

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

**Brief of Amici Curiae States of California, Connecticut,
District of Columbia, Hawaii, Maine, Massachusetts,
Minnesota, Nevada, New Jersey, New Mexico, New
York, Oregon, Rhode Island, Vermont and Washington**

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AMENDED CERTIFICATE OF INTERESTED PARTIES

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1(a)(3) and 26.1-2(b), the undersigned counsel certifies that the following persons and parties may have an interest in the outcome of this case:

1. Alabama Attorney General's Office;
2. Alabama Center for Law and Liberty;
3. Alabama Law Enforcement Agency;
4. Alabama Policy Institute;
5. American Civil Liberties Union Foundation;
6. American Civil Liberties Union Foundation of Alabama;
7. American Civil Liberties Union of Alabama;
8. Archer, Jon;
9. Arkles, Gabriel;
10. Balderas, Hector;
11. Barnes, Meridith H.;
12. Barnes, Noel S.;
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14. Boone, Brock;
15. Borden, Hon. Gray M.;

16. Brown, David;
17. Burck, Andrew J.;
18. California Attorney General's Office
19. Cisneros, Lisa J.
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30. Doyle, Hon. Stephen M.;
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52. Sinclair, Winfield J.;
53. Taylor, Hon. Hal;
54. Tong, William;
55. Thompson, Hon. Myron H.;

56. Transgender Legal Defense and Education Fund;

57. Ward, Charles;

58. Welborn, Kaitlin; and,

59. Wilson, Thomas A.

Counsel for the State of California further certify that no additional publicly traded company or corporation has an interest in the outcome of this case or appeal. Respectfully submitted this 16th day of August 2021.

/s Lisa Cisneros
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INTEREST OF AMICI CURIAE

Amici States California, Connecticut, District of Columbia, Hawaii, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington (“Amici States”) submit this brief, pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure, in support of Plaintiffs-Appellees’ challenge to the Alabama Law Enforcement Agency’s (ALEA) Policy Order 63 under the Equal Protection Clause of the Fourteenth Amendment. First, Policy Order 63 creates a sex-based classification under the Equal Protection Clause by denying driver’s licenses that accurately reflect the gender and sex with which the holders identify unless they have undergone “gender reassignment surgery.” Second, the policy reflects an extreme outlier rule among states that is unsupported by any legitimate governmental interest.

Amici States have a profound interest in the proper application of the Equal Protection Clause to protect all Americans against unconstitutional discrimination in any form—in particular, to help reverse and remedy the stigma and discrimination that transgender Americans have experienced for many years. Moreover, Amici States have adopted policies contrary to Alabama’s policy at issue here, and thus have experience-based information for the Court to consider as relevant context in evaluating Alabama’s asserted interests. Amici States also regularly welcome visitors from across the country, including from Alabama, who

frequently present their state-issued identification in the course of their travel and transactions. If these visitors' driver's licenses reflect a sex designation different from the gender with which they identify, they are at higher risk of discrimination or other bias-motivated action, implicating our state and local law enforcement and civil rights enforcement agencies responsible for responding to such violations.

ARGUMENT

I. ALABAMA'S POLICY ORDER 63 ESTABLISHES A SEX-BASED CLASSIFICATION SUBJECT TO SCRUTINY UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, AND IT FAILS UNDER ANY CONSTITUTIONAL STANDARD.

Amici States agree with the District Court that Policy Order 63 enacts a sex-based classification that must be scrutinized under the Equal Protection Clause of the Fourteenth Amendment. Policy Order 63 singles out transgender people as a class, as they are individuals whose gender identity differs from the sex they were assigned at birth. *See Bostock v. Clayton County, Ga.*, 140 S. Ct. 1731, 1747 (2020) (recognizing that “discrimination based on . . . transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”) Under the policy, Alabama grants non-transgender individuals driver's licenses that accurately reflect the gender and sex in which they are living, but, in general, denies such licenses to transgender applicants unless they have undergone

“gender reassignment surgery.” Doc. 101 at 5.¹ By imposing a standard that turns on “gender reassignment surgery,” Policy Order 63 also treats applicants differently due to their genitalia, which amounts to a classification based on sex. *See Bostock*, 140 S. Ct. at 1739 (reasoning, for purposes of the case, that “sex” includes “reproductive biology”). Finally, Policy Order 63 dictates sex designations for Alabama driver’s licenses, and therefore, it is a sex-based classification that is required to pass muster under the Equal Protection Clause. *See e.g., Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 3 F.4th 1299, 1306-1307, 1314-1316 (11th Cir. 2021). From any and all of these angles, the challenged policy establishes a sex-based classification.

Although intermediate scrutiny applies to Policy Order 63, the policy also fails the rational basis test. Under the intermediate scrutiny standard, Alabama has failed to show that the policy is substantially related to achieving important governmental objectives. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). On the record, Alabama has not demonstrated that aligning its policy for amending sex designations on driver’s licenses with such a policy for birth certificates is an important government interest, and the abundant inconsistencies in Policy Order 63’s application show that it is not substantially

¹ “Doc. ___” refers to docket entries in the district court. The pin-cited page numbers correspond to the CM/ECF pagination.

related to advancing such an interest. *See* Doc. 101 at 29-30. Furthermore, Policy Order 63 does not advance either the law enforcement interests that Alabama has asserted or its interest in reliable identification.

Even if the rational basis test is applied, Policy Order 63 fails for similar reasons. First, the policy actually undermines Alabama's stated interest in driver's licenses that serve as reliable identification. Second, Policy Order 63 does not bear a relationship to Alabama's asserted law enforcement interests. Driver's licenses are not reasonably related to either prison and jail administration (as existing state and federal standards make clear), or the privacy interests of incarcerated persons. Third, the limitations to Policy Order 63's surgery requirement, such as the exceptions applicable to individuals born outside of Alabama, undermine Alabama's stated interests.² The exceptions mean that many transgender applicants are treated differently depending on their place of birth, and whether

² The surgery requirement does not apply, and ALEA will accept an amended birth certificate issued by another State, even if that State does not require surgery for the amendment. Doc. 101 at 6; *see also* Doc. 48-5 at 53. Furthermore, an individual who has lived outside of Alabama and received an out-of-state license, as well as a U.S. passport, may receive an Alabama driver's license that reflects the sex designation on both documents, even if it does not align with their sex assigned at birth. As discussed below many states issue driver's licenses in which the sex designation reflects one's gender identity. The State Department issues U.S. passports with sex designations that reflect the passport holder's self-selected gender, without requiring surgery. *See Selecting your Gender Marker*, U.S. Dep't of State, <https://travel.state.gov/content/travel/en/passports/need-passport/selecting-your-gender-marker.html> (last visited August 13, 2021).

they previously applied for a driver's license while residing out of state. Moreover, some incarcerated persons do not have driver's licenses, and such identification is not updated automatically when one undergoes gender reassignment surgery. *See F.V. v. Barron*, 286 F. Supp. 3d 1131, 1142 (D. Idaho 2018) (there is no rational basis for a policy that categorically disallows amendments to a birth certificate, but permits changes to name and paternity information) *clarified sub nom. F.V. v. Jeppesen*, 466 F. Supp. 3d 1110 (D. Idaho 2020), *and clarified*, 477 F. Supp. 3d 1144 (D. Idaho 2020) (same). Finally, rather than bearing a rational relationship to a valid state interest, Policy Order 63 undermines important governmental interests in reducing hate violence and discrimination, and requires a surgery that sterilizes most individuals who undergo it, absent medical support for such a policy. *Cf. Gonzalez v. Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018).

II. THE EXPERIENCES OF AMICI STATES DEMONSTRATE THAT ALABAMA'S POLICY IS AN EXTREME OUTLIER AND UNSUPPORTED BY VALID STATE INTERESTS.

A. Alabama's express surgery requirement is rare, and many states have not imposed such a requirement for a long time.

Although state rules for driver's licenses vary across the country, a strong majority of states permit transgender individuals to correct their driver's licenses to reflect their gender identity without undergoing surgery. In 2016 the American Association of Motor Vehicle Administrators (AAMVA) identified thirty-one

states, along with Puerto Rico and the District of Columbia, that authorized sex designation changes without surgery.³ Jurisdictions that do not expressly require surgery for sex designation changes on driver’s licenses include large and small states, and hail from a geographic cross-section of the country including in the Eleventh Circuit.⁴ In fact, Amici States have identified only three states that have adopted statutes or regulations or published policies, guidance, or forms for the public that expressly require surgery for sex designation changes on driver’s

³ AAMVA Resource Guide, Appendix B: U.S. Driver’s License Policies (listing eighteen states that provided simplified forms for gender change requests that required “no medical details”, seven states that accepted certification of gender changes by medical or mental health providers with no surgery required, three states with forms that required certification from a limited range of healthcare providers, but imposed no surgery or a court order requirement, and three states that did not offer forms and imposed no surgery requirement, but set out other requirements). The AAMVA’s list also notes that several states had unknown policies. After 2016, states continued to lower barriers for transgender driver’s license applicants. *See e.g.* Md. Transp. Code Ann. § 12-305 (requiring sex designations on licenses be based on the applicant’s self-designation alone.); Or. Admin. R. 735-062-0013 (2017) (same); 2017 Cal. Stat. ch. 853, sec. 15 (SB 179) (adding Cal. Veh. Code § 12800) (same).

⁴ **Alaska:** Alaska Admin. Code tit. 2, § 90.480(c); Div. of Motor Vehicles, Certification for Change of Sex Designator on Driver License or Identification Card, Form 427, <http://doa.alaska.gov/dmv/forms/pdfs/427.pdf>; **Colorado:** Colo. Rev. Stat. § 42-2-107(2)(a)(II); **Florida:** General Information Policy 034-2011, Gender Reassignment Requirements 047-2010 (Rev. 2011), <https://www.gulfcoasttransgenderalliance.com/florida-dmv-gender-marker-change-requirements.html>; **Michigan:** Sec’y of State, Sex Designation Form, https://www.michigan.gov/documents/sos/Gender_Change_form_Fillable_671603_7.pdf; **Ohio:** Bureau of Motor Vehicles, Declaration of Gender Change Form, BMV 2369; **Virginia:** Dep’t. of Motor Vehicles, Gender Change Request, Form DL17, <https://www.formalu.com/forms/89978/gender-change-request>.

licenses, similar to Policy Order 63’s requirement.⁵

State policies allowing the correction of sex designations on driver’s licenses without surgery are not novel. The AAMVA has described the modernization trend as “replacing requirements to submit proof of surgical treatment with standards that focus on the gender in which individuals live their daily lives, as affirmed by a medical provider, mental health provider, or social worker.”⁶

Some Amici States’ driver’s license policies have not required surgery for nearly a decade or even substantially longer.⁷ Dating back to the 1990s, California

⁵ **Iowa:** Iowa Admin. Code r. 761-601.5(7); Iowa Code Ann. 144.23; **Kentucky:** Commonwealth of Kentucky, <https://drive.ky.gov/Docs/ValidProofDocuments.pdf>; **Oklahoma:** Okla. Admin. Code § 595:10-1-18(c)(4)-(5). Certain requirements for Georgia driver’s licenses refer to surgery, but an applicant may also update their gender marker by presenting a current U.S. passport. See Georgia Dep’t. of Driver Servs., <https://dds.georgia.gov/georgia-licenseid/general-license-topics/real-id> (last visited August 13, 2021). As noted earlier, *supra* note 2, the State Department does not require surgery to change the sex designation on one’s U.S. passport.

⁶ American Ass’n. of Motor Vehicle Administrators, Resource Guide on Gender Designation on Driver’s Licenses and Identification Cards, Sept. 2016 (AAMVA Resource Guide), at 3.

⁷ See e.g. **Alaska:** Alaska Admin. Code tit. 2, § 90.480(c), Div. of Motor Vehicles, compare Form 427 (2012), <https://web.archive.org/web/20120930022901/http://doa.alaska.gov/dmv/forms/pdfs/427.pdf> with Form 427 (2021), <http://doa.alaska.gov/dmv/forms/pdfs/427.pdf>; **Maine:** Bureau of Motor Vehicles, License Servs. Div., Gender Designation Form (updated 01/2013), <https://web.archive.org/web/20150514090450/https://www1.maine.gov/sos/bmv/forms/GENDER%20DESIGNATION%20FORM.pdf>. **Pennsylvania:** Penn. Dep’t. of Transp., Request for Gender Change on Driver’s License/Identification Card, Form DL-32 (7-14),

and Oregon have permitted transgender individuals to correct the sex designation on their driver's licenses without proof of surgery. Or. Driver License Manual, Change of Sex, Procedure No. 18-05 (1992);⁸ Or. Driver License Policy and Procedure Manual: Name/Gender Change on Driver's License (rev. 1999);⁹ Cal. Dep't. of Motor Vehicles, DL TECH Manual, pp. 4-38 (1994);¹⁰ Cal. Code Reg. tit. 13 § 20.04 (2004). By 2009, the California Department of Motor Vehicle's administrative policy was codified in state regulations. Cal. Code Regs. tit. 13, § 20.05 (2009); No. 8-Z Cal. Regulatory Notice Reg. 292 (Feb. 20, 2009). In the mid 2000s, multiple states and the District of Columbia did not require surgery to correct a sex designation for a transgender person's license.¹¹ In the subsequent

<https://web.archive.org/web/20151014040341/https://www.dot.state.pa.us/Public/DVSPubsForms/BDL/BDL%20Form/DL-32.pdf>.

⁸ See Addendum.

⁹ See Dean Spade, Documenting Gender, 59 Hastings L.J. 731 (2008), n. 431.

¹⁰ See Third International Conference on Transgender Law and Employment Policy, Appendix G at G-2 (August 1994) (summarizing administrative rules and referencing DL Form 328), available at

<https://www.digitaltransgenderarchive.net/downloads/jw827b75s>.

¹¹ See *supra* note 9, Spade at Appendix I; Jen Colletta, *PennDOT Revises Trans Rules*, Philadelphia Gay News, Sept. 2, 2010, <https://epgn.com/2010/09/02/9360103-penn-dot-revises-trans-rules/> (reporting that 26 states and the District of Columbia did not require surgery.)

decade more states similarly revised their policies for gender changes on driver's licenses.¹²

States have advanced many reasons for lowering barriers for transgender individuals to update their driver's licenses, including foremost reducing discrimination, harassment, and violence that many transgender people

¹² See e.g., Nev. Admin. Code § 483.070 (2010); Nev. Dep't. of Motor Vehicles, Medical Certification and Authorization (Gender Change), Form DLD-136, <https://web.archive.org/web/20101202171937/http://www.dmvnv.com/pdfforms/dld136.pdf>; 2-2000-2217 Del. Admin. Code § 5.5 (2011); 15 Del. Reg. Regs. 687 (Nov. 1, 2011); New Mexico Taxation & Revenue Dep't, Motor Vehicle Division, Gender Designation Change Request, Form 10237, <https://web.archive.org/web/20140912011837/http://realfile.tax.newmexico.gov/mvd10237.pdf>; Rhode Island, Division of Motor Vehicles, Gender Designation on a License or Identification Card, https://web.archive.org/web/20120808142510/http://www.dmv.ri.gov/documents/forms/license/gender_designation.pdf; Laura Crimaldi, *RMV Backs Up On Gender Rule*, Boston Herald, Feb. 1, 2009, <https://www.bostonherald.com/2009/02/01/rmv-backs-up-on-gender-rule/> (announcing Massachusetts' Registry of Motor Vehicles policy change, ending surgery requirement and requirement to amend birth certificate in order to change the sex designation on one's driver's license). In the late 2010s the Massachusetts Registry of Motor Vehicles dropped the requirement that the license holder present medical or social worker signature, and Nevada dropped its requirement of medical certification. See Commonwealth of Massachusetts's Driver's Manual: Passenger Vehicles (rev. 2/2018) at 41, https://www.mass.gov/files/documents/2018/03/21/Drivers_Manual.pdf; April Corbins Girbus, *A DMV Victory for the Trans Community*, Nevada Current, June 7, 2018, <https://www.nevadacurrent.com/2018/06/07/a-dmv-victory-for-the-trans-community-what-it-means-what-comes-next/>.

experience.¹³ States have similarly recognized interests in removing onerous, unnecessary requirements in light of financial barriers in accessing healthcare, the recognition that one’s gender identity exists regardless of medical interventions undertaken, and that there is no uniform set of procedures that transgender people require, and some do not need treatment at all.¹⁴ States have also revised their policies to improve efficiency and lower administrative burdens and costs.¹⁵

B. Driver’s licenses that reflect a transgender person’s gender identity address longstanding governmental interests in lowering hate violence against transgender people and also advance more recently established civil rights protections.

¹³ See 2017 Legis. Bill Hist. CA S.B. 179 (Lexis), Senate Floor Analysis (Sept. 14, 2017); 2017 Cal. Stat. ch. 853, sec. 2(b), (e) (legislative findings). The New Jersey Motor Vehicle Commission further removed its medical certification requirement in 2020 to help advance the equal treatment of New Jerseyans. New Jersey Motor Vehicle Commission, Press Release (Feb. 12, 2020), <https://www.state.nj.us/mvc/press/archives/2020/021220.htm>.

¹⁴ New Jersey Motor Vehicle Commission, Press Release (April 27, 2009) (eliminating the proof of surgery requirement to establish a “more fair and consistent policy” that recognizes that many individuals begin presenting as their gender without completion of surgery).

¹⁵ See also Hundreds Change Driver’s License to Reflect Gender Identity, WOSU 89.7 NPR News, WOSU Public Media, (April 30, 2015) (Ohio Bureau of Motor of Motor Vehicles Registrar explaining, “[I]nstead of the BMV attempting to exercise medical judgment, we’re going to defer to a medical professional to attest to the change in status.”); AAMVA Resource Guide at 3 (new forms “sav[e] time and money, and reduce[] the jurisdiction’s liability in holding customers’ private medical information.”). Compare the District Court’s Order at Doc. 101 at 13, 28-30 (observing that Policy Order 63 requires ALEA officials to make a determination of the applicant’s sex based on the official’s review of medical documentation and even “impressionistic sense” of a doctor’s letter.).

Over a million Americans identify as transgender,¹⁶ and many jurisdictions, including the federal government, have recognized the problem of violence against transgender people for years. The federal government and nearly all states have passed legislation addressing hate crime.¹⁷ Jurisdictions, including the federal government, have addressed bias motivated crimes against transgender communities by expanding hate crimes law to include gender and gender identity as a protected basis. California, for example, in 1998 approved legislation clarifying that its hate crimes law included protections for transgender victims of crimes motivated by gender bias.¹⁸ In the 2000s a growing number of states

¹⁶ Flores, A.R., Herman, J.L., Gates, G.J., & Brown, T.N.T. (2016). *How Many Adults Identify as Transgender in the United States?* Los Angeles, CA: The Williams Institute.

¹⁷ Michael Shivley, National Institute of Justice, *The Study of Literature and Legislation on Hate Crime in America* i (2005) <https://www.ojp.gov/pdffiles1/nij/grants/210300.pdf>; Dep't. of Justice, Hate Crimes Laws and Policies, <https://www.justice.gov/hatecrimes/laws-and-policies>. See also the Khalid Jabara and Heather Heyer National Opposition to Hate, Assault, and Threats to Equality Act of 2021, Pub. L. No. 117-13, § 5, 135 Stat. 266 (2021) (bipartisan legislation that included a finding that, “The incidence of violence known as hate crimes, or crimes motivated by bias, poses a serious national problem.”)

¹⁸ 1998 Cal. Adv. Legis. Serv. ch. 993 (Assembly Bill 1999); Assembly Bill 1999, Assembly Committee on Public Safety, Bill Analysis (1997-1998) (April 14, 1998) p. 3-5 (explaining that the purpose of the legislation is to enhance protection for transgender people in light of higher incidence of violent crime committed against transgender people compared to the general population, as reflected in the federal National Crime Survey).

expanded hate crimes law to include gender identity.¹⁹ In 2009 Congress approved the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, amending federal hate crimes law to add protections based on gender identity. Pub. L. No. 111-84, § 4701, et seq., 123 Stat. 2835 (2009). Congress considered that “[h]ate crimes against transgender people tend to be particularly violent.” H.R. Rep. No. 110-113 at 8-12 (2007) (discussing the need for legislation in a predecessor bill, H.R. 1592). Bias motivated violence is a social scourge that negatively impacts transgender people, as well as other vulnerable groups, and for more than a decade, a uniform federal hate crime law has extended protection to transgender people. Transgender employees who confront workplace discrimination and harassment due to their sex, now have recourse under federal law for that harm as well. *See Bostock*, 140 S.Ct. at 1754.

The District Court correctly recognized, and Alabama has not disputed, that a driver’s license that is incongruent with one’s gender identity exposes the license

¹⁹ *Supra* n. 17, *The Study of Literature and Legislation on Hate Crime in America* at ii (highlighting an increasing number of states expanding the number of protected groups by adding groups defined by gender). A broad range of states have adopted hate crimes laws that encompass gender identity including Maine, Me. Rev. Stat. Ann. tit. 5, § 4553(9-C), Massachusetts, Mass. Gen. Laws ch. 265, § 39(a), Nevada, Nev. Rev. Stat. § 193.1675, New Mexico, N.M. Stat. Ann. § 31-18B-3, Missouri, Mo. Rev. Stat. § 556.06, and Virginia, Va. Code Ann. § 52-8.5, as well as Georgia, which most recently added hate crimes protections based on gender after the *Bostock* decision when the state legislature approved HB 426, 2020 Ga. Laws 10, amending Georgia Code Section 17-10-17.

holder as transgender, and creates a genuine risk of harassment and discrimination, and even physical harm. Doc. 101 at 9. By compelling self-disclosure of one's transgender status in contexts where presentation of a driver's license is required, Policy Order 63 puts transgender people in potentially dangerous situations and impairs their ability to protect their safety and well-being.²⁰ Instead, the policy exposes transgender people to a known risk of violence and discrimination, and imposes a surgery requirement absent medical support--heedless of the sterility that results for most transgender people who undergo it. *Cf. Gonzalez*, 305 F. Supp. 3d at 333 (a birth certificate policy compelling disclosure of transgender status, was not justified by any governmental interest, as the policy failed to further public safety, and thus, violated the right of informational privacy under the Fourteenth Amendment). Evidently, ALEA adopted this requirement without consultation with its medical advisory board, which participates in other ALEA policy decisions. Doc. 48-5 at 10, 12-13. In contrast, Amici States' driver's license policies do not impose arbitrary, medically unsupported surgery requirements, and the provision of driver's licenses that accurately reflect their gender identity directly assists in advancing public safety and reducing the

²⁰ Even the manner in which Policy Order 63 places transgender individuals at risk is arbitrary, as surgery is not required for those who never lived in Alabama previously and received an updated sex designation on an out-of-state driver's license or birth certificate prior to becoming an Alabama resident. Doc. 101 at 6.

occurrence of discrimination. Policy Order 63's relationship to Alabama's asserted state interests is also doubtful for the reasons explained below.

C. Alabama's asserted interests are unsupported and contrary to federal law.

1. Policy Order 63 does not advance Alabama's interests in the correctional and law enforcement contexts.

Alabama incorrectly asserts that Policy Order 63 serves an important interest in assisting law enforcement personnel in conducting searches and assigning individuals to detention and correctional facilities, thereby reducing the risk of sexual violence. State Br. at 29-30. Amici States wholly agree that protecting against in-custody rape and sexual assault is valid and important. However, Alabama's premise appears to be that driver's licenses issued pursuant to Policy Order 63 are necessary or important to separate individuals based on their genitalia and avoid cross-gender searches. Amici States administer men's and women's prison facilities, and our laws and policies, consistent with federal requirements, limit cross-gender searches in prisons and jails. *See e.g.* 28 C.F.R. 115.15(a); Cal. Penal Code §§ 2002, 3200, 4030(k); Cal. Code of Regs. tit. 15, § 1360; Cal. Dep't of Corr. and Rehabilitation Operations Manual (Cal DOM) § 52050.16.5. Based on our experience, Alabama's position is not consistent with federal law, and driver's license restrictions under Policy Order 63 do not substantially advance or address security concerns in the correctional or law enforcement context.

Regulations promulgated pursuant to the federal Prison Rape Elimination Act (PREA) of 2003 undercut Alabama’s contention that Policy Order 63 serves necessary, substantial interests. The PREA set a zero-tolerance standard for prison rape, and mandated regulations to curb sexual violence, sexual misconduct, and sexual harassment in prisons, jails, and other regulated detention facilities. Pub. L. 108-79, 117 Stat. 972, 974, Sec. 3(1), (3) (Sept. 4, 2003). *See also National Standards to Prevent, Detect and Respond to Prison Rape*, 77 Fed. Reg. 37,106 (Jun. 20, 2012). PREA regulations impose specific requirements that apply regarding the treatment of transgender inmates that account for the “particular vulnerabilities” that they face. 77 Fed. Reg. at 37,109-10; 37,130-31; 37,202 (codifying 28 C.F.R. §§ 115.15(e), (f)); 37,204 (codifying 28 C.F.R. §§ 115.42). PREA regulations prohibit housing and other placement decisions based exclusively on genitalia. *See* 28 C.F.R. § 115.42 (criteria for housing, bed, work, education, and program assignments). If there is a need to know the genital status of an incarcerated person—for example, when complying with regulations that limit cross-gender searches—genital status can be determined without reference to a driver’s license. *See* 28 C.F.R. §§ 115.15(e). These recognized methods include conversations with the detainee or incarcerated person, or review of medical records. *See* 28 C.F.R. §§ 115.15(e); 115.115(d); 115.215(e); 115.315(e). PREA standards govern jails and lockups, in addition to prisons, and thus, they apply

from the moment an individual is in a custody facility. Under PREA standards, driver's licenses restricted in the manner established by Policy Order 63 are not closely or substantially related to administering housing and programs in women's and men's prisons, or conducting searches – indeed, PREA regulations do not even contemplate the use of driver's licenses for these purposes. See, e.g., 28 C.F.R. § 115.15(e).

Amici States have also developed a range of prison and detention administration policies that account for the gender identity of transgender individuals who are incarcerated and address management and security concerns.²¹ These policies likewise demonstrate that Alabama's defense of Policy Order 63 is flawed.²² The record in this case does not indicate that Policy Order 63's gender

²¹ Amici States, however, do not argue that any states with laws, regulations, and policies that do not mirror those cited here violate the Equal Protection Clause. Rather, Amici States, take the position that Policy Order 63 is not necessary or important to administer policies for women's and men's prisons and jails, or limit cross-gender searches.

²² See e.g., California Department of Corrections and Rehabilitation (CDCR), Housing and Searching Incarcerated Persons Consistent with their Gender Identity, <https://www.cdcr.ca.gov/prea/sb-132-faqs/>; State of Washington Department of Corrections, *Transgender, Intersex, and/or Gender Non-Conforming Housing and Supervision*, Policy DOC 490.700 (Feb. 13, 2020), <https://www.doc.wa.gov/information/policies/files/490700.pdf>; New Jersey Attorney General's Law Enforcement Directive No. 2019-3 at 6-7, 13-14 (addressing lockups within police stations and recognizing that additional questioning may be necessary where official identification is unavailable or does not reliably establish gender), <https://www.nj.gov/oag/dcj/agguide/directives/ag-directive-2019-3.pdf>.

reassignment surgery requirement is necessary to assist Alabama correctional and law enforcement officials in implementing placement and search policies. *See* Doc. 52-3 at 27 (ALEA Chief of Driver’s License Division unable to testify regarding the search procedures or practice of any particular agency); Doc. 52-27 at 7 (expert testimony affirming that different correctional administrators may make different interpretations regarding the meaning of “sex”). Furthermore, inmates in Alabama correctional facilities apparently are not authorized to possess driver’s licenses during their period of incarceration.²³ PREA, however, requires states to conduct screenings as part of the intake process for an inmate who has newly arrived at an institution or has been transferred to a new facility, and the screening must determine, among other things, whether an inmate is or perceived to be transgender. 28 C.F.R. §§ 115.41(a), (d); 115.241(d)(7).

Alabama’s expert on correctional administration testified that the state’s law enforcement interest is served by any standardized definition of sex, and further

²³ Alabama, like Amici States such as California, issues identification cards to all individuals incarcerated in their correctional facilities, and possession of an identification card is evidently limited to that issued by the correctional agency. *See* Ala. Dep’t. of Corr. Admin. Reg. No. 032.V.A, C.2; No. 338.II, V.A.7.h.; Annex A to Ala. Dep’t. of Corr. Admin. Reg. 338; CDCR Dep’t Operating Manual §§ 54030.10.10, 54030.1(a). *See also* State of Washington Department of Corrections, *Washington State Identification/Social Security Cards*, DOC 490.700 (Mar. 4, 2021) (if the incarcerated individual arrives with a Washington State Driver’s License or ID or a Social Security card, the document is kept in a stored, secured area, and then provided to the individual upon release, arrival at Work Release, or placement onto electronic home monitoring).

explained that at booking an individual's sex designation is typically gathered from a driver's license when available. Doc. 52-27 at 7-8. Yet, driver's licenses serve to implement a consistent definition of sex because the vast majority of individuals are not transgender--not because a state policy imposes a surgery requirement on transgender people seeking to update their licenses. Even for a correctional institution that defines sex based on genitalia, Policy Order 63 does not reasonably relate to establishing the anatomy of a transgender individual due to the policy's various exceptions, and to the reality some do not have driver's licenses and licenses are not automatically updated following an individual's surgery. Moreover, as noted earlier, *supra* at 14, if a prison or jail official needs to know an individual's genital status, there are methods such as asking the incarcerated individual or reviewing their medical records. Alabama conducts medical screenings as part of its intake processes.²⁴

Alabama has also raised the privacy concerns of incarcerated individuals seeking to avoid exposure to individuals with genitals different from their own. Policy Order 63, however, does not address these asserted interests. Some do not have driver's licenses, and such identification is not updated automatically when

²⁴ Alabama Dep't. of Corrections, Male Inmate Handbook, No. 113: Health Services (Sept. 25, 2017), <http://www.doc.state.al.us/docs/PublicMaleInmateHandbook.pdf>.

one undergoes gender reassignment surgery. The installation of privacy screens and curtains, and similar measures are recognized strategies to curb cross-gender observation in prisons and jails.²⁵ Privacy screens are frequently installed by Amici States in a range of locations within their correctional facilities, including bathrooms, showers, and holding cells.²⁶ And of course, to the extent Alabama suggests that certain incarcerated persons may be uncomfortable around transgender individuals, that logic has no place in our constitutional order. Alabama certainly has no valid interest in endorsing or tolerating anti-transgender animus, discrimination, or ignorance by incarcerated persons in the state’s custody.

²⁵ National PREA Resource Center, Frequently Asked Questions, <https://www.prearesourcecenter.org/frequently-asked-questions/do-prohibitions-prea-standards-against-cross-gender-pat-searches-female>.

²⁶ See CDCR, PREA Annual Reports and Audits, <https://www.cdcr.ca.gov/prea/prea/reports-audits/> (audit reports from 2016-2020 detailing the installation of modesty screens in bathroom and shower areas); State of Washington Department of Corrections, *Prison Rape Elimination Act (PREA) Prevention and Reporting*, DOC 490.800 (Nov. 20, 2020), <https://www.doc.wa.gov/information/policies/files/490800.pdf> (“Individuals will be provided the opportunity to shower, perform bodily functions, and change clothing without non-medical staff of the opposite gender viewing their breasts, buttocks, or genitalia, except in exigent circumstances or when such viewing is incidental to routine cell checks. This includes viewing via surveillance systems.”); State of Washington Department of Corrections, *Prison Rape Elimination Act (PREA) Risk Assessments and Assignments*, DOC 490.820 (Jun. 13, 2019), <https://www.doc.wa.gov/information/policies/files/490820.pdf> (All facilities (prisons and work release) will develop local procedures to allow transgender/intersex individuals the opportunity to shower and/or dress separately from other individuals. This “may include individual shower stalls, separate shower times, or other procedures based on facility design.”).

Cf. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (state has no valid interest in “tolerat[ing] . . . [p]rivate biases”).

2. Policy Order 63 does not enhance the effectiveness of driver’s licenses as an identification document and compliance with the REAL ID Act.

Restricting driver’s license sex designations based on genital status does not enhance such licenses as a reliable tool for identification, as Alabama claims. State Br. at 29. Unlike publicly visible physical attributes noted on some state driver’s licenses, such as hair, weight or eye color, or those attributes evident in the full facial photograph that must appear on the surface of a driver’s license that is REAL ID compliant, 6 C.F.R. § 37.17(e), physical features hidden from public view can hinder the accurate identification of individuals. A sex designation according to Alabama’s Policy Order 63 is linked to physical features that are not readily discernable to the public. Therefore, sex designations on Alabama driver’s licenses do not support the ability of a person to confirm the identity of the person presenting the license compared to the physical information that is present on a license *and* is readily visible to a person assessing the license and the license holder. *See K.L. v. State Dep’t of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL 2685183, at *7 (Alaska Super. Ct. Mar. 12, 2012). When California amended its Vehicle Code, codifying its existing administrative rules granting driver’s licenses with sex designations based on gender identity alone,

without regard to surgical proof or other medical certification, no law enforcement interest groups were recorded as having opposed the legislation. *See* 2017 Legis. Bill Hist. CA S.B. 179 (Lexis), Senate Floor Analysis (Sept. 14, 2017).

Alabama further suggests that Policy Order 63 is necessary to ensure that its driver's license holders are permitted to board flights under the standards required by the REAL ID Act of 2005. State Br. at 7, 29. That is incorrect. In 2008 the Department of Homeland Security issued implementing regulations which left to the States the authority to define gender for purposes of a compliant driver's license. 73 Fed. Reg. 5272, 5301, 5335 (Jan. 29, 2008); 6 C.F.R. § 37.17(c) (requiring that compliant identifications list "*Gender*, as determined by the State.") (italics in original). And as discussed above, *supra* p. 5-6, the vast majority of states do not impose a surgical requirement as a precondition to changing gender on driver's licenses. Policy Order 63 is thus unnecessary for compliance with the REAL ID Act.

3. Alabama has not established that consistency between sex designations on birth certificates and driver's licenses is a legitimate interest served by Policy Order 63.

Alabama also asserts an interest in uniformity between sex designations on birth certificates and driver's licenses. Amici states have struggled to understand this argument given the dearth of record evidence and explanation in Alabama's appellate brief. Moreover, state rules for driver's licenses have not always

mirrored rules for birth certificates: they are often governed by different state codes and administered by different agencies for distinct purposes.²⁷

As discussed above, the animating policy goals in revising driver's license laws and regulations related to sex designations have been to reduce the harms that transgender people experience when their driver's licenses are incongruent with their gender identity, including the very real risk of mistreatment and even violence. Furthermore, sex designations on driver's licenses are not required to match the sex designation that appears on birth certificates in order to meet REAL ID Act standards. States are permitted to issue REAL ID compliant driver's licenses with a license holder's name that is not reflected on their birth certificate,

²⁷ See Dep't of Health & Human Servs., Model State Vital Statistics Act and Statistics Regulations, 1992 Revision, (Apr. 1995), <https://www.cdc.gov/nchs/data/misc/mvsact92aacc.pdf>. In 1907, the U.S. Census Bureau developed the first Model State Vital Statistics Act, which provided recommended standards so the federal government could obtain comparable birth and death data from state and local vital records offices. Dep't of Health & Human Servs., U.S. Vital Statistics System Major Activities and Developments, 1950–95 5 (Feb. 1997), <https://www.cdc.gov/nchs/data/misc/usvss.pdf>. Compare Cal. Dep't. of Motor Vehicles, the History of the Department of Motor Vehicles, <https://www.dmv.ca.gov/portal/about-the-california-department-of-motor-vehicles/the-history-of-the-department-of-motor-vehicles-dmv> (last visited August 13, 2021). The federal government, for example, uses birth certificates and driver's licenses for distinct purposes. See e.g. 42 C.F.R. § 435.407. Birth certificates are accepted as proof of U.S. citizenship to establish an individual's eligibility for certain government benefits, while a driver's license issued by a U.S. state or territory with a photograph or other identifying information may be accepted as identification. See e.g. 42 C.F.R. § 435.407(b)-(c). However, a birth certificate may serve as an identification document for purposes of establishing a person's name. See e.g. 6 C.F.R. §§ 37.17(a), 37.11(c)(ii).

provided that the applicant presents evidence of the marriage or adoption, a court order for the name change, and the state maintains record of the change. 6 C.F.R. § 37.11(c)(2). This suggests that from a security standpoint, uniformity between sex designations on driver’s licenses and birth certificates is not necessary. To the extent that Alabama seeks uniformity in order to entrench traditional expectations related to sex, under our equal protection precedents, state law may not single out and disadvantage a class for reasons solely based on moral objections. *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015); *Dep’t. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”). *See also Ray v. McCloud*, 507 F. Supp. 3d 925, 940 (2020) (categorical denial of requests to amend birth certificate resembled policy “born of animosity” that has “no rational relation to a legitimate government purpose.”) (internal quotation marks and citations omitted).

In summary, many states, including undersigned amici, issue driver’s licenses with updated sex designations without requiring applicants to undergo surgery. These policies serve important governmental interests in reducing discrimination and even violence. They also ease administrative burdens without undermining the operation of prisons and jails or any other valid state interests identified by Alabama. Policy Order 63 violates the Equal Protection Clause under both the intermediate scrutiny and rational basis standards of review.

CONCLUSION

For the foregoing reasons, Amici States urge the Court to uphold the decision below.

Dated: August 16, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Lisa Cisneros, an employee in the Office of the Attorney General of the State of California, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 3,798 words and complies with the typeface requirements and length limits of Rules 21(d), 29, and 32(a)(5)-(7), and the corresponding local rules.

s/ Lisa Cisneros

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2021, I electronically filed the foregoing [insert title of brief] with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I certify that the following participant in this case will be served by certified First-Class mail:

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All other participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

I further certify that four paper copies identical to the electronically filed brief will be mailed to the Clerk of the Court by certified First-Class mail.

s/ Lisa Cisneros

Addendum

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DRIVER LICENSE MANUAL

SUBJECT		PAGE	EFFECTIVE DATE	NUMBER
CHANGE OF SEX		1 OF 3	11-25-92	18-05
AUTHOR	APPROVAL	▼ SUPERSEDES ▼		
mau		1 OF 2	12-02-91	19-09

POLICY

The sex designation shown on permits, licenses, or identification cards may be changed for persons who have undergone sex change surgery or transsexuals undergoing gender reassignment therapy with a qualified therapist. The person must present documentation from a physician or clinic attesting to performed sex change surgery or a letter from a qualified therapist (see page 3 of 3 for list of therapists) attesting to the person living full-time as the desired gender as part of gender reassignment therapy. (Exception: No verification is necessary if change is to correct a typographical error on the current permit, license, or identification card.) The notation "Change of Sex" will be entered in the "Reason for Duplicate" space.

If the applicant has both a driver license and an identification card, the change can be made only on the driver license.

The \$11 duplicate fee is charged to issue a new license showing the sex designation change. If the change is made in conjunction with a renewal, only the renewal fee is due.

If a name change is also being made, the applicant must present required proofs of identity (one proof in previous name, and one proof in new name). The letter from the therapist attesting to the person living full-time in the desired gender may be accepted as proof of the new name if the new name information is included in the letter.

The person will retain the license number previously assigned.

PROCEDURE

1. View documentation from physician or clinic attesting to the performed sex change surgery or attesting to the person living full-time in the desired gender.

DRIVER LICENSE MANUAL

SUBJECT		PAGE	EFFECTIVE DATE	NUMBER
CHANGE OF SEX		2 OF 3	11-25-92	18-05
AUTHOR	APPROVAL	▼ SUPERSEDES ▼		
mau		2 OF 2	10-01-86	19-09

If a change of name is also being made, verify applicant's proof of age and/or identity. Proof must be submitted in both the previous name and the new name.

2. Return the documentation to applicant.
3. Process as a duplicate or renewal as appropriate.
4. Correct sex designation in "Sex" field.
5. Obtain previous license if available.
6. Have applicant check camera card for accuracy, complete upper half of camera card, and sign it. (Applicant is to sign in two spaces -- once on the upper half of the application and once in the "signature" space on the camera card.)
7. Collect fee if applicable.
8. Conduct photo process.
9. Issue photo-license.

The following therapists are qualified to issue letters of documentation as required in this procedure. These therapists are qualified because they follow the Harry Benjamin Standard of Care as defined by the Harry S. Benjamin International Gender Dysphoria Association Standards of Care.

DRIVER LICENSE MANUAL

SUBJECT		PAGE	EFFECTIVE DATE	NUMBER
CHANGE OF SEX		3 OF 3	11-25-92	18-05
AUTHOR	APPROVAL	▼ SUPERSEDES ▼		
mau	<i>Michael A. Hays</i> 	OF		19-09
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MOTOR VEHICLES DIVISION

INTERNAL MEMORANDUM

DATE December 14, 1992

Refer to:

TO: Field Office Personnel

FROM: Mike Unger 

SUBJECT: Driver License Manual Procedure 18-05

Attached is a copy of a revised procedure on Change of Sex on driver licenses, permits and ID cards.

This procedure contains a major policy change. A person will now be able to have the sex designation on their driver license, permit or ID card changed if they have undergone sex change surgery or are undergoing gender reassignment therapy with a qualified therapist. Previously the sex designation could only be changed if the person had undergone sex change surgery.

The procedure gives the details on how to process these requests. The biggest change is a person undergoing gender reassignment therapy must provide a letter of documentation from a qualified therapist. A list of qualified therapists is provided in the procedure.

The main reason for this change is due to the Harry Benjamin Standard of Care which is a national standard in the area of sex changes. This standard was developed by the Harry S. Benjamin International Gender Dysphoria Association Standards of Care. One of the main components of this standard is the person must live for one year as the gender (s)he wishes to become after surgery. A person cannot get a sex change unless they meet this requirement. California and Washington already allow change of sex designation on driver licenses, permits and ID cards in similar circumstances.

If you have any questions, please give me a call. My telephone number is 378-6994.