Case No. 21-10486

In the United States Court of Appeals for the Eleventh Circuit

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DARCY CORBITT, et al.,
Plaintiffs – Appellees
v.

HAL TAYLOR, et al.,
Defendants – Appellants

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

AMICUS BRIEF OF AMICUS FOUNDATION FOR MORAL LAW IN SUPPORT OF DEFENDANTS-APPELLANTS SEEKING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, counsel for *Amicus Curiae* Foundation for Moral Law, represents that this organizations does not issue stock and has one parent company, Foundation for Moral Law, Inc., a 501(c)3 non-profit. Counsel further certifies that, to the best of his knowledge, the following persons and entities have an interest in this appeal:

ACLU of Alabama (Law firm for Plaintiffs/Appellees)

American Civil Liberties Union Foundation (Law firm for Plaintiffs/Appellees)

Alabama Center for Law and Liberty (*Amicus Curiae*)

Alabama Policy Institute (Parent corporation of *Amicus Curiae*)

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law (the Foundation) is a national public-interest legal organization based in Montgomery, Alabama, dedicated to defending a strict interpretation of the United States Constitution according to the intent of its Framers.

The Foundation believes the Order of the District Court below stretches the Equal Protection Clause of the Fourteenth Amendment far beyond its intended meaning. The Equal Protection Clause means persons may not be treated differently without a rational basis for different treatment, or in some instances, without intermediate scrutiny or strict scrutiny. Simply identifying people as males or females, without giving one sex favored treatment over the other, does not constitute different treatment.

The Foundation further believes the policy mandated by the District Court below, in effect allowing each person to subjectively choose his/her sexual identification based only on personal desire and without objective criteria or scientific evidence, could lead to far-reaching disastrous consequences.

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1 Pursuant to Rule 37.6, no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Identification of a person's sex does not implicate the Equal Protection Clause of the Fourteenth Amendment unless that identification is for the purpose of discriminatory treatment. Alabama driver licenses list the holder as M or F for identification purposes only; they do not entitle the person to more or fewer rights than one of the opposite sex. Therefore, the District Court's central argument argues that this identification must be judged by intermediate scrutiny falls.

In adopting Policy Order No. 63, the Alabama Law Enforcement Agency (ALEA) simply uses common sense and scientific ways of determining sex. If persons can require the State to identify them by whatever sex designation they choose, the State will be forced to abandon reality and enter a fantasy world in which order disappears and chaos reigns with disastrous consequences.

ARGUMENT

I. Identification Is Not Discrimination.

The Equal Protection Clause of the Constitution provides that "...nor shall any State ... deny to any person within its jurisdiction the equal protection of the laws."

The purpose of the clause is to prevent arbitrary enforcement of the laws against any person. "Arbitrary" is usually defined as treating people differently

without a fair or rational basis for doing so,[2] or in some cases without justification by intermediate scrutiny or strict scrutiny.

So which level of scrutiny applies in this case? The answer is: none of them because no one is being treated differently. Everyone who receives an Alabama driver license has his/her sex listed on the license, and it is determined by either the birth certificate or, according to ALEA Policy Order 63, by evidence of surgical alteration of the genitalia. Men's driver licenses are determined in this way, and women's driver's licenses are determined in the same way. This is no more discrimination than listing a person's height by how tall he/she is, or the person's weight by how heavy he/she is, or the person's hair color or eye color by the color of their hair or eyes.

Listing a person's sex on a driver license could lead to a discriminatory classification, only if it were used for a discriminatory purpose. For example, allowing only men to drive on certain roads, or allowing only women to drive certain vehicles, or posting different speed limits for male and female drivers, could be considered sex discrimination. But, in this case, the state does not discriminate between male and female drivers in any way. Merely identifying drivers by M for male and F for female is just that -- identification, and nothing more. The Supreme Court observed in *Washington v. Davis,* 426 U.S. 229, 244 n. 12 (1976), that one

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2 *Black's Law Dictionary, 7th Ed.*, "Arbitrary."

may not claim harm from a facially law without showing an intent to discriminate. There is no intent to discriminate here. No one is unable to get a driver's license. The gender markers M and F reflect the only two sexes recognized by medical science and by the State of Alabama historically.

Accordingly, the levels of scrutiny do not apply to this case, because simply identifying people by sex does not implicate the Equal Protection Clause.

None of the cases cited by the District Court involve only classification; all of them involve acts of discrimination. The closest the Court can come to any authority for this proposition is the concurring opinion by Justice Thomas in *Missouri v. Jenkins,* 515 U.S. 70. 120-21 (1995), in which Justice Thomas says "we must subject all racial classifications to the strictest of scrutiny." However, even in that concurring opinion Justice Thomas seems to be speaking of classifications that involve discriminatory actions, not merely identification.

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), involved not just identifying women as women but admitting only women to the university's School of Nursing. Discriminatory action, not merely identification.

Johnson v. California, 543 U.S. 499 (2005), invalidated a California policy of segregating prisoners in double cells for up to 60 days each time they enter a new correctional facility to prevent violence caused by racial gangs. Again, discriminatory action, not merely identification.

Jones v. Commonwealth, 80 Va. 538 (1885) reversed a conviction for racial intermarriage; the defendant was convicted not because he was black but because he had married a woman of a different race. Again, discriminatory action, not merely identification. *United States v. Virginia,* 518 U.S. 515 (1996), invalidated Virginia Military Institute's refusal to admit women into its program. Again, discriminatory action, not merely identification. *Sessions v. Morales-Santana,* 137 S.Ct. 1678 (2017), involved a U.S. policy that made it more difficult for citizen fathers than for citizen mothers to transmit citizenship to their out-of-wedlock children born outside the United States. Again, discriminatory action, not merely identification.

In contrast to all of these cases, the State of Alabama has merely identified male drivers with an M on their licenses and female drivers with an F. The M or F designation on the license neither grants nor denies any right or privileges not equally applicable to the opposite sex. This is merely identification, not discriminatory action.

II. ALEA Policy Order 63 Sets Forth Appropriate Means of Designating Sex on Driver's Licenses.

ALEA Policy Order 63 sets for two means by which sex may be determined for driver licenses:

(1) By relying on the designation on the applicant's birth certificate; or

(2) By relying on medical evidence that the applicant has undergone surgery to change genitalia from those of one sex to those of the other sex.[3] Although Alabama law allows a person to change the sex designation on his/her birth certificate by presenting medical evidence of surgical change, one need not change one's birth certificate in order to change one's driver license.

ALEA adopted Policy Order 63 to accommodate transgender persons who want to change their licenses to reflect their new sexual identification. The Constitution does not require them to do so. ALEA could have taken the position that one's sex is fixed at conception, because a person conceived and born with male DNA retains that male DNA throughout life, and no kind of surgery can change that. By allowing the alternative of basing the gender marker on either surgery or the birth certificate, ALEA has accommodated Appellees to a far greater extent than the Constitution requires.

The Foundation does not agree that gender reassignment surgery in fact changes a person's sex. The Foundation believes that even surgical alteration of one's sexual organs does not and cannot change the basic DNA with which a person

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3 The District Court says some departments have applied this to require that the surgery be "complete" or "irreversible," but Policy Order 63 does not contain that requirement It requires only "An amended state certified birth certificate and/or a letter from the physician that perform the reassignment procedure. The letter must be on the physician's letterhead."

was born. "It is physiologically impossible to change a person's sex, since the sex of each individual is encoded in the genes—XX if female, XY if male. Surgery can only create the appearance of the other sex."[4] Dr. George Burou, a surgeon who has performed over 700 sexual reassignment surgeries, stated, "I don't change men into women. I transform male genitals into genitals that have a female aspect. All the rest is in the patient's mind." [5]

The gender marker on the driver license is simply the State's way of identifying the person's sex. Some of the discussion of this issue has assumed that the license is the private property of the person to whom it is issued. But the license is produced by the State and issued by the State, and the State may under certain circumstances order the holder to surrender it. It is therefore an open question whether the driver license is the property of the State or of the person to whom it is issued, and the answer to that question may be relevant to some of Appellees' First Amendment claims. Either way, the driver license, like a license plate, is probably "government speech" rather than personal speech, *Walker v. Texas Div., Sons of Confederate Veterans,* 576 U.S. 200, 212 (2015), and as the Court said in *Pleasant Grove city v. Summum,* 555 U.S. 460, 467 (2009), when the government speaks it "has the right to speak for itself." When a person shows his/her driver license with F or M, he/she

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4 Richard P. Fitzgibbons, M.D., et al., *The Psychopathology of "Sex Reassignment" Surgery*, Nat'l Catholic Bioethics Q. (April 2009), at 118.

5 Quoted in Janice C. Raymond, *The Transsexual Empire* 10 (1979).

is not saying "This is what sex I am" but rather, "This is the sex with which the State has identified me using its criteria."

III. The District Court's Order Would Create Confusion.

In determining the State's interest in designating sex on driver licenses, the District Court looked only at Policy Order 63 and concluded that the State's interest was only in facilitating those who wanted to change the sex designation on their licenses. But that does not equate with the State's interest in identifying a person's sex on the driver license. The gender marker on the driver's license goes back well before Policy Order 63 was originally issued in 2012; Alabama driver licenses listed M or F long before 2012, as have, at least until recently, the licenses of most other states. Some of those reasons are self-evident:

(1) To enable the officer to determine whether the license produced by the person he/she has stopped is in fact the license of the person; that is, to enable the officer to ensure that the person he/she has stopped is in fact the person identified on the license and that the person has not given the officer a fake license or a license belonging to another person. The sex designation as well as the age, height, weight, color of eyes and hair, and the photo are all part of the means of making sure the person has given the officer the correct driver license. The State has valid reasons for making proper identifications when circumstances require, as the Supreme Court

held in *Hilbel v. Sixth Judicial District Court of Nevada, Humboldt County,* 542 U.S. 177 (2004) (upholding a statute requiring suspects to disclose their names during valid *Terry* stops), and as the Fifth Circuit held in *Veasey v. Abbott,* 888 F.3d 792 (5th Cir. 2018) (upholding Texas statute requiring photo ID for voting).

(2) To determine proper search procedures, i.e., whether a search should be conducted by a male or female officer.

(3) To determine proper interrogation procedures; for example, a male officer commonly does not interrogate a female suspect behind closed doors without someone else being present.

(4) To facilitate medical treatment if the person is injured, as treatment could be different for men or women.

(5) To determine, in the event of an arrest, whether the person should be placed in a male or female facility. This Court has recognized that "placing a female in the general population of a male detention facility created an extreme condition and posed an unreasonable risk of serious harm to the female's future health or safety," *DeVeloz v. Miami-Dade County,* 756 F.App'x 869, 877 (11th Cir. 2018).

The District Court discounted these reasons, saying

> ...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 this policy.

> *Corbitt v. Taylor*, 2:18-cv-00091-MHT-SMD, Doc. 101 (MD. AL. Jan. 15, 2021).

However, the Court here considered only the adoption of Policy Order No. 63 in 2012 and its amendment in late 2015 or early 2016. The policy of designating M for male and F for female on Alabama driver licenses long predates the adoption of this policy.[6]

At the very least, Policy Order No. 63 has a rational basis because of these aforementioned reasons. However, because the Equal Protection Clause is not implicated by mere identification, not even a rational basis is necessary.

IV. The District Court's Order Could Lead to Bizarre Consequences.

The essence of the District Court's ruling is that a person has the right to decide what sex he/she is, using whatever criteria the person chooses to employ, and the State must recognize that choice on an official document issued by the State.

This requires the State to accept an alternate view of reality. Starting with the existential tenet that "existence precedes essence,"[7] the State would have to agree

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6 The Foundation has been unable to determine when the policy of designating sex on Alabama driver licenses began, but upon counsel's personal knowledge, sex has been designated on Alabama licenses as early as the 1940s.

7 *Encyclopedia Brittanica,* Nicola Abbagnano, "Existentialism, "https://www.britannica.com/topic/existentialism; *Stanford Encyclopedia of Philosophy,* S, Crowell, "Existentialism," https://plato.stanford.edu/entries/existentialism/.

that human existence is primary and that people create their own values and their own identity. The State must further agree with the postmodern tenet that truth is subjective, that reality is only a construct, and that people therefore define for themselves who and what they are.[8]

But if the District Court is permitted to force the State to accept that view of reality, it will lead to problematic consequences.

First, the State will have no basis for rejecting the claims of many LGBTQ persons that sex is binary. A 2018 article in *Scientific American* argues, as its title suggests, that "The idea of 2 sexes is overly simplistic."[9] Likewise, a 2021 *Women's Health* article lists "gender identities" as including cisgender, transgender, cishet, non-binary, intersex, genderqueer, gender-fluid, gender non-conforming, gender-expansive, agender, and gendervoid.[10] However, a 2020 article on *aPATH* claimed that, in 2010, the writer had said there are sixty-three genders, but now that must be

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8 *Encyclopedia Brittanica,* Brian Duignan, "Postmodernism," https://www.britannica.com/topic/postmodernism-philosophy; Steve Cornell, "What Does Postmodern Mean?", Summit Ministries, October 24, 2006, https://www.summit.org/resources/articles/what-does-postmodern-mean/.

9 Claire Ainsworth, "Sex Redefined: The idea of 2 Sexes Is Overly Simplistic," *Scientific American,* October 22, 2018, https://www.scientific american .com/ article/ sex -redefined-the-idea-of-2-sexes-is-overly-simplistic1/.

10 Perri Blumberg, "A Comprehensive Gender Identity List, as Defined by Experts," *Women's Health,* May 13, 2021 https://www.womenshealth mag.com/relationships/a36395721/gender-identity-list/

updated to eighty-one genders.[11] And a 2016 article in *CNRS News* titled "How Many Sexes Are There?" says "We may thus conclude that an infinite combination of biological genders exists ... and thus, far more than the five sexes proposed by Anne Fausto-Sterling in the 1990s, which were in fact based primarily on a gonadic definition of gender."[12]

If the State is required to accede to Appellees' requests that their driver licenses should reflect their chosen sexual identity without regard to birth certificates or surgical evidence, then the State would also have to grant their requests to be listed as any of the 81 sexes listed above, or any other that they might imagine.[13]

Furthermore, if people can require that the State classify them in whatever way they want to be classified, nothing limits that classification requirement to sex. For example, Alabama places the word "Veteran" on the bottom right corner of the

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11 "63 Genders... Now 81 Genders" *aPATH: Many Paths, One Destination* (no author listed), March 20, 2000 https://apath.org/63-genders/

12 Philippe Testard-Vaillant, "How Many Sexes Are There?" *CNRS News* August 1, 2016 https://news.cnrs.fr/articles/how-many-sexes-are-there.

Testard-Vaillant concedes, however, that "Based on the sole criterion of production of reproductive cells, there are two and only two sexes: the female sex, capable of producing large gametes (ovules), and the male sex, which produces small gametes (spermatozoa)."

13 The District Court cited evidence suggesting that transgender persons are subject to physical abuse and other forms of harassment if they show a driver license that does not reflect their chosen sex. It seems equally possible that a born male who identifies as female but has not had sexual reassignment surgery, could be subject to abuse or harassment if he/she presents a driver license with a gender marker that does not conform to his/her physical characteristics.

licenses of those who have served in the military. But suppose a person has never served in the military and still identifies as a veteran. Can he/she require the State to place the word "Veteran" on his/her license?

Or suppose a person was born 08/23/1952 but identifies as a 35-year-old: Can that person require that his license reflect a later birth date?

Or perhaps a person is 6'1", 190 lb., with blue eyes and white hair, but identifies as someone 5'4", 120 lb., with brown eyes and brunette hair: Must the State recognize this in the license?[14]

To some, these suggestions may seem downright silly; others will call them a "parade of horribles." But if we accept the premise that people may choose their sexual identity without regard to DNA or physical characteristics, the choices are limited only by the imagination. Once again, Policy Order No. 63 is based on an objective, common sense view of reality which is the only way an orderly society can function.

Conclusion

To those who ask, "How can the State tell us what we can be?," the Foundation responds that the State did not tell us who and what we can be. God and nature determined who and what we are. We can envision ourselves to be whatever

[14] Race – a Black identifying as White, or an Asian identifying as Hispanic – is another obvious question, but race is not identified on Alabama driver licenses.

we want, but that does not change our DNA, and nothing in the Constitution or Alabama law requires the State or anyone else to indulge our imaginations.

The Foundation urges this Court to reverse the decision of the District Court and enter judgment in favor of Appellant.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. 32(G)(1)

Pursuant to Fed. R. App. 32(g)(1), the undersigned certifies this brief complies with the type-volume limitations, typeface requirements and type style requirements.

1. This brief complies with the type-volume limitation because this brief contains 3167 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2021, I served the foregoing motion upon all counsel of record through the CM/ECF system.

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