

No. 22-11707

IN THE 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 (No. 2:22-cv-00184-LCB-SRW)

UNOPPOSED MOTION OF LAMBDA LEGAL DEFENSE & EDUCATION FUND, INC., CAMPAIGN FOR SOUTHERN EQUALITY, EQUALITY FLORIDA, FAMILY EQUALITY, AND FOUR OTHER ORGANIZATIONS FOR LEAVE TO FILE *AMICI CURIAE* BRIEF SUPPORTING PLAINTIFFS-APPELLEES' PETITION FOR REHEARING *EN BANC*
[CAPTION CONTINUED ON NEXT PAGE]

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-2(b), and Federal Rule of Appellate Procedure 29(a)(4)(A), *amici curiae* hereby certify that, to the best of their knowledge, the Certificate of Interested Persons set forth in Plaintiffs-Appellees' petition for rehearing *en banc* is complete, subject to the following amendments:

- Campaign for Southern Equality – *amicus curiae*
- Equality Florida – *amicus curiae*
- Family Equality – *amicus curiae*
- Gonzalez-Pagan, Omar – Counsel for *amici curiae*
- Jenner & Block LLP – Counsel for *amici curiae*
- Lambda Legal Defense and Education Fund, Inc.– *amicus curiae*
- Loewy, Karen L. – Counsel for *amici curiae*
- National Center for Transgender Equality – *amicus curiae*
- Sitton, Jocelyn A. – Counsel for *amici curiae*
- Southern Legal Counsel – *amicus curiae*
- Transgender Law Center – *amicus curiae*
- Transgender Legal Defense and Education Fund – *amicus curiae*
- Unikowsky, Adam G. – Counsel for *amici curiae*

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-3, each *amici curiae* hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Amici curiae further certify that they are not aware of any publicly traded company or corporation that has an interest in the outcome of this case or appeal.

Date: September 18, 2023

/s/ Adam G. Unikowsky
Adam G. Unikowsky

**UNOPPOSED MOTION FOR LEAVE TO FILE *AMICI CURIAE*
BRIEF**

Pursuant to Rules 27 and 29 of the Federal Rules of Appellate Procedure, Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”), Campaign for Southern Equality, Equality Florida, Family Equality, National Center for Transgender Equality, Southern Legal Counsel, Transgender Law Center, and Transgender Legal Defense and Education Fund, Inc. (collectively, “*Amici*”) respectfully request leave to file a brief as *amici curiae* in support of Plaintiffs-Appellees’ (“Plaintiffs”) Petition for Rehearing *en banc*, as no more than seven (7) days have elapsed since the filing of Plaintiffs’ brief. *See* Fed. R. App. P. 29(b)(5). All parties have consented to *Amici*’s filing a brief in this matter.

In support of its motion, *Amici* state as follows:

1. *Amici* are nonprofit organizations with an interest in ensuring the equal treatment of lesbian, gay, bisexual, transgender, queer, and non-binary people across the nation.

2. *Amici* have expertise to offer that will assist this Court in its consideration of this case by providing additional arguments for the standard of scrutiny that should be applied to the issues presented, including the ways in which the exclusion of transgender minors from accessing gender-affirming medical care constitutes sex discrimination.

3. Courts of Appeals routinely permit interested parties like Lambda Legal to file *amicus curiae* briefs in cases where the *amicus*'s perspective may be of assistance in understanding the significance of the material issues and provide useful context as the court considers a particular case. See *Neonatology Assocs., P.A. v. Comm'r.*, 293 F.3d 128, 132 (3d Cir. 2002) (“Even when a party is very well represented, an amicus may provide important assistance to the court.”). “Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group.” *Id.* (citation omitted); see also *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763-64 (7th Cir. 2020) (Scudder, J., in chambers) (describing how *amicus* briefs may aid the court). In this case, the proposed *amici* brief fulfills all of these functions.

4. The Sixth Circuit Court of Appeals and the Eighth Circuit Court of Appeals allowed several of the *amici* organizations who are also signatories here to file briefs in support of fully briefed motions on claims that are similar to the claims asserted here. See *Amicus Brief, Jane Doe 1 v. Thornbury*, No. 23-5609 (6th Cir. Aug. 10, 2023), ECF No. 77; *Amicus Brief, Brandt v. Rutledge*, No. 21-2875 (8th Cir. Jan. 20, 2022), Entry ID 5119009.

5. *Amici* certify that no party’s counsel authored the *amici curiae* brief in whole or in part; no party or party’s counsel contributed money intended to fund preparing or submitting the brief; and no person—other than *amici curiae*, their members, or their counsel—contributed money intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E).

6. The *amici curiae* brief complies with Federal Rule of Appellate Procedure 29(b)(4) because it is no more than 2,600 words.

7. There have been no prior actions of this or any other court or judge to which this motion to file an *amicus curiae* brief in this appeal, or a substantially similar or related application for relief, has been made. *See* 11th Cir. R. 27-1(a)(4).

8. All parties have consented to *Amici*’s filing of a brief in this matter. *See* 11th Cir. R. 27-1(a)(5).

Given their substantial interest in this case, *Amici* respectfully move for leave to file the attached brief as *amici curiae* in support of Plaintiffs-Appellees’ petition for rehearing *en banc*.

September 18, 2023

Respectfully submitted,

/s/ Adam G. Unikowsky

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CERTIFICATE OF COMPLIANCE

Under Rule 32(g) of the Federal Rules of Appellate Procedure, I certify this motion complies with the length limits set forth in Fed. R. App. P. 27(d)(2)(A) because it contains 622 words, as counted by Microsoft Word, excluding the items that may be exempted under Fed. R. App. P. 27(a)(2)(B).

This document 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 this document has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 in 14-point Times New Roman font.

/s/ Adam G. Unikowsky
Adam G. Unikowsky

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2023, I caused the foregoing document to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adam G. Unikowsky
Adam G. Unikowsky

No. 22-11707

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Equality Florida – *amicus curiae*

Family Equality – *amicus curiae*

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Jenner & Block LLP – Counsel for *amici curiae*

Lambda Legal Defense and Education Fund, Inc. – *amicus curiae*

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Unikowsky, Adam G. – Counsel for *amici curiae*

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 through 26.1-5, each *amicus curiae* hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

Dated: September 18, 2023

/s/ Adam G. Unikowsky

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DISCLOSURE REQUIRED BY 11TH CIR. R. 35-5(C)

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court and the Supreme Court: *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020); *Adams ex rel. Kasper v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: The proper standard of scrutiny to be applied to questions to sex-based restrictions on transgender health care is heightened scrutiny.

/s/ Adam G. Unikowsky

Counsel of Record for *Amici Curiae*

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INTERESTS OF *AMICI CURIAE*¹

Amici consist of eight nonprofit organizations committed to ensuring that all people, including women and LGBTQ people, can live their lives free from discrimination, including with respect to health care access. *Amici* seek to eliminate discriminatory barriers to health care for LGBTQ people, particularly transgender people, across the United States and in particular the South, through impact litigation, education, and public policy work.

Amici organizations are:

- Lambda Legal Defense and Education Fund, Inc.
- Campaign for Southern Equality
- Equality Florida
- Family Equality
- National Center for Transgender Equality
- Southern Legal Counsel
- Transgender Law Center
- Transgender Legal Defense and Education Fund, Inc.

¹ *Amici* hereby certify that 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, and no person—other than *amicus*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(b)(2).

All parties consent to the filing of this brief.

SUMMARY OF ARGUMENT

In April 2022, Alabama enacted S.B. 184 (the “Ban”) forbidding healthcare providers from performing or offering to perform any medical procedure for the purpose of “attempting to alter the appearance of or affirm the minor’s perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor’s sex[.]” Ala. Code § 26-26-4(a). In enacting the Ban, Alabama has placed many transgender adolescents at grave risk of harm while also violating their constitutional rights.

The district court correctly enjoined the Ban. The Ban facially discriminates based on sex. Every time the law is applied, the minor’s sex is outcome-determinative. The law targets transgender people, and as both the Supreme Court and this Court have held, laws and policies that target transgender people inherently discriminate based on sex. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1753-54 (2020); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011). Therefore, the Court should rehear this case *en banc* and hold that the Ban should be subject to heightened scrutiny.

ARGUMENT

The Ban discriminates based on sex. Therefore, it is subject to heightened scrutiny.

I. All Sex-Based Government Actions Are Subject To Heightened Scrutiny.

The Equal Protection Clause bars a State from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. To implement that constitutional guarantee, the Supreme Court requires “all gender-based classifications” and “gender-based government action” to be subjected to “heightened scrutiny.” *United States v. Virginia*, 518 U.S. 515, 531, 555 (1996) (citations omitted). Heightened scrutiny serves to “smoke out” illegitimate motives by ensuring that the state can prove—not just assert—that the governmental action has a sufficiently persuasive justification. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

Heightened scrutiny applies even to those classifications ostensibly based on physical differences between men and women. For example, laws distinguishing between mothers and fathers are subject to heightened scrutiny. The typical rationale for such laws—mothers give birth to children, fathers do not—is relevant to whether the laws *pass* heightened scrutiny, not whether they are subject to heightened scrutiny in the first instance. *Compare Tuan Anh Nguyen v. INS*, 533 U.S. 53, 60-61 (2001) (applying heightened scrutiny to statute distinguishing

between mothers and fathers, but upholding statute based on physical differences in means of proving parentage), *with Sessions v. Morales-Santana*, 582 U.S. 47, 57-58 (2017) (applying heightened scrutiny and invalidating statute distinguishing between mothers and fathers that relied on outdated gender stereotypes).

Constitutional limitations on gender-based classifications and actions apply with full force to laws that single out people who do not conform to sex stereotypes. Many of the Supreme Court’s foundational sex-discrimination cases involve such litigants. Women stereotypically do not attend military school, yet “generalizations about ‘the way women are,’” or “estimates of what is appropriate for *most women*,” do not justify treating women who seek to attend military school differently from men. *Virginia*, 518 U.S. at 550. Likewise, even in a world where “nearly 98[%] of all employed registered nurses were female,” men and women applying to nursing school must be treated equally, and a legislature may not “perpetuate the stereotyped view of nursing as an exclusively woman’s job.” *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729 (1982).

II. Laws That Single Out Transgender People Constitute Sex Discrimination.

As *Bostock v. Clayton County* explains, policies discriminating against transgender people constitute sex discrimination. 140 S. Ct. 1731. “[T]ake an employer who fires a transgender person who was identified as a male at birth but who now identifies as a female. If the employer retains an otherwise identical

employee who was identified as female at birth, the employer intentionally penalizes a person identified as male at birth for traits or actions that it tolerates in an employee identified as female at birth.” *Id.* at 1741. And if the policy discriminates against both transgender men and transgender women, it “doubles rather than eliminates” the discrimination. *Id.* at 1742.

The panel distinguished *Bostock* by concluding *Bostock*’s reasoning applies only to Title VII and not the Equal Protection Clause. (Opinion 43-44). That is not a principled distinction. Appellate decisions “must comport with the ‘reasoning or theory,’ not just the holding, of Supreme Court decisions.” *Thompson v. Hebdon*, 7 F.4th 811, 827 (9th Cir. 2021) (citation omitted). Indeed, “when the Supreme Court ... decides a case, not merely the *outcome* of that decision, but the *mode of analysis* that it applies will thereafter be followed by the lower courts[.]” Antonin Scalia, *The Rule of Law As A Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989).

Here, Title VII and the Equal Protection Clause bar sex discrimination. What constitutes sex discrimination by a state actor under Title VII also constitutes sex discrimination under the Fourteenth Amendment. *See Glenn*, 663 F.3d at 1316-17. As *Bostock* explained, it is arbitrary to distinguish discrimination based on sex stereotyping from discrimination against transgender people: If an employer who “fires men who do not behave in a sufficiently masculine way” engages in sex discrimination, why should courts “roll out a new and more rigorous standard” when

“that same employer discriminates against ... persons identified at birth as women who later identify as men”? 140 S. Ct. at 1749. That arbitrariness does not abate when considering discrimination under the Equal Protection Clause as opposed to discrimination under Title VII.

This Court’s decision in *Glenn v. Brumby* similarly confirms that discrimination against transgender people based on sex stereotypes constitutes sex discrimination under the Equal Protection Clause. The *Glenn* Court explained that, under the Equal Protection Clause, “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination.” 663 F.3d at 1317.

Adams ex rel. Kasper v. School Board of St. Johns County does not affect this analysis. 57 F.4th 791 (11th Cir. 2022). In *Adams*, the Court was concerned not with whether the policy at issue discriminated based on sex but “whether discrimination based on biological sex necessarily entails discrimination based on transgender status.” *Id.* at 809. But this Court maintained that “[a]ll persons, whether transgender or not, are protected from discrimination on the basis of [a sex stereotype].” *Id.* at 813 (quoting *Glenn*, 663 F.3d at 1318-19).

The panel asserted that *Glenn* dealt with the scenario “where an employer fired an employee for failing to adhere to certain expectations and stereotypes associated with the employee’s sex,” not one involving the medical care of minors. (Opinion 45). But *Glenn* establishes the principle that laws or policies singling out

transgender people are a type of sex discrimination. That principle does not go away merely because the law at issue involves medical care rather than employment.

Finally, the panel’s decision conflicts with out-of-circuit authority, further strengthening this case for rehearing *en banc*. The Fourth, Seventh, Eighth, and Ninth Circuits have all found that *Bostock*’s reasoning extends beyond Title VII. *See, e.g., Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (Title IX); *A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023) (Title IX and Equal Protection); *Sch. of the Ozarks, Inc. v. Biden*, 41 F.4th 992, 1001 (8th Cir. 2022) (Fair Housing Act), *cert denied*, 143 S. Ct. 2638 (2023); *Doe v. Snyder*, 28 F.4th 103, 113-14 (9th Cir. 2022) (Title IX and Section 1557 of the ACA).

III. The Ban Discriminates Based On Sex And Is Subject To Heightened Scrutiny.

On its face, the Ban discriminates based on sex. Under the Ban, a healthcare provider may not perform a medical procedure on a minor only if it is an attempt to “alter the appearance of or affirm the minor’s perception of his or her gender or sex, if that appearance or perception is inconsistent with the minor’s sex.” Ala. Code § 26-26-4(a).

Every single time the Ban will be applied, a court must ascertain the minor’s sex assigned at birth. When “[t]he biological sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical

care and those who may not,” the law is considered a sex-based classification and “is therefore subject to heightened scrutiny.” *Brandt ex rel. Brandt v. Rutledge*, 47 F.4th 661, 670 (8th Cir. 2022).

Moreover, the rationale for applying heightened scrutiny applies with full force. Heightened scrutiny exists to “smoke out” improper legislative rationales, such as hostility to gender nonconformity. *J.A. Croson Co.*, 488 U.S. at 493. Although the State contends it is trying to protect minors from well-established medical treatments it considers harmful, there are strong reasons to be concerned that these justifications are a pretext for a desire to discourage gender nonconformity. The district court rejected the State’s asserted rationale that the cited medical procedures were harmful to minors. *Eknes-Tucker v. Marshall*, 603 F. Supp. 3d 1131, 1148 (M.D. Ala. 2022).

It therefore makes perfect sense to conduct the heightened scrutiny analysis and “smoke out” illicit motives by requiring a “searching analysis” into the justifications for the Ban. *Virginia*, 518 U.S. at 536 (citation omitted); *J.A. Croson Co.*, 488 U.S. at 493. That heightened scrutiny analysis allows a court to determine whether the State’s asserted motive—protection of children from purportedly dangerous medical treatments—*in fact* justifies the Ban. *See Virginia*, 518 U.S. at 535-36.

The panel’s arguments for applying rational basis review lack merit. First, the opinion reasoned: “[the Ban] establishes a rule that applies equally to both sexes: it restricts the prescription and administration of puberty blockers and cross-sex hormone treatment for purposes of treating discordance between biological sex and sense of gender identity for *all* minors.” (Opinion 42).

But applying a sex-based rule to both sexes does not immunize the classification. See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 141-42 (1994); see also *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 124 (4th Cir. 2022). The “fact of equal application does not immunize the statute” from the “burden of justification” required by the Fourteenth Amendment. *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

Bostock repudiated that reasoning. It rejected an interpretation of Title VII that “would require [the Court] to consider the employer’s treatment of groups rather than individuals, to see how a policy affects one sex as a whole versus the other as a whole,” instead explaining that “our focus should be on individuals, not groups.” 140 S. Ct. at 1740. The same analysis applies to the Equal Protection Clause, which embodies the exact same “basic principle” as Title VII: it “protect[s] *persons*, not *groups*.” See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Thus, a law that treats groups equally in the aggregate—but *individually* classifies people based on a suspect characteristic—is subject to heightened scrutiny. See *Parents*

Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 743 (2007); accord *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring in judgment) (the Equal Protection Clause is “concern[ed] with rights of individuals, not groups”).

Next, the panel reasoned: “[T]he statute refers to sex only because the medical procedures that it regulates—puberty blockers and cross-sex hormones as a treatment for gender dysphoria—are themselves sex-based” and that “it is difficult to imagine how a state might regulate the use of puberty blockers and cross-sex hormones for the relevant purposes . . . *without* referencing sex in some way.” (Opinion 42-43).

But while the panel was correct that a law regulating gender-affirming medical care will necessarily refer to sex, the panel drew the wrong inference. It is precisely *because* such laws necessarily refer to a person’s sex that heightened scrutiny is warranted. The Ban is not a generally applicable law that happens to regulate transgender people. It applies to transgender people only, and hence inherently classifies based on sex each time it is applied. The fact that a law “needs” to refer to sex to regulate transgender health care is not a basis to ratchet the level of scrutiny down—it is the very reason the standard of scrutiny must be ratcheted up. *See Grimm*, 972 F.3d at 608.

The panel’s reliance on *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022), and *Geduldig v. Aiello*, 417 U.S. 484 (1974), was also misplaced.

Those cases involved laws that restricted abortion (*Dobbs*) and barred coverage for certain pregnancy-related disabilities (*Geduldig*). The panel cited those cases for the proposition that “[t]he regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext[t] designed to effect an invidious discrimination against members of one sex or the other.’” (Opinion 45) (first quoting *Dobbs*, 142 S. Ct. at 2245-46, then quoting *Geduldig*, 417 U.S. at 496 n.20). But the statement in *Dobbs* was dictum² and there are strong arguments that *Geduldig*—which predates the Supreme Court’s decision to apply heightened scrutiny to sex-based classifications—is inconsistent with subsequent case law, including *United States v. Virginia*.³

But even if *Dobbs* and *Geduldig* accurately characterize the law, both cases are inapposite here. In *Dobbs* and in *Geduldig*, the Court reasoned (incorrectly) the laws at issue did not facially discriminate. *Geduldig*, 417 U.S. at 489-90; *Dobbs*, 142 S. Ct. at 2246. As noted, however, the Ban facially classifies based on sex.

² There was no equal protection claim active in the case. The plaintiffs amended their complaint years prior to drop their equal protection claim. *See Jackson Women’s Health Org. v. Currier*, 349 F. Supp. 3d 536, 538 (S.D. Miss. 2018).

³ *See* Reva B. Siegel et al., *Equal Protection in Dobbs and Beyond: How States Protect Life Inside and Outside of the Abortion Context*, 43 Colum. J. Gender & L. 67, 68-69 (2022), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3954&context=faculty_scholarship.

Moreover, in *Geduldig* and in *Dobbs*, the policies at issue barred a particular procedure (abortion and pregnancy services) equally for everyone; it did not matter why an individual received the procedure. By contrast, here, “the minor’s sex at birth determines whether or not the minor can receive certain types of medical care under the law.” *Brandt*, 47 F.4th at 669. The more analogous cases are therefore those holding that laws targeting same-sex relationships are sexual-orientation classifications. *See, e.g., Christian Legal Soc’y Chapter of Univ. of Cal. v. Martinez*, 561 U.S. 661, 689 (2010); *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring).

CONCLUSION

The Court should grant rehearing *en banc*.

September 18, 2023

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1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(b)(4) and 11th Circuit Rule 29-3 because it contains 2,594 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and 11th Circuit Rule 29-3.

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September 18, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September 2023, I caused the foregoing document to be electronically filed with the Clerk of the Court for the Eleventh Circuit United States Court of Appeals using CM/ECF, which will send notice to all counsel of record in this matter.

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