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January 3, 2023

Mr. David J. Smith, Clerk of Court
U.S. Court of Appeals for the 11th Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: *Darcy Corbitt, et al. v. Hal Taylor, in his official capacity as Secretary of the Alabama Law Enforcement Agency, et al.*, No. 21-10486

Dear Mr. Smith:

The Court’s decision in *Adams v. School Board of St. Johns County*, No. 18-13592 (11th Cir. Dec. 30, 2022) (en banc), provides further reasons to reject Plaintiffs’ equal-protection claim.

First, *Adams* settles that an “accommodation”—there, sex-neutral bathrooms; here, Policy Order 63’s option for changing a license’s sex designation—does “not place a special burden on transgender” persons. Slip.Op.34; *see also* Reply.Br.1-3, 9-10, 17, 25.

Second, *Adams* confirms that the Equal Protection Clause forbids neither sex-segregated bathrooms nor definitions of sex rooted in objective physical differences. The question whether “the School District’s policy of assigning bathrooms based on sex violate[d] the Equal Protection Clause” warrants intermediate scrutiny. Slip.Op.10, 17. The question here, however, is whether the State may lawfully define sex according to objective physical characteristics.

This is a different question, Slip.Op.8-9 n.2, and one that warrants only rational-basis review. *See Adams v. Sch. Bd. of St. Johns Cnty*, 3 F.4th 1299, 1326 (11th Cir. 2021) (Pryor, C.J., dissenting) (“[T]he mere act of determining an individual’s sex, using the same rubric for both sexes, does not treat anyone differently on the basis of sex.”). Simply put, heightened scrutiny does not apply

where plaintiffs seek to *avail* themselves of sex segregation and attack only the *definition* of sex on which a policy segregates. Reply.Br.5-12.

Third, even if heightened scrutiny applied here, under *Adams* the Policy easily would survive:

- The State’s interests in providing law-enforcement and medical first responders with “the information they need” (DE48-5:16; Reply.Br.14-20) are no less weighty than students’ “need for privacy” (Slip.Op.21-22).
- Defining sex by objective physicality “is clearly related to” (Slip.Op.23) these interests, and, as in *Adams*, is accurate over 99% of the time. DE52-46:2; Slip.Op.32-33.
- Plaintiffs rely on the same reverse-*Bostock* argument (Resp.Br.17-18) that *Adams* rejected (Slip.Op.30-31).
- As in *Adams*, here “[t]here is no evidence” suggesting the State enacted the Policy “because of ... its adverse effects upon’ transgender” individuals. Slip.Op.33. So, “[a]t most, [Plaintiffs’] challenge amounts to a claim that the [Policy] has a disparate impact” on transgender individuals. Slip.Op.32. And “disparate impact alone does not violate the Constitution.” Slip.Op.32-33.

Respectfully submitted,

s/ Thomas A. Wilson

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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 345 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 2007 in 14-point Times New Roman font.

/s/ Thomas A. Wilson

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Counsel for State Defendants

CERTIFICATE OF INTERESTED PERSONS

In accordance with 11th Cir. R. 26.1-1(a)(3) and 26.1-2(b), undersigned counsel certifies that the persons and entities listed in the amended certificate of interested persons contained in Appellants' Reply Brief are all the persons or entities known to undersigned counsel to have an interest in the outcome of this appeal.

/s/ Thomas A. Wilson _____
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed on January 3, 2023 using the CM/ECF Document Filing System, which will send notification of such filing to all noticed parties.

/s/ Thomas A. Wilson

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