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D. John Sauer

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VIA CM/ECF

Ms. Molly C. Dwyer
Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103

RE: *Doe et al. v. Horne et al. and Petersen and Toma*
No. 23-16026 (c/w No. 23-16030)

Dear Ms. Dwyer:

After Intervenors-Defendants-Appellants (“Intervenors”) filed their petition for initial en banc hearing and en banc consideration of their stay motion, the Eleventh Circuit decided *Eknes-Tucker v. Governor of the State of Alabama*, 2023 WL 5344981 (11th Cir. Aug. 21, 2023). *Eknes-Tucker* reversed a preliminary injunction, granted in part on Equal Protection grounds, enjoining Alabama’s prohibition on the medical transition of transgender minors (the “Alabama Law”).

As relevant here, *Eknes-Tucker* rejected the argument—based on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)—that the Alabama Law “classifies on the basis of sex by classifying on the basis of gender nonconformity.” *Id.* at *16. *Bostock*’s Title VII analysis, the court said, “bears minimal relevance to the instant case.” *Id.*

The Eleventh Circuit also reiterated its “grave ‘doubt’ that transgender persons constitute a quasi-suspect class.” *Id.* at *17 (quoting *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cty.*, 57 F.4th 791, 803 n.5 (11th Cir. 2022) (en banc)). Instead, the court said, the law is subject to—and passes—rational-basis scrutiny. *See id.* at *15. “[T]hese types of issues are quintessentially the sort that our system of government reserves to legislative, not judicial, action.” *Id.* at *18.

Eknes-Tucker underscores the need for initial en banc hearing. It affirms the national importance of the issues in this case and the split between this Court and the Eleventh Circuit on whether transgender individuals are a quasi-suspect class and whether *Bostock* applies outside of Title VII. *See* Pet. Initial En Banc Consideration 8–9.

Moreover, *Eknes-Tucker* said the Alabama Law did not discriminate on the basis of gender identity even though it regulated a “medical treatment that ... only gender nonconforming individuals may receive.” 2023 WL 5344981, at *17. That analysis is inconsistent with the district court’s conclusion that the SWSA classifies on transgender status. *See* A35; *see also Hecox v. Little*, 2023 WL 5283127, at *10–*11 (9th Cir. Aug. 17, 2023) (same conclusion as to Idaho’s law). That divergence is another reason to grant Intervenor’s Petition and highlights the importance of the issues involved.

Sincerely,

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2023, the foregoing was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which serve all counsel of record.

/s/ D. John Sauer

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the body of this letter contains 343 words as determined by the word-count feature of Microsoft Word. This letter has been scanned for viruses and is virus-free.

/s/ D. John Sauer