

United States Court of Appeals
for the
Eleventh Circuit

PAUL A. EKNES-TUCKER, Rev., BRIANNA BOE, individually and on behalf of her minor son, Michael Boe, JAMES ZOE, individually and on behalf of his minor son, Zachary Zoe, MEGAN POE, individually and on behalf of her minor daughter, Allison Poe, KATHY NOE, et al., individually and on behalf of her minor son, Christopher Noe,

Plaintiffs-Appellees,

– v. –

GOVERNOR, OF THE STATE OF ALABAMA, ATTORNEY GENERAL, STATE OF ALABAMA, DISTRICT ATTORNEY, FOR MONTGOMERY COUNTY, DISTRICT ATTORNEY, FOR CULLMAN COUNTY, DISTRICT ATTORNEY, FOR LEE COUNTY, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, CASE NO: 2:22-cv-00184-LCB-SRW (HONORABLE LILES C. BURKE, U.S. DISTRICT JUDGE)

**MOTION FOR LEAVE OF FAMILY LAW AND
CONSTITUTIONAL LAW SCHOLARS TO FILE BRIEF
AMICI CURIAE IN SUPPORT OF PLAINTIFFS' PETITION
FOR REHEARING *EN BANC***

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CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

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2. Khiara M. Bridges, Professor of Law, University of California, Berkeley,
School of Law;
3. Maxine Eichner, Graham Kenan Distinguished Professor of Law,
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4. Clare Huntington, Professor of Law, Columbia Law School;
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Professor of Civil Rights, University of Pennsylvania Carey Law School;

9. Katharine B. Silbaugh, Professor of Law, Boston University School of Law;

10. Jane M. Spinak, Edward Ross Aranow Clinical Professor Emerita of Law, Columbia Law School.

There is no further information to add to the previously filed Certificate of Interested Persons.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Federal Rules of Appellate Procedure 29(b) and Eleventh Circuit Rule 29(b), Proposed *amici*, Kevin M. Barry, Khiara M. Bridges, Maxine Eichner, Clare Huntington, Ira C. Lupu, Nancy D. Polikoff, Solangel Maldonado, Dorothy E. Roberts, Katharine B. Silbaugh, and Jane M. Spinak, through undersigned counsel, respectfully request leave of this Court to file the attached brief in support of Plaintiffs' petition for rehearing en banc. The proposed brief is attached to this Motion. In support of this motion, *amici* state as follows:

1. Proposed *amici* are well-placed to submit a brief in support of the Plaintiff's petition. Proposed *amici* are legal scholars whose scholarship and teaching focus on family law and the Due Process Clause of the Fourteenth Amendment. These scholars have an interest in ensuring that the Fourteenth Amendment is interpreted to protect parents' fundamental right to direct their children's medical care. Proposed *amici* include (in alphabetical order, and with affiliations listed for identification purposes only): Kevin M. Barry, Professor of Law, Quinnipiac University School of Law; Khiara M. Bridges, Professor of Law, University of California, Berkeley, School of Law; Maxine

Eichner, Graham Kenan Distinguished Professor of Law, University of North Carolina School of Law; Clare Huntington, Professor of Law, Columbia Law School; Ira C. Lupu, F. Elwood and Eleanor Davis Professor Emeritus of Law, The George Washington University Law School; Nancy D. Polikoff, Professor Emerita of Law, American University Washington College of Law; Solangel Maldonado, Eleanor Bontecou Professor of Law, Seton Hall University School of Law; Dorothy E. Roberts, George A. Weiss University Professor of Law and Sociology & Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights, University of Pennsylvania Carey Law School; Katharine B. Silbaugh, Professor of Law, Boston University School of Law; and Jane M. Spinak, Edward Ross Aranow Clinical Professor Emerita of Law, Columbia Law School.

2. Proposed *amici's* expertise is desirable and relevant to this Court. In its decision vacating the district court's order preliminarily enjoining Alabama's ban on transition care for transgender adolescents, this Court concluded, *inter alia*, that parents' fundamental right to direct the upbringing of their children does not include the more specific right to direct the medical care of their children subject to medically accepted standards. Proposed

amici seek to provide information to this Court regarding why this conclusion conflicts with U.S. Supreme Court precedent, Eleventh Circuit precedent, and the common law, and why it also grants unprecedented power to the State to disrupt families and jeopardize the health of children.

3. Leave to file a brief as *amici curiae* should be granted when “the *amici* have stated ‘an interest in the case,’ and it appears that their brief is ‘relevant’ and ‘desirable,’” such as when “it alerts the merits panel to possible implications of the appeal.” *Neonatology Assoc., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.) (quoting Fed. R. App. P. 29(a)(3)); *see also id.* at 132 (“The criterion of desirability set out in Rule 29(b)(2) is open-ended, but a broad reading is prudent.”). Proposed *amici* submit both of these criteria are met.

For the foregoing reasons, proposed *amici* respectfully request that this Court grant leave to file the attached *amicus curiae* brief in support of Plaintiffs’ petition for rehearing en banc.

Date: September 18, 2023

Respectfully submitted,

/s/ Paula Hinton

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**CERTIFICATE OF
COMPLIANCE**

Under *Federal Rule of Appellate Procedure* 32(g)(1), I certify that this document complies with the type-volume limitation and contains 549 words.

The foregoing was prepared in MS Word, Book Antiqua, 14 pt. type.

**CERTIFICATE OF
SERVICE**

I HEREBY CERTIFY that on September 18, 2023, a copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF
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There is no further information to add to the previously filed Certificate of Interested
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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici are legal scholars whose scholarship and teaching focus on family law and the Due Process Clause of the Fourteenth Amendment. These scholars have an interest in ensuring that the Fourteenth Amendment is interpreted to protect parents' fundamental right to direct their children's medical care. *Amici* include (in alphabetical order): Kevin M. Barry, Professor of Law, Quinnipiac University School of Law; Khiara M. Bridges, Professor of Law, University of California, Berkeley, School of Law; Maxine Eichner, Graham Kenan Distinguished Professor of Law, University of North Carolina School of Law; Clare Huntington, Professor of Law, Columbia Law School; Ira C. Lupu, F. Elwood and Eleanor Davis Professor Emeritus of Law, The George Washington University Law School; Nancy D. Polikoff, Professor Emerita of Law, American University Washington College of Law; Solangel Maldonado, Eleanor Bontecou Professor of Law, Seton Hall University School of Law; Dorothy E. Roberts, George A. Weiss University Professor of Law and Sociology & Raymond Pace and Sadie Tanner Mossell Alexander Professor of Civil Rights, University of Pennsylvania Carey Law School; Katharine B. Silbaugh, Professor of Law, Boston University School of Law; and Jane M. Spinak, Edward Ross Aranow Clinical Professor Emerita of Law, Columbia Law School.

The institutional affiliations of *Amici* are supplied for the purpose of identification only and the positions set forth below are solely those of *Amici*.¹

¹ No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amici curiae* or their counsel—contributed money that was intended to fund preparing or submitting this brief. All parties consented to the filing of this brief.

STATEMENT OF THE ISSUES

Amici adopt and incorporate Plaintiffs’ Statement of the Issues in their brief. *See* Pls.’ Pet. For Rehearing En Banc, at 1-2.

SUMMARY OF THE ARGUMENT

In *Eknes-Tucker v. Alabama* this Court concluded, *inter alia*, that parents do not have a fundamental right to direct the medical care of their children under medically accepted standards.¹ Because this conclusion conflicts with U.S. Supreme Court and Eleventh Circuit precedent, and the common law, and because this Court’s decision grants unprecedented power to the State to disrupt families and jeopardize the health of children, *Amici* urge this Court to grant Plaintiffs’ petition for rehearing en banc.²

ARGUMENT

I. THE RIGHT OF PARENTS TO DIRECT THEIR CHILDREN’S MEDICAL CARE IS A FUNDAMENTAL RIGHT PROTECTED BY THE FOURTEENTH AMENDMENT

It is well-established that the century-old right of parents to “make decisions concerning the care, custody, and control of [their] children”³ includes the right to

¹ No. 22-11707, 2023 WL 5344981, at *11 (11th Cir. Aug. 21, 2023).

² *Amici* agree with petitioners that Alabama’s ban does not survive heightened scrutiny. This brief does not address the arguments supporting that conclusion.

³ *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

direct their children’s medical care under medically accepted standards.⁴ According to the Supreme Court, “as long as parents choose from professionally accepted treatment options the choice is rarely reviewed in court and even less frequently supervised....The decision to provide or withhold medically indicated treatment is, except in highly unusual circumstances, made by the parents or legal guardian.”⁵

II. RECOGNITION OF THE FUNDAMENTAL RIGHT OF PARENTS TO DIRECT THEIR CHILDREN’S MEDICAL CARE FURTHERS THE BEST INTERESTS OF CHILDREN AND SOCIETY

The Court’s deeply-rooted deference to parents’ right to direct the upbringing of their children, including their children’s medical care, reflects two normative

⁴ See, e.g., *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (noting that parents’ “high duty, to recognize and prepare [their children] for additional obligations...[s]urely...includes a ‘high duty’ to recognize symptoms of illness and to seek and follow medical advice.”) (citation omitted); *id.* at 604 (“[Parents], of course, retain plenary authority to seek...[medical] care for their children”); *Kanuszewski v. Mich. Dep’t of Health and Hum. Servs.*, 927 F.3d 396, 419 (6th Cir. 2019) (recognizing parents’ right to direct their children’s medical care); *PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010) (same); *Bendiburg v. Dempsey*, 909 F.2d 463, 470 (11th Cir. 1990) (recognizing “the right of parents to generally make decisions concerning the treatment to be given to their children” and prohibiting a state from “willfully disregard[ing] th[at] right”); *R.J.D. v. Vaughan Clinic, P.C.*, 572 So. 2d 1225, 1227-28 (Ala. 1990) (“The common law deems parental care for children not only an obligation, but also an inherent right: In such matters as deciding on the need for surgical or hospital treatment,...[t]he will of the parents is controlling, except in those extreme instances where the state takes over to rescue the child from parental neglect or to save its life. ...The United States Supreme Court followed this common law rule in [*Parham*].”); 59 Am. Jur. 2d *Parent and Child* § 22 (2023).

⁵ *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 627 n.13 (1986) (plurality) (quotation marks omitted).

judgments. The first is that this fundamental right is necessary to protect children.⁶ Because parents—not the State or other adults—are generally in the best position to know what is best for their children, and because “natural bonds of affection” generally “lead parents to act in the best interests of their children,” recognition of parental rights benefits children.⁷ In order to meet their obligation to provide for their children, the State must not prevent parents from fulfilling this obligation.⁸

The Supreme Court’s parental rights jurisprudence also reflects the legal judgment, backed by centuries of tradition, that parental rights serve society’s interests. Societies with good reason have elevated the sanctity of the family and the United States has committed to limited government with the care and support of each new generation as central goals.⁹ Whether drawn from consistent lines of judicial precedent or from conceptions of history and tradition informing constitutional interpretation, legal protection for parental decisions stands as an enduring commitment revered across communities and generations.

⁶ See, e.g., Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529, 2529 (2022).

⁷ *Parham*, 442 U.S. at 602 (citing 1 W. Blackstone, Commentaries *447).

⁸ See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923).

⁹ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977) (plurality) (“Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition.”).

As the Supreme Court has repeatedly noted, “[The] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”¹⁰ Because “[i]t is through the family that we inculcate and pass down many of our most cherished values, moral and cultural,”¹¹ many consider this deeply rooted tradition of parental authority to be necessary to the maintenance of a free society and “a strong hedge against tyranny.”¹²

The connection between parental rights and a free society is not academic. As demonstrated by centuries of disruption of Black and Indigenous families through slavery, forced apprenticeship, and placement in government-run boarding schools and White adoptive homes,

[f]amily destruction has historically functioned as a chief instrument of group oppression in the United States. The family is a critical social institution that serves as a caring shield around its members to protect them from the totalitarian dictates of government officials. Families pass on the cultural norms, moral values, and political commitments of groups within a society. Families prepare children for participating in the economic, political, and

¹⁰ *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); accord *Parham*, 442 U.S. at 602; see also *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

¹¹ *Moore*, 431 U.S. at 503–04 (plurality); see also *People v. Bennett*, 501 N.W.2d 106, 121 n.2 (Mich. 1993) (Riley, J., concurring in part and dissenting in part) (“[T]he cultural patterns of American family life have contributed enormously to the ultimate purposes of a democratic society by providing the stability and the structure that are essential to sustaining individual liberty over the long term.”) (quoting Prof. Bruce Hafen).

¹² *Bennett*, 501 N.W.2d at 122 n.3 (Riley, J., concurring and dissenting); see also *Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (plurality) (“Properly understood, then, the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.”).

social life of the various communities they will be part of as adults....
Rupturing families within a group is a means of repressing the entire group.¹³

In this way, state disruption of the family—society’s “value transmission system”—
is “a hallmark of totalitarianism.”¹⁴

Accordingly, for over a century, the Supreme Court has vigorously protected
parents’ child-rearing decisions from substitution by State decision-makers.¹⁵ In
Wisconsin v. Yoder, for example, the Court invalidated Pennsylvania’s compulsory
school attendance law that would have exposed Amish children to worldly
influences considered detrimental by their parents.¹⁶ The law undermined the
“diversity [society] profess[es] to admire and encourage,” leaving Amish parents
with an impossible choice: “abandon belief and be assimilated into society at large,
or be forced to migrate to some other and more tolerant region.”¹⁷

III. TRANSITION CARE BANS INFRINGE PARENTS’ FUNDAMENTAL RIGHT TO DIRECT THE MEDICAL CARE OF THEIR CHILDREN

Legal respect for parental decision-making is especially warranted when
parents consent to the medical treatment recommended by their children’s

¹³ Dorothy Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World* 87-88 (2022) (quotation marks omitted).

¹⁴ *Bennett*, 501 N.W.2d at 122 n.3 (Riley, J., concurring and dissenting) (quoting Hafén).

¹⁵ See, e.g., *Pierce v. Soc’y of the Sisters*, 268 U.S. 510, 536 (1925); *Meyer*, 262 U.S. at 403; *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).

¹⁶ 406 U.S. at 217-18.

¹⁷ *Id.* at 218, 226.

physicians. Laws that prevent parents from obtaining professionally accepted treatments for children with gender dysphoria infringe parents’ fundamental right to direct their children’s medical care.¹⁸ That parental right may be preempted by the State only in exceptional situations where parental choice counters medical advice and jeopardizes the child’s health, such as where the treatment is deemed “experimental”¹⁹ or harmful by the mainstream medical community,²⁰ or where it was once deemed medically standard but is subsequently shown to be harmful in

¹⁸ See, e.g., *Brandt v. Rutledge*, No. 4:21CV00450 JM, 2023 WL 4073727, at *36 (E.D. Ark. June 20, 2023) (“[parents’] fundamental right to seek medical care for their children and, in conjunction with their adolescent child’s consent and their doctor’s recommendation, make a judgment that medical care is necessary”); accord *L.W. ex rel. Williams v. Skrmetti*, No. 3:23-cv-00376, 2023 WL 4232308, at *8 (M.D. Tenn. June 28, 2023) (“[parents’] fundamental right to direct the medical care of their children, which naturally includes the right of parents to request certain medical treatments on behalf of their children”); *Doe v. Thornbury*, No. 3:23-cv-230-DJH, 2023 WL 4230481, at *6 (W.D. Ky. June 28, 2023) (“[parents’] right to obtain established medical treatments to protect their children’s health and well-being”); *Doe v. Ladapo*, No. 4:23cv114-RH-MAF, 2023 WL 3833848, at *11 (N.D. Fla. June 6, 2023) (“[parents’] right to control a child’s medical treatment...that is [not] properly prohibited on other grounds”).

¹⁹ See, e.g., *Abigail All. for Better Access to Developmental Drugs v. von Eschenbach*, 495 F.3d 695, 711-12 (D.C. Cir. 2007) (en banc) (no fundamental right to access “experimental” drugs); see also *Washington v. Glucksberg*, 521 U.S. 702, 723, 731 (1997) (no fundamental “right to commit suicide”) (internal quotation omitted).

²⁰ See *Pickup v. Brown*, 740 F.3d 1208, 1223, 1225 (9th Cir. 2014) (no fundamental right to access treatment that State has “reasonably deemed harmful” based on the “well-documented, prevailing opinion of the medical and psychological community”) (emphasis added).

light of new evidence. Such exceptional situations also include a parent’s refusal to obtain necessary medical care for a child.²¹

None of these exceptions apply here. The right asserted by Plaintiffs goes to the heart of parental decision-making: a parent’s right to direct their children’s medical care by accessing professionally accepted treatment that the State has not demonstrated jeopardizes children’s health. Transition care is supported by the research and expertise of specialists in the field and every leading medical and mental health organization in the country.²² Indeed, transition care is the *only* effective, medically necessary, and safe treatment for gender dysphoria.²³

Certainly, transition care carries with it some risks, but “[f]ew if any drugs are completely safe in the sense that they may be taken by all persons in all circumstances without risk...”.²⁴ As the Supreme Court stated in *Parham v. J.R.*,

Simply because the decision of a parent...involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made

²¹ See 59 Am. Jur. 2d *Parent and Child* § 22 (2023).

²² See, e.g., *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022) (finding “substantial evidence in the record” to support district court’s factual findings that transition care conforms with “the recognized standard of care for adolescent gender dysphoria” and “is supported by medical evidence that has been subject to rigorous study”); *accord Brandt*, 2023 WL 4073727, at *36; *Ladapo*, 2023 WL 3833848, at *11.

²³ See *Brandt*, 2023 WL 4073727, at *17.

²⁴ *United States v. Rutherford*, 442 U.S. 544, 555–56 (1979); see also *Brandt*, 2023 WL 4073727, at *18 (finding that risks associated with transition care were comparable to risks associated with many other medical treatments for adolescent children); *accord Ladapo*, 2023 WL 3833848, at *13.

for a tonsillectomy, appendectomy, or other medical procedure...Parents can and must make those judgments [concerning their children's treatment].²⁵

The fact that FDA has not specifically approved the use of puberty blockers and hormone therapy to treat adolescents with gender dysphoria does not alter this conclusion. Many established medical treatments, particularly those for children, involve off-label uses of FDA-approved medications.²⁶

Whether parents have a personal right to medical treatment is not the question; parents by law are required to meet their children's needs.²⁷ For this reason as well as longstanding recognition of the centrality of family formation and guidance to human liberty, parents have an obligation and the corresponding right to determine their children's medical care.

To hold that parents have no fundamental right to direct their children's medically accepted care jeopardizes children's health and leaves parents with an impossible choice: remain in their home state as their child's health deteriorates, or, assuming they have the resources to do so, "migrate to some other and more tolerant

²⁵ *Parham*, 442 U.S. at 603.

²⁶ See Am. Acad. Pediatrics Comm. on Drugs, *Policy Statement, Off-Label Use of Drugs in Children*, 133 PEDIATRICS 563, 563 (2014) (stating that off-label use of FDA-approved medications "does not imply an improper, illegal, contraindicated, or investigational use"); *accord Ladapo*, 2023 WL 3833848, at *15; *Brandt*, 2023 WL 4073727, at *18.

²⁷ *Pierce*, 268 U.S. at 535 ("[Parents] have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.").

region”—precisely the type of harm that the Supreme Court condemned in *Yoder*.²⁸ Forcing parents to either risk their children’s lives or uproot their families is antithetical to a free society, Western civilization concepts of the family, and “the diversity we profess to admire and encourage.”²⁹

CONCLUSION

This Court should grant Plaintiffs’ petition for rehearing en banc.

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Respectfully submitted,

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²⁸ *Yoder*, 406 U.S. at 218.

²⁹ *Id.* at 226.

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**CERTIFICATE OF
COMPLIANCE**

Under *Federal Rule of Appellate Procedure* 32(g)(1), I certify that this document complies with the type-volume limitation and contains 2,563 words.

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I HEREBY CERTIFY that on September 18, 2023, a copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Paula Hinton