No. 22-11707

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PAUL A. EKNES-TUCKER, et al.,

Plaintiffs-Appellees,

&

UNITED STATES OF AMERICA

Intervenor-Plaintiff-Appellee,

vs.

GOVERNOR OF THE STATE OF ALABAMA, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:22-cv-184-LCB

BRIEF FOR *AMICI CURIAE* UNITARIAN UNIVERSALIST ASSOCIATION, UNION FOR REFORM JUDAISM, CENTRAL CONFERENCE OF AMERICAN RABBIS, SOUTHEAST CONFERENCE OF THE UNITED CHURCH OF CHRIST, UNIVERSAL FELLOWSHIP OF METROPOLITAN COMMUNITY CHURCHES, *ET AL.* IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1(a)(1), 26.1-2(b), and 26.1-3, the undersigned counsel certifies that the following listed persons and entities not already included in the CIP contained in the first brief filed and in any other brief filed have an interest in the outcome of this case:

1. Arnold, Rev. Stephanie York – *Amicus Curiae*
2. Barham, Rev. Richard – *Amicus Curiae*
3. Barnhart, Jr., Rev. Dr. David. L. – *Amicus Curiae*
4. Blakemore, Rev. Robin – *Amicus Curiae*
5. Bridges, Rev. Dr. Rebecca L. – *Amicus Curiae*
6. Central Conference of American Rabbis – *Amicus Curiae*
7. Conrady, Rev. Julie – *Amicus Curiae*
8. Cooper, Rev. Erica – *Amicus Curiae*
9. Dingus, Rev. Jaimie – *Amicus Curiae*
10. Finney II, Rev. Johnny R. - *Amicus Curiae*
11. Foster, Rev. Carolyn – *Amicus Curiae*
12. Genau, Rev. Joseph – *Amicus Curiae*
13. Gibson, Rev. Henry N. – *Amicus Curiae*
14. Global Justice Institute, Inc. – *Amicus Curiae*
15. Hamilton-Poore, Rev. Dr. Samuel F.– *Amicus Curiae*

16. Hamilton-Poore, Rev. Terry - *Amicus Curiae*
17. Henkin, Rabbi Steven – *Amicus Curiae*
18. Hopkins, Rev. C. Lynn. – *Amicus Curiae*
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35. Universal Fellowship of Metropolitan Community Churches – *Amicus Curiae*

36. Weaver, Susan Kay – Counsel for *Amici Curiae*

37. Women of Reform Judaism – *Amicus Curiae*

38. Wood, Rev. Kimberly – *Amicus Curiae*

The organizations Unitarian Universalist Association, Southeast Conference of the United Church of Christ, Union for Reform Judaism, Central Conference of American Rabbis, Women of Reform Judaism, Men

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I. ISSUES PRESENTED

1. Did the district court

justice. WRJ works for a more just and compassionate world for people of all backgrounds and identities. *Amicus curiae* Men of Reform

Rev. Stephanie York Arnold (Birmingham First United Methodist Church);

Rev. Richard Barham (Spirit of the Cross Church (United Church of Christ), Huntsville);

Rev. Dr. David L. Barnhart, Jr. (Saint Junia United Methodist Church, Hoover);

Rev. Robin Blakemore (First Christian Church Birmingham (Disciples of Christ);

Rev. Dr. Rebecca L. Bridges (St. Stephen's Episcopal Church, Vestavia Hills);

Rev. Julie Conrady

Rev. C. Lynn Hopkins (Unitarian Universalist Fellowship of Montgomery);

Rev. Laura Hutchinson (First Christian Church (Disciples of Christ), Anniston);

Rev. Shane Isner (First Christian Church (Disciples of Christ), Montgomery);

Rev. Dr. Ellin Jimmerson (Baptist);

Rev. Dr. Helene Loper (God's House, Tuscaloosa);

Rev. Nicole Newton (First Presbyterian Church, Birmingham);

Rev. Steven S. Renner (Messiah Lutheran Church, Montgomery);

Rev. Chris Rothbauer (Auburn Unitarian Universalist Fellowship);

Rev. Jennifer Sanders (Beloved Community Church, United Church of Christ, Birmingham);

Rev. Dr. Kevin L. Thomas (Forest Lake United Methodist, Tuscaloosa);

Rev. Beth Thomason (First Christian Church, Birmingham (Christian Church, (Disciples of Christ));

Rev. Kimberly Wood (Southeast Conference, United Church of Christ).

Amici are united in believing that loving parents must be free to seek medically accepted gender-affirming care for their transgender children.

Glucksberg, 521 U.S. 702, 721 (1997))(cleaned up); *see Glucksberg,* 521 U.S. at 727 n.19.

The Act fails both strict scrutiny under the Due Process Clause, and heightened scrutiny under the Equal Protection Clause. Far from being narrowly tailored or even substantially related to advancing

right to seek gender-affirming care for their children according to modern medically accepted standards.

V. ARGUMENT

A. The Act Interferes with Parents' Fundamental Liberty Right to Seek and Follow Expert Medical Advice for Their Children.

"The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by th[e Supreme]

[O]ur constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925). See also *Wisconsin v. Yoder,* 406 U.S. 205, 213 (1972);

regardless of whether subsequent cases have raised doubts about their continuing vitality.'" *Bosse v. Oklahoma,* 137 S.Ct. 1, 2 (2016)

lead to anxiety, depression, eating disorders, substance abuse, self-harm, and suicide." 13Appx.51(DE112-1:3). The record shows that one of the plaintiff minors in this case "suffered from severe depression and suicidaliisc q 010158.761 326Tm /TT2 1 A24 85Tm /TT2 1 Tf [(d) 2 (f) 2 (r) 1 (o) 1 (

puberty-blocking medications and hormones due to their nonconformity to gender stereotypes. 13Appx.70-71(DE112-1:22-23).

That the statute involves discrimination on the basis of sex is beyond question. The Supreme Court held in *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1741 (2020), a Title VII employment-discrimination case, that "it is impossible to discriminate against a person for being

based classifications,'" *Sessions v. Morales-Santana,* 137 S.Ct. 1678, 1689 (2017)(quoting *J.E.B. v. Alabama*

of protection.[7] Yet the Act is not substantially related to serving Appellants' asserted goal of protecting minors and hurts precisely the children the State of Alabama claims it protects.

Transgender minors suffer when Alabama denies their parents the opportunity to obtain for them evidence-based medical treatment for gender dysphoria, administered in consultation with medical professionals, and according to established medical standards.[8] The evidence demonstrates such treatment's benefits that, for some youth, may be

found there is no evidence to show transitioning medications are "experimental." 13Appx.72(DE112-1:24).

The Act fails to protect transgender youth who currently rely on puberty blockers or hormones to alleviate their gender dysphoria, and for whom loss of treatment can lead to physical and emotional harm.[10] As a result, Alabama families with a transgender child are considering whether they must leave the state.[11] To do so would mean pulling their transgender child (and any siblings) from school and abandoning friends and extended family in Alabama, all to ensure their transgender child receives needed medical care. Clergy, called upon to provide pastoral counseling and support to families with transgender youth, may find the only way to responsibly minister to these families is to

[10] Landinsky Declaration, 1Appx.225(DE8-2:6[ECFp.7]¶15 593T2 1 Tf ( ) Tj ET Q

suggest they seek such care by removing to states where it is legal—an option that uproots the families, cutting them off from the love and support of their Alabama-based faith communities.

C. Theological Arguments Concerning "Natural Law" Cannot Block Parents Seeking to Provide their Children with Medical Treatment.

The Alabama Center for Law and Liberty ("ACLL") amicus brief charts a bizarre course from William Blackstone to Joseph Story and the Fourteenth Amendment, asserting that if Christianity is part of the common law, as they contend Blackstone and Story asserted, the Fourteenth Amendment necessarily incorporates a Christian theology concerning "natural law" that forecloses parents from seeking gender-affirming care for their children. ACLL insists that the Supreme Court's recent overruling of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), in *Kennedy v. Bremerton School District,* 142 S.Ct. 2407 (2022), requires this Court to adjudicate the meaning of the Fourteenth Amendment according to ACLL's notions of sound theological doctrine concerning Christian "natural law." ACLL Brief at 11.

The ACLL's position is contrary to settled law. Nothing in the Constitution authorizes federal courts to adjudicate cases on the basis of theological inquiries. The First Amendment's religion clauses flatly preclude any such approach to constitutional decision-making. "'The law knows no heresy, and is committed to the support of no dogma, the

establishment of no sect.'" *Serbian Eastern Orthodox Diocese for U. S. of Am. & Canada v. Milivojevich*, 426 U.S. 696, 710-11 (1976)(quoting

health services for their transgender children in safe clinical spaces.[14] The letter's signatories include clergy in Baptist, Methodist, Episcopal, Presbyterian Church (U.S.A.), Christian Church (Disciples of Christ), United Church of Christ, Evangelical Lutheran Church and Unitarian Universalist faith communities.[15]

Denominations comprising New England's founding churches, the Unitarian Universalist Association ("UUA") and the United Church of Christ ("UCC"), both oppose the Act's interference with parental support for their transgender children. The President of the UUA, Rev. Susan Frederick-Gray, has criticized Alabama's "cruel and invasive actions will threaten the health and well-being of trans youth."[16] The UUA opposes interference with parents'

their child to a health care provider to offer gender-affirming care is providing love and support."[17]

United Church of C

Reform Judaism's biblical tradition teaches that all human beings are created *b'tzelem Elohim*—in the Divine Image.[21] The Jewish family

transgender youth, particularly when they are not affirmed in their gender identity, combating these laws is a religious obligation as well as a matter of life and death."[25]

The Rabbinical Assembly, the international association of rabbis serving institutions

is not how the Constitution works. The Constitution protects faiths, and precludes any from imposing its will as law.

ACLL relies on yet gravely misapprehends the writings of Justice Joseph Story. Story was a prominent Unitarian who served as a Vice President of the American Unitarian Association for its first decade, [28] and as the denomination's President from 1844-1845,[29] and who was

[28] George Willis Cooke, *Unitarianism in America: A History of Its Origin and Development* 134-35 & 143 (Boston: American Unitarian Association, 1902) (noting that

active in Unitarian congregations in Salem[30] and Cambridge,[31] Massachusetts, and in Washington, D.C.[32]

ACLL's brief quotes Story speaking at his installation in 1829, as Harvard Law School's Dane Professor of Law, for the proposition that "Christianity is a part of the common law." ACLL Brief at 12. Reading to the end of Story's paragraph, however, one finds him elaborating on what he called the great "error of the common law":

> It tolerated nothing but Christianity, as taught by its own established church, either Protestant or Catholic; and with unrelenting severity consigned the conscientious heretic to the stake, regarding his very scruples as proofs of incorrigible wickedness. Thus, justice was debased, and religion itself made the minister of crimes by calling in the aid of the secular power to enforce that conformity of belief, whose rewards and punishments belong exclusively to God.

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[30] Cooke, *supra* note 28, at 381.

[31] 2 William Wetmore Story, ed., *Life and Letters of Joseph Story* 550 (Boston: Charles C. Little and James Brown, 1851)(mentioning "the Unitarian Church at Cambridge, of which my father was a member").

[32] Jennie W. Scudder, *A Century of Unitarianism in the National Capital, 1821-1921,* at pp. 27-28, 82, 113 (Boston: Beacon Press, 1922); *A Washington Church Completed,* in 27:43 *The Universalist Leader* 19, 19 (October 25, 1924)("Joseph Story and Samuel F. Miller, Associate Justices of the Supreme Court, were members of the Unitarian Church in Washington.").

Joseph Story, *A Discourse Pronounced Upon the Inauguration of the Author as Dane Professor of Law in Harvard University* 21 (Boston: Hilliard, Gray, Little and Wilkins, 1829). Story deemed it inappropriate for courts to inquire into matters of theology in order to impose any particular religious doctrines as law. *See id.* That is exactly the opposite of ACLL's position.

ACLL's insistence that the Fourteenth Amendment is imprisoned within a common law arrested in 1868 conflicts, moreover, with Story's understanding that the common law "must for ever be in a state of progress, or change, to adapt itself to the exigencies and changes of society." Story, *Discourse,* at 9. "In truth, the common law, as a science, must be for ever in progress; and no limits can be assigned to its principles or improvements." *Id.* at 33. "In this respect it resembles the natural sciences, where new discoveries continually lead the way to new, and sometimes astonishing results." *Id*. "It is its true glory, that it is flexible, and constantly expanding with the exigencies of society; that it daily presents new motives for new and loftier efforts; that it holds out for ever an unapproached degree of excellence; that it moves onward

in the path towards perfection, but never arrives at the ultimate point." *Id*.

ACLL asserts that "Story agreed with Blackstone that Christianity clarified any doubts as to what natural law is." ACLL Brief at 12. Yet Story held only that Christianity "seems to concentrate all morality in the simple precept of love to God and love to man," while elevating "the advocate of rational liberty." Story, *Discourse,* at 43. That amounts to no endorsement of ACLL's theological assertions. Far from contending that the Constitution embraces any particular version of

Unitarians of his generation, “natural law was a set of possible legal choices that was consistent with their views as to the perfectibility of mankind.”[34] “So defined, Story’s natu1 Tf [08mT1 (s) (d)rys d( )1 (rr) -1 (tr)1 (v) d( )

ablest and the purest men have differed upon the subject." *Id.* at 38 (quoting *Calder v. Bull*, 3 U.S. 386, 399 (1798)(Iredell, J.)).

Neither does the Fourteenth Amendment arrest medical science in the nineteenth century. The Supreme Court has held that the Eighth Amendment's proscription of "cruel and unusual punishment" requires both state and

constitutional right. Still, if ACLL is right, treatments unknown to the Fourteenth Amendment's framers cannot be recognized as within the scope of anyone's constitutional rights—whether parents or prisoners: no antibiotics, no insulin, no dialysis, no modern anesthetics. Courts considering constitutional rights relating to medical care also would have to ignore new diseases or medical conditions that were not recognized in 1791 or in 1868—such as Lyme disease, HIV, or gender dysphoria.

That conclusion is inconsistent with decisions of this Court concerning gender dysphoria. This Court has acknowledged gender dysphoria as a medical condition that the Eighth Amendment may, through the Due Process Clause of the Fourteenth Amendment, require state prisons to treat. *See Keohane v. Florida Dep't of Corr. Sec'y,* 952 F.3d 1257, 1266 (11th Cir.2020).

Gender dysphoria and COVID were unknown to the Fourteenth Amendment's framers. But neither parents nor courts can pretend today that they don't exist. Gender-affirming puberty blockers and hormone therapy were unknown to the Fourteenth Amendment's framers. But so were the antibiotics and insulin that are often essential

to saving children's lives today. Parents are entitled under a century-long string of decisions, beginning with *Meyer,* to seek the medical care they and their physicians believe their children need. The State of Alabama cannot be permitted to block them.

VI. CONCLUSION

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief, which has been prepared in proportionally space Century Schoolbook 14-point font, complies with the type-volume limitation of Fed.R.App.P. 29(a)(5), the typeface requirements of Fed.R.App.P