at *1.

Additionally, the reasoning from *F.V.* and *Arroyo Gonzalez* does not support the distinction Defendants draw. In *Arroyo Gonzales*, the court made a finding of fact that: "Not every person suffering from gender dysphoria undergoes the same treatment. From a medical and scientific perspective, there is no basis for refusing to acknowledge a transgender person's true

sex based on whether that person has undergone surgery or any other medical treatment." 305 F. Supp. 3d at 331. In finding that their rights were violated, the court in that case expressly relied *not* on any medical care the plaintiffs had undergone, but on their right to define themselves. "The right to identify our own existence lies at the heart of one's humanity. And so, we must heed their voices: 'the woman that I am,' 'the man that I am.'" *Id.* at 334. Similarly, in *F.V.*, the court explicitly observed that "[n]ot all transgender people choose to undergo surgery as a part of the transition process. This is due to numerous potential factors, including whether surgery is medically necessary, and personal and financial factors such as lack of insurance coverage." 286 F. Supp. 3d at 1137. It observed that for the policy the state created to be constitutionally permissible, it "must not subject one class of people to any more onerous burdens than the burdens placed on others without constitutionally-appropriate justification—for instance, to apply for a change in paternity information the applicant is not required to submit medical evidence, such as DNA confirmation, to prove paternity or non-paternity." *Id.* at 1141–42.

Defendants also argue that *Love* has no relevance to equal protection analysis because it ruled that the policy there, one essentially identical to the one here, violated the privacy rights of the plaintiffs. Doc. 60 at ECF 19. Tellingly, Defendants fail to make any attempt to distinguish the *Love* analysis as to privacy. Doc. 60 at ECF 6-9. But also, crucially, the court in *Love*, like the courts in each of these cases, went further than a simple ruling that the state's policy was not sufficiently narrowly tailored. Whether using a due process or equal protection analysis, these courts held that the states' policies actually *undermined* the states' claimed interests. *Love*, 146 F. Supp. 3d at 856 ("the Policy undermines Defendant's interest in accurately identifying Plaintiffs to 'promote law enforcement.'") (internal citations omitted); *K.L.*, 2012 WL 2685183, at *7 ("a licensing policy based on the appearance of one's physical features concealed from

public view can undermine the accuracy of identification of individuals based on driver's licenses"); *Arroyo Gonzalez*, 305 F. Supp. 3d at 333 (D.P.R. 2018) ("Such forced disclosure… is not justified by any legitimate government interest. It does not further public safety…. To the contrary, it exposes transgender individuals to a substantial risk."); *F.V.*, 286 F. Supp. 3d at 1141-42 (indicating that the state had conceded, and the court agreed, that the policy had no rational basis).

II. The Government May Not Insulate Itself from Privacy Claims by Making Records Public.

Defendants claim that no information the government chooses to place on a driver's license can ever violate a license holder's right to privacy, because driver's licenses are public records. Doc. 60 at ECF 8. If that were the law, it would permit an end run around the Constitution: a government entity could designate anything it wished to disclose a "public record" and escape its constitutional obligation to avoid infringing on individual privacy rights.

Defendants also argue that Plaintiffs have no privacy interest in preventing disclosure of their transgender status because that status may also be disclosed through a court-ordered name change or an original birth certificate. Doc. 60 at ECF 8. Defendants are mistaken in stating that birth certificates are public records. In fact, they only become unrestricted public records 125 years after the birth, or twenty-five years after the death, of the registrant. Ala. Code § 22-9A-21(f). Until then, only the registrant, the registrant's guardian, the immediate family member of a registrant, or a registrant's legal representative may obtain a copy of a person's birth certificate in Alabama. Ala. Code § 22-9A-21(b). The demand for birth certificates in daily life is also much less than the demand for driver's licenses. *See* Pls.' Statement of Facts ¶¶ 93-97. And the

fact that the state policy on changing the sex designation on birth certificates has not yet been challenged is no evidence that it is constitutional.

Name change orders, unless sealed, are technically public records, but not readily accessible. One would need to go the appropriate court and specifically request the file for a known individual's name change case to review the order. As already discussed in Plaintiffs' memorandum of law in support of their motion for summary judgment (Doc. 51 at ECF 47-48) and memorandum of law in opposition to defendants' motion for summary judgment (Doc. 58 at ECF 25-26), Plaintiffs risk violence, harassment, and discrimination every time they have to reveal that they are transgender through showing their driver's licenses, in person, to a stranger. That concern is not present when one's name is changed in a court order that would be difficult to find without seeking out the specific Probate Court record. Plaintiffs do not have to show their name change order to strangers at bars, at airports, on dark country roads, at hotels, at car rental locations, at job locations, at pharmacies, at government offices, at colleges, at polling places, at banks, at any place where a credit or bank card might be used, at every location where there might be any interaction with court personnel, or at any location where there might be any interaction with law enforcement officials. All of those situations do, however, call for driver's licenses.

III. Defendants' Slippery Slope Argument with Regard to Compelled Speech is Unpersuasive.

Defendants argue that, when the Supreme Court and Eleventh Circuit held that the government may not compel people to associate themselves with messages with which they disagree, they could not have meant what they said. *See Janus v. Am. Fed'n of State, Cty., and Mun. Emps.*, 138 S. Ct. 2448, 2464 (2018); *N.A.A.C.P. v. Hunt*, 891 F.2d 1555, 1566 (11th Cir.

1990). Defendants reason that if it were so, anyone could stop the government from putting any sort of information on a piece of identification. Doc. 60 at 10-11.

This argument disregards the reality of what it is to be transgender. Ruling that the government may not compel people to endorse an inaccurate, ideological message about gender that contradicts their core sense of self and puts them at very real risk of harm[6] when the government lacks any compelling (or even legitimate) reason for doing so is not the same as holding that a person has a constitutional right to lie about their age on ID because they would like to buy alcohol while underage.[7] While it is possible that the government may not compel people to convey some other messages on their licenses—as this Court has already held—any other challenges along these lines would have to be considered on their own merits. *See Doe 1 v. Marshall*, No. 2:15-CV-606-WKW, 2019 WL 539055, at *6 (M.D. Ala. Feb. 11, 2019).

IV. Plaintiffs Rest on Their Previous Arguments as to the Fundamental Right to Refuse Medical Treatment.

Because Defendants have raised no new arguments in an attempt to refute the Plaintiff's due process claim, Plaintiffs rest on the arguments in their previous briefing.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for summary judgment on all counts.

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[6] Defendants request that the Court disregard Plaintiffs' Exhibits 48 and 49 relating to the recent murder of a transgender woman in Alabama. Doc. 60 at ECF 5. Plaintiffs request that the Court take judicial notice of this murder pursuant to Fed. R. Evidence 201(b), because it is not subject to reasonable dispute. The articles attesting to this event could not have been turned over during discovery because they were only published after that time, but their accuracy on this point cannot reasonably be questioned. However, should the court decline to take judicial notice of this recent murder, Plaintiffs have already produced sufficient admissible evidence of the very real danger to transgender women in Alabama and throughout the United States. Pls.' Statement of Facts ¶¶ 51, 62, 64, 78, 79, 82, 83, 85; Pls.' Supplemental Statement of Facts ¶¶ 167-169.

[7] *See United States v. Alvarez*, 567 U.S. 709, 719 (2012) (acknowledging that while outright lying receives First Amendment protection, that protection may be somewhat more qualified); *Gary v. City of Warner Robins*, 311 F.3d 1334, 1339 (11th Cir. 2002) (ruling that restriction on underage drinking survives Equal Protection challenge).

Respectfully submitted this 22th day of March 2019.

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CERTIFICATE OF SERVICE

I certify that on March 22, 2019, I filed the foregoing electronically using the Court's CM/ECF system, which will serve all counsel of record.

s/ Gabriel Arkles

DOC. 62

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DARCY CORBITT, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**CASE NO. 2:18-cv-91-MHT-GMB**
	)	
HAL TAYLOR, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Defendants Hal Taylor, Charles Ward, Deena Pregno and Jeannie Eastman file this reply to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (doc. 58).

A. A Note on the Use of the Word "Physiognomy"

Plaintiffs take issue with Defendants' use of the word "physiognomy." They object to Defendants' expert, Donald Leach, using the term to refer to physical sex characteristics, and they further object to the undersigned using the term in briefs submitted to the Court. Doc. 58 at 14-15, 44-45. Plaintiffs state that "[p]hysiognomy refers to determining a person's ethnicity and character based on facial features." Doc. 58 at 14 ¶ 174 (citing Gorton Decl. ¶ 42). They add that "[d]uring the period of eugenics, 'experts' in the United States and Germany claimed that physiognomy proved that people of African descent were less intelligent than people of European descent, and that Jewish people were inherently deceitful." *Id.* at 14-15 ¶ 175. They support this proposition with a citation to a post from a sociology blog and an unpublished paper written by an undergraduate at the State University of New York, New Paltz. *See* Docs. 59-16, 59-17.[1]

As shown below, "physiognomy" has another dictionary meaning that is completely benign, and Plaintiffs are aware that this benign meaning is how Defendants and their expert used the term. Nonetheless, Plaintiffs state that "[t]he repeated use of the term in Defendants' brief is *particularly chilling* in the context of this case, where they defend a policy requiring Plaintiffs to undergo a sterilizing surgical procedure before receiving a driver's license that they can use without risking a variety of negative outcomes, ranging from employment discrimination to

[1] *See* https://thesocietypages.org/socimages/2015/01/30/helpful-guide-to-human-character/ (containing Plaintiffs' Exhibit 75); https://www.newpaltz.edu/history/bestseminarpapers, https://www.newpaltz.edu/media/department-of-history/chair-intro-2017-2018.pdf (containing Plaintiffs' Exhibit 76).

physical attack." Doc. 58 at 44 (emphasis added). Plaintiffs continue that "the state's position harkens back to an era when the state identified people it deemed undesirable and *subjected them to involuntary sterilization*." *Id.* (emphasis added). Plaintiffs add in a footnote, again citing to an unpublished source obtained at random from the internet—this time a compilation made by undergraduate students at the University of Vermont[2]—that "[t]wo hundred twenty-four people deemed mentally deficient were subjected to involuntary sterilization in Alabama under a 1919 law," and that "[m]ultiple attempts were made to expand the law to authorize sterilization of 'sexual perverts' and 'homosexuals' in the 1930s." Doc. 58 at 44 n.3. While conceding that "what the state does here is thankfully not as direct as past atrocities," Plaintiffs maintain that "ultimately its basis is *just as spurious*, and it causes very real harm to a group with little political power." *Id.* at 44-45 (emphasis added).

Defendants make three points in response to Plaintiffs' assertions. First, Defendant's expert Don Leach defined what he meant by the term "physiognomy" in his expert report. *See* Doc. 48-10 at 96 (defining "physiognomy" as the physical or biological component of sex, as distinct from gender identity and sexual preference). Plaintiffs' counsel asked Leach in his deposition what he meant by "physiognomy," to which Leach responded "[t]he physical being, the physical makeup, physical compositions," "[t]he actual structural components that go into—in this case it would go into—into sex." Doc. 48-9 at 13. Leach's definition of "physiognomy" is consistent with the third definition of that term in Merriam-Webster, where it is defined simply as "external aspect." *Physiognomy Definition*, Merriam-Webster.com,

[2] *See* http://www.uvm.edu/~lkaelber/eugenics/ (containing the source from which Plaintiffs' Exhibit 77 was obtained).

http://merriam-webster.com/dictionary/physiognomy (last visited March 20, 2019).[3] Leach was then directly asked whether he used "physiognomy" in the sense that would link it with any racial pseudoscience, and he *expressly stated* this was not what he meant by the term:

> Q. So—and so I'd like you to listen to this definition of physiognomy—sorry—physiognomy: A person's facial features and expression, *especially when regarded as indicative of character or ethnic origin*.
>
> *That's not what you mean; right?*
>
> A. No.
>
> Q. Okay.

Doc. 48-9 at 13-14 (emphasis added).

Second, nowhere in Plaintiffs' Amended Complaint do Plaintiffs allege that they do not wish to have sex reassignment surgery because it will result in their sterilization. Plaintiffs were asked in their depositions to explain in their own words how Policy Order 63 had harmed them, and no Plaintiffs testified that meeting Policy Order 63's surgery requirement would result in their involuntary sterilization. *See* Doc. 48-2. at 36-38; Doc. 48-1 at 33-34; Doc. 48-3 at 35-36. Furthermore, in Jane Doe's sworn declaration she states that she *wants* surgical treatment for her gender dysphoria but cannot afford it. Doc. 52-42 ¶ 20. At Plaintiff Corbitt's deposition, Defendants played a recording of a video that Corbitt acknowledged she uploaded to her publicly-viewable Facebook page moments after she was informed by an ALEA driver license examiner in August 2017 that she was unable to get an Alabama license designating her sex as female due to

[3] Leach's use of "physiognomy" to define one component of sex also tracks the definition of "sex" in Black's Law Dictionary. *See Sex*, Black's Law Dictionary (10th ed. 2014) (defining "sex" as "[t]he sum of the peculiarities of structure and function that distinguish a male from a female organism; gender."). Unlike Black's Law Dictionary, which equates "sex" and "gender," Leach's report distinguishes between the two terms. *See* Doc. 48-10 at 96.

Policy Order 63's surgery requirement, and the court reporter transcribed her statements as follows:

> They [*i.e.* the employees in ALEA's Opelika field office] called Montgomery and they tried to like figure out what to do. Basically I have to have surgery. Well, I can't afford that. In fact, *I told them if I had sixty thousand dollars I would go get it done tomorrow*, so if you want to give me sixty thousand dollars I can be in compliance with this fucking law.

Doc. 48-2 at 79-80, 84 (emphasis added). Nor did any Plaintiff state in their declarations submitted after their depositions in support of their motion for summary judgment that they did not wish to receive sex reassignment surgery because it would result in permanent infertility. Plaintiffs have either expressed a desire to undergo sex reassignment surgery or made no mention of permanent infertility as a basis for their constitutional challenge to Policy Order 63. Thus, not only do Plaintiffs unfairly link the defense of Policy Order 63 to eugenic policies of forced sterilization, their arguments based on forced sterilization are an improper attempt to amend their complaint at summary judgment. *See Gilmour v. Gates, McDonald & Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) ("A plaintiff may not amend her complaint through argument in a brief opposing summary judgment.").

Third, and finally, Plaintiffs' argument that "the state's position harkens back to an era when the state identified people it deemed undesirable and subjected them to involuntary sterilization" (doc. 58 at 44) is a red herring because Policy Order 63 does not force people to undergo sterilization procedures against their will. In the case cited by Plaintiffs, *In re Opinion of the Justices*, 162 So. 123 (Ala. 1935), the Supreme Court of Alabama considered the constitutionality of a bill that would grant sole discretion to the superintendent of mental institutions to sterilize anyone "lawfully committed" to the institution "with or without the consent of the patient, or his or her relatives." *In re Opinion of the Justices*, 162 So. 2d at 125. By contrast,

Plaintiffs in this case lawfully possess or could possess Alabama driver licenses, although they cannot not change the sex designation on these licenses without proof of sex reassignment surgery. It is simply hyperbolic to compare Policy Order 63 to a policy granting a state official unfettered discretion to sterilize an individual without the individual's consent. In addition, Plaintiffs do not dispute in any way that the origin of Policy Order 63's surgery requirement was to maintain consistency with the statutory surgery requirement for amending Alabama birth certificates rather than any eugenic ideology based on the pseudoscientific study of "physiognomy." Plaintiffs' characterization of Defendants' position as tantamount to a defense of forced sterilization of those "deemed undesirable" by the State (doc. 58 at 44) is unsupported by the facts and irrelevant to any constitutional claim Plaintiffs have standing to assert.

B. Reply to Plaintiffs' Remaining Arguments

1. Plaintiffs Corbitt and Clark's Claims Are Barred by the Statute of Limitations

Defendants argued that Plaintiffs Corbitt and Clark's claims are barred by the statute of limitations. Doc. 54 at 24-27. They argued Corbitt's claim accrued in July 2013 when she updated her driver license to match her new legal name as a woman, and that Clark's claim accrued in April 2015 when she changed her name on her license and was informed by defendant Jeannie Eastman that she did not meet the requirements to change the sex on her license at that time. (*Id.* at 25). Plaintiffs counter that these accrual times are "wholly arbitrary," and that the injury they complain of "is not having a traditionally feminine name on a license with a male sex designation" but rather "not being permitted to change the sex designation on their license to correspond to their actual sex, female." Doc. 58 at 18.

But Plaintiffs overlook the fact that Corbitt and Clark testified that their legal name changes marked the point at which they fully identified as transgender women and began living publicly as

transgender women. Corbitt testified that she "had started living as Darcy full-time on May 11, 2013." Doc. 48-2 at 25. As part of living full time as Darcy, she thereafter legally changed her name with the probate judge and then changed her new license to match her identity as Darcy, a transgender woman. Policy Order 63 operated in 2013 to result in a driver license that used the sex on her birth certificate, male, as the default, resulting in a license with a sex designation with which Corbitt did not identify. Likewise, Clark testified that she had always considered herself a female, and that it had bothered her ever since she was sixteen that her sex designation on her driver license did not match her gender identity. Doc. 48-1 at 31-32. Thus, Clark's legal change of name, change of name on her driver license, and failed attempt to change the sex on her license in 2015 resulted in the injury as Plaintiffs characterize it in their brief. Doc. 58 at 18. Policy Order 63 operated at these times to inflict the injury of which Corbitt and Clark now complain, namely, a driver license with a sex designation they could not change to match their gender.

Plaintiffs attempt to reframe the point at which their injuries accrued as the point at which they became fully informed about Policy Order 63's requirements. Doc. 58 at 17. But a claim accrues for purposes of Section 1983 not when a person becomes aware of the precise contents of the policy causing the injury, but when the person knows *or has reason to know* that the person has been injured. *See Mullinax v. McElhenney*, 817 F.2d 711, 716 (11th Cir. 1987) ("Thus Section 1983 actions do not accrue until the plaintiff knows or has reason to know that he has been injured."). Here, Corbitt and Clark claim their injury is the inability to eliminate the incongruence between the sex designation on their driver licenses and their gender identity. Doc. 58 at 18. Policy Order 63 operated to make Corbitt and Clark unable to change the sex on their licenses at the time they completed their transition to living publicly as transgender women by changing their licenses to match their legal female names. Their injury occurred at this time even if they were not fully

aware of Policy Order 63's requirements because at that time they "could have discovered the factual predicate of [their] claim." *Brown v. Ga. Bd. of Pardons & Paroles*, 335 F.3d 1259, 1262 (11th Cir. 2003).

The parole cases cited by Defendants in *Brown* and *Lovett v. Ray*, 327 F.3d 1181 (11th Cir. 2003) remain on point because they held the inmates' injury occurred when their parole hearings were set for a date longer than what they claimed was permissible because they should have known at that point that the law had changed to lengthen the time between parole hearings. *See Brown*, 335 F.3d at 1260-62; *Lovett*, 327 F.3d at 1182-83. Plaintiffs seize on the fact that the plaintiffs in those cases were informed by the parole board of the decision to reconsider their parole years later and cite a parole case from this Court, *Neelley v. Walker*, 67 F. Supp. 3d 1319, 1325 (M.D. Ala. 2014). However, the holding of those cases turned on when the decision affecting the plaintiffs was made rather than on whether the plaintiffs were notified of the underlying policy applied to them.

The court in the *Neelley* case cited by Plaintiffs actually changed course and held the plaintiff's claim was barred by the statute of limitations. *See Neelley v. Walker*, 173 F. Supp. 3d 1257, 1265-70 (M.D. Ala. 2016), *rev'd by Neelley v. Walker*, 677 F. App'x 532 (11th Cir. 2017). Although the Eleventh Circuit reversed, the court's unpublished opinion makes clear that the proper inquiry is when the decision that inflicts the alleged injury is made rather than when the plaintiff understands the policy resulting in the injury. *See Neelley*, 677 F. App'x at 535. The court noted the district court "relied on *Chardon v. Fernandez*, 454 U.S. 6 . . . (1981) (per curiam), for the proposition that when ascertaining the relevant injury, courts must focus on the moment of the adoption of the unconstitutional act itself rather than the moment at which the claimant experiences its effects." *Neelley*, 677 F. App'x at 535 (internal quotation and citation omitted). Although there

was a passage of time between the enactment of the statute challenged by Neelley and the parole board informing her she was ineligible for parole, the court held her claim accrued when the parole board denied Neelley's parole pursuant to the statute because the parole board possessed independent decisionmaking authority to deny parole. *Id.* That is, the statute did not inflict Neelley's injury automatically by operation of law but required an independent decision by the parole board. *Id.*

In this case, unlike a parole board "charged with the responsibility of determining who is eligible for parole," *Neelley*, 677 F. App'x at 535 (internal quotation and citation omitted), Policy Order 63 made Corbitt and Clark unable to change the sex designation on their licenses by operation of law when they changed the names on their licenses to match their legal names when they updated their identity documents to live publicly as transgender women in 2013 and 2015, respectively. ALEA did not make a new or independent determination to apply Policy Order 63 to Corbitt in August 2017 when she first became aware of the surgery requirement, but rather it had been applied when she received her first license as a transgender woman in 2013. In Clark's case, the undisputed facts show that Policy Order 63 was actually expressly applied by Jeannie Eastman in 2015, although its surgery requirement had been in effect to prevent Clark from changing the sex on her license before that. Because the "decision had been made" *Neelley*, F. App'x at 535 (quoting *Chardon,* 454 U.S. at 8), by operation of law when Corbitt and Clark updated their licenses to change their names in 2013 and 2015, Corbitt and Clark's later express awareness of Policy Order 63's requirements is irrelevant to when their claims accrued.

Because the parole cases of *Brown* and *Lovett* thus remain on point notwithstanding Plaintiffs' citation of *Neelley*, the analysis of the "continuing violations" doctrine and "separate and distinct" injury rule from those cases is also applicable. *See Brown*, 335 F.3d at 1261-62;

Lovett, 327 F.3d at 1183. As previously argued, Corbitt and Clark do not experience continuous violations of Policy Order 63 but rather its present consequences of a one time violation, and Corbitt's August 2017 denial of a change to her sex designation was not a separate and distinct injury from the 2013 injury. *See* Doc. 54 at 26-27. For these reasons, Corbitt and Clark's claims are barred by the statute of limitations.

2. Policy Order 63 Does Not Disclose Confidential Information in Violation of Plaintiffs' Due Process Rights

The dispute on Count I really boils down to this: does Policy Order 63 *disclose* Plaintiffs' transgender status in the manner required to amount to a due process violation? Plaintiffs do not dispute that personal information contained in driving records is not the sort of confidential information protected by the Due Process Clause. *See* Doc. 58 at 22-23; *see also Collier v. Dickinson*, 477 F.3d 1306, 1308 (11th Cir. 2007); *Pryor v. Reno*, 171 F.3d 1281, 1288 n.10 (11th Cir. 1999). Defendants do not dispute that an individual's transgender status can constitute the sort of intimate personal information protected by due process. But Defendants maintain that Policy Order 63 does not disclose Plaintiffs' transgender status because their licenses disclose only their "sex" as defined by Policy Order 63. Under *Collier* and *Pryor*, this information is no more confidential than the other information disclosed on a license such as date of birth, height, weight, hair color, and eye color.

Plaintiffs argue that Policy Order 63 discloses their transgender status because on certain occasions individuals viewing their licenses, in conjunction with their feminine appearance and manner of dress, have inferred that they are transgender. Doc. 58 at 24. But if Policy Order 63 "discloses" Plaintiffs' transgender status only in this inferential manner, then it does so in the same sense in which it also might "disclose" an individual's thyroid condition based on the weight listed on a license or "disclose" a genetic condition causing premature aging (Progeria) based on the date

of birth combined with the individual's older appearance. The question is whether this inferential "disclosure" of confidential information from the non-confidential personal information contained on a driver license combined with other information observed about the licensee is a "disclosure" of that confidential information in the legal sense required to amount to a due process violation.

Whether Policy Order 63 results in a "disclosure" of confidential information in the legal sense must be answered by reference to binding precedent, and under this standard it clearly does not result in the sort of disclosure required for a due process violation. *See National Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 147-56 (2011); *James v. City of Douglas*, 941 F.2d 1539, 1543-44 (11th Cir. 1991); *Hester v. City of Milledgeville*, 777 F.2d 1492, 1496-97 (11th Cir. 1985). In *Nelson*, certain NASA employees were required to complete a questionnaire that asked them such intimate questions as whether they had ever received any treatment or counseling for illegal drug use. *Nelson*, 562 U.S. at 152. In *James*, a police detective received a videotape of the plaintiff engaging in sexual activity in connection with her claim that someone was attempting to extort her, and other officers viewed the tape for their own gratification rather than for any investigatory purpose. *James*, 941 F.2d at 1540-41. In *Hester*, the plaintiff firefighters were required to submit to polygraph examinations as a condition of continued employment and to answer certain control questions such as whether they had ever done something that would have resulted in their dismissal or would have discredited the department. *Hester*, 777 F.2d at 1496-97. In each of these cases, the policy or actions of the government officials resulted in the *direct* disclosure of the confidential information through questions asked as a condition of public employment or through the unauthorized viewing of an intimate act. None of these cases involved an indirect or inferential disclosure of confidential information from non-confidential information and thus support

Defendants' position that Policy Order 63 discloses only the non-confidential information considered in *Collier* and *Pryor*.

Furthermore, only in *James* did the court hold that the disclosure of the confidential information amounted to a due process violation. *See James*, 941 F.2d at 1543-44. While all of the above cases involved direct disclosures of confidential information, the court in *James* stated that whether the disclosure of confidential information violates due process requires an inquiry into "whether there is a legitimate state interest in disclosure that outweighs the threat to the plaintiff's privacy interest." *Id.* at 1544. Clearly, the officers viewing the videotape of a possible victim of extortion for personal gratification was not a legitimate state interest that outweighed the plaintiff's privacy interest. *Id.*

Here, not only does Policy Order 63 not directly disclose Plaintiffs' transgender status, but the indirect or inferential disclosure of their transgender status through the disclosure of the non-confidential sex designation on their license involves a legitimate state interest that outweighs the threat to Plaintiffs' privacy interests. *See James*, 941 F.2d at 1544. Policy Order 63 serves the State's interests in using driver licenses as a form of identification primarily for law enforcement purposes. As Defendants have argued, Alabama law compels licensees to disclose their driver license, rather than another form of identification, only under limited circumstances related to law enforcement and the operation of a motor vehicle. Doc. 54 at 30-31. These are unquestionably legitimate state interests that outweigh any indirect, inferential disclosure of Plaintiffs' transgender status. Plaintiffs possess or could possess passports designating their sex as female for all other identification purposes.

Plaintiffs counter that Defendants cannot appeal to the availability of passports to mitigate the unconstitutionality of the forced disclosure of their transgender status created by Policy Order

63. Doc. 58 at 25-27. If Plaintiffs were correct that displaying their Alabama licenses violated their due process rights, then it would indeed be irrelevant to argue they could reduce the extent to which their constitutional rights were violated by using passports. But this is not the point of Defendants' argument regarding passports. Defendants' argument is that Alabama law limits the circumstances in which Plaintiffs are required to display an Alabama license rather than another form of identification to those related to operating a motor vehicle or dealing with law enforcement or court personnel. The legally-required display of an Alabama license is thus limited to situations involving a legitimate state interest that outweighs the threat to Plaintiffs' privacy interests. *See James*, 941 F.2d at 1544.[4] For other situations, Plaintiffs retain the discretion to choose which form of identification to display, such as a passport.

Finally, Plaintiffs respond to Defendants' argument that they lack standing to assert any right to confidentiality regarding their transgender status by framing it as an issue of waiver, citing *Drake v. Covington County Board of Education*, 371 F. Supp. 974 (M.D. Ala. 1974). Doc. 58 at 28. Defendants will not rehash the facts establishing Plaintiffs have not kept their transgender status confidential but here distinguish *Drake*. In *Drake* the majority of a three-judge panel found the plaintiff had not waived her privacy rights in challenging her termination for "immorality"

[4] Plaintiffs argue that "[e]ven if the disclosure did only happen to law enforcement officers, that would still be too much." Doc. 58 at 24. Plaintiffs give the example of an officer disclosing Jane Doe's transgender status to co-workers after seeing her license during an investigation of a traffic accident. But Jane Doe's initial display of her license to the officer for the purpose of investigating the accident was related to the legitimate government purpose of accurately identifying subjects involved in traffic accidents. Policy Order 63 is related to accurate physical identification of license holders, and the officer's voluntary choice to exceed this legitimate scope is no more justified than the officers' choice in *James* to view the videotape for their own gratification. But police misconduct in individual cases does not prevent the State from requiring individuals to identify themselves through documents whose contents are controlled by the State. If the fear of misuse of confidential information were to prevent any disclosure of this information to law enforcement, then law enforcement could not investigate sex crimes, for instance, by compelling disclosure of sensitive information.

because her employer had discovered she was pregnant outside of wedlock by receiving an unauthorized disclosure from her doctor. *Drake*, 371 F. Supp. at 978; *see also Id.* at 981 ("While there is some dispute over the facts, it would appear that the question of Miss Drake's pregnancy came to the Board's attention because her private physician breached his confidential relationship and reported her condition to the Board.") (Johnson, C.J., concurring). The dissenting judge would have held that the teacher's sexual relationship was not confidential because "it was publicly discussed in Florala." *Id.* (Varner, J., dissenting).

Whether viewed as an issue of standing or waiver, *Drake* establishes that a plaintiff may assert a claim for the disclosure of private or confidential information only if the plaintiff has in fact treated that information in a confidential manner. None of the Plaintiffs, including Jane Doe, have done so in this case. Plaintiffs have disclosed their transgender status through social media and through public participation in transgender activist events. This is nothing like the school board members learning of the teacher's pregnancy through the unauthorized disclosure from a physician in *Drake*. Summary judgment is due to be granted in Defendants' favor on Count I.

3. Policy Order 63 Neither Compels Plaintiffs to Receive Medical Treatment Nor Conditions Receipt of a Government Benefit on Receiving Such Treatment

Defendants reincorporate their arguments from Section A, *supra*, as to Count II.

4. Policy Order 63 Is Government Speech and May Not Be Challenged as Compelled Speech

Defendants have argued that the sex designation on an Alabama driver license, as defined by Policy Order 63, is government speech and is thus not susceptible to a First Amendment compelled-speech challenge. Doc. 54 at 40-41 (analyzing three elements of government speech under *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015)). Plaintiffs cite in opposition a recent decision of this Court holding that information on a driver license

compels speech in *Doe v. Marshall*, No. 2:15-cv-606-WKW, 2019 WL 539055, at *6-8, __ F. Supp. 3d __ (M.D. Ala. Feb. 11, 2019). Defendants respectfully disagree with the holding in *Doe*.

Doe held that a policy of placing the words "CRIMINAL SEX OFFENDER" on registered sex offenders' driver licenses was compelled speech under the First Amendment and failed to satisfy strict scrutiny. *Doe*, 2019 WL 539055, at *6-8. The court held that the State had a compelling interest in requiring sex offenders to possess a driver license or identification card bearing "a designation that enables law enforcement officers to identify the licensee as a sex offender," Ala. Code § 15-20A-18(b), but that the words chosen required the plaintiffs to express a message about themselves with which they disagreed. *Id.* The court in *Doe agreed* that the sex offender designation "is indeed government speech," but held that "the fact that a license is government speech does not mean it is immune from the compelled speech analysis." *Id.* at 7 (citing *Wooley v. Maynard*, 430 U.S. 705 (1977)). Defendants respectfully disagree that if speech on a driver license is government speech under the analysis set out in *Walker*, then it is not immune from compelled speech analysis.

If the sex designation on a driver license satisfies the elements for government speech under *Walker*, then the speech on a driver license cannot be attributed to the licensee but rather to the government. But if the speech is not attributed to the licensee, then the licensee may not bring *any* First Amendment challenge to the speech, whether it is based on compelled speech, viewpoint discrimination, or any other claim. *See Walker*, 135 S. Ct. at 2245 ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says . . . Thus, government statements . . . do not normally trigger the First Amendment rules designed to protect the marketplace of ideas."). The Supreme Court has held that, if speech is government speech, a compelled speech challenge under the First Amendment is simply inapplicable. *See Johanns v.*

Livestock Mktg. Ass'n, 544 U.S. 550, 553, 556-57, 567 (2005); *see also Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1220 (9th Cir. 2009) (concluding that because an advertising scheme "is the government's own speech" it "is thereby exempt from a First Amendment compelled speech challenge" under *Johanns*).

The question turns on who is doing the speaking. If Defendants are correct that the State of Alabama speaks, primarily to its law enforcement officers, through the personal identifying information contained on driver licenses, then Plaintiffs' compelled speech claim fails as a matter of law with no need for further analysis. If Plaintiffs were to prevail, then it would be they who compelled the government to speak, a result at odds with *Walker*. *See Walker*, 135 S. Ct. at 2253 ("But here, compelled private speech is not at issue. And just 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."). Defendants respectfully disagree with the analysis in *Doe* and move for summary judgment in their favor on Plaintiffs' compelled speech claim.

5. Policy Order 63 Is Facially Neutral and Otherwise Satisfies Constitutional Scrutiny Under the Equal Protection Clause

Defendants submit additional authority in support of their equal protection argument that was released the date they filed their opposition brief, March 8, 2019, and which did not come to their attention in time to raise in that brief. *See Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 1086495, __ F.3d __ (D.C. Cir. Mar. 8, 2019).[5] The Court of Appeals for the District of Columbia released an unpublished judgment vacating a preliminary injunction against the "Mattis Plan,"

[5] Defendants cite this case for the first time in their reply because it did not come to their attention in time to include it in their opposition brief filed the same day the decision was released. Accordingly, if Plaintiffs wish to file a sur-reply to address the applicability of *Shanahan* to the case, Defendants do not oppose any motion for leave to file a sur-reply on the relevance of *Shanahan.*

which, among other things, excludes all of those diagnosed with gender dysphoria from military service and requires all servicemembers to serve in their biological sex. *See Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309, at *1, __ F. App'x __ (D.C. Cir. Jan. 4, 2019). The January 4, 2019 judgment noted that opinions would be filed at a later date. *See Shanahan*, 2019 WL 102309, at n.*. The court filed its opinions on March 8, 2019.

Defendants have argued that Policy Order 63 is facially neutral with respect to transgender individuals because it provides a criterion for changing the sex that is applicable to transgender and non-transgender individuals on the same basis and thus does not trigger heightened scrutiny. *See* Doc. 54 at 42-43; Doc. 60 at 9-14. Plaintiffs argue that Policy Order 63 is not facially neutral because it applies only to transgender people. Doc. 58 at 37-38. In an opinion concurring in the judgment, Senior Circuit Judge Williams addressed, and rejected, an identical equal protection argument asserted by transgender opponents of the Mattis Plan. *Shanahan*, 2019 WL 1086495, at *32-34. Judge Williams concluded that the ban on service for people diagnosed with gender dysphoria and the requirement that all servicemembers serve in their biological sex were facially neutral because they applied to transgender and non-transgender people:

> Plaintiffs, of course, object to the requirement that all must serve in their biological sex. That is central to their claim. See Oral Arg. Tr. 19:12–16 (arguing that the Mattis policy "requires anyone who serves to do so in their biological sex," but that "not living in a person's biological sex is the defining characteristic of what it means to be transgender"). *But the requirement is nevertheless facially neutral; "all" means "all." Transgender or non-transgender; gender dysphoria or non-gender dysphoria; "all" service members must serve "in their biological sex."* *Mattis Memo* 3, J.A. 265. This can't be facially discriminatory as to transgender persons; military officials need not know an individual's transgender status in order to enforce the policy—knowledge of physical characteristics unrelated to gender preference is both necessary and sufficient. Cf. *Crandall v. Paralyzed Veterans of Am.*, 146 F.3d 894, 897 (D.C. Cir. 1998)

> (observing that an employer can't discriminate on the basis of a disability without an actual "awareness of the disability itself").
>
> To be sure, plaintiffs (wrongly) maintain that the biological-based sex standards operate as a complete ban on transgender persons. *Panel Judgment* *2 (This is "clear error."). But the effect of these standards on transgender persons (*Op.* —— n.* (Wilkins, J., concurring)) is no different from that of a regulation barring headgear (and thus yarmulkes) on Orthodox Jews. See *Goldman*, 475 U.S. at 514, 106 S.Ct. 1310 (Brennan, J., dissenting) ("It sets up an almost absolute bar to the fulfillment of a religious duty."). Even if both policies require "suppressi[on] [of] the characteristic that defines [a person's] identity," Appellees' Br. 21—be it "transgender identity," *id*., or "religious ... identity," *Goldman*, 475 U.S. at 517, 106 S.Ct. 1310 (Brennan, J., dissenting)—the magnitude of the impact does nothing to transform a facially neutral policy into a facially discriminatory one, see *id*. at 510, 106 S.Ct. 1310 (majority opinion) (describing the headgear policy as "reasonabl[e]" and "evenhanded[ ]" "even though [its] effect is to restrict ... [expression] required by [ ] religious beliefs"); *id*. at 513, 106 S.Ct. 1310 (Stevens, J., concurring) (agreeing that the headgear policy is "neutral, completely objective").

Shanahan, 2019 1086495, at *33 (emphasis added).

Applying Judge Williams' concurring opinion, Policy Order 63 provides a criterion for changing the sex on a driver license that applies to *all*, transgender and non-transgender alike. The policy applies to those with intersex conditions as well as non-transgender individuals who wish to change the sex on their license to change their identity so they could, for example, engage in identity fraud. Judge Williams' analysis, like that of Judge William Pryor's concurrence in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1259 (11th Cir. 2017) (Pryor, J., concurring), concludes that a policy that disparately impacts transgender individuals based on their *status* as transgender does not constitute invidious discrimination . Thus, Policy Order 63 does not constitute sex-based discrimination based on gender non-conforming *behavior* requiring intermediate scrutiny as in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), but rather provides a facially neutral criterion for changing the sex designation on a license that disparately impacts transgender

individuals based on their status. Since the policy is facially neutral, no form of heightened scrutiny applies, and Policy Order 63 easily satisfies rational basis review for the reasons already argued. Doc. 60 at 10-14.

Defendants reincorporate their previous arguments as to Plaintiffs' equal protection claim, namely, that even if intermediate scrutiny applies, Policy Order 63 satisfies this level of scrutiny and that transgender individuals do not constitute a suspect class warranting heightened scrutiny outside of the behavior-based analysis in *Glenn*. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' equal protection claim.

C. Conclusion

For the reasons stated above, Plaintiffs' motion for summary judgment should be denied and Defendants' motion for summary judgment should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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