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 V

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

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

*Counsel for the State Defendants*

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,

Vs. CASE NO.: 2:18cv91-MHT

HAL TAYLOR, et al.,

Defendants.

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MOTION HEARING

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BEFORE THE HONORABLE MYRON H. THOMPSON, UNITED STATES DISTRICT JUDGE, at Montgomery, Alabama, on Tuesday, July 30, 2019, commencing at 10:05 a.m.

APPEARANCES

FOR THE PLAINTIFFS: Mr. Gabriel Arkles
Attorney at Law
AMERICAN CIVIL LIBERTIES UNION
125 Broad - 18th Floor
New York, NY 10004

Mr. Brock Boone
Mr. Randall C. Marshall
Attorneys at Law
ACLU OF ALABAMA FOUNDATION, INC.
Post Office Box 6179
Montgomery, Alabama 36106-0179

APPEARANCES, continued:

FOR THE DEFENDANTS: Mr. Brad A. Chynoweth
Mr. Winfield J. Sinclair
Office of the Attorney General
Post Office Box 300152
Montgomery, Alabama 36130

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Proceedings reported stenographically;

transcript produced by computer

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(The following proceedings were heard before the Honorable Myron H. Thompson, United States District Judge, at Montgomery, Alabama, on Tuesday, July 30, 2019, commencing at 10:05 a.m.:)

(Call to Order of the Court)

THE COURT: Court calls the case of Corbitt versus Taylor, civil action number 18cv91.

Who do we have representing the plaintiffs?

MR. ARKLES: Gabriel Arkles for the plaintiffs.

THE COURT: What was the name?

MR. ARKLES: Gabriel Arkles, Your Honor.

THE COURT: Arkles?

MR. ARKLES: A-R-K-L-E-S.

THE COURT: You pronounce it Arkles?

MR. ARKLES: Yes, Your Honor.

THE COURT: Okay. Very good. Thank you.

And who do we have representing the defendants?

MR. CHYNOWETH: Brad Chynoweth and Win Sinclair, Your

Honor.

THE COURT: Okay. Is that Chynoweth?

MR. CHYNOWETH: Chynoweth, yes.

THE COURT: Okay. Would you both stand at the lectern, please. I'm going to be asking you questions back and forth rather than having you talk for an hour or half an hour or what and then the other one stand up.

Now, I have cross motions for summary judgment, so I'm really just going to ask some basic initial questions that would apply across the board.

First of all, Mr. Arkles, are there any disputed issues of fact?

MR. ARKLES: Your Honor, first of all, if I may, I should have introduced Randall Marshall and Brock Boone, my cocounsel, and Destiny Clark, who's one of the clients in this case.

There are some very narrow disputed issues of fact, but I don't believe there are disputed issues of fact that are material to the outcome of the case.

THE COURT: Okay. Explain that to me.

MR. ARKLES: So for the most part, the parties agree as to what the policy is, how the policy is enforced, and how it has affected the plaintiffs in this case. There's potentially some dispute as to exactly what happened when Ms. Corbitt, one of my clients, went to the driver's license office in Opelika in

terms of whether she was publicly misgendered and referred to as an it. I don't believe that that is material to the outcome of this case.

There are also -- there is certainly a strong dispute over the interpretation of some of Jane Doe's deposition testimony in terms of how public she is about her transgender identity. There's no dispute as to the actual facts or what she said, but there appears that there may be some dispute as to exactly what that means.

But, again, I think that while there may be some relevance to the privacy claim, ultimately it can be resolved regardless of how the Court --

THE COURT: Isn't there some dispute also about whether -- and I'll just refer to it as the state rather than -- I think it's ALEA; is that right? Whether the state consistently or inconsistently applies the policy at issue, Policy Order 63?

MR. ARKLES: So as to each particular decision where the defendants produced evidence about how they had applied the policy, I don't think that there is dispute as to the decision in each particular instance.

THE COURT: Well, I was more concerned about things like when the policy was made public; how consistently the state has applied the policy, not just to your clients, but in general; whether those who allegedly administer the policy have

done so consistently; things like that.

MR. ARKLES: Your Honor, I'm having a difficult time thinking of specific facts in the record that are actually in dispute on that topic, although, again, I think the inferences drawn from that are disputed and certainly how to apply the facts to those -- how to apply the law to those facts.

THE COURT: Well, you know, I mean, it could be not disputed that, you know, the weather was bad and you were going too fast. And I could know your speed and I could know the weather was bad, but the inference I would draw could be very strongly disputed as to whether you were negligent or not. So I'm trying to see whether I can draw from the record the way in which the state has applied the policy and what inferences I can draw, would those be disputed or not.

MR. ARKLES: Yes, Your Honor. There may be some dispute as to how consistently the policy is in play, although I think on the particular decisions that were made, there's no actual evidence that's conflicting in the record.

THE COURT: Right. Are there any other areas that you could think of that --

MR. ARKLES: I can think also in terms of the record of how the policy has been applied. There's potentially some difference in interpretation of the document where --

THE COURT: What about the issue of how the policy has affected your clients? You know, I could say that, you know,

you could give me the facts, but the inferences I could draw could be disputed; is that correct?

MR. ARKLES: Yes, Your Honor. However, the defendants have not submitted any evidence that would dispute any of my clients' testimony.

THE COURT: Right. What about the experts? Do both sides concede that the experts meet the requirements of Daubert?

MR. ARKLES: Yes, Your Honor, although we would submit that the testimony of Donald Leach should be limited to correctional expertise rather than medical expertise, but I think that's the spirit in which defendants are offering him.

THE COURT: Is that a Daubert issue?

MR. ARKLES: No, Your Honor. We believe he's qualified on the issue of corrections.

THE COURT: But is it a Daubert issue as to whether his testimony is relevant here?

MR. ARKLES: No, Your Honor. We concede that his testimony may be relevant to the government interests in correctional policies.

The experts, interestingly, contradict each other very little, even though they have very different perspectives. And their testimony to a large extent didn't overlap and, therefore, didn't conflict. So the expert for the plaintiffs testified to the meaning of sex, gender identity, and gender dysphoria, the harmful and dangerous impact that the policy has on the health

of transgender people, and what an appropriate and scientifically based policy would be.

The expert for the defendants, Donald Leach, testified that there is an interest -- there is a correctional interest in having a policy that indicates what sex means on driver's licenses and that it is helpful to have a sex designation on driver's licenses. But he did not express an opinion about whether there should be surgery requirements, which is what the plaintiffs are challenging.

THE COURT: Right. If the case were to go to trial, how long would it take?

MR. ARKLES: Your Honor, we believe that the -- for the plaintiffs' case, we would be able to put it on in two days, possibly less.

THE COURT: Okay. What would be the plaintiffs' position if the Court were to, say, take it under submission, the evidence that you've presented, but it would not be on cross motions for summary judgment? In other words, the Court could resolve disputed issues of fact if there are any.

There are cases where -- well, let me put it this way. There are actually three avenues you could take. You could do it on cross motions for summary judgment, we could do it at trial, and we could do it just by taking the case under submission, but it's not on cross motions for summary judgment. In other words, I would just be resolving the case as if I had

held a trial.

What would be the plaintiffs' position on that?

MR. ARKLES: Your Honor, the plaintiffs would be amenable to that.

THE COURT: And if I had any issues, I could just merely, you know, narrow them or bring them in, but it would -- so, in other words, I would not be bound by -- what is it? -- Rule 56?

MR. ARKLES: Yes, Your Honor.

THE COURT: The summary judgment rule.

MR. ARKLES: I should confer with my clients, but I don't believe we would have any objection to that.

THE COURT: Mr. Chynoweth, I'm going to ask you the same questions. Are there any disputed issues of fact here?

MR. CHYNOWETH: No, Your Honor, I do not believe there are any disputed issues of fact that are material. I believe that I agree with Mr. Arkles on that assessment.

THE COURT: Can the Court draw inferences about the impact of Policy Order 63 on the plaintiffs from the record? Would the Court be free to draw its own inferences about things like that without having had the plaintiffs appear before the Court?

MR. CHYNOWETH: Yes, I believe so, Your Honor, because the plaintiffs testified in their depositions very clearly. I asked each one of them, can you please testify in your own words

how Policy Order 63 has harmed you, and each plaintiff did so. And the state does not have -- the injuries that the plaintiffs testified to are -- I think could be characterized as psychological injuries. And the state does not intend to offer evidence to rebut that. It's more that this policy is not intended to inflict psychological harm on transgender individuals, in that the state interests that we have under the relevant levels of scrutiny for each claim are constitutional.

THE COURT: What about the experts? Do you agree that their expert meets all the requirements of Daubert?

MR. CHYNOWETH: Yes. We believe Dr. Gordon is qualified to testify on the treatment of transgender individuals as a general practitioner who specializes in that practice.

THE COURT: But don't you take issue with the inferences the Court can draw from -- I believe it's -- is it Dr. Gordon? Yes.

MR. CHYNOWETH: It's not so much -- it's not the inferences so much as the legal relevance. When Dr. Gordon testifies that in his opinion he thinks the most clinically appropriate policy would be self-certification of gender, we think that's simply not relevant.

THE COURT: I thought you took issue, though, with the fact that Dr. Gordon had not actually examined the plaintiffs, and therefore could not offer any opinions as to their particular circumstances and how their particular circumstances

are affected in this case.

MR. CHYNOWETH: We think that was relevant to get on the record. It does not appear that the plaintiffs have put any particular medical condition they might have at issue, and I do not understand them to be making any part of their claim based on any particular medical issue.

THE COURT: Didn't all three plaintiffs testify that they suffer from gender dysphoria?

MR. CHYNOWETH: They did. However, it's not in the complaint that that is any basis for the relief they seek. And, in fact, in response to the state's interrogatory, which is in the record, the state directly requested that the plaintiffs identify whether they had been diagnosed with gender dysphoria.

THE COURT: Is that evidence the Court can rely on?

MR. CHYNOWETH: I think that the fact that the plaintiffs refused to answer that interrogatory on the grounds that it was not relevant is certainly something the Court can take into account. Again, had that been the principal issue, that should have been pled. And the case was not built around that. That came out, I think, as voluntary disclosures in depositions.

THE COURT: Right.

MR. CHYNOWETH: So I think that Dr. Gordon's testimony -- we don't dispute that he is offering opinion as to what he thinks is clinically appropriate. We have not put on

contrary evidence that would say that Dr. Gordon is wrong. And, in fact, we think that the experts are testifying about different opinions, and those then serve as a backdrop to the different legal interests that the parties are asserting.

So I believe that these are simply questions of law for the Court to decide. It's not as if we have experts offering conflicting testimony on the same subject. They're, frankly, talking past one another.

THE COURT: What about resolving this case on the record rather than on summary judgment?

MR. CHYNOWETH: I am not familiar with that from a procedural standpoint.

THE COURT: It's pretty straightforward. It just means you would just submit the case to the Court on the record that you've formed, but I would not be bound by Rule 56 because you-all agree that if there are disputed issues of fact, I can resolve those.

MR. CHYNOWETH: I don't believe that the defendants would have any objection to that, because our position is that were we to have a trial --

THE COURT: Essentially, what you would be saying is were we to have a trial, I would be hearing the same evidence.

MR. CHYNOWETH: Yes.

THE COURT: And therefore, Judge, just go ahead and decide the case without us having to come back to court. But

you're not restricted by Rule 56. But that would mean I could draw inferences which would be binding.

That doesn't mean I would necessarily still not want to have a trial. Let me get that clear. But it's just another avenue.

Do you want to think about it?

MR. CHYNOWETH: Yes. Yes, Your Honor.

THE COURT: Yes, what?

MR. CHYNOWETH: Yes, we would like to think about it.

THE COURT: How long would a trial take if we were to go to trial?

MR. CHYNOWETH: I believe that it would take defendants two days, approximately, to put on their case.

THE COURT: So it could be four to five days for both sides.

MR. CHYNOWETH: Yes, Your Honor.

THE COURT: Okay. Now, Mr. Arkles, when can you let me know about submitting the case on the record but not on cross motions for summary judgment?

MR. ARKLES: I'm sorry, Your Honor.

THE COURT: I'm sorry. I'm asking Mr. Chynoweth this. You've already agreed that you could do it.

MR. CHYNOWETH: I'm sorry?

THE COURT: When can you let me know you could agree to submitting the case on the record?

MR. CHYNOWETH: Certainly by the end of the day.

THE COURT: By the end of the day? Okay.

MR. CHYNOWETH: Or perhaps even if we could take --

THE COURT: Do you want to take a moment and just talk with your cocounsel?

MR. CHYNOWETH: Yes. Because I have general counsel for ALEA here with us as well.

THE COURT: Why don't you take a moment? The easier and the earlier I can dispose of this, the better. If you'd like to confer, just confer. I'll let you do it right now. Take a moment.

(Recess was taken from 10:21 a.m. until 10:27 a.m., after which proceedings continued, as follows:)

THE COURT: Yes, Mr. Chynoweth.

MR. CHYNOWETH: Thank you. Thank you for letting us have that time. I'm going to admit, you threw a curve ball at us. We would like to place on the record that without waiving our objection to the fact that in discovery they said that their gender dysphoria diagnosis was not relevant, with our objection being placed on the record, we consent to submitting the case to the Court on the record.

THE COURT: Okay. Again, I want to emphasize that I still might want to have -- to hear some evidence live, if not all. But that puts us in a slightly different posture, then. But let's talk about some of the issues.

Mr. Arkles, we've been talking about driver's licenses. Does all of this argument also apply to nondriver license IDs?

MR. ARKLES: Your Honor, I believe that all of the same arguments would apply. The policy itself only names driver's licenses, but the same interests would appear to be relevant. Certainly the same harms would occur as well.

THE COURT: I'm just raising it because some of the identifications that are required -- some of the instances where identification is required and you would use a driver's license, you can quite often use a nondriver's license ID. And I just wanted to make sure that the concerns that are raised here would apply to -- I think they're called nondriver IDs or something like that. Anyway, it's just a state ID, which you can get, I understand.

MR. ARKLES: Yes, Your Honor. My clients each have driver's licenses, but I believe the same arguments would apply with the same force to a nondriver's license ID.

THE COURT: Does this policy, order 63, apply to nondriver IDs?

MR. ARKLES: Your Honor, I don't believe we have that in the record. The policy itself names driver's licenses, and I'm not aware whether there's a separate policy for nondriver IDs.

THE COURT: Do you know, Mr. Chynoweth?

MR. CHYNOWETH: I do not know, Your Honor.

THE COURT: Because if your clients can get nondriver IDs, why wouldn't that resolve the problem?

MR. ARKLES: Well, Your Honor, they would still need to carry and show driver's licenses any time when they're driving.

THE COURT: So that would restrict it to just when they're driving, then. But --

MR. ARKLES: Yes, Your Honor. So that would -- that would potentially limit the harm, which could be relevant in the balancing test for privacy.

THE COURT: How can I find out whether Policy Order 63 applies to nondriver IDs? That cuts both ways. I mean, if -- well, let me just hear. Does it apply to nondriver IDs or not?

MR. ARKLES: Well, Your Honor, I believe we would need to get evidence from the state agency on that issue, and the plaintiffs don't have within their possession information on how it applies to nondriver IDs.

THE COURT: Because all of the state's asserted interests, why wouldn't it apply to both driver IDs and nondriver IDs?

MR. ARKLES: I believe it probably would, Your Honor. I'm also not certain, though, whether my clients, who already have driver IDs, would be able to get --

THE COURT: Well, I'm not getting at your clients. I'm trying to get at the state's interests now.

MR. ARKLES: Right.

THE COURT: In other words, a lot of people don't drive, and they have nondriver IDs. Can you get your gender changed on a nondriver ID if you don't drive? In fact, a lot of people, getting back to the state's experts, who are in prison don't have driver IDs. Sometimes they have nondriver IDs because they can't get driver IDs, maybe, for various and sundry reasons. Maybe got too many DUIs or something like that. Does the state find it okay that you can easily change a nondriver ID?

MR. ARKLES: It is true, Your Honor, that there are a number of people who are arrested who don't have a driver's license or certainly don't have an Alabama driver's license. Some might not have any IDs at all. And the government is still able to achieve its interests, despite that fact. And, in fact, even --

THE COURT: I guess my question -- which maybe should be for Mr. Chynoweth, but I guess I'd like to know the difference -- if the state doesn't require this for nondriver IDs, what's the reason for requiring it for license IDs?

MR. CHYNOWETH: Well, Your Honor, the statute that references driver's license requires that there be a description.

THE COURT: For a nondriver ID, doesn't it require a description?

MR. CHYNOWETH: I'm not prepared to -- I am not sure

about the statutes governing nondriver IDs off the top of my head. I have general counsel attempting to determine whether Policy Order 63 applies to nondriver IDs.

Again, under the complaint that was pled, which applied only to driver's license -- I understand the Court's concern that it is evidence of the state's interests, but I don't have any knowledge of that off the top of my head.

(Brief pause in the proceedings)

MR. CHYNOWETH: Defendants can stipulate that Policy Order 63 does apply to nondriver IDs.

THE COURT: Oh, it does apply to nondriver IDs?

MR. CHYNOWETH: It does. Yes.

THE COURT: Okay. Does it say it applies to nondriver IDs?

MR. CHYNOWETH: The policy uses the word driver license. That's Exhibit 7 to Diane Woodruff's deposition. So there's a 2012 version of the policy. The 2012 version uses the words Alabama license, and the 2015 version says driver license.

THE COURT: Right. So how do you conclude that it applies to nondriver IDs, then?

MR. CHYNOWETH: I've only just been told, Your Honor, by general counsel that it does. Again, I'm not -- nothing in the record is on that issue one way or the other.

MR. SINCLAIR: We don't even know if it's come up.

THE COURT: That's something I would like to know one

way or the other. Because it does -- I would like to know how the state can justify it applying -- the policy applying to driver's IDs and not applying to nondriver IDs. Seems to me, to the extent they serve the purpose of identification, they serve the same purpose. Anyway, we need to resolve that.

One other thing, Mr. Arkles. I know that we have Plaintiff Doe in the complaint; is that correct?

MR. ARKLES: Yes, Your Honor.

THE COURT: You have no problems with using Ms. Corbitt and Ms. Clark's names in anything I write; is that correct?

MR. ARKLES: That's correct, Your Honor.

THE COURT: You have information in the record about the treatment of transgender people and certain violence and hostility. Is any of your evidence specific to Alabama?

MR. ARKLES: Yes, Your Honor.

THE COURT: What evidence do you have that's specific to Alabama?

MR. ARKLES: There are two primary types of evidence that are specific to Alabama. One is my clients' own experiences, like Jane Doe, who was told she would burn in hell and denied services in a bank when she showed her driver's license.

The other type of evidence is one of the studies that was a national study did a breakout report specific to Alabama. And that report talks about rates of discrimination and

violence, which are generally similar to the national rates. The rates of transgender people in Alabama who have ID'd that as consistent with their gender identity is much lower than nationally.

THE COURT: What, now?

MR. ARKLES: I'm sorry. This is --

THE COURT: Say that again.

MR. ARKLES: So in general, the rates of discrimination and violence that transgender people experience in Alabama appears to be very similar to the national rates. There are also some statistics in that report about how common it is for transgender people to have ID that matches their gender identity. Those rates are different in Alabama than nationally.

THE COURT: Oh, so you're saying for Alabama, it's lower in what regard, now? What were you saying? You said something was lower.

MR. ARKLES: Yes. So transgender people are able to get an ID that matches their gender identity less frequently in Alabama than other parts of the country. Which is not surprising, given Policy Order 63.

THE COURT: But I could not infer, for instance, that the hostility to transgender people is either higher or lower in Alabama than elsewhere in the country.

MR. ARKLES: I do not believe we have evidence to support that inference, Your Honor.

THE COURT: Okay. Now, I noticed that --

Would you agree with that, Mr. Chynoweth?

MR. CHYNOWETH: Agree that --

THE COURT: There's nothing specific to Alabama that would indicate that the hostility towards transgender people is higher or lower?

MR. CHYNOWETH: Yes.

THE COURT: Okay. Mr. Arkles, if I were to write an opinion in your favor, but I could only write it on one of your claims, which would you prefer it be and why?

MR. ARKLES: Your Honor, I think that the equal protection claim is probably the one that I would choose.

THE COURT: Why?

MR. ARKLES: Because for transgender people not to have access to driver's license that they can use safely and with dignity without getting medical care that is unrelated to their ability to drive treats them far less favorably than nontransgender people. And it also indicates that the state can make a policy deciding what your body type has to be to be a real woman or to be enough of a man, which I think is abhorrent to the equal protection clause which prohibits discrimination on the basis of gender in the absence of an important government interest that is substantially furthered by the policy. Here the policy itself is simply about making a distinction on the basis of gender and saying that most transgender --

THE COURT: Let's talk about making a distinction on the basis of gender. What about the state's argument that everybody is treated alike? In other words, all the state is saying is that your driver's license should reflect what you are -- what your genitals show, and that's true to both -- to everyone across the board. There's no discrimination.

MR. ARKLES: Well, so, Your Honor, I think that there is clearly discrimination. Because for transgender people, this means that they can't have a license they can use safely or with dignity and that discloses something that's exclusively about genitalia rather than the sex that they live as, identity as, or are typically perceived to be. And the reasoning is simply because of a sense of what makes somebody the right kind of a man or a woman. That reasoning is simply not adequate under the equal protection clause.

THE COURT: I thought, though, that you made the argument earlier that your equal protection claim is that transgender people are treated differently. But how are they treated differently if both transgender and what you call cisgender and everyone else just requires that your driver's license reflect your genitalia, that's it, case closed, according to the state?

MR. ARKLES: Your Honor --

THE COURT: So where is the disparate treatment there?

MR. ARKLES: Your Honor, because transgender people and

transgender people alone are required to undergo a form of genital surgery that results in permanent sterilization that is irrelevant to their ability to drive before they can get an ID that indicates who they are and that they can use without putting themselves at risk of harassment, discrimination, and violence, and because it is based specifically on whether the state believes that transgender people are the right kind of women or men.

It also imperfectly reflects genitalia. There are a number of people for whom the driver's license actually won't indicate their genital type. For example, transgender people who are born in one of the roughly 25 U.S. jurisdictions where you can amend your birth certificate without surgery and then move to Alabama, the driver's license will not reflect whether or not they've had genital surgery or what their genitals looked like when they were born. And at any rate, a desire simply to describe people's genitals in and of itself is not an important government interest.

THE COURT: Let me ask you this, Mr. Chynoweth. What would you do in the case where someone was transitioning? If the driver's license is supposed to reflect their genitalia, what happens when you're transitioning?

MR. CHYNOWETH: I think that our deposition testimony was crystal clear on that point: That medical documentation had to say that the sex reassignment surgery has been completed.

THE COURT: Well, suppose it's not completed. That's what I'm saying. You're transitioning. Suppose you're just taking hormones or suppose you're going through a point where you're, I guess, arguably in between. I don't understand, how would the state -- what would the state want then?

MR. CHYNOWETH: For the cases that --

THE COURT: Yeah. Where the person is transitioning. Where they haven't -- it hasn't been what you would call complete yet.

MR. CHYNOWETH: Then you cannot change your sex on your license pursuant to --

THE COURT: But then it wouldn't reflect necessarily your status, would it? Unless you're just saying, it has to be completely trans -- complete, I guess, in the essence of your genitals maybe?

MR. CHYNOWETH: I understand the Court's question.

THE COURT: Yes. But maybe I don't understand the surgery itself. Maybe someone needs to enlighten me on exactly what the surgery entails.

MR. CHYNOWETH: The state's interests in the policy is identifying people based on sex described in physical terms for law enforcement purposes. If I could add that all together with hyphens as one interest, that would be the state's interest.

Now, I understand the Court has said, look. There can be transitional stages. There can be indeterminate stages.

This is a bright-line rule. The state has chosen a bright-line rule to define sex by reference to physical characteristics, including genitalia. And it is a bright-line rule because it is something that is simple for law enforcement officers and corrections officers throughout the state to understand.

THE COURT: You said it's a bright-line rule, including genitalia. What else other than genitalia is at issue here?

MR. CHYNOWETH: I believe there's testimony in the record that top and bottom, to use a somewhat inelegant way of describing it, but that is the way --

THE COURT: I see. You mean breasts?

MR. CHYNOWETH: Yes.

THE COURT: So what if someone has breast removal but not necessarily genitalia change?

MR. CHYNOWETH: The way that the documentation has been required, that would not be sufficient.

THE COURT: Even though if you're looking, as you put it, top and bottom, the top may reflect one thing and the bottom may reflect something else, but the state still says you're stuck with the bottom.

MR. CHYNOWETH: Yes. Again, the policy choice is a bright-line rule defined by complete sex reassignment surgery. Because I think once you start saying, well, what about this rather than that, there is a whole range of indeterminate, intermediate conditions. And I think that it results in an

administrative burden to say, well, if somebody's had procedures X and Y but not Z, can we change the sex on their license? I think that part of the reason that Policy Order 63, that choice was made, was administrative simplicity.

THE COURT: Do you want to respond to that?

MR. ARKLES: Your Honor, if the interest is administrative simplicity, then a gender-identity-based policy is far simpler and is actually something that both experts agreed would work here.

In terms of the health care that people -- that people may need, as Dr. Gordon testified, this is individualized care. What people need can vary. Some people undergo hormone treatment. Hormone treatment can cause changes in the genitalia along with other parts of the body. Then there are wide variety --

THE COURT: Does the record reflect these types of changes? For instance, you said hormonal changes can bring about a change in genitalia; right?

MR. ARKLES: Yes, Your Honor. Not the type of change that it appears from Chief Pregno's testimony, penis or vagina, that the state is looking for, but it does provide -- it does create changes to a wide variety of body systems, including changes to the genital area.

I can't quite recall what detail Dr. Gordon's testimony got into this. But at the end of the day, also, it seemed to us

from Chief Pregno's testimony that she was defining it as penis or vagina, because that's what she said.

It is also true that I believe Ms. Eastman testified top and bottom surgery, which would actually mean that a transgender woman who had had genital reconstruction surgery and who had also grown breasts due to hormone therapy would still be required to get breast augmentation surgery before she could change the sex designation on her license.

If that's true, it cuts against any interest in having consistent information about genitalia on a license. Which, again, the government doesn't actually need. What the government needs --

THE COURT: You're saying that under this policy, if you were transitioning into -- if you were born a female -- no. Maybe I have it backwards. You would have to get --

If you were born a male, you would actually have to get breast augmentation for it to be complete; is that correct?

MR. ARKLES: So, Your Honor, that appears to be, from what Mr. Chynoweth just said, what the state's position is. If they're required both top and bottom surgery, then that's what it means.

So even if you have female typical genitalia, even if you have breasts, you would still need to get surgery on the upper half of your body in some way. Or perhaps they mean facial feminization surgery or a tracheal shave, which reduces

the size of the Adam's apple.

The state was never able to be very specific about what it meant, even though it insists on this particular rule. Really, the state should not be in the business of trying to regulate what type of medical care people get.

THE COURT: I'll get to that in a minute. Right now I just want to figure out what the state is requiring and what the implications are. Now, what the state should be doing is another question, and I'll get to that in a minute.

So what about the Adam's apple? What happens there, Mr. Chynoweth? Does that need to be changed?

MR. CHYNOWETH: Again, ALEA doesn't enumerate specific procedures that are necessary and sufficient when taken together to constitute sex reassignment.

THE COURT: I'm just trying to understand your bright line here. You said there's a bright line. The question is, what is the bright line? Or is the line not so bright is another question.

So does the Adam's apple need to be changed if you want to have complete transition for someone who, say, wants to transition to female?

MR. CHYNOWETH: ALEA relies on the statements provided by the doctors who have performed these procedures that sex reassignment surgery has been completed. And Jeanie Eastman testified that no one had ever asked her, what do you mean by

sex reassignment? Do you mean this rather than that? And, in fact, this is the way the medical unit follows up on a variety of medical conditions. They use terms, and there has never been any confusion as to what this meant. And there doesn't appear to have been any confusion as to whether this disqualified plaintiffs from receiving a sex designation change.

THE COURT: So what you're saying is all you need is a doctor's statement saying it's complete, but you're not going to challenge what complete means.

MR. CHYNOWETH: That the sex reassignment surgery has been complete. Yes.

THE COURT: What if they had a statement saying it had been complete, but there had been no genitalia change? Would that be okay? Depends on what you mean by complete. You know, maybe it's the person saying I want to complete, but I don't want to lose my right to engage in reproductive activities, so I'm not going to have my genitalia changed. But it's complete otherwise. I'm a female or a male.

MR. CHYNOWETH: The understanding and the way the policy has been interpreted in the medical unit is that it applies to genitalia.

THE COURT: So just saying it's complete is not enough.

MR. CHYNOWETH: Correct. And I think that the modifier complete should go before the word surgery as opposed to the surgery being complete. Because, yes, saying that a surgery --

THE COURT: So if someone got breast augmentation but didn't change the genitalia because they wanted to be able to still have children, that would not comply.

MR. CHYNOWETH: That would not.

THE COURT: Okay.

MR. CHYNOWETH: Your Honor, can I respond to one point Mr. Arkles made?

THE COURT: Yes.

MR. CHYNOWETH: On the administrative convenience question, it is not that the state's only interest is in administrative feasibility. The primary interest is physical identification for law enforcement purposes. However, administrative convenience by choosing what we contend is a bright-line rule --

THE COURT: That's a pretty Draconian requirement by the state to say that in order to transition, you have to give up your right to reproduce. Your reproductive right. Not only do you have to be changed, but you can't even have children anymore.

MR. CHYNOWETH: The state does not require people to give up the right to reproduce.

THE COURT: Yes, but to get this license, you do.

MR. CHYNOWETH: They have licenses, Your Honor. Two of the three plaintiffs have their Alabama license --

THE COURT: Yes, but to get their licenses to

accurately reflect your gender, you have to give up your right to have children.

MR. CHYNOWETH: And what the word accurately reflects gender means really goes to the heart of the issue. The state contends it is not making an ideological statement as to what gender really means. It says the state of Alabama defines sex as follows for law enforcement purposes. It is not imposing an ideological message on the bearers of the license. It is just like weight is measured in pounds rather than kilograms. And this is -- it contains -- the state has to have the right to control the meaning of the information that goes on a driver's license.

THE COURT: Could I just get a clarification here, Mr. Arkles? Am I correct that when you have the gender surgery, you lose your reproductive capacity, or am I incorrect on that?

MR. ARKLES: It is correct for genital reconstruction -- for any sort of genital surgery for transgender women, it inevitably leads to permanent infertility.

THE COURT: What about for the penis? If you -- same thing?

MR. ARKLES: For transgender men, according to Dr. Gordon's testimony, there is one procedure that is a more limited procedure that can be performed without impacting reproductive capacity. But he has never known anyone who has

gotten only that procedure and not other procedures that also ended --

THE COURT: So for someone who was born male in genital, there is a possibility of keeping a reproductive capacity.

MR. ARKLES: I'm sorry. The other way. So for people who are assigned male at birth and who identify as women, like my clients, the only way to get genital surgery ends reproductive capacity.

For people who are assigned female at birth and identify as men, there is one procedure that could preserve it, although it is not a common procedure. The vast majority do not preserve it.

THE COURT: I had it backwards. Yes.

I know you say that you would prefer the Court to rely on your equal protection argument, but you also have this unwanted medical treatment claim.

MR. ARKLES: Yes, Your Honor.

THE COURT: What exactly is that claim?

MR. ARKLES: So that claim is that the government of Alabama is conditioning a government benefit on undergoing -- on giving up the right to refuse medical treatment. In this case, for all transgender women and in general for transgender men as well, that means also giving up the opportunity to be able to have children. And that's a right that has been acknowledged by

the Supreme Court in a number of cases, and it has particular importance in the context of sterilization.

If there was some connection to the ability to drive, then it might make sense to have a medical requirement, which is generally when the government has medical requirements related to driver's licenses. It's about the ability to drive. But certainly there are no allegations here that there's any relevance to ability to drive.

THE COURT: Are you familiar with the unconstitutional doctrine -- unconstitutional conditions doctrine?

MR. ARKLES: Yes, Your Honor.

THE COURT: Does that apply here?

MR. ARKLES: Yes, Your Honor.

THE COURT: How?

MR. ARKLES: Well, if the government can't condition receipt of public assistance on giving up the right to -- the right to refuse unreasonable searches, then the government also can't condition access to a usable license, a license that people can actually lose without endangering themselves and contradicting their fundamental sense of self, on giving up the right to refuse medical care. We're talking about nonincarcerated, competent adults, and a type of medical care that is profoundly intimate; that touches on one's identity, one's relationships, one's reproductive capacity.

And it's an -- important for medical care for a number

of --

THE COURT: What about the argument that it's really not applying a condition? You can get a driver's license. It just doesn't necessarily accurately reflect your -- the gender you would like it to reflect.

MR. ARKLES: The government has no business conditioning anything on sterilizing surgery unless it has a very good reason for it. And here it just doesn't.

In fact, functionally speaking, when a transgender person presents a driver's license with the wrong sex designation, they're sometimes met with hostility, sometimes even violence. Sometimes they aren't believed that it could actually be their license.

In situations where -- I mean, my client who's here today, Destiny Clark, has been embarrassed and frightened when it has suddenly outed her as transgender at an election site, to a poll worker, and to a police officer on the side of the road. There are situations where sometimes this actually rises to violence.

It's not meaningfully available in the same way it is available to other people to have a sex designation that indicates a sex that's different from the sex you live your life to be.

THE COURT: Mr. Chynoweth, do you want to respond to that?

MR. CHYNOWETH: Yes. Thank you, Your Honor.

So in Count 2, there's a compelled medical treatment claim. As I understand it, there's not even a contention that we're physically forcing someone to receive medical treatment they don't want. So I understand Count 2 to be an unconstitutional conditions claim. That claim fails because it's circular.

THE COURT: Because what?

MR. CHYNOWETH: Because it is circular. It has to assume the truth of what it's trying to prove.

In the *LeBron* case, the unconstitutional conditions case out of Florida, the policy was you will not receive public assistance unless you submit to a suspicionless urine test. That was an independent Fourth Amendment right those applicants had that they were expressly required to waive on condition of not receiving public assistance.

We don't condition receipt of the license, first of all. It's not even a condition. But number two, what is unconstitutional about it? We're not requiring people to have surgery.

So the claim has to be, well, you are requiring to receive a license that doesn't have the sex with which they identify. And then the question is, well, why is that unconstitutional? And that can only be answered by Counts 1, 3, or 4. So which of those other three counts makes it

unconstitutional to have Policy Order 63 define your sex?

THE COURT: Let's maybe talk about that a little bit.

X is transgender. X presents a driver's license, but X is dressed as -- and the driver's license says X is male, but X is dressed as a female. Someone sees this.

And we deal with this in the real world. This is not a hypothetical. We're not talking about the moon. We're not talking about Mars.

Once someone sees that driver's license and sees X, you automatically know they're transgender; right?

MR. CHYNOWETH: No, Your Honor. With respect to Count 1 --

THE COURT: I'm talking about actually all four counts in this sense. But the reality is that every time someone presents a driver's license, you essentially are holding up a banner that says "I'm transgender" because you're presenting yourself as a female, and your driver's license is showing you as a male. You might as well have a scarlet letter T on your driver's license because you're presenting in one gender and your driver's license is saying something else. Why isn't this just purely a scarlet letter case?

MR. CHYNOWETH: Your Honor, we disagree with that contention --

THE COURT: Okay. Why?

MR. CHYNOWETH: -- for two reasons. Number one, the

audience. It is essential to our case throughout all of these counts that the state limits situations in which you must show a driver's license, rather than any other form of identification that you have discretion to choose, to law enforcement officers and court personnel. So the --

THE COURT: Can you show a passport or something like that? Is that what you're saying?

MR. CHYNOWETH: There are certain cases in which you are not allowed to do that, very limited cases having to do with traffic stops, law enforcement contacts.

THE COURT: Actually, I should say, why isn't a scarlet letter case or German -- you know what I'm talking about --

MR. CHYNOWETH: Because it does not say transgender.

THE COURT: Well, yes, you are. You have this person walk up, and you might as well be wearing a little patch on your arm saying you're transgender, you know, and get beaten up. Because you appear one way, and your driver's license shows something else. Why isn't just -- you know, what the Germans call wearing a pink -- I'm trying to remember the name of it right now, but --

MS. CORBITT: Pink triangle.

THE COURT: Pardon me?

MS. CORBITT: It's a pink triangle.

THE COURT: Yes. A pink triangle.

Why isn't this just a pink triangle case?

MR. CHYNOWETH: Because first of all, the disclosure of someone's transgender status is inferential.

Now, consider someone who's simply wearing a disguise. Consider the case of somebody who's robbed a bank, and it's a man who's simply cross dressing as a woman to disguise himself. The fact that his license says "M" is valuable information to law enforcement. It doesn't disclose he's transgender. He's not transgender. He's disguising himself.

THE COURT: Well, that person may want to take the risk of wearing a pink triangle, but what about people who don't want to take the risk of wearing a pink triangle?

MR. CHYNOWETH: The defendants do not agree this is analogous to a pink triangle for the reasons --

THE COURT: Why is it not analogous to a pink triangle?

MR. CHYNOWETH: Because limited disclosure. It is not outward -- and this goes to the *Wooley v. Maynard* case under the compelled speech. It's not like a driver's license where the Supreme Court analyzed its case by saying, you are being forced to use your car as a mobile billboard to broadcast the state's ideological message. I think that sounds like a pink triangle. This is not the case.

THE COURT: Well, that's different, because with the license plate, it's just a license plate. Here your body is at issue. You're presenting yourself dressed a certain way. You are sending a message through your body. It's you. Not just a

driver's license. It's the driver's license in conjunction with you. It's very privatized to you. It's not purely like a license plate, which everybody has on their car. And it could be your daughter. It could be your son driving the car. It could be you.

Here this only takes meaning when you, the person who is dressed a certain way, present a driver's license that shows something else. So why doesn't this circumstance distinguish it from the driver's license -- I mean from the car license cases?

MR. CHYNOWETH: So the information references a unique individual; however, the information is defined in a uniform way that applies to a transgender individual as equally as to someone who is simply attempting to disguise himself. And the --

Again, I think this is more of a compelled speech thing. The question is, who is doing the speaking? And it's more, how would an outside observer view that?

So, yes, I understand that is information that is describing you. But is it you that's expressing the message or wanting to be associated with the message, or is it the government? And every reasonable person understands that the descriptive things that appear on the face of a driver's license are put there by the state and they're defined by the state.

THE COURT: I also want to inquire a little bit more about your everybody's-being-treated-the-same argument. You

know, that might apply if we lived on the moon or if we lived on Mars. But the everybody-being-treated-the-same argument doesn't apply in the real world where transgender people are actually subjected to violence and actually subjected to discrimination if they reveal this disconnect between who they are and what's on their driver's license.

So when you really say that everyone's being treated the same, that might apply if we lived on another planet. But on this planet we have to apply this in a world in which transgender people are actually attacked and even killed because of who they are. So how can you say that this law is neutral and that it applies across the board?

MR. CHYNOWETH: Under the relevant Supreme Court precedent and under the *Evans* case, which draws the distinction between status and conduct with respect to transgender, the answer is simply binding precedent. That --

THE COURT: Let's talk about status versus conduct. Describe that distinction to me.

You're talking about Judge Pryor's distinction, aren't you?

MR. CHYNOWETH: Yes. And, in fact --

THE COURT: Describe that distinction to me.

MR. CHYNOWETH: And I think it's also the holding of that case, which was to remand to allow the plaintiff to replead a gender nonconforming claim.

THE COURT: Right. Describe that distinction to me.

MR. CHYNOWETH: Yes. Status has to do with things like one's disposition, such as sexual orientation or physical nature. Conduct has to do with conduct. *Glenn v. Brumby* said that gender nonconforming conduct is sex-based behavior and is subject to intermediate scrutiny under the Fourteenth Amendment.

Policy Order 63 is clearly a status-based classification. It is by reference to physical things, and it does not say you're not allowed to have a license if you were born biologically a male and wear a dress.

THE COURT: Wouldn't this case be more conduct than status?

MR. CHYNOWETH: No, Your Honor, because the plaintiffs could not satisfy Policy Order 63 by supplying the relevant medical documentation described --

THE COURT: Well, it would be conduct in the sense that -- I mean, it would be status in the sense that they might be transgender, but it isn't conduct in the sense that they have to present their driver's license showing that their driver's license designation of gender doesn't match their appearance. Isn't that classic conduct, not status?

MR. CHYNOWETH: I believe the relevant -- where we apply the conduct/status-based distinction is to the face of Policy Order 63: Is the classification status or conduct based --

THE COURT: Do you want to respond to that, Mr. Arkles?

MR. ARKLES: Yes, Your Honor. This is -- to the extent the status/conduct distinction actually matters -- which I'm not convinced that it does, but to the extent that it matters -- this is a clear situation of conduct. Both in the sense that the government is requiring people to take the action of getting genital surgery in order to change the sex designation on their license, and because it's precisely about this disjuncture between somebody's genitalia and the traditional associations with those genitalia, and somebody who expresses, presents, identifies as a gender that is not traditionally associated with those genitalia.

The state has decided that it is not okay with people presenting themselves through their license as a sex that doesn't match their genitalia. That is a distinction that is exactly about the same type of issue as in *Glenn v. Brumby*. There Brumby didn't like the fact that Glenn was saying that she was a woman and was dressing in traditionally female ways and had, according to Brumby's assumption, genitalia that was not right for that.

That's exactly what the state is doing here. They're saying, your body isn't right for the way you're presenting to the world, or you need to change your body if you're going to change the way you present yourself to the world.

THE COURT: Do you want to respond? Anything I haven't

heard?

MR. CHYNOWETH: Just briefly, Your Honor.

Again, it's not an ideological message. It's a physical description. And second, *Glenn v. Brumby*, I think that that was clearly an animus-based employment decision. That's clearly not what's going on here. It's status based, as is shown by the documentation of nonparties who have successfully gotten license changes. Show me you can provide the medical documentation, and we change it. Nothing like an employer saying, you're wearing a dress. That's inappropriate. You're fired.

THE COURT: Let me ask you this, Mr. Arkles. Why can't it be characterized that what you're really seeking here is really sort of an ADA claim? That is, you're seeking an accommodation for your clients?

MR. ARKLES: Oh, an accommodation, Your Honor.

THE COURT: And why did you not?

MR. ARKLES: So, Your Honor, a couple of different reasons. One, the ADA has written into it an exclusion for gender identity disorders, which I think is unconstitutional, but that would present a whole other path, and it seemed to me not --

THE COURT: You decided not to take that on.

MR. ARKLES: Yes, Your Honor. And it seemed to me that it wasn't crucial, because I think that these other claims are

exactly on point. There is a privacy violation, people -- as courts in other cases that are comparable around the country have found. People are forced to disclose that they are transgender without any good reason for that. There is an equal protection violation. There is an unconstitutional condition on the right to refuse medical care. And it does compel speech. It compels them to associate themselves with and say that they are something that they aren't. Something that contradicts their core sense of self and that they find abhorrent. And that fits classically, I think, in the case law on all of those different points.

THE COURT: What relief do you want from this Court?

MR. ARKLES: Your Honor, we would like a declaration that the surgery requirement in Policy Order 63 is unconstitutional, and we would like an order permitting my clients to get access to driver's licenses with female sex designations.

THE COURT: Now, the relief here would be restricted just to your clients.

MR. ARKLES: The declaratory relief would, of course, go further. Very early in this litigation the defendants indicated that they would certainly be willing to comply with any declaratory relief, so a permanent injunction is probably not required in this case.

THE COURT: Let me ask you this, Mr. Chynoweth. If --

and I can't remember which one lived, I believe, in -- North -- South Dakota or North Dakota --

MR. CHYNOWETH: That was Plaintiff Corbitt.

THE COURT: Corbitt. Right.

MR. CHYNOWETH: She changed her license in North Dakota.

THE COURT: If she had not lived in Alabama first and just presented the Dakota license, Alabama would have taken that; right?

MR. CHYNOWETH: Yes.

THE COURT: Without a problem.

MR. CHYNOWETH: Yes.

THE COURT: Just presented that North Dakota license, which did not require any surgical change.

MR. CHYNOWETH: Correct.

THE COURT: But because she had had an Alabama residence before, suddenly she can't get the designation; is that correct?

MR. CHYNOWETH: That was correct. Yes.

THE COURT: So what's the distinction there? If she had been born in -- if she had been born in North Dakota or just simply had not gotten a driver's license, in fact, in Alabama, but had just merely gotten the driver's license in --

Was it North or South Dakota? I can't remember.

MR. CHYNOWETH: It was North.

THE COURT: North Dakota.

But had simply gotten the driver's license in North Dakota, presented it to the Alabama officials, she could have gotten an Alabama license that reflected her gender as female; right?

MR. CHYNOWETH: Correct, Your Honor.

THE COURT: So the real crux here is merely the fact that she had gotten an Alabama driver's license early on.

MR. CHYNOWETH: Yes.

THE COURT: What's the point here? Where's the state's interest any different?

MR. CHYNOWETH: As I --

THE COURT: I mean -- or if she presented a passport that said that she was female. Where's the state's interest served if that's the thin thread of the distinction?

MR. CHYNOWETH: I have two responses to that. The first is there are two arguments against the state's policy, one based on overinclusive and one based on underinclusive. And I think it's just helpful to get them out on the table here. I think this is -- I think what --

THE COURT: Put them out on the table.

MR. CHYNOWETH: What Your Honor is raising is an overinclusive argument.

So you say, state, that the interest in Policy Order 63 is physical identification for law enforcement purposes, and

that's why you have a surgery requirement that tells someone about the underlying change to that person's physical appearance. Yes. So there is an overinclusiveness objection.

State, isn't it true that you accept out-of-state documents that do not have -- from a state that maybe does not have a surgery requirement? That is correct.

And the state has two responses to that. It really goes to the level of scrutiny, though, whether that -- the traction that that overinclusiveness objection gets depends on what level of scrutiny applies. I will just say that. Of course, that applies across the board to all of these arguments.

But the state's response to that is, again, administrative convenience. Not that that's our only interest, but it is an interest. Administrative convenience. We are not going to research every single out of state. Number two, full faith and credit to nonlitigation documents from other states.

Then there is an underinclusive objection.

THE COURT: Is the state required to give full faith and credit to the North Dakota license to that extent, or is that just a matter of convenience for the state of Alabama?

MR. CHYNOWETH: I believe that is -- I believe that that is administrative convenience.

THE COURT: Okay.

MR. CHYNOWETH: So there's an underinclusive objection here as well, which is, can't you be in the state of Alabama and

have surgery and not change your license? Now, so long as you're not changing your name. If you change your name, you are required to legally change your license. However, the state doesn't ask people when they go to renew their licenses, have you had a sex change reassignment?

That's an underinclusiveness; that is, you can have the surgery and not have the sex change on your license. And the state's response to that is that it is entitled to rely on the fact that if somebody has taken the trouble to have sex reassignment surgery, they are presumably going to go and have the sex on their license changed.

And we think that under -- that the highest level of scrutiny -- actually, I agree with Mr. Arkles that the action here is on the equal protection claim. We believe that under the highest level the scrutiny that would apply under any of these claims, it would be intermediate scrutiny in that those underinclusiveness and overinclusiveness type objections satisfy substantial relations.

THE COURT: Let me see if I understand another scenario here. If someone was born in Alabama and got a passport, and the passport showed -- let's take Ms. Corbitt. If she had been born in Alabama but never applied for an Alabama license, got a passport and it showed her gender as female, and she presented that to the driver's license folk here in Alabama, she could get a license that reflected her gender as female.

MR. CHYNOWETH: I would have to review what --

THE COURT: All I'm saying is if someone is born in Alabama and they get a passport showing their gender as different from their birth, would the state accept that passport and show their gender as -- or her gender as female?

MR. CHYNOWETH: I --

THE COURT: Or do you not know? Which is also an important question.

MR. CHYNOWETH: There was testimony, I believe, in Chief Pregno's deposition, and I can't recall that. I cannot recall if you have to -- when you're applying for a license initially, if you're required to show a birth certificate.

THE COURT: Apply for a license initially, present a passport that shows you as female -- and use Ms. Corbitt. The license shows you as -- pardon me. The passport shows you as female. You hadn't applied before. Could you get a license in Alabama that showed you as female?

MR. ARKLES: Your Honor, the passport is adequate under the ALEA regulations -- I'm sorry -- the ALEA policy. It's listed as a primary document, which is sufficient.

THE COURT: I thought that would be the answer. I just wanted to make sure that's true.

MR. CHYNOWETH: Sorry my recollection on that was not clear. I believe Chief Pregno did testify to that.

THE COURT: So why does the state recognize that

passport and not just, you know, a letter from her doctor just saying she's female?

MR. CHYNOWETH: Again, I think under the highest level of scrutiny we apply, that it would be a substantial relation and that the state is entitled to rely on the fact that for the most part, people use their Alabama documents; that in the vast majority of cases, that's going to be the document that is used.

THE COURT: Okay. Anything else you-all want to say to me? I would like to get a final disposition on the nondriver ID, though. You can assure me that this policy applies to the nondriver ID, or are you not sure? Even though the policy does not mention nondriver ID.

MR. SINCLAIR: Let's research and get back to them.

MR. CHYNOWETH: Your Honor, it is applied.

MR. SINCLAIR: Let's get back to them.

THE COURT: Do you have evidence that it has ever been applied to a nondriver ID or do you have anything -- do you have any evidence that says that it does apply other than your representation here in court? Because the policy doesn't say that.

MR. CHYNOWETH: There's nothing in this record. I can't --

THE COURT: Has that issue even come before you?

MR. CHYNOWETH: I cannot tell you, standing here. Would the Court -- I guess my question would be, would the Court

like a supplement --

THE COURT: I want an answer to my question is what the Court would like.

MR. CHYNOWETH: Would you like the parties to submit a stipulation on that limited issue?

THE COURT: We'll see. Do you think you can -- well, you can try, I guess. It won't hurt.

Why don't we take a brief recess, and I'll let you know whether I have any more questions. Thank you.

MR. ARKLES: Thank you, Your Honor.

(Recess was taken from 11:18 a.m. until 11:29 a.m., after which proceedings continued, as follows:)

THE COURT: Counsel, will you get something to me by the end of the day on nondriver IDs, what the status of those is?

MR. ARKLES: We will do our best, Your Honor. I believe so.

THE COURT: Okay. Good. Thank you.

And let's talk about the upcoming pretrial. I don't think we really need a pretrial, or at best we can do it by phone. I'll just have to decide whether I want to rely just on the record, since both sides have stipulated I can, or I want to hold a trial. I may want to hold a trial, either in whole or in part, but I'll let you know. But I don't think I really need a pretrial.

I guess I really do need a pretrial order that just sets forth the positions of both sides, but I don't -- when do you think you can get that to me?

MR. ARKLES: Your Honor, I believe it's currently scheduled to be due on August 6th, and we're prepared to meet that deadline.

THE COURT: Okay, then. Why don't you get your pretrial order to me that formalizes and updates the complaint and the answer and all the other pending matters? And both motions for summary judgment are denied, but that doesn't mean, as I say -- in fact, that means I have two choices: Either to hold a trial or just to consider the case on the current record.

Let's see. Do I need to take care of anything else?

I have one other little issue. And I guess it perhaps is a side issue, but it's one that I noticed. Ms. Corbitt claimed that forcing her to denote herself on her license as male was against God's plan and, therefore, violated her religion. Is that a viable claim?

MR. ARKLES: Your Honor, she has not made a free exercise claim in explaining why this is important to her --

THE COURT: Right. I know she made it in her deposition, but she was pretty vocal about it and she said that, you know, having to do this is against -- she says it's against God's plan for me. Why isn't that a violation of her right of free exercise? Why isn't she just like the cake maker in the

other Supreme Court case? She's saying the state is forcing her to say this, and it's against her religious views.

MR. ARKLES: Well, Your Honor, I think she is much like the cake baker in that ultimately she is contending with what's a generally applicable neutral-as-to-religion state law, and therefore it would be subject only to rational basis review. There would be heightened strict scrutiny or a balancing test under the other claims.

THE COURT: Wouldn't that require strict scrutiny?

MR. ARKLES: Not if it's neutral and generally applicable as to religion.

THE COURT: Do you want to respond to that, Mr. Chynoweth?

MR. CHYNOWETH: I think that that is a compelled speech claim, and so the defendants maintain that it fails for the reasons already set out. It's government speech.

Your Honor, on the trial issue, we have one other pretrial deadline, which would be witness and exhibit lists.

THE COURT: I'll let you know all about that. I think the question for me first is going to come down to whether I want a trial.

Let me say this. Those deadlines are all suspended for now.

MR. CHYNOWETH: Okay. And except for the pretrial order --

THE COURT: I would like the pretrial order.

MR. CHYNOWETH: -- August 6th. Okay.

THE COURT: All other deadlines, pretrial deadlines, are suspended until you hear from me. I just -- no sense in your going through all that until I make up my mind.

MR. ARKLES: Thank you, Your Honor.

THE COURT: Let's see what else.

Oh, one final big matter. Can you resolve this?

MR. ARKLES: Your Honor --

THE COURT: Do you think mediation would help since this applies to your three clients?

MR. ARKLES: Your Honor, we would certainly be open to discussing settlement, but it's been my understanding that the state is not willing to change its policy and without a change -- without a judicial order. And without a change to the policy --

THE COURT: Well, Mr. Chynoweth, you've said that, you know, if Ms. Corbitt had been under different circumstances, you would have accommodated her. Are you just saying, then, there's just no possibility of resolution of this informally through mediation? Or you could even mediate changing your policy, for all that matters. But I'm just asking the state, is it willing to discuss it.

MR. CHYNOWETH: We have not seen alternative policies that we have been willing to adopt.

THE COURT: Okay.

MR. CHYNOWETH: I have not -- we have not had any discussions about whether an individual plaintiff should be treated differently from any of the other plaintiffs based on individual circumstances.

THE COURT: My question is very simple. Are you willing to engage in mediation or not?

MR. CHYNOWETH: I do not think it would resolve the issues --

THE COURT: I can't force you. This Court does not have compulsory mediation. So my question for you is, are you willing? All you have to say is yes or no, and that's the end of it. It's the end of the discussion.

MR. CHYNOWETH: No, Your Honor.

THE COURT: No. Okay. Very good, then.

Anything else, counsel?

MR. ARKLES: Your Honor, just to very briefly clarify, I do think that on the nondriver ID point -- and Mr. Chynoweth certainly can correct me if I'm wrong -- that one can either have a driver's license or a nondriver ID, but one cannot hold both at once. Just to the extent that is relevant.

THE COURT: I do not know. Is that the law?

MR. SINCLAIR: Not quite.

MR. ARKLES: Oh, I'm sorry.

MR. SINCLAIR: But that's basically correct, Your

Honor. If your driver's license is suspended, for example, you may have both a driver license and a nondriver ID. But ordinarily, you cannot have a valid driver's license with a nondriver ID as well.

THE COURT: Right. And this is Mr. Boone; right? No, Mr. Sinclair.

MR. SINCLAIR: Yes, Your Honor.

THE COURT: Okay. Mr. Boone's over here.

But my real concern wasn't that. My real concern was just how are nondriver IDs treated by the state. That's my real concern here. That's what I would like for you to resolve for me, whether the Policy Order 63 applies and, if so, how long -- well, let me ask. I'll pose all my questions. If it does apply, how long does it apply? What documentation do you have that it does apply, et cetera?

Anything else?

MR. ARKLES: No, Your Honor. Thank you.

THE COURT: Very good, then. Court's in recess.

(Proceedings concluded at 11:36 a.m.)

* * * * * * * * * * * * * *

COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

This 14th day of August, 2019.

/s/ Patricia G. Starkie
Registered Diplomate Reporter
Certified Realtime Reporter
Official Court Reporter

# DOC. 81

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

| | | |
|---|---|---|
| **DARCY CORBITT, et al.,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | **CIVIL ACTION NO.** |
| **v.** | ) | **2:18cv91-MHT** |
| | ) | |
| **HAL TAYLOR, in his official capacity as Secretary of the Alabama Law Enforcement Agency, et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |

**ORDER**

**This court, having denied the parties' cross-motions for summary judgment, must resolve "whether to decide the case on the paper record or to hold a trial as to some or all issues." Order (doc. no. 69). In order to inform that decision, the court seeks additional briefing from the parties. Accordingly, it is ORDERED that the parties are to separately file, by noon on September 18, 2020, a brief responding to the**

**following questions, with any reply, if desired, due by noon on September 25, 2020:**

**(1) What impact, if any, should the decision of the United States Supreme Court in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), have on the equal protection claim before the court?**

**(2) Should the court hold a hearing to determine whether the defendants' interest in law enforcement identification is "hypothesized or invented *post hoc* in response to litigation," as described by the United States Supreme Court in *United States v. Virginia*, 518 U.S. 515, 533 (1996)?**

**(3) Is Policy Order 63 in fact consistent with the process for amending the sex designation on an Alabama birth certificate? The parties should specifically address any judicial interpretation of when "the sex of an individual born in this state has been changed by surgical procedure." Ala. Code § 22-9A-19(d).**

**DONE, this the 3rd day of September, 2020.**

**/s/ Myron H. Thompson**
**UNITED STATES DISTRICT JUDGE**

# DOC. 82

**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-SMD** |
| | ) | |
| **HAL TAYLOR, *et al.*,** | ) | |
| | ) | |
| **Defendants.** | ) | |

**DEFENDANTS' RESPONSE TO THE COURT'S BRIEFING ORDER**

Defendants Hal Taylor, Charles Ward, Deena Pregno and Jeannie Eastman file this response to the Court's September 3, 2020 briefing order (doc. 81).

**1. Policy Order 63 Does Not Constitute Invidious Sex-Based Discrimination in Violation of Equal Protection Notwithstanding *Bostock*.**

Defendants' equal protection argument consists of two parts. First, Defendants are entitled to judgment as a matter of law on Plaintiffs' equal protection claim because Policy Order 63 does not intentionally discriminate against Plaintiffs on the basis of their transgender status and thus does not constitute invidious sex-based discrimination. *See* doc. 54 at 45-46; doc. 60 at 11-20; doc. 62 at 17-20.[1] Second, even assuming Policy Order 63 is a sex-based classification triggering intermediate scrutiny, Defendants are entitled to judgment as a matter of law because Policy Order 63 satisfies intermediate scrutiny. *See* doc. 54 at 47-51; doc. 60 at 20-24; doc. 62 at 20. *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), is potentially relevant only to Defendants' *first*

[1] Citations are to the ECF header page numbers.

argument, *i.e.*, whether Policy Order 63 discriminates against Plaintiffs based on their transgender status or "because of" their sex.[2]

*Bostock* does not affect Defendants' principal argument that Policy Order 63 does not involve a classification on the basis of transgender status or sex that constitutes invidious discrimination under the Equal Protection Clause. *See* doc. 54 at 45-46. *Bostock* does require Defendants to withdraw their reliance on the distinction between discrimination based on transgender *status* and gender non-conforming *conduct* in the context of Title VII claims in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248, 1254-55 (11th Cir. 2017). *See* doc. 60 at 17-18. Defendants' reliance on the Title VII analysis and Judge Pryor's concurrence in *Evans* are hereby withdrawn. Nevertheless, Defendants maintain 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), even after *Bostock*. An analysis of *Bostock* reveals why Policy Order 63 is distinguishable from the analysis of sex-based discrimination in the context of employment discrimination in *Bostock* and *Glenn*.

The issue in *Bostock* was whether terminating an employee because she was transgender was discrimination "because of" sex within the meaning of Title VII. 140 S. Ct. at 1737. The Court held that such an act is discrimination "because of" sex in violation of Title VII. *Id.* at 1742. But the Court's statutory interpretation shows that context matters—and it matters in ways that distinguish an employment decision affecting only an individual from the group classification at issue in Policy Order 63.

[2] Defendants' second argument that, in the alternative, Policy Order 63 satisfies intermediate scrutiny, is addressed in response to the Court's second and third questions posed in its September 3 order.

The Court's plain-meaning analysis of Title VII began with the premise that "sex" refers "only to biological distinctions between male and female." *Id.* at 1739. But the question was not "just what 'sex' meant, but what Title VII says about it." *Id.* The statute "prohibits employers from taking certain actions 'because of' sex," that is sex cannot be the "but for" cause of the employer's action. *Id.* But "Title VII does not concern itself with everything that happens 'because of' sex" but "imposes liability on employers only when they 'fail or refuse to hire,' 'discharge,' 'or otherwise . . . discriminate against' someone because of a statutorily protected characteristic like sex." *Id.* at 1740. Thus, in this context, "'[t]o discriminate against' a person . . . would seem to mean treating that individual *worse* than others who are similarly situated." *Id.* (emphasis added).

The Court further narrowed its interpretation of discrimination "because of" sex by noting Title VII prohibits discrimination against individuals, not groups. *Id.* at 1740-41. "The consequences of the law's focus on individuals rather than groups are anything but academic." *Id.* at 1741. That is, Title VII prohibits adverse employment decisions against an individual employee because of sex even if the employer generally treats men and women equally as a group. *Id.*

From this context, the Court extracted the following rule: "An employer violates Title VII when it intentionally fires an individual employee based in part on sex." *Id.* at 1741. "It doesn't matter if other factors besides the plaintiff's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group." *Id.* Applying this prohibition on sex-based intentional discrimination against individuals to the issue at hand, the Court concluded "[a]n individual's homosexuality or transgender status is not relevant to employment decisions." *Id.* This is because "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* If an employer fires a "transgender person who was identified as a male at birth but who now

identifies as a female" but "retains an otherwise identical employee who was identified as female at birth" the "employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth." *Id.* In the specific context of employment discrimination, "homosexuality and transgender status are inextricably bound up with sex." *Id.* at 1742.

Thus, *Bostock* concludes that discrimination based on transgender status is discrimination because of sex based on all of the following context-specific features of Title VII: (a) an employer treats an *individual* employee (b) *worse* than a similarly-situated employee (c) because of (but for) the employee's transgender status. In this context, an employer cannot intentionally discriminate against an employee because of her transgender status without basing its decision in part on the employee's sex, *e.g.* if an employee was born as a man but identifies and dresses as a woman.

But *Bostock* (and *Glenn*) are inapplicable to Policy Order 63 because it concerns a *group classification* that treats men and women, and transgender and non-transgender, alike—and it does not treat transgender individuals *worse* than non-transgender individuals. The equal protection analysis here is guided by the two-step analysis from *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979), which differs from the individual employment decisions in *Bostock* and *Glenn*. *See* doc. 54 at 45-46. Under *Feeney*, a court first looks to whether it involves a gender-based *group classification*. *See Feeney*, 442 U.S. at 274. If the classification is facially neutral, the court next looks to whether "the adverse effect reflects invidious gender-based discrimination." *Id*. Unlike the individual, animus-based employment decisions in *Bostock* and *Glenn*, Policy Order 63 does not invidiously discriminate on the basis of sex even if it disparately impacts transgender individuals.

First, Policy Order 63's group-based classification does not single out Plaintiffs for adverse treatment based on their transgender status. Policy Order 63 is facially neutral under the first step of the *Feeney* test. It is a policy for changing the sex designation on an Alabama driver license of general applicability. It applies to men and women. It applies to anyone who wants to change a license regardless of whether the request is because of someone's transgender status. By contrast, *Bostock* expressly stated that its statutory analysis did not apply to considerations of equal treatment between groups. *See Bostock*, 140 S. Ct. at 1747-48. But the equal protection analysis here turns on the rationality of the group *classification* made by Policy Order 63. *See Feeney*, 442 U.S. at 272.

Second, applying the second step of the *Feeney* test demonstrates why *Bostock* is distinguishable. The second step is to show that the facially neutral policy has an "*adverse effect* [that] reflects invidious gender-based discrimination." *Feeney*, 442 U.S. at 274 (emphasis added). To constitute invidious discrimination for equal protection purposes, 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.* 279 (emphasis added). Policy Order 63 neither treats transgender individuals worse than non-transgender individuals, nor was it adopted because of its adverse effect upon transgender individuals.

Policy Order 63 does not have an "adverse effect" on transgender individuals because it does not prevent transgender individuals from possessing a driver license on the same terms as other citizens, nor does it prevent them from changing the sex designation on their license if they can meet the surgery requirement. While Plaintiffs feel that Policy Order 63 treats them worse because they cannot meet its surgery requirement, Policy Order 63 serves as *an accommodation*, rather than an adverse effect, for transgender individuals who no longer identify with the sex with

which they were born. Policy Order 63 does not impose an adverse effect on Plaintiffs like the employers' *termination* of the plaintiffs in *Bostock* and *Glenn*.

Nor was Policy Order 63 "selected or reaffirmed" "because of" its effect on transgender individuals. *Feeney*, 442 U.S. at 279. Policy Order 63 treats similarly-situated individuals the same. The undisputed facts show that Defendants changed the sex designation for those who provided medical documentation of sex reassignment surgery. Policy Order 63 does not deny Plaintiffs a change in the sex designation on their license "because of" their transgender status. Plaintiffs are treated differently because they cannot meet the surgery requirement. Unlike the animus-based discrimination in *Bostock* and *Glenn* that singled out employees for adverse treatment based on a characteristic necessarily involving sex, the surgery requirement applies equally regardless of sex or transgender status.

Finally, consider the facts that motivated the Court's analysis in *Bostock* in contrast to the facts here. Aimee Stephens presented as a male when she began working for her funeral home employer but began living as a woman after her diagnosis for gender dysphoria. *See Bostock*, 140 S. Ct. at 1738. After she informed her employer of her plan to live and work full-time as a woman, the funeral home fired her, "telling her 'this is not going to work out.'" *Id.*; *see also Glenn*, 663 F.3d at 1321 (holding employer discriminated on the basis of sex where he terminated transgender employee after stating her appearance and dress were "inappropriate," "unsettling," and "unnatural."). The employees in *Bostock* and *Glenn* were treated worse (terminated) on an individual basis because they dressed as women, but were born as men. The employers would not have terminated them if they were born as women and dressed as women. And so terminating the employees on the basis of their transgender status was necessarily related to their sex.

But here, Plaintiffs were denied a change to the sex designation on their driver licenses because they could not provide medical documentation of sex reassignment surgery. If they could have provided it, the sex designation would have been changed as it was for the others who could provide such documentation. *See* doc. 48-16. Unlike the employee in *Bostock* whose transgender status is "inextricably bound up with sex," and hence the employer's reason to terminate her, Defendants did not deny Plaintiffs a change to the sex designation based on their transgender status. The record does not indicate that Defendants inquired or knew about Plaintiffs' status as transgender women. Defendants simply requested medical documentation as they would anyone else requesting a change to the sex designation on their license. Nor did Defendants treat Plaintiffs worse than non-transgender individuals. Under *Feeney*'s equal protection analysis for a policy of general application, rather than the analysis for individual employment decisions *Bostock* and *Glenn*, Policy Order 63 does not invidiously discriminate on the basis of sex or transgender status. Defendants are entitled to judgment as a matter of law on Plaintiffs' equal protection claim without the need to engage in any intermediate scrutiny analysis.

**2. Defendants' Interest in Law Enforcement Identification Is Not Hypothesized or Invented *Post Hoc* in Response to Litigation.**

Even assuming Defendants must satisfy intermediate scrutiny, the Court does not need to hold a hearing on whether Defendants' interest in law enforcement identification is "hypothesized or invented *post hoc* in response to litigation." Doc. 81 at 2 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)). The evidence the Court would hear at such a hearing is already in the record in this case. It indisputably demonstrates Defendants' law enforcement interest in Policy Order 63 through actions prior to or independent of this litigation.

First, the Alabama State agency responsible for identification information on driver licenses has always been a law enforcement agency. This responsibility first lay with the

Department of Public Safety ("DPS") and, later, with the Alabama Law Enforcement Agency ("ALEA") after its creation in 2013. *See* Ala. Code § 32-6-6 (delegating the duty to determine identification information to be included on a driver license to DPS); Ala. Code § 41-27-1 (creating ALEA "to coordinate public safety in this state" and placing DPS and the State Bureau of Investigations under its jurisdiction); Doc. 48-7 [Woodruff Deposition] at 12-14; Doc 48-5 [Chief Pregno Deposition] at 55 ("As I stated earlier [at 44], we are a law enforcement agency, and we are preparing and issuing an identification document."). The Director of DPS, Defendant Colonel Charles Ward, is appointed by the Secretary of ALEA and is required by statute to "have an extensive law enforcement background and, by virtue of office, is a state law enforcement officer . . . ." Ala. Code § 41-27-6(a)(1). Alabama does not have a Department of Motor Vehicles ("DMV"). Driver licenses, insofar as they are used as a means of identifying Alabama citizens, have *always* been under the authority of a state law enforcement agency. Defendants' law enforcement interest in providing a uniform physical description (or criterion for changing a physical description) on driver licenses pre-dates this litigation by virtue of this institutional history.

Second, the testimony and records submitted show that Defendants have actually enforced and applied the surgery requirement for changing the sex designation on driver licenses since before Policy Order 63 was even put in writing in 2012. Prior to Policy Order 63's formal creation in 2012, DPS had an unwritten procedure for changing the sex designation on a license if the licensee provided a letter from a physician stating that the physician had performed sex reassignment surgery on the licensee and the surgery had been completed. Doc. 48-7 at 48-50. There are documents in the record reflecting DPS changed the sex designation on a license upon receiving medical documentation of sex reassignment surgery dating as far back as 2008. *See, e.g.*,

doc. 48-18 at Bates Nos. D1245-48; *see also id.* at D1208, 1212-16, 1218-19, 1222, 1228, 1238-39, 1139-44, 1179, 1181-82, 1184, 1186-87, 1190, 1196 (containing additional records of sex changes from 2008 through 2012). And, of course, the records contain numerous examples of additional sex designation changes since Policy Order 63 was put into writing in 2012. *See id.* Plaintiffs may quibble whether DPS and ALEA employees maintained complete uniformity over the years on whether a given doctor's note was sufficient to meet the surgery requirement. But there is no dispute that Defendants in fact required medical documentation of sex reassignment surgery before changing the sex designation on a driver license with documentation reaching back to 2008. Defendants' documented history of enforcing and applying Policy Order 63 over the years, and prior to this litigation, demonstrates their stated law enforcement interests are *not* "hypothesized or invented *post hoc* in response to litigation." Defendants' enforcement history shows an institutional concern for uniform physical descriptions on driver licenses rather than a merely pretextual after-the-fact justification, as would be the case for an historically unenforced policy.

Third, Defendants' law enforcement interests are justified by facts that occurred prior to or independently of this litigation. Defendants have stated Policy Order 63 serves the State's interest in "provid[ing] 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." Doc. 48-17 at 6. Defendants submitted a report from an expert in correctional administration, Don Leach, on October 31, 2018. Doc. 48-9, PX38. In the report, Leach stated his opinion that there is a governmental interest in having a standardized definition of "sex" so that correctional administrators can form appropriate search, housing, supervision, and medical care policies that take an inmate's sex into account. *Id.* at pp. 13-17. On

November 21, 2018, *after* Defendants served Leach's report, the Eleventh Circuit issued an opinion in which it held a Florida county jail was deliberately indifferent in misgendering a female inmate during intake and placing her in a male detention facility. *See DeVeloz v. Miami-Dade Cty.*, 756 F. App'x 869, 877 (11th Cir. 2018). *DeVeloz* occurred independently of this litigation and reinforces Leach's opinion on the importance of providing a uniform definition of "sex" on a driver license on which a corrections officer may rely at booking. Also independent of this litigation, Chief Pregno testified about a situation in which a district attorney contacted ALEA for help identifying a deceased individual that a medical examiner had identified as female based on the presence of female genitalia. Doc. 48-5 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 ALEA's driver license records. *Id.* at 59-61. Finally, Plaintiffs all testified in their depositions that they had been required to display their driver licenses to Alabama law enforcement officers in connection with a traffic stop, traffic accident, or to report a crime. Doc. 48-2 at 66-70; Doc. 48-1 at 33-34; Doc. 48-3 at 71-72. *DeVeloz*, Chief Pregno's example of identifying the homicide victim, and Plaintiffs' prior displays of their licenses to law enforcement officers all exemplify Defendants' law enforcement interests in Policy Order 63, and these facts occurred prior to or independently of this litigation.

Fourth, if Defendants' interest in consistency with the process of amending birth certificates is not "hypothesized or invented *post hoc* in response to litigation," then neither is their interest in law enforcement identification. But Defendants' interest in maintaining consistency with the process for amending birth certificates is not post hoc because Policy Order 63 was based on the statutory surgery requirement for amending sex on birth certificates when it was created

years before this litigation. *See* doc. 48-5 at 42. Therefore, the necessarily related law enforcement interest is also not post hoc. While these interests are conceptually distinct, Defendants' interest in law enforcement identification are inseparable from maintaining consistency with the process for amending birth certificates. The sex designation on an Alabama birth certificate is the "default" for establishing the sex designation on the same individual's driver license. Doc. 48-7 at 90-92; *see also* doc. 48-5 at 104 (testimony of Chief Pregno that if someone changes their name on their birth certificate, they are also required to change their name on their license). If the physical descriptions on a birth certificate provide the default descriptions on a driver license, and a driver license is used by law enforcement officers to identify subjects, then consistency between changes in the physical characteristics on the two documents is related to Defendants' interest in law enforcement identification. Since Defendants' interest in consistency are neither hypothesized nor post hoc, then neither is their interest in law enforcement identification.

For these reasons, the evidence in the record demonstrates that, even assuming intermediate scrutiny applies, Defendants' asserted interest in law enforcement identification is not "hypothesized or invented *post hoc* in response to litigation." Therefore, the Court should not hold a hearing on the issue as it would merely hear evidence already in the record establishing this fact.

**3. Policy Order 63 Is Consistent with the Process for Amending the Sex Designation on an Alabama Birth Certificate.**

Policy Order 63 is consistent with the process for amending the sex designation on an Alabama birth certificate because there is no specific list of procedures that satisfy the surgery requirement under Alabama Code § 22-9A-19(d) and judges approve amended birth certificates based upon documentation of sex reassignment surgery, similarly to Policy Order 63.

Alabama birth certificates may be amended to change the sex designation as follows:

> Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual born in this state has been changed by surgical procedure and that the name of the individual has been changed, the certificate of birth of the individual shall be amended as prescribed by rules to reflect the changes.

Ala. Code § 22-9A-19(d). Defendants have been unable to locate any case law or Attorney General Opinions construing what specific procedures satisfy the requirement that "the sex . . . has been changed by surgical procedure." *Id.* However, the Alabama Department of Public Health, Division of Vital Statistics, has promulgated administrative regulations that provide some details on amending birth certificates. *See* Ala. Admin. Code § 420-7-1-.16.

Two subsections of this administrative regulation are applicable to changes to the sex designation on a birth certificate. The first section concerns amendments to birth certificates other than for the correction of minor errors within one year of the date of the event. *See* § 420-7-1-.16(6). For such amendments, "documentary evidence must be presented" and "[a]ll documents presented must contain sufficient information to clearly indicate that they pertain to the registrant on the birth certificate for which the correction has been requested." *Id.* Examples of acceptable documents include "[c]ourt orders clearly establishing the facts to be amended" and "[m]edical records." *Id.* § 420-7-1-.16(6)(a)(1.)(i.), (j.). Such records must be a "duly certified copy or excerpt thereof from the original custodian of the record." *Id.* 420-7-1-.16(6)(a)(3.). Although less applicable, the regulation contains another section for amendments to "other items on the birth certificate," which must include "adequate documentary evidence to support the amendment," including an "order from an Alabama circuit court." *Id.* 420-7-1-.16(6)(f)(3.). Thus, the Alabama Code and relevant administrative regulations authorize a change to the sex designation on a birth certificate with a court order supported by adequate medical documentation, with no specific definition of sex reassignment surgery provided.

The record contains samples of court orders approving amendments to the sex designation on Alabama birth certificates. *See* doc. 48-18 at Bates Nos. D1148, 1162, 1199, 1225, 1241-42.[3] These court orders demonstrate that the petitions were supported by medical documentation with no specific procedures mentioned, similar to the medical documentation deemed sufficient for a change in a driver license under Policy Order 63. For instance, one order makes a specific finding based on "evidence submitted" that "the Petitioner has undergone a surgical procedure to irreversibly change her sex, male to female, in order to reflect her true gender; and that her sex was so changed thereby." *Id.* at Bates No. 1225. None of these court orders makes a specific finding regarding which procedures were performed, but only that the verified petitions and record evidence before the court satisfies the surgery requirement of § 22-9A-19(d). Based on the petitioners' documentation of sex reassignment surgery, the courts issued orders to the respondent Alabama Department of Public Health, Division of Vital Statistics, to issue an amended birth certificate changing the sex designation.

Thus, the plain language of § 22-9A-19(d) requires a petitioner requesting a change to the sex designation on a birth certificate to supply proof "that the sex of an individual born in this state has been changed by *surgical procedure*." *Id.* (emphasis added). Supporting administrative regulations require proof of this surgical procedure by medical documentation. *See* § 420-7-1-.16(6)(a.), (f.). Policy Order 63 tracks this statutory requirement for birth certificates by requiring either an amended birth certificate or proof of "gender reassignment surgery." Doc. 48-7, PX7 at D2. For purposes of implementing Policy Order 63, the terms "sex reassignment surgery,"

[3] In addition to these court orders, the record contains numerous examples of amended birth certificates that reference circuit court or probate court cases approving sex designation changes in the "FACTS AMENDED" section. *See* doc. 48-18 at Bates Nos. D1147, 1159, 1167, 1175, 1189.

"reassignment procedure," and "gender reassignment surgery" are interchangeable. Doc. 48-4 at 62. Because changes to both documents require medical documentation of sex reassignment surgery, Policy Order 63 is in fact consistent with the process for amending the sex designation on an Alabama birth certificate.

Respectfully submitted,

Steve Marshall,
*Attorney General*

s/ Brad A. Chynoweth
Brad A. Chynoweth (ASB-0030-S63K)
*Assistant Chief Deputy Attorney General*
Winfield J. Sinclair (ASB-1750-S81W)
*Assistant Attorney General*

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8400
Brad.Chynoweth@AlabamaAG.gov
Winfield.Sinclair@AlabamaAG.gov

***Counsel for Defendants Hal Taylor, Charles Ward, Deena Pregno, and Jeannie Eastman***

**CERTIFICATE OF SERVICE**

I hereby certify that on September 18, 2020, 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:

Randall C. Marshall
ACLU OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106-0179
(334) 265-2754
rmarshall@aclualabama.org

Rose Saxe
Gabriel Arkles
Leslie Cooper
ACLU LGBT & HIV Project/ACLU Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2605
rsaxe@aclu.org
garkles@aclu.org
*Admitted Pro Hac Vice*

*/s* Brad A. Chynoweth
Counsel for Defendants

# DOC. 83

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 RESPONSE TO ORDER FOR ADDITIONAL BRIEFING**

On February 6, 2018, Plaintiffs brought this action challenging Defendants' policy preventing them from obtaining driver's licenses that correctly designate them as female as violating their rights under the Equal Protection clause, Due Process clause, and Free Speech clause of the Constitution. The parties cross moved for summary judgment on February 8, 2019. At oral argument, the parties agreed to submission of the case on the record. By Order dated July 30, 2019, this Court denied both motions for summary judgment and reserved for judgment "whether to decide the case on the paper record or to hold a trial as to some or all issues." On September 3, 2020, the Court ordered the parties to submit additional briefing on three issues. Doc. No. 81. Pursuant to that Order, Plaintiffs submit that the Supreme Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), further supports Plaintiffs' Equal Protection claim, a hearing on the subject of the state's justification for its policy is not needed, and that Policy Order 63 is inconsistent with the process for amending sex designation on an Alabama birth certificate.

## I. *Bostock* Reinforces the Conclusion that Policy Order 63, in Denying Access to an Accurate Useable Driver's License to Plaintiffs Because They Are Transgender, Constitutes Sex Discrimination in Violation of the Equal Protection Clause.

Policy Order 63 facially discriminates on the basis of sex. By purpose, design, and effect, Policy Order 63 denies transgender people—and only transgender people—access to an accurate

driver's license that they may use without sacrificing their safety, health, privacy, and dignity. Policy Order 63 punishes those who identify and live as a sex other than the sex they were assigned at birth unless they undergo sterilizing surgery. It also reinforces the sex stereotype that everyone does or should only identify and live as the sex conventionally associated with their genital anatomy and breast size. The Eleventh Circuit has already held that discrimination against transgender people is sex discrimination, and thus receives heightened scrutiny. *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011).

Defendants have argued that Policy Order 63 does not discriminate based on sex, and so is not subject to intermediate scrutiny. Rather, they argue that Policy Order 63 should be seen as a neutral policy that merely disparately impacts transgender people. In making this argument, they have relied on an out-of-circuit decision that held a policy requiring service members in the U.S. armed services to serve in their "biological sex" did not discriminate on the basis of sex, because it nominally applied to everyone. Defs.' Reply (Doc. No. 62) at 15–18 (citing *Doe 2 v. Shanahan*, 917 F.3d 694, 700 (D.C. Cir. 2019)); *contra Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019). They have also argued that the policy permissibly differentiates based on real sex-based physical differences.

*Bostock* has resolved any doubt on this point in favor of the Plaintiffs. In *Bostock*, the Supreme Court considered whether it was discrimination because of sex under Title VII of the Civil Rights Act of 1964 for an employer to fire a transgender woman when she "wrote a letter to her employer explaining that she planned to 'live and work full-time as a woman.'" *Bostock*, 140 S. Ct. at 1738. Because the employer would have allowed an employee assigned female at birth to live and work full-time as a woman, but fired Aimee Stephens, who was assigned male at birth, for the same conduct, "sex play[ed] an unmistakable and impermissible role" in the decision. *Id.*

at 1742–43. Indeed, the Court recognized that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex." *Id.* at 1741. The Court clarified that where sex motivates a practice, "it is irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it." *Id.* at 1744. While *Bostock* was decided in the context of Title VII, Title VII cases often inform Equal Protection analysis, particularly where the salient question is whether an action is because of sex. *See, e.g., Wilborn v. S. Union State Cmty. Coll.*, 720 F. Supp. 2d 1274, 1308 (M.D. Ala. 2010). Indeed, the Eleventh Circuit relied extensively on Title VII cases in reaching its conclusion in *Glenn.* 663 F.3d at 1316.

In the short time since *Bostock* was decided, five courts have cited it in resolving an Equal Protection claim brought by transgender litigants. Each court ruled in favor of the transgender plaintiffs. *Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty*., 968 F.3d 1286, 1296 (11th Cir. 2020) (pet. for reh'g en banc pending); *Whitman-Walker Clinic, Inc. v. U.S. Dep't of Health & Human Servs*., No. CV 20-1630 (JEB), 2020 WL 5232076 (D.D.C. Sept. 2, 2020); *Grimm v. Gloucester Cnty. Sch. Bd*., No. 19-1952, 2020 WL 5034430 (4th Cir. Aug. 26, 2020), *as amended* (Aug. 28, 2020);*Walker v. Azar*, No. 20CV2834FBSMG, 2020 WL 4749859 (E.D.N.Y. Aug. 17, 2020); *Hecox v. Little*, No. 1:20-CV-00184-DCN, 2020 WL 4760138 (D. Idaho Aug. 17, 2020).

Most salient here, the Eleventh Circuit recently ruled that a school district policy prohibiting a transgender boy from using the boys' restroom violated Title IX and the Equal Protection clause. The court found that the plaintiff "properly tee[d] up" the constitutional issue when he explained that "by defining 'boy' and 'girl' based on 'biological sex,' or sex assigned at birth, the School Board divides restrooms based on a characteristic that 'punishes transgender students and favors non-transgender students.'" *Adams*, 968 F.3d at 1296. The court reasoned that,

consistent with *Glenn* and *Bostock*, the policy was subject to heightened scrutiny because it "places a special burden on transgender students because their gender identity does not match their sex assigned at birth." *Id.* The same is true in this case. Policy Order 63 defines sex based on assigned sex at birth and sex-related anatomy, which punishes transgender Alabamans, favors cisgender Alabamans, and places a special burden on transgender people because their gender identity does not match their assigned sex at birth.

Like the Eleventh Circuit in *Adams*, the Fourth Circuit recently ruled that a school district's policy requiring students to use restrooms based on their "biological gender" discriminated against a transgender boy. *Grimm*, No. 19-1952, 2020 WL 5034430, at *21 ("After the Supreme Court's recent decision in *Bostock v. Clayton County*, we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restrooms discriminated against him 'on the basis of sex.'") (internal citation omitted).

Defendants in *Grimm* raised an identical argument to the one Defendants have made here: that the policy applies to everyone, so it does not discriminate because of sex. *Id.* at *15. The Fourth Circuit rejected that argument, mirroring the reasoning in *Bostock* when it noted that preventing the transgender boy from using boy's restrooms required considering sex. *Id.* Just so here—Defendants cannot continue to deny Darcy Corbitt, Destiny Clark, and Jane Doe a female sex designation on their licenses without consideration of sex.

Also of note is *Hecox v. Little*, another case interpreting *Bostock* in the context of an Equal Protection challenge to a rule that classified transgender women as "male." In that case, a state law stated that only females could play on girls' sports teams, and defined female based on various physiological and anatomical characteristics (reproductive anatomy, endogenous hormone levels, and genetic makeup). There, the court found that the law was subject to heightened scrutiny

because it treated cisgender athletes differently from transgender athletes: cisgender athletes could participate in sports consistent with their gender identity, while transgender athletes could not. *Hecox*, No. 1:20-CV-00184-DCN, 2020 WL 4760138, at *27. Similarly, here, cisgender people can obtain licenses consistent with their gender identity, while transgender people cannot.

In that case, like in this one, Defendants claimed the law was not subject to heightened scrutiny because it did not expressly use the term "transgender" and differentiated only on the basis of real physiological characteristics. The court noted that avoiding the term "transgender" was not enough to avoid the conclusion that the law was directed at transgender people, and that differentiating based on sex-related characteristics did nothing to show the policy was not sex-based. *Id.* Defendants further argued that transgender women were not barred from participating in sports because they could always do so as men, as Defendants here have argued that they do offer Plaintiffs driver's licenses—simply ones that label them as male. *Id.* at *35. The court rejected that argument "as did the Supreme Court in *Bostock*," noting that it was the equivalent of arguing that gay men and lesbians were not prohibited from marrying under statutes preventing same-sex marriage, because they could always marry people of a different sex. *Id.*

## II. Because the Undisputed Evidence Shows that Defendants' Interest in Law Enforcement Identification Is Invented *Post Hoc,* A Hearing Is Not Needed.

No hearing is necessary to determine whether the Defendants' interest in law enforcement identification is "hypothesized or invented post hoc in response to litigation." *United States v. Virginia*, 518 U.S. 515, 533 (1996). The record is undisputed that the Defendants' only contemporaneous reason for adopting the current policy was wanting consistency with the state birth certificate policy.

The only evidence offered on the reasons for Policy Order 63 was from the Chief Deena Pregno in her 30(b)(6) testimony. Chief Pregno was asked "what considerations went into ALEA's

decision to adopt this policy as opposed to some other?" Pregno Dep. 45:5–7. She responded, "what the state requires for amended birth certificates." *Id.* at 8–9. In response to the question, "Were there any other considerations that ALEA took into account at that time?" *Id.* at 10–12. She responded: "Not that I'm aware of." *Id.* at 13–14. While the policy was revised after that time, the only reason offered for that change was to give "more latitude" and "stay consistent with" the state policy. *Id.* at 47:7–8, 48:10.

In the absence of any admissible evidence contradicting the 30(b)(6) testimony, it is undisputed that any other interests did not actually motivate the creation or revision of Policy Order 63. As such, they were invented post hoc, and cannot satisfy heightened scrutiny.

## III. Policy Order 63 Is Inconsistent with the Process for Amending Sex Designation on an Alabama Birth Certificate.

Not only did Defendants' purported rationalization for Policy Order 63 come after the fact, it also makes little sense. Policy Order 63 is inconsistent with the state's process for sex designation changes on birth certificates.

Plaintiffs have not been able to identify any judicial interpretation of what the phrase "the sex of an individual born in this state has been changed by surgical procedure" means. Ala. Code § 22-9A-19(d).

Nonetheless, Policy Order 63's process for changing a sex designation on a driver's license does not fully coincide with the process for amending a person's sex designation on an Alabama birth certificate.

In some ways, the statute governing birth certificates may be more onerous because a person amending the sex designation on their birth certificate must 1) change their name and 2) petition a court to issue an order indicating that the individual underwent a surgical procedure to change their sex and that the name was changed. *See id.* Under Policy Order 63, an individual

need not change their name to change their sex designation and need not obtain a court order. There is also obviously no way to change an Alabama birth certificate through submitting an amended birth certificate from some other state, as is possible under Policy Order 63. Eastman 30(b)(6) Dep. 59:13–18.

But in many ways, Policy Order 63 is far more onerous. Ala. Code § 22-9A-19(d) does not state what specific "surgical procedure" is required, and it at least strongly implies that only one procedure is required. It leaves open the possibility that judges will interpret the requirement in a way that does not require permanent sterilization, and that they will accept proof of any form of gender-affirming surgery as sufficient. While this standard would still be burdensome and unconstitutional if used for driver's licenses, because it would still treat transgender people worse than cisgender people, disclose sensitive personal information, compel speech, and condition a government benefit on renouncing the right to refuse medical care, it would be significantly less extreme than what Defendants require under Policy Order 63.

Defendants interpret Policy Order 63 to require what they refer to as "complete" gender reassignment, by which they mean that a transgender person must receive at least two forms of surgery before changing the sex designation on a driver's license: genital reconstruction surgery and surgery on the upper body. Eastman 30(b)(6) Dep. 53:9–54:1; 66:19–22; 67:4–18; Pregno Dep. 85:12–20; Spencer Dep. 61:10–20; 63:13–17. The genital surgery they require always results in permanent sterilization for transgender women, and almost always does for transgender men. Gorton Decl. ¶ 43.

The birth certificate statute also leaves open the ways a person may prove that they have undergone a surgical procedure to a judge. For example, if someone's surgeon has retired or died, presumably they could prove they had undergone surgery through some means other than a letter

from the surgeon who performed the procedure—an option foreclosed to them under Policy Order 63. Eastman 30(b)(6) Dep. 61:14–20. Even if it were simply more convenient or less costly to submit evidence from one's primary care physician to the court stating that one has undergone surgery, a judge might accept that proof, and a judge would not necessarily arbitrarily require the physician to have used the word "complete," as Defendants do. *Id.* at 53:9–54:1. And it is vanishingly unlikely that state judges call litigants' physicians without permission to inquire into the details of the medical care they have received, as Defendants do. *Id.* at 37:17–41:10.

While consistency with the state birth certificate policy would not meet the standards as an important government interest, and even a policy that aligned as fully as possible with the statute regarding birth certificates would violate the constitution, these differences demonstrate that Defendants' rationalization does not even hold true: Policy Order 63 is inconsistent with the process for amending the sex designation on a birth certificate in Alabama.

## CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court rule in favor of Plaintiffs on all counts.

Respectfully submitted this the 18th day of September 2020.

s/ Gabriel Arkles
Rose Saxe
Gabriel Arkles
ACLU LGBT & HIV Project / ACLU Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2605
rsaxe@aclu.org
garkles@aclu.org
*Admitted Pro Hac Vice*

Randall Marshall
ACLU OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106-0179
(334) 265-2754
rmarshall@aclualabama.org
***Counsel for Plaintiffs Darcy Corbitt, Destiny Clark, and Jane Doe***

**CERTIFICATE OF SERVICE**

I certify that on September 18, 2020, I filed the foregoing electronically using the Court's CM/ECF system, which will serve all counsel of record.

s/ Randall Marshall

# DOC. 84

**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-SMD** |
| | ) | |
| **HAL TAYLOR, *et al.*,** | ) | |
| | ) | |
| **Defendants.** | ) | |

**DEFENDANTS' REPLY TO PLAINTIFFS' MEMORANDUM OF LAW**
**IN RESPONSE TO ORDER FOR ADDITIONAL BRIEFING**

Defendants Hal Taylor, Charles Ward, Deena Pregno and Jeannie Eastman file this reply to Plaintiffs' Memorandum of Law in Response to Order for Additional Briefing (doc. 83).

**1. Plaintiffs' Case on the Constitutionality of a Bathroom Policy for Transgender Students Is Distinguishable.**

In their response to the Court's order for additional briefing, Plaintiffs rely significantly on the Eleventh Circuit's case in *Adams by and through Kasper v. School Board of St. Johns County*, 968 F.3d 1286 (11th Cir. 2020) (mandate withheld by order of the court on August 10, 2020 and petition for rehearing *en banc* filed August 28, 2020). *See* doc. 83 at 3-4.[1] In *Adams*, the court held it was an unconstitutional violation of equal protection for a school board to require transgender students to use either the bathroom that corresponded to the gender on their enrollment documents or a gender-neutral restroom. 968 F.3d at 1303. But *Adams* is distinguishable both as to the threshold issue of whether Policy Order 63 is a classification on the basis of sex or transgender status and as to whether Policy Order 63 satisfies intermediate scrutiny, assuming it applies.

[1] Plaintiffs cite a number of cases from other jurisdictions, but as only *Adams* is binding Defendants limit their discussion to that case.

The parties in *Adams agreed* that the school board's policy discriminated on the basis of sex. *Id.* at 1296. The school board framed it as discriminating on the basis of sex "by requiring biological females to use girls' bathrooms and biological males to use boys' bathrooms." *Id.* (internal quotations omitted). The plaintiff framed it more narrowly as discrimination "against him because, by being transgender, he defies gender norms and stereotypes." *Id.* Given that the school board's policy expressly referenced transgender students, the court agreed with the plaintiff's characterization:

> The School Board's bathroom policy singles out transgender students for differential treatment because they are transgender: "Transgender students will be given access to a gender-neutral restroom and will not be required to use the restroom corresponding to their biological sex." The policy emphasized the School Board's position that no law required it to "allow a transgender student access to the restroom corresponding to their consistently asserted [] gender identity." In this way, the policy places a special burden on transgender students because their gender identity does not match their sex assigned at birth.

*Id.* (emphasis in original).

Here, Policy Order 63 does not discriminate on the basis of sex or transgender status because it references neither characteristic and it does not "place[] a special burden" on transgender licensees "because their gender identity does not match their sex assigned at birth." *Id.* Policy Order 63 expressly references neither sex nor transgender status and applies to anyone who wishes to change the sex on their driver license. It prevents a person in bad faith from changing the sex designation on his license so he can commit identify fraud as equally as it applies to a transgender individual who wishes to make the same change because she no longer identifies with her sex at birth. Nor does it place a "special burden" on transgender licensees "because their gender identity does not match their sex assigned at birth." *Id.* Unlike the categorical prohibition on using the bathroom matching one's gender identity in *Adams*, Policy Order 63 provides a method for

transgender licensees to change the sex designation on their license. Again, Plaintiffs disagree with the surgery requirement. But the surgery requirement does not categorically deny transgender individuals the ability to change the sex designation on their driver licenses because their gender identity does not match their sex at birth. Because Policy Order 63 does not apply *only* to transgender licensees or categorically deny them the opportunity to change their sex designation, it does not discriminate against them under *Adams*. Therefore, heightened scrutiny does not apply.

Even assuming intermediate scrutiny does apply to Policy Order 63, *Adams*'s intermediate scrutiny analysis is also distinguishable. As here, the parties agreed that the government had asserted an important government interest. *Id.* at 1297. The school board's interest in *Adams* was "[p]rotecting the bodily privacy of young students." *Id.* But *Adams* provided three reasons for why the board's policy was not substantially related to this interest, each of which is in contrast to the facts of this case.

First, the board's policy of determining what bathroom a student must use was completely unrelated to its goal of assigning students to a bathroom based on biological sex at birth. *Id.* at 1297-99. The board used a student's enrollment documents to determine the student's sex at birth, but the student could list whatever sex they chose and so the forms "say nothing about a student's assigned sex at birth." *Id.* at 1298. By contrast, the default sex designation on an Alabama driver license is the sex designation on an Alabama birth certificate. Doc. 48-7 at 90-92. Unlike the self-identified sex on the student enrollment forms in *Adams*, a birth certificate is the best source of information for determining an individual's sex at birth or default sex designation for physical identification purposes.

Second, while the court acknowledged the anatomical differences between the sexes, it concluded these made no difference in using the bathroom because the plaintiff used the bathroom

in a closed stall without anyone seeing him. *Id.* at 1299-01. As a result, the board's policy was unrelated to its interest in preventing students from exposing their genitals to each other. Defendants have already set out four arguments as to why its law enforcement identification interest is not hypothesized or invented *post hoc* in response to litigation. *See* doc. 82 at 7-11. Defendants have already shown that they have an actual, demonstrated interest in a uniform physical description of Alabama license holders, and they reincorporate this argument in response to the second point in *Adams*. *Id.*

Third, the board's bathroom policy "treat[ed] transgender students . . . differently because they fail to conform to gender stereotypes." *Id.* at 1301. This was because the board's policy "presume[d] every person deemed 'male' at birth would act and identify as a 'boy' and every person deemed 'female' would act and identify as a 'girl,'" and there were *no exceptions* to this stereotyped classification. *Id.* Here, the sex designation on a driver license uses the sex designation on a birth certificate as a *default*, and this default is reasonable since Plaintiffs' expert agreed this corresponds to a person's gender identity in 99% of cases. *See* doc. 48-8 at 23-24. And Policy Order 63 does not incorporate gender stereotypes because it does not assume a sex designation on a driver license can never change from the default at birth. Its entire purpose is to provide the circumstances for when a sex designation can change. Thus, Policy Order 63 is substantially related to the State's interest in consistency with birth certificates and law enforcement identification, unlike the bathroom policy in *Adams*.

**2. Although the Contemporaneous Reason for Adopting Policy Order 63 Was Consistency with Birth Certificate Policy, It Does not Follow that Defendants' Interest in Law Enforcement Identification Is Hypothesized or Invented *Post Hoc* in Response to Litigation.**

Plaintiffs argue that because Policy Order 63's surgery requirement was adopted based on the State's statutory process for amending birth certificates, the State's interest in law enforcement

identification is a *post hoc* rationalization incapable of satisfying intermediate scrutiny. *See* doc. 83 at 5-6. But as Defendants have argued, the State's interest in consistency with amending birth certificates is conceptually distinct but not independent of its interest in law enforcement identification. *See* doc. 82 at 10-11. Consistency between the sex designation on a birth certificate and on a driver license is necessarily related to law enforcement identification. *Id.* Therefore, the contemporaneous reason for adopting Policy Order 63—consistency with birth certificates—does not show the law enforcement interest is hypothesized or *post hoc*, but in fact demonstrates the opposite.

**3. Plaintiffs' Argument That Policy Order 63 Is Inconsistent with the Process for Amending Birth Certificates Is Speculative.**

The parties agree that there are no specified procedures that satisfy the surgery requirement of Alabama Code § 22-9A-19(d). Plaintiffs' argument that judges might not require genital reconstruction surgery and surgery on the upper body before ordering an amendment to a birth certificate is purely speculative. As with any application of a statute, individual judges might interpret and apply requirements slightly differently. But there can be no doubt that Policy Order 63's surgery requirement is consistent with the plain language of § 22-9A-19(d), which requires "that the sex of an individual born in this state has been changed by *surgical procedure*." (emphasis added). Intermediate scrutiny does not require proof that Policy Order 63 corresponds exactly to the way every Alabama circuit or probate judge interprets and applies § 22-9A-19(d). *See Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 70 (2001) ("None of our gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance."). Policy Order 63's surgery requirement is clearly substantially related to the statutory surgery requirement for changing the sex designation on birth certificates.

Respectfully submitted,

Steve Marshall,
*Attorney General*

s/ Brad A. Chynoweth
Brad A. Chynoweth (ASB-0030-S63K)
*Assistant Chief Deputy Attorney General*
Winfield J. Sinclair (ASB-1750-S81W)
*Assistant Attorney General*

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8400
Brad.Chynoweth@AlabamaAG.gov
Winfield.Sinclair@AlabamaAG.gov

***Counsel for Defendants Hal Taylor, Charles Ward, Deena Pregno, and Jeannie Eastman***

**CERTIFICATE OF SERVICE**

I hereby certify that on September 25, 2020, 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:

Randall C. Marshall
ACLU OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106-0179
(334) 265-2754
rmarshall@aclualabama.org

Rose Saxe
Gabriel Arkles
Leslie Cooper
ACLU LGBT & HIV Project/ACLU Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2605
rsaxe@aclu.org
garkles@aclu.org
*Admitted Pro Hac Vice*

*/s* Brad A. Chynoweth
Counsel for Defendants

# DOC. 85

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

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

**PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO THE COURT'S BRIEFING ORDER**

Plaintiffs submit this additional argument in response to the first two issues in Defendants' Response to the Court's Briefing Order. Plaintiffs rest on their previous briefing on the third question.

## I. By Any Formulation, Policy Order 63 Treats Transgender People Differently Based on Sex.

Defendants' various arguments for how Policy Order 63 does not trigger heightened scrutiny are unavailing. A policy that categorizes people based on male or female on their license based on sex on their birth certificate or evidence of genital surgery is patently sex-based. In purpose, design, and effect, the policy treats transgender people worse than cisgender people.

Defendants argue that Policy Order 63 does not trigger heightened scrutiny because it involves a group-based distinction. But group distinctions, like individual distinctions, do trigger heightened scrutiny whenever the government draws those distinctions at least in part based on sex. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("Classifications based upon gender . . . must bear a close and substantial relationship to important governmental objectives."); *United States v. Virginia*, 518 U.S. 515, 547 (1996) (holding rule excluding women, as a group, from admission to Virginia Military Academy unconstitutional); *Frontiero v. Richardson*, 411 U.S. 677,

691 (1973) (finding statutes making it more difficult for women service members than men service members to claim their spouses as dependents unconstitutional).

Defendants also argue that Policy Order 63 does not hurt transgender people. In Equal Protection claims seeking only declaratory and injunctive relief, Plaintiffs need not show injury beyond what is necessary to satisfy Article III standing; while Title VII concerns itself only with an enumerated list of actions, including discrimination, the Equal Protection clause examines classifications. *Compare Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1740 (2020) (assuming for sake of argument that Title VII only prohibits "discrimination"), *with Feeney*, 442 U.S. at 272 ("In assessing an equal protection challenge, a court is called upon only to measure the basic validity of the legislative classification."); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994) (heightened scrutiny applies to "all gender-based classifications").

But here, Plaintiffs have offered overwhelming, undisputed evidence that Policy Order 63 has harmed each of the Plaintiffs and other transgender people in myriad ways. Corbitt Dep. 36:21–23; 37:1–11 (the humiliation Ms. Corbitt experienced when seeking an Alabama driver's license led her to lose sleep and miss work); Corbitt Decl. ¶ 12 (Ms. Corbitt will not be able to stay in Alabama after her graduation if Policy Order 63 stays in effect); Clark Decl. ¶ 9 (Ms. Clark avoids buying alcohol because she fears showing her license); Clark Dep. 33:20–13; 34:1–9 (Ms. Clark fears for her safety while voting); Doe Dep. 78:11–79:4 (Ms. Doe was refused service and told she was going to Hell when she showed her license to a bank teller); Doe Dep. 35:19–23; 36:1–4 (Ms. Doe has been harassed when she showed her license to restaurant staff); U.S. Trans Survey of 2015: Alabama State Report (28% of transgender people surveyed in Alabama had experienced some form of mistreatment when they showed ID with a sex designation that did not match their

presentation); Gorton Decl. ¶ 27 (having an identity document with the correct sex designation corresponds with a large reduction in suicide attempts for people with gender dysphoria).

Defendants further argue that the distinction they draw is not based on sex or transgender status, but rather based on surgery. First, it is disingenuous to suggest that a distinction based on surgery is not based on sex when defining the surgery in question as "sex reassignment surgery." Doc. No. 82 at 6. This is surgery performed on some transgender people to alter their physical sex-related characteristics for purposes of relieving their gender dysphoria. Gorton Decl. ¶¶ 36, 43. Because these surgeries cannot be described or explained without reference to sex, any distinction based on them is also a distinction based on sex. *See Bostock*, 140 S. Ct. at 1746.

Second, the distinction Defendants draw is certainly not only about surgery. People who identify with their assigned sex at birth can obtain a driver's license with a sex designation that corresponds to their identity without undergoing any form of surgery, without losing their fertility, and without submitting any sort of medical evidence to the government (even if their genitalia or upper body is not typical for those of their sex). Transgender people cannot, precisely because their assigned sex at birth differs from their gender identity—that is, because they are transgender and thus because of sex. *Id.* at 1741. Even if these are not the sole cause of Defendants' decision to withhold a safe and accurate driver's license from Plaintiffs and other transgender people, that does not make the decision any less because of sex. *Id.*

Finally, Defendants argue that Defendants did not know that Plaintiffs were transgender women when they sought to change the sex on their driver's licenses. In fact, Defendants or their subordinates did have actual knowledge that each Plaintiff was identified as male at birth and now identifies as a woman, and thus that they are transgender women. But even if that knowledge did

somehow escape them, heightened scrutiny would still apply to the sex-based policy Defendants created and implemented.

## II. None of the Evidence that Defendants Point to Indicate that the Interest in Law Enforcement Identification Actually Motivated Its Policy.

Defendants offer various interpretations of the record in an attempt to cast their interest in law enforcement identification as "genuine" and not "hypothesized or invented post hoc in response to litigation." *Virginia*, 518 U.S. at 533. But they point to no evidence from the record indicating that this interest actually motivated the adoption of any iteration of Policy Order 63. Nor could they, as this evidence does not exist.

Defendants continue to misunderstand the meaning of the term "post hoc." Post hoc means "subsequently." *Post Hoc*, Black's Law Dictionary (11th ed. 2019). Whether in administrative law or under heightened scrutiny analysis in Equal Protection law, the rationales offered to justify agency actions must have actually motivated the agency's decision at the time it was made. *See Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) ("[T]he problem is the timing . . . ."). Otherwise, they may not be considered. *See Virginia*, 518 U.S. at 533.

Thus, Defendants' various arguments miss the point. The fact that ALEA is a law enforcement agency sheds no light on what actually motivated its decision to impose a surgical requirement. Nor does the fact the agency has imposed this requirement for some time clarify its original purpose for doing so. The fact that law enforcement agencies have some sex-specific policies for arrest and detention, or sometimes use sex among other characteristics to assist in identifying people, also has no bearing on what the agency actually considered in setting its policy. And it is entirely possible to want to maintain rough consistency with the birth certificate policy

for reasons that have nothing to do with law enforcement identification, which, according to the agency's 30(b)(6) witness, is what happened here.

Again, the record is undisputed that the Defendants' only contemporaneous reason for adopting the current policy was wanting consistency with the state birth certificate policy. The 30(b)(6) witness stated that she had no knowledge of the agency taking law enforcement interests into account when it first formulated its policy. Pregno Dep. 44:20–45:2. She testified that to her knowledge—and thus to the agency's knowledge—the *only* interest at the time was consistency with birth certificates, and nothing else. *Id.* at 45:3–13; Fed. R. Civ. P. 30(b)(6). When asked why that interest mattered, the agency offered nothing more than "we wanted to be in line with what their requirements were" and "[w]e want to be consistent in . . . requiring the same types of documents when we're dealing with the same situation." Pregno Dep. at 43:5–16; 102:16–19. That is not the same as formulating a policy to assist law enforcement officers in identifying crime suspects or missing persons. Indeed, if law enforcement identification were a genuine rationale for creating a policy about transgender access to updated sex designations, the agency may well have arrived at a different conclusion, since Policy Order 63 manifestly undermines the law enforcement interest in accurate identification. *See Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 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 *7 (Alaska Super. Mar. 12, 2012).

In the absence of any admissible evidence contradicting the 30(b)(6) testimony, it is undisputed that any other interests did not actually motivate the creation or revision of Policy Order 63. As such, they were invented post hoc, and cannot satisfy heightened scrutiny.

Should the Court decide to hold a hearing on this or any other issue in this matter, Plaintiffs respectfully request that the hearing be held remotely to mitigate risks of COVID-19 transmission.

**CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court rule in favor of Plaintiffs on all counts. In the event the Court should decide to hold a hearing, Plaintiffs respectfully request that the hearing be held remotely.

Respectfully submitted this the 25th day of September 2020.

s/ Gabriel Arkles
Rose Saxe
Gabriel Arkles
ACLU LGBT & HIV Project / ACLU Foundation
125 Broad St., 18th Floor
New York, NY 10004
(212) 549-2605
rsaxe@aclu.org
garkles@aclu.org
*Admitted Pro Hac Vice*

Randall C. Marshall
ACLU OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106-0179
(334) 265-2754
rmarshall@aclualabama.org
***Counsel for Plaintiffs Darcy Corbitt, Destiny Clark, and Jane Doe***

**CERTIFICATE OF SERVICE**

I certify that on September 25, 2020, I filed the foregoing electronically using the Court's CM/ECF system, which will serve all counsel of record.

s/ Randall C. Marshall

# DOC. 101

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

| | | |
|---|---|---|
| DARCY CORBITT, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | CIVIL ACTION NO. |
| v. | ) | 2:18cv91-MHT |
| | ) | (WO) |
| HAL TAYLOR, in his official capacity as Secretary of the Alabama Law Enforcement Agency, et al., | ) | |
| | ) | |
| Defendants. | ) | |

**OPINION**

Plaintiffs Darcy Corbitt, Destiny Clark, and Jane Doe are transgender women living in Alabama who have sought driver licenses[1] from the Alabama Law Enforcement Agency (ALEA) reflecting that they are women. Each has been unable to obtain a license with a female sex

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1. While these documents are called "drivers' licenses" under State law, *see, e.g.*, Ala. Code § 32-6-6, ALEA refers to them instead as "driver licenses." The terminology used in other States apparently varies. Because the subject of this opinion is an ALEA policy, the court employs ALEA's nomenclature.

**designation because of the surgery requirements imposed by ALEA's Policy Order 63. Corbitt, Clark, and Doe have named as defendants, in their official capacities, the Secretary of ALEA and other ALEA officials. They claim ALEA's policy is incompatible with the Equal Protection Clause of the Fourteenth Amendment, their fundamental right to privacy, their liberty interest in refusing unwanted medical treatment, and their First Amendment right to be free of compelled speech, and they seek to enjoin the policy's enforcement. The court has jurisdiction under 28 U.S.C. § 1331 (federal question) and § 1343 (civil rights).**

**The parties agreed to resolution of this case on the evidence and briefs they have submitted. *See* July 30, 2019 Hr'g Tr. (doc. no. 74) at 11-13. They agreed that the court could resolve disputed issues of fact and draw reasonable factual inferences and conclusions from the evidence, and that the court's findings and inferences would be binding to the same extent as if made after trial. *See id.*; *see also Anderson v. City of Bessemer***

*City*, 470 U.S. 564, 573-74 (1985) (findings of fact carry the same weight whether made on the documentary record or at trial). Today the court reaches this resolution.

For the reasons below, the court finds Policy Order 63 unconstitutional. Policy Order 63, as interpreted by ALEA, makes it possible for people to change the sex designation on their driver licenses only by surgically modifying their genitals. By making the content of people's driver licenses depend on the nature of their genitalia, the policy classifies by sex; under Equal Protection Clause doctrine, it is subject to an intermediate form of heightened scrutiny. ALEA has not presented an adequate justification for Policy Order 63. The interests asserted by the State are insufficient to meet the standards of intermediate scrutiny, and the policy is inadequately tailored to advancing those interests.

The resolution of this case follows from longstanding equal-protection jurisprudence. The plaintiffs' claims may be novel, but the standards by which the court

evaluates them are not: They are the rules that apply to all sex-based classifications under the Equal Protection Clause. Finally, because the court finds that Policy Order 63 violates the Equal Protection Clause, it does not reach the alternative constitutional arguments made by Corbitt, Clark, and Doe.

## I. BACKGROUND

Policy Order 63, first issued in 2012, provides that in general the holders of Alabama driver licenses must surgically modify their genitals before they can change the sex designation on their licenses.[2] When a person born or previously licensed in Alabama seeks a license with a sex designation that differs from the sex on the

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2. ALEA was not yet constituted when Policy Order 63 was originally issued in 2012; the policy was issued at that time by the Department of Public Safety. *See* Defs.' Motion for Summary Judgment (doc. no. 54) at 4-6. The Department of Public Safety became part of ALEA when the latter was created in 2013. *See id.* at 4. To avoid unnecessary confusion, this opinion refers to ALEA both in discussing the current operation of the policy and the circumstances surrounding its original entry.

applicant's birth certificate, the text of Policy Order 63 requires that the applicant receive "gender reassignment surgery" and provide a letter from the doctor who performed the "reassignment procedure" on that doctor's letterhead. *See* Pls.' Evidentiary Submission (doc. no. 52-1) at 1. ALEA interprets this to mean that the applicant must undergo what it calls "complete" or "completed" surgery, which it says at least includes surgery to alter the applicant's genitals, although defendants have suggested it may also require chest surgery. *See, e.g.*, Depo. of Jeannie Eastman (doc. no. 48-4) at 64-69; *see also* Defs.' Motion for Summary Judgment (doc. no. 54) at 8 (noting that the surgery required by Policy Order 63 must "includ[e] genital reassignment"). The effect is to make surgical genital modification the only route to a changed sex designation, other than in cases of typographical error.

There are two exceptions to this rule. First, instead of a doctor's letter, applicants are permitted to provide an updated Alabama birth certificate, which

also requires surgery to obtain but may not require genital surgery. *See* Ala. Code § 22-9A-19(d) (requiring that the individual's sex be "changed by surgical procedure"). Alternatively, if the applicants have never lived in the State before and have already updated their sex on an out-of-state license or birth certificate, ALEA will accept the sex on that document regardless of whether the State where the document was updated has a surgery requirement. These caveats aside, the basic function of Policy Order 63 is that it makes the sex designation on Alabamians' driver licenses changeable only by genital surgery. It is this function that plaintiffs challenge.

Though defendants do not contest plaintiffs' standing to bring their equal protection claim, they have suggested at various points that Corbitt, Clark, and Doe are not harmed by Policy Order 63. *See, e.g.*, Defs.' Motion for Summary Judgment (doc. no. 54) at 20. In light of this argument and the court's constitutional obligation to assure itself of its jurisdiction before

**proceeding, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998), the court pauses to note the impact of Policy Order 63 on the plaintiffs.**

**The injuries caused by Policy Order 63 are severe. For individuals born in Alabama or previously licensed here whose gender identity differs from the sex they were assigned at birth, the policy requires surgery, which results in permanent infertility in "almost all cases," to be able to obtain a license with a sex designation that matches their gender. *See* Decl. of Dr. Gorton (doc. no. 52-45) at ¶ 43. Even for those who want it, this surgery may be unaffordable, as it is for Doe. *See* Decl. of Jane Doe (doc. no. 56-42) at 20.**

**The alternative to surgery is to bear a driver license with a sex designation that does not match the plaintiffs' identity or appearance. That too comes with pain and risk. Corbitt feels that carrying a license "that says I am male when I know that is not true" would be "proclaim[ing] a lie." Decl. of Darcy Corbitt (doc. no. 52-28) at 4. This, she says, would run counter to**

her religious beliefs as a "devout and practicing Christian." *Id.* Doe says that carrying an "incorrect ID feels like I am not able to be my true self." Decl. of Jane Doe (doc. no. 56-12) at ¶ 24. For these plaintiffs, being reminded that they were once identified as a different sex is so painful that they redacted their prior names from exhibits they filed with the court. *See* Pls.' Motion for Summary Judgment (doc. no. 51) at 9 n.2.

More concretely, carrying licenses with sex designations that do not match plaintiffs' physical appearance exposes them to a serious risk of violence and hostility whenever they show their licenses. Corbitt, Clark, and Doe present as women. They have traditionally feminine features. *See* Photographs of Corbitt and Clark (docs. no. 1-2 and 1-3). They dress as other women dress. The court lists these attributes not to suggest that they are what make the plaintiffs women, but to explain why bearing licenses that do not designate the plaintiffs as women exposes them to such risk.

**Whenever plaintiffs show an identification document that calls them male, the reader of the document instantly knows that they are transgender. That, the record makes clear, is dangerous. One-quarter of all transgender people who carry identification documents that do not match their gender have been harassed after showing those documents.** ***See*** **Pls.' Evidentiary Submission (doc. no. 52-47) at 8. One in six has been denied services, and more than half have faced harassment or assault from a law enforcement officer who learned they were transgender.** ***Id.*** **at 6, 8. One in 50 who presented an incongruous identification document has been physically attacked after doing so.** ***Id.*** **at 8. As Clark explained, when she shows her license that reveals her to be transgender, "There's always a risk of violence."** ***See*** **Depo. of Destiny Clark (doc. no. 48-1) at 80-82.**

**This risk is not hypothetical for these plaintiffs. Doe, who works in a dangerous industry, was badly injured and nearly killed by her co-workers because of her transgender status.** ***See*** **Decl. of Jane Doe (doc. no.**

**56-12) at ¶¶ 9-12. She later lost a job after she showed her male-designated driver license to someone who informed her employer that she is transgender. *See id.* at ¶ 15; Pls.' Motion for Summary Judgment (doc. no. 51) at 18-19.**

**The evidence above demonstrates that Policy Order 63 has directly and concretely injured the plaintiffs. But the Equal Protection analysis below does not turn on the injuries that the policy causes transgender individuals like Corbitt, Clark, and Doe. As explained below, the court analyzes Policy Order 63 as a sex-based classification not because it harms transgender people, but because it classifies driver license applicants by sex. The State's justifications for the policy fall short not because of the policy's consequences for transgender Alabamians, but because the government's interests are insubstantial or were formulated *post hoc*, and because the policy is inadequately tailored to advancing them.**

## II. LEGAL STANDARD

Sex-based classifications imposed by a State are subject to an intermediate form of heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment. Under Policy Order 63, people in Alabama can change the sex designation on their driver licenses only by changing their genitalia. *See* Defs.' Motion for Summary Judgment (doc. no. 54) at 8; *see also* Depo. of Jeannie Eastman (doc. no. 48-4) at 64-69, 80-84. The policy thereby ensures that a person with typically male genitalia receives a license bearing one sex designation and a person with typically female genitalia receives a license bearing another, stamping them publicly with that sex regardless of the sex with which the individuals identify. The policy thus treats people differently based on the nature of their genitalia, classifying them by sex. *See* Decl. of Dr. Gorton (doc. no. 52-45) at ¶ 10 (defining "sex" as "the sum of the anatomical, physiological, and biologically functional characteristics of an individual that places them in the

**categories male, female, or along a spectrum between the two").**

**All state actions that classify people by sex are subject to the same intermediate scrutiny. The State need not favor or disfavor men or women to trigger such scrutiny; the classification itself is the trigger. *Cf. Missouri v. Jenkins*, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring) (noting that all state-imposed race classifications are subject to strict scrutiny, regardless of whether the classifications cause "feelings of inferiority" or produce "[p]sychological injury or benefit"). At the point of resolving the level of scrutiny that should apply in this case, it therefore does not matter whether the State classifies people by giving them different sex designations on their driver licenses or by sending them to different schools. Intermediate scrutiny applies regardless of what sex-based action the State takes. *See Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723-24, 724 n.9 (1982).**

**The sex classification of Policy Order 63 is also one imposed by the State. *See Johnson v. California*, 543 U.S. 499, 505 (2005) (classifications "imposed by government" trigger heightened scrutiny). Through Policy Order 63, the State sets the criteria by which it channels people into its sex classifications. The policy obligates ALEA officials to review a license applicant's birth records and medical documentation, decide what they believe the applicant's sex to be, and determine the contents of the individual's license based on that decision. In so doing, the policy imposes its sex classification, denying the women who are plaintiffs in this case the ability to decide their sex for themselves instead of being told who they are by the State.**

**If the policy pertained to race or religion instead of sex, it would be apparent that this raised constitutional concerns. Government agencies collecting demographic data routinely ask people to self-report their race. *See, e.g.*, 19-3 Miss. Code R. § 11.13. The alternative, where States publicly designated people's**

**race based on state-determined criteria, would be troubling: bureaucrats comparing skin tones and tracing family lineages to decide who is white and who is black. Laws demanding such inquiries have a long and loathsome history. *See, e.g.*, *Jones v. Commonwealth*, 80 Va. 538, 544-45 (1885) (reversing a conviction for racial intermarriage due to insufficient evidence that the defendant had "one-fourth at least of negro blood in his veins," an element of the offense). Just as those laws would today trigger strict scrutiny, *see Loving v. Virginia*, 388 U.S. 1, 6-8 (1967), so Policy Order 63 triggers intermediate scrutiny, for it publicly designates people's sex based on state-determined criteria. As a result, the difficult question here is not whether intermediate scrutiny applies, but whether Policy Order 63 survives such scrutiny.[3]**

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**3. The court therefore does not base its decision on any "special burden" that Policy Order 63 places on transgender individuals. *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1296 (11th Cir. 2020), *petition for reh'g en banc filed*. Its decision is based instead on the fact that the policy classifies by sex, and it follows**

**The path the court must take to answer that question is well worn. The Equal Protection Clause "does not make sex a proscribed classification." *United States v. Virginia*, 518 U.S. 515, 533 (1996). But the State must show that its decision to classify based on sex "serves important governmental objectives" and that the particular policy it employs is "substantially related to the achievement of those objectives." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1690 (2017). Neither the asserted interest nor the alleged tightness of the policy's tailoring may "rely on overbroad generalizations" about the roles and attributes of men and women. *Id.* at 1689, 1692. Nor may the State's interests be "hypothesized or invented *post hoc* in response to litigation"--they must be the actual goals the policy was intended to advance at the time it was created. *Virginia*, 518 U.S. at 533; *see also Morales-Santana*, 137 S. Ct. at 1696-97. In other words,**

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**the traditional Equal Protection principles that apply to all state-imposed sex classifications.**

the State must provide an "exceedingly persuasive justification" for the sex-based classification. *Virginia*, 518 U.S. at 531.[4]

## III. DISCUSSION

Defendants name two government interests to justify Policy Order 63. First, they say the policy was created

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4. To dispose of a threshold matter: In defendants' motion for summary judgment, they argued that the claims of plaintiffs Corbitt and Clark are barred by the applicable statute of limitations. *See* Defs.' Motion for Summary Judgment (doc. no. 54) at 24-27. The court is not persuaded, at least as to Corbitt, because she moved to Alabama and first sought a female-designated license from ALEA in August 2017--only six months before filing suit. *See* Pls.' Response to Motion for Summary Judgment (doc. no. 58) at 16. Corbitt neither knew nor had reason to know that she had been injured by Policy Order 63 until she requested a female-designated license and was denied; indeed, she had not been injured by the policy until that point. *See Rozar v. Mullis*, 85 F.3d 556, 561-62 (11th Cir. 1996); *Foudy v. Indian River Cty. Sheriff's Office*, 845 F.3d 1117, 1122-23 (11th Cir. 2017) (holding that the injury-discovery rule for claim accrual still applies to equal protection claims). Nor did she have a "complete and present cause of action" until then. *Wallace v. Kato*, 549 U.S. 384, 388 (2007). In any event, defendants do not challenge Doe's capacity to bring the same injunctive claims raised by Corbitt and Clark.

to ensure consistency with the State's existing requirements for amending a birth certificate. Second, they say that Policy Order 63 "serves the State's interests in providing an accurate description of the bearer of an Alabama driver license" to make it easier for law enforcement officers to identify people when determining appropriate post-arrest search and placement procedures. *See* Defs.' Motion for Summary Judgment (doc. no. 54) at 10. To determine whether the State has met its burden under the Equal Protection Clause, the court must assess whether these interests are "important," whether Policy Order 63 is "substantially related" to advancing them, and whether they were the actual interests considered when Policy Order 63 was adopted.

A. Consistency with Birth Certificate Amendments

According to defendants, "Policy Order 63 was originally created based on the statutory process for amending a birth certificate." *Id.* at 46. They say the policy thus "serves the important government interests

in maintaining consistency between the sex designation on an Alabama birth certificate and an Alabama driver license." *Id.* Under state law, an Alabama birth certificate may be amended to change the sex designation with a court order indicating that the "sex of an individual born in this state has been changed by surgical procedure and that the name of the individual has been changed." Ala. Code § 22-9A-19(d).

Defendants have done little to elucidate why their alleged interest in uniformity between birth certificate and driver license amendment standards is important. They have noted, without further explanation, that it "is related [to] 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." Defs.' Response to Pls.' Motion for Summary Judgment (doc. no. 60) at 19. And they have argued, as appears to be true, that this interest is

neither *post hoc* nor reliant on "overbroad generalizations" about men and women. *Id.* at 20.

In the context of sex-based classifications, the "burden of justification is demanding and it rests entirely on the State." *Virginia*, 518 U.S. at 533. Defendants' failure to articulate the importance of their alleged interest in conformity with birth certificate protocols falls short of meeting that burden. But to the extent that defendants have defined this interest, the court does not see how it can meet the requirements of intermediate scrutiny.

For one, defendants' argument rests on the premise that an alignment of procedures should generate an alignment of documents--that is, that having uniform processes for amending licenses and birth certificates is likely in practice to produce uniformity between individuals' licenses and birth certificates. As a logical matter, this premise is dubious. Many people may seek to amend their driver licenses without bothering to amend their birth certificates, regardless of the

**requirements for each. Showing one's license is a common occurrence; the times when a person needs to present a birth certificate are few and far between. Accordingly, the risks of bearing a sex-designated document that does not match a person's gender are much greater when the document is a driver license than when it is a birth certificate. A person with limited time or resources might reasonably decide to change one but not the other.**

**Underscoring the faultiness of their premise, defendants have presented no evidence to support it. Defendants could, for instance, have compared their driver license records with the State's birth certificate records to determine how often people who have changed the sex designation on their licenses through the procedure of Policy Order 63 also have changed the sex designation on their birth certificates. They have not done so, leaving the court in the dark as to whether the baseline presumption underlying the State's asserted interest in uniform procedures is ever actually borne out. In the context of intermediate scrutiny, where the**

**State bears the burden of justification, this evidentiary hole is fatal. *See Virginia*, 518 U.S. at 533.**

**Even if the court accepted defendants' shaky premise, their asserted interest would remain inadequate. Since the earliest days of the Supreme Court's sex-classification jurisprudence, the Court has insisted that "administrative ease and convenience" is not a sufficiently important justification for a state policy based on sex. *See Craig v. Boren*, 429 U.S. 190, 198 (1976); *see also Tuan Anh Nguyen v. I.N.S*, 533 U.S. 53, 88 (2001) (O'Connor, J., dissenting) ("We have repeatedly rejected efforts to justify sex-based classifications on the ground of administrative convenience."). And on the record presented here, the court finds that the State's interest in conformity with the rules for birth certificates provides only the convenience of avoiding the need to gather some additional documentation of sex changes on infrequent occasions.**

**As ALEA's Federal Rule of Civil Procedure 30(b)(6) witness Deena Pregno, chief of the agency's driver**

**license division, explained in her deposition when asked why this conformity was important, "if the birth document doesn't match [the driver license], we need to either find a document that links the change or find out why there is a discrepancy." Depo. of Deena Pregno (doc. no. 48-5) at 103. Pregno could think of no problem that might flow from an inconsistency between the driver license and birth certificate procedures other than the extra documentation that would be required when "tracking changes to that person's identifying information." *Id.* at 103, 109-10.**

**Nor has the State provided anything beyond Pregno's testimony to explain why such an inconsistency would be problematic for the State. Instead, they have doubled down on her explanation, arguing that Policy Order 63 "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." Defs.' Motion for Summary Judgment**

(doc. no. 54) at 11.[5] Moreover, this need to maintain a paper trail apparently crops up only when a person applies for a license; Pregno could think of no other time when a person's license and birth certificate would need to be compared. *See* Depo. of Deena Pregno (doc. no. 48-5) at 105-06.

Under the Supreme Court's precedents, avoiding the occasional burden of finding some additional documentation to track a change in a person's identification materials is not an adequate basis for sex-based state policy. While a government may appropriately choose to advance an important interest by means that promote effective and efficient administration, *see Nguyen*, 533 U.S. at 69, ALEA's asserted desire to avoid paperwork cannot suffice as the interest itself.

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5. Indeed, the State's apparent expectation that individuals' licenses and birth certificates will differ even with Policy Order 63 in place suggests that it recognizes the unlikelihood that maintaining uniform procedures will lead people to change both documents.

**Indeed, the interest ALEA claims in uniformity between the driver license and birth certificate amendment standards seems designed to make an end-run around the State's burden to show an "exceedingly persuasive justification" for sex-based differential treatment. *Virginia*, 518 U.S. at 532-33. But state interests, like the sexes, are not fungible. *See id.* at 533. The State may have good reasons for using the appearance of a child's genitalia to determine the sex on his or her birth certificate: For one thing, as gender identity "cannot be ascertained immediately after birth," Amended Complaint (doc. no. 38) at ¶ 34, the State might be hard-pressed to come up with a viable alternative approach. For another, the State has serious interests in gathering and maintaining certain population data via birth certificates, including information about sex. *See* Ala. Admin. Code § 420-7-1-.03(3)(a) (describing the information collected for birth certificates and requiring that sex be collected). But ALEA has never argued that such interests apply to driver licenses, nor**

**is there any evidence that it considered such interests when creating Policy Order 63.**

**By contrast to birth certificates, neither state law nor regulation requires ALEA to include sex designations on driver licenses; it is a creature of ALEA policy. The Code of Alabama mandates that driver licenses must contain a license number, "color photograph ... name, birthdate, address, and a description of the licensee," as well as the licensee's signature. Ala. Code § 32-6-6. The Alabama Administrative Code does not require sex to be designated either. ALEA cannot export the interests underlying one presumably lawful sex classification to prop up its sex-based policy simply by citing the inconvenience of disuniformity between the two, especially when the inconvenience is as minimal as the record demonstrates it to be in this case.**

**Finally, even if the State had a sufficiently important interest in avoiding the need to document discrepancies between a person's birth certificate and license, Policy Order 63 would still fail as inadequately**

**tailored to advancing that interest. Although state action need not "be capable of achieving its ultimate objective in every instance" under the intermediate version of heightened scrutiny that applies to sex-based classifications, *see Nguyen*, 533 U.S. at 70, the State must still show a "direct, substantial relationship between objective and means," *Miss. Univ. for Women*, 458 U.S. at 725-26.**

**Defendants here do not show a substantial relationship--or much relationship at all--between the operation of Policy Order 63 and the State's desire for consistency with the birth certificate amendment process. Although Policy Order 63 and the birth certificate amendment statute both require some type of surgery, the record shows this facial likeness to be thin ice over deep water.**

**"The parties agree that there are no specified procedures that satisfy the surgery requirement" of the birth certificate amendment statute. Defs.' Reply in Response to Order for Add'l Briefing (doc. no. 84) at 5.**

**Indeed, defendants have provided no evidence whatsoever of how this surgery requirement is applied. Though they fault as "purely speculative" plaintiffs' concern that Policy Order 63 may require different surgeries than birth certificate amendments, *see id.*, it is defendants' burden under intermediate scrutiny to establish that their interest in uniformity between these policies is actually borne out, not plaintiffs' to establish the opposite.**

**The evidence in the record shows that there is no one sex-reassignment surgery and that different surgeries are appropriate for different people. *See* Decl. of Dr. Gorton (doc. no. 52-45) at ¶ 36. Some of the plaintiffs have even received sex-reassignment surgery. Clark's application for a female-designated license was rejected notwithstanding her doctor's letter indicating that she had received "gender transformation surgery"--namely, surgery to modify her chest. *See* Pls.' Sealed Evidence (doc. no. 56-10) at 2; *see also* Depo. of Destiny Clark (doc. no. 48-1) at 41. Defendants present no evidence**

that Clark's surgery would not meet the birth certificate statute's requirement that a person's sex be "changed by surgical procedure." Ala. Code § 22-9A-19(d).

Nor are defendants consistent about what surgery or surgeries Policy Order 63 requires. As they explain, ALEA "does not maintain any specific list of procedures" that satisfy the policy. *See* Defs.' Motion for Summary Judgment (doc. no. 54) at 8. In practice, whether defendants will approve a change of sex designation appears to turn on the particular phrasing of the doctor's letter provided, or even an ALEA staff member's impressionistic sense of the letter's sufficiency.

Clark's application, for instance, was rejected in spite of her surgery because the doctor did not say he had performed "complete gender reassignment surgery." *See* Pls.' Sealed Evidence (doc. no. 56-10) at 2. Another transgender individual applying for a license whose doctor's note said the applicant had "undergone a surgical procedure performed by me ... to irreversibly correct an anatomical male appearance" was similarly

rejected because the letter did not say the procedure was a "complete" surgery. *See* Pls.' Sealed Evidence (doc. no. 56-6) at 2. But another applicant was approved whose doctor's letter said that "[s]ex reassignment surgery has been successfully completed ... and surgery is permanent and irreversible." *See* Pls.' Sealed Evidence (doc. no. 56-3) at 2. Yet another applicant was approved whose letter merely said she had "undergone Gender Confirmation Surgery for the purpose of sex/gender reassignment from male to female" and that the surgery was "irreversible," though it did not say she received "complete" surgery. *See* Pls.' Sealed Evidence (doc. no. 56-1) at 2. Another was approved with a letter saying the applicant received "sexual reassignment surgery," with no indication that the surgery was either "complete" or "irreversible," and no specific mention of what surgery was performed. *See* Defs.' Sealed Evidence (doc. no. 49-4) at 55.

In canvassing the spread of doctors' letters in cases where applicants have or have not been approved, the court is convinced, and so finds, that there is no rhyme

or reason at all. Defendants have said that they interpret a letter's use of the term "complete"--a requirement that appears nowhere in the text of Policy Order 63--to mean that the individual received both genital and chest surgery, *see* Depo. of Jeannie Eastman (doc. no. 48-4) at 53, and they say that in any case an application will be approved if the doctor's letter uses the term "complete." But in practice they neither approve only applications that use the word "complete," nor only applications that otherwise indicate that both genital and chest surgeries were performed.

This is therefore not a case where a sex-based policy merely fails to "achiev[e] its ultimate objective in every instance." *See Nguyen*, 533 U.S. at 70. Policy Order 63 governs the process for people who seek to change the sex designation on their licenses. ALEA says the policy's goal is to align the steps that this subset of license applicants must take with what those individuals would have to do to amend the sex designation on an Alabama birth certificate. In that context, on the

**record presented here, the court finds that Policy Order 63 does not hit any more often than it misses.**

**In sum, defendants assert that the important government interest underlying Policy Order 63 is in the occasional reduction of paperwork they achieve by maintaining uniformity between, on the one hand, a policy which they interpret to require either a combination of genital and chest surgeries or a doctor's note that specifically says the surgery is "complete"--and which they sometimes apply to require neither--and on the other, a state law for which they do not know what surgeries are required. The former policy additionally allows people to get an accurate in-state license if they have accurate out-of-state identification and have never been licensed in Alabama before. The latter law includes an additional name-change prerequisite and requires a court order.**

**That is not a "direct, substantial relationship between objective and means." *Miss. Univ. for Women*, 458 U.S. at 725-26. Even if defendants' purported interest**

in uniformity between Policy Order 63 and Alabama Code § 22-9A-19(d) were important enough to meet the standards of intermediate scrutiny, the haphazard and paper-deep overlap that ALEA has shown between the two still would not sustain its policy.[6]

### B. Law Enforcement Identification

The court therefore turns to defendants' alternative asserted interest in facilitating identification by law enforcement. It fares no better.

Defendants claim that "Policy Order 63 serves the important government interest of providing information

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6. Of course, the State always has the option of removing sex designations from Alabama driver licenses, which presumably would raise no constitutional concern. As noted above, while State law requires that license-holders' names, photographs, birthdates, and addresses appear on their driver licenses, it does not require sex to be designated. Similarly, many states once included race designations on driver licenses, a practice today employed only in North Carolina and optional there. *See* Cassius Adair, *Licensing Citizenship*, 71 Am. Q. 569, 587 (2019). The court has not further considered this potential remedy because it was not requested by the plaintiffs.

related to physical identification to law enforcement officers." *See* Defs.' Motion for Summary Judgment (doc. no. 54) at 49. They say this is important because a driver license "provides information to law enforcement officers ... so that each state agency can formulate its own search, seizure, and booking policies based on this information." *Id.* at 49-50.

In particular, ALEA argues it is important to use a person's genitalia to determine the identification on that person's license to assist with "the creation of appropriate policies and procedures in a correctional context for inmate searches, hosing, supervision, and medical care." *Id.* at 50.[7] Policy Order 63 allegedly serves this purpose by "providing an accurate description

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7. The record demonstrates, and the court finds, that this asserted State interest is in using genital status in particular to determine the sex designations on driver licenses. It is therefore different from the State's interest discussed above in "providing a uniform understanding of 'sex' on a driver license," Defs.' Response to Pls.' Motion for Summary Judgment (doc. no. 60) at 19, which the courts finds to be an interest in providing some uniform definition of sex, regardless of what that definition is.

**of the bearer of an Alabama license." *See* Defs.' Motion for Summary Judgment (doc. no. 54) at 10. As defendants' expert Donald Leach explained during his deposition, the sex designation on a driver license is among the "foremost pieces of information that's used when booking an individual." *See* Defs.' Evidence (doc. no. 48-9) at 34. Driver license sex designations, along with conversations with the arrestee and even medical examinations when necessary, are part of how officers decide whether a male or female officer should conduct body searches during the booking process. *See id.* at 34-36.**

**Ensuring that law enforcement officers apply appropriate booking procedures is important. But the court need not reach the question whether Policy Order 63 is adequately tailored to advancing that interest. To justify a sex-based policy, the State's interest must not only be important; it must also not be "hypothesized or invented *post hoc* in response to litigation." *Virginia*, 518 U.S. at 533. Defendants bear the burden under**

**intermediate scrutiny of establishing that the interests they assert were the actual goals ALEA considered when it first created Policy Order 63. But the evidence in the record does not indicate that defendants' asserted interest in facilitating proper booking procedures played any part in ALEA's calculus when it developed Policy Order 63. Instead, the record shows, and the court finds, that conformity with the State's birth certificate amendment procedures was the only interest ALEA considered when creating the policy.**

**Pregno discussed this issue at length in her Rule 30(b)(6) deposition testimony on behalf of ALEA. She testified that the State was focused on conformity with the birth certificate statute when it developed Policy Order 63. As she explained, "the policy was established based on the state statute for changing the gender on a birth certificate," because "[w]e wanted to be consistent in how we operated as a state." Depo. of Deena Pregno (doc. no. 48-5) at 42-43. She was later asked directly: "[I]n the course of creating this policy, what**

considerations went into ALEA's decision to adopt this policy as opposed to some other?" *Id.* at 45. She answered: "What the state requires for amended birth certificates." *Id.* Plaintiffs' counsel then asked: "Were there any other considerations that ALEA took into account at that time?" *Id.* She answered: "Not that I'm aware of." *Id.* When asked whether ALEA considered the effects of the policy on arrest and booking procedures, she answered "I don't -- I'm not sure if they did or not." *Id.* at 44-45. Considered as a whole, Pregno's testimony left the court with little doubt that ALEA was interested in uniformity with the State's birth certificate amendment statute when it developed Policy Order 63, not in helping officers decide on proper arrest and booking procedures.[8]

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8. Pregno also testified that when ALEA revised the policy to allow applicants to provide either a doctor's letter or an amended birth certificate instead of requiring both, its only goal was to give "more latitude" to applicants, not to help law enforcement officers make decisions about booking search procedures. *Id.* at 46-47.

**Under Federal Rule of Civil Procedure 30(b)(6), the court must understand Pregno's testimony on behalf of ALEA as the testimony of ALEA itself. *See* 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2103 (3d ed. 2020). Defendants have had ample opportunity since her testimony to provide evidence that the circumstances of Policy Order 63's adoption were different than she described, subject to the general principle that "a party whose testimony 'evolves' risks its credibility." *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 34-35 (2d Cir. 2015). They have not done so; instead, defendants have confirmed that Pregno's testimony was accurate. As ALEA submitted in response to the court's request for supplemental briefing on this particular issue, "the contemporaneous reason for adopting Policy Order 63 was consistency with [the] birth certificate policy." Defs.' Reply in Response to Order for Add'l Briefing (doc. no. 84) at 4 (capitalization adjusted). That concession, supported as it is by**

**Pregno's Rule 30(b)(6) testimony, is an insurmountable obstacle to defendants' position.**

**Defendants say, however, that "the contemporaneous reason for adopting Policy Order 63--consistency with birth certificates--does not show the law enforcement interest is hypothesized or *post hoc*." *Id.* at 5. They say this is so because "the physical descriptions on a birth certificate provide the default descriptions on a driver license, and a driver license is used by law enforcement officers to identify subjects." Defs.' Response to the Court's Order (doc. no. 82) at 11. Thus, "[s]ince Defendants' interest in consistency are [sic] neither hypothesized nor *post hoc*, then neither is their interest in law enforcement identification." *Id.* (italics added).**

**This line of argument flirts with incoherence. More problematically, the record is devoid of evidence supporting it. Defendants have not shown that officers use birth certificates to decide any part of the booking procedures. They do not clarify why it would matter, at**

**the moment of booking, whether the sex designations on arrestees' licenses match the designations on their birth certificates. *Cf.* Depo. of Deena Pregno (doc. no. 48-5) at 105-06 (indicating that Pregno is unaware of any time when driver licenses and birth certificates are compared other than when a person applies for a driver license). Nor do they otherwise explain why an interest in conformity with birth certificate amendments is the same as an interest in ensuring appropriate post-arrest booking procedures. And nothing they say contradicts either Pregno's Rule 30(b)(6) testimony or the concession in their briefing that consistency with birth certificates was all ALEA considered when it developed Policy Order 63.**

**Defendants have also hinted that their purported interest in law enforcement identification may relate to traffic stops and arrests. *See* Defs.' Motion for Summary Judgment (doc. no. 54) at 49 (including "arrest" on a list of procedures that Policy Order 63 helps officers formulate); Defs.' Response to the Court's Order (doc.**

**no. 82) at 10 (noting that plaintiffs have had to display their licenses during traffic stops). Pregno clarified that defendants' concern would be about avoiding the risk of mistaken identity during such encounters. *See* Depo. of Deena Pregno (doc. no. 48-5) at 62-63.**

**Again, defendants have presented no evidence showing how a license with a sex designation that differs from the license-holder's appearance could help officers confirm that the license matches the driver. Indeed, the record suggests that licenses denoting the license-holder's genital status are wholly unhelpful for this purpose, as Pregno acknowledged that officers don't typically check a person's genitals when stopping or arresting them. *See id.* at 67-68. Furthermore, this interest suffers from the same infirmity as the ostensible interest in facilitating the booking process: Nothing indicates that ALEA considered it when creating Policy Order 63.**

**In the final measure then, the State's interest in consistency with birth certificate amendment procedures**

**is one of marginal administrative convenience that cannot support a sex-based policy, and Policy Order 63 in practice does little to advance it. The interest in facilitating the determination of appropriate search procedures and housing placements during the post-arrest booking process was not one that ALEA considered when it created Policy Order 63, so the policy cannot survive intermediate scrutiny on that basis. These are the interests the State asserts, and neither provides the justification that the Constitution requires for sex-based laws. *See Virginia*, 518 U.S. at 531. Under the tenets of equal protection law, that is the end of the road.**

## IV. CONCLUSION

**Nearly 50 years ago, the Supreme Court recognized that the Equal Protection Clause demands special skepticism of state actions that impose sex-based classifications. *See Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion). The Court soon**

**settled on the standard of scrutiny that this court applies today, instructing that "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197. Neither "benign justifications" nor an absence of discriminatory intent prevents a sex-based law from being subject to this scrutiny. *Virginia*, 518 U.S. at 535-36. All laws and state policies that "differentiate on the basis of gender" receive this heightened standard of review. *Morales-Santana*, 137 S. Ct. at 1689.**

**Many pass such scrutiny. As the Court has explained, "[j]ust as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction. The equal protection question is whether the distinction is lawful." *Nguyen*, 533 U.S. at 64. The fact that a State acts based on sex does not invalidate its action, but it does require that the State justify the decision by proving that its reasons were important and its methods well-picked. Here, ALEA has failed to**

**show that the interests it actually considered at the time it created Policy Order 63 were substantial enough to justify the sex-based distinction that the policy draws. The State has not risen to meet the obligation that the Equal Protection Clause imposes. Alabama therefore may no longer make people's genitalia determine the contents of their driver licenses. Policy Order 63 is unconstitutional.**

**The court will enter an appropriate order and judgment enjoining the enforcement of Policy Order 63. On application by plaintiffs Corbitt, Clark, and Doe, ALEA must issue them driver licenses reflecting that they are women.**

**DONE, this the 15th day of January, 2021.**

**/s/ Myron H. Thompson**
**UNITED STATES DISTRICT JUDGE**

# DOC. 102

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

| | | |
|---|---|---|
| **DARCY CORBITT, et al.,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | **CIVIL ACTION NO. 2:18cv91-MHT** |
| **v.** | ) | **(WO)** |
| | ) | |
| **HAL TAYLOR, in his official capacity as Secretary of the Alabama Law Enforcement Agency, et al.,** | ) | |
| | ) | |
| **Defendants.** | ) | |

**JUDGMENT**

**In accordance with the opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of the court as follows:**

**(1) Judgment is entered in favor of plaintiffs Darcy Corbitt, Destiny Clark, and Jane Doe, and against defendants Hal Taylor, Charles Ward, Deena Pregno, and Jeannie Eastman.**

**(2) It is DECLARED that the policy of the Alabama Law Enforcement Agency entitled "Subject: Changing Sex**

on a Driver License Due to Gender Reassignment," also known as Policy Order 63, as it has been applied to plaintiffs Corbitt, Clark, and Doe, is unconstitutional.

(3) Defendants Taylor, Ward, Pregno, and Eastman are ENJOINED and RESTRAINED from failing to issue to plaintiffs Corbitt, Clark, and Doe new driver licenses with female sex designations, upon application for such licenses by them.

It is further ORDERED that costs are taxed against defendants Taylor, Ward, Pregno, and Eastman, for which execution may issue.

The clerk of the court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

This case is closed.

DONE, this the 15th day of January, 2021.

/s/ Myron H. Thompson
UNITED STATES DISTRICT JUDGE

# DOC. 105

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

| | | |
|---|---|---|
| Darcy Corbitt, Destiny Clark, and, Jane Doe,<br><br>Plaintiffs,<br><br>v.<br><br>Hal Taylor, in his official capacity as Secretary of the Alabama Law Enforcement Agency; Col. Charles Ward, in his official capacity as Director of the Department of Public Safety; Chief Deena Pregno, in her official capacity as Chief of the Driver License Division; and, Jeannie Eastman, in her official capacity as Driver License Supervisor in the Driver License Division,<br><br>Defendants. | ) | Civil Action No.<br>2:18-cv-91-MHT-SMD |

**NOTICE OF APPEAL**

Defendants—Hal Taylor, in his official capacity as Secretary of the Alabama Law Enforcement Agency, Col. Charles Ward, in his official capacity as Director of the Department of Public Safety, Chief Deena Pregno, in her official capacity as Chief of the Driver License Division,[1] and Jeannie Eastman, in her official capacity as Driver License Supervisor in the Driver License Division—hereby give notice of their appeal to the United States Court of Appeals for the Eleventh Circuit from this Court's Opinion (doc. 101) and Judgment (doc. 102) entered on January 15, 2021, as well as from all earlier rulings, opinions, and orders adverse to them in this case.

[1] Chief Pregno has since retired, but no one has yet assumed her title at ALEA, and so this official capacity suit has continued in her name. *See* Fed. R. Civ. P. 25(d); Fed. R. App. P. 43(c).

Respectfully submitted,

Steve Marshall
*Attorney General*

s/ Brad A. Chynoweth
Brad A. Chynoweth (ASB-0030-S63K)
*Assistant Chief Deputy Attorney General*
James W. Davis (ASB-4063-I58J)
Winfield J. Sinclair (ASB-1750-S81W)
Misty S. Fairbanks Messick (ASB-1813-T71F)
*Assistant Attorneys General*

State of Alabama
Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130
Telephone: (334) 242-7300
Facsimile: (334) 353-8440
Brad.Chynoweth@AlabamaAG.gov
Jim.Davis@AlabamaAG.gov
Winfield.Sinclair@AlabamaAG.gov
Misty.Messick@AlabamaAG.gov

***Counsel for the Defendants***

**CERTIFICATE OF SERVICE**

I hereby certify that, on February 12, 2021, 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 counsel for Plaintiffs: Gabriel Arkles (garkles@transgenderlegal.org); Randall Marshall (rmarshall@aclualabama.org); Rose Saxe (rsaxe@aclu.org); Kaitlin Welborn (kwelborn@aclualabama.org); and LaTisha Gotell Faulks (tgfaulks@aclualabama.org).

s/ Brad A. Chynoweth
Counsel for the Defendants

**CERTIFICATE OF SERVICE**

I certify that on June 2, 2021, I electronically filed this document using the Court's CM/ECF system, which will serve a copy of this document to all counsel of record electronically registered with the Clerk.

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