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June 9, 2023

Mr. David J. Smith, Clerk of Court
U.S. Court of Appeals for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *Eknes-Tucker v. Governor of the State of Alabama*, No. 22-11707
Response to Plaintiffs' Rule 28(j) Supplemental Authority Letter
Concerning *Doe v. Ladapo*, No. 4:23-cv-114 (N.D. Fla. June 6, 2023)

Dear Mr. Smith:

The *Ladapo* court's blatant errors only confirm that this Court's correction is needed. These cases are not about whether "[g]ender identity is real," Op.41, but about whether States may protect children with gender dysphoria from risky, unproven medical interventions. The *Ladapo* court assumed that Plaintiffs' preferred medical interest groups set the constitutional standard, Op.9-10, but *Dobbs* says otherwise. *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228, 2267 (2022). The Supreme Court held that *States* retain broad authority to regulate medical treatments even when ideologically captured medical groups disagree. *Id.* The *Ladapo* court ignored *Dobbs* entirely.

The court also rode roughshod over the Supreme Court's holding that heightened scrutiny is not triggered whenever a regulation prohibits a procedure "that only one sex can undergo." *Dobbs*, 142 S.Ct at 2245-46. Administering testosterone as a transitioning treatment fits that category. Like Plaintiffs, the court concluded that it doesn't only by reasoning that giving testosterone to a boy to cure a deficiency is the "same treatment" as giving it to a girl for transitioning—even though, by biological reality, the purposes and effects of those treatments are entirely different. Op.20.

Last, the court created a false "binary decision"—"to use or not use GnRH agonists or hormones"—and determined that States can't choose "not" because "[i]t is no answer to say the evidence on the yes side is weak when the evidence on the

no side is weaker or nonexistent." Op.28. In fact, even if heightened scrutiny applied, it is completely proper to choose the "no side" if the "yes" option means sterilizing children and the "no side" lacks a similar risk profile. This isn't like choosing a high-risk but unproven procedure to save a terminally ill patient (though States can regulate there, too, *Abigail All. for Better Access v. von Eschenbach*, 495 F.3d 695, 711 (D.C. Cir. 2007) (en banc)). The alternative to transitioning treatments isn't doing nothing (as the court implied), but psychiatric care—which doesn't result in sterilization or any other significant risk caused by transitioning treatments. The Constitution does not require States to approve the unproven, high-risk option.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that this document complies with the type-volume limitations set forth in Fed. R. App. P. 28(j) and 11th Cir. R. 28, I.O.P. 6. The document contains 349 words, including all headings, footnotes, and quotations, and excluding the parts of the brief exempted under Fed. R. App. P. 32(a)(7)(B)(iii).

2. In addition, 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on June 9, 2023, using the CM/ECF Document Filing System, which will send notification of such filing to all noticed parties.

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