

Case No. # 24-10139

**IN THE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

BRUCE HENRY,

Plaintiff-Appellant,

v.

RON ABERNATHY, *et al.*,

Defendant-Appellee

**EN BANC BRIEF OF AMICUS CURIAE THE SOUTHERN CENTER FOR
HUMAN RIGHTS IN SUPPORT OF APPELLEE**

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1(a)(3) to 26.1-2(b), the undersigned counsel certifies that the following persons and parties may have an interest in the outcome of this case:

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2. Roberts, Cameron (Attorney for The Southern Center for Human Rights);
3. The Southern Center for Human Rights (Amicus Curiae);
4. Abernathy, Ron (Defendant-Appellant, Sheriff, Tuscaloosa County);
5. Adams, Magistrate Judge Jerusha T. (U. S. District Court, Middle District of Alabama);
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15. Henry, Bruce (Plaintiff-Appellee);

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30. Webb, Hayes (Defendant-Appellant).

Undersigned counsel further certifies that no publicly traded company or corporation has an interest in the outcome of this appeal.

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This 7th day of November, 2025.

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INTERESTS OF AMICUS CURIAE

The Southern Center for Human Rights (“SCHR”) is a nonprofit law firm dedicated to advancing equality, dignity, justice, and fairness within the criminal legal system. Since 1976, SCHR has protected people across the South from state overreach. SCHR challenges confinement conditions, parole and supervision restrictions, and collateral-consequence regimes—contexts where categorical disabilities tied to conviction status erode constitutional rights long after any valid purpose has expired.

As an example, in June 2006, SCHR filed a class-action suit on behalf of 14,500 putative class members on Georgia’s sex-offender registry, seeking injunctive relief from the statute’s residency, employment, and religious restrictions. *Whitaker v. Perdue*, Civ. A. No. 4:06-cv-140-CC (N.D. Ga. Filed June 20, 2006). After years of litigation and a series of court rulings, SCHR advocated for bipartisan legislation to redress constitutional and practical concerns with Georgia’s law relating to people on the sex offender registry.

This case presents an exceptionally important question: whether Alabama may permanently deprive parents of their right to live with and raise their child based solely on a past conviction. The Court’s en banc briefing notice asks a threshold question: must a past conviction be included in a liberty interest’s definition? SCHR submits this brief to help the Court answer that question and

show that while a past conviction may justify restricting a right, it is not part of the right's definition.

INTRODUCTION AND SUMMARY OF ARGUMENT

Unlike every other state, Alabama categorically bars anyone convicted of certain defined sex offenses from living with a child—even their own. The ban applies no matter the offense's severity and timing, or the parent's rehabilitation. By banning these parents from living with their children, Alabama abandons this country's tradition of judging parental fitness individually.

After his sentence, Bruce Henry married and became a father. Under Alabama's Sex Offender Registration and Notification Act ("ASORNA"), however, Henry cannot reside with his son or, by extension, with his wife. A panel of this Court held that, as applied to Henry, ASORNA violates his "fundamental right to live with his child and, as a parent, to the care and custody of his child." *Henry v. Sheriff of Tuscaloosa Cnty., Ala.*, 135 F.4th 1271, 1328 (11th Cir.), *reh'g en banc granted, opinion vacated*, 150 F.4th 1370 (11th Cir. 2025). This Court granted rehearing en banc and invited the parties to address whether "the fact of [Henry's] conviction should be included in the description of his liberty interest." *En Banc Briefing Notice* at 1 (Sept. 8, 2025). SCHR files this brief as *amicus curiae* to address that question.

As the panel correctly recognized, Henry’s prior conviction “bears on the State’s justification for depriving him of his fundamental rights.” *Henry*, 135 F.4th at 1296. But his prior conviction should not be included in the right’s definition. Binding precedent recognizes that Henry’s liberty interest in “establish[ing] a home and bring[ing] up children” is unqualified by conviction status. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

And even outside the parental-rights context, including conviction status in a liberty interest’s definition is improper. When identifying a liberty interest, *Dobbs*’s and *Glucksberg*’s history-and-tradition inquiry concerns the *conduct* implicated by the claimed liberty interest—not the *status* or *class* of the person invoking that interest. The Equal Protection Clause prohibits defining fundamental liberty interests by reference to classes of people who exercised those rights before the Fourteenth Amendment’s adoption. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding that the Equal Protection Clause forbade the sterilization of people convicted of certain statutorily defined felonies). Classifications that burden fundamental rights, as ASORNA does, are instead subject to strict scrutiny. Under that framework, the Court should hold, as the panel did, that ASORNA violates Henry’s “fundamental right to live with his child and, as a parent, to the care and custody of his child.” *Henry*, 135 F.4th at 1328.

ARGUMENT

This argument has three parts. First, as recognized by the Supreme Court, the liberty interest in raising one’s own children is not qualified by the parent’s conviction status. Second, even setting aside binding precedent on parental rights, the Fourteenth Amendment protects “any person[’s]” liberty interest and prohibits defining those liberty interests by reference to class, including classes of past convictions. Instead, past convictions only bear on Alabama’s asserted justifications for restricting a liberty interest. Third, tying liberty interests to conviction status would be unworkable.

I. Binding precedent establishes a liberty interest in raising one’s children.

The Supreme Court long ago recognized that parents’ interest in custody of their children is among “the oldest of the fundamental liberty interests recognized by the Court.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion). And although some decisions have said the Supreme Court has recognized parental rights “at a high level of generality,” *Eknes-Tucker v. Gov. of Ala.* 80 F.4th 1205, 1224 (11th Cir. 2023), Henry seeks only what the Constitution protects at its “core.” *Henry*, 135 F.4th at 1299, 1301. He claims the right to “establish a home and bring up children,” *Meyer*, 262 U.S. at 399—the same *conduct* recognized as fundamental under the Constitution and forbidden by ASORNA. No more “careful

description” of Henry’s liberty interest is possible. *Washington v. Glucksberg*, 521 U.S. 702, 721(1997) (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

Alabama disagrees. It argues that Henry’s liberty interest must include ASORNA’s classification—its ban on people convicted of certain sex offenses living with children. Appellants’ En. Banc Br. at 22.

But the Supreme Court has long recognized that the liberty interest in living with and raising one’s child belongs to *all parents*, without qualification by class, status, or circumstance. Since *Meyer*, 262 U.S. 390, and *Pierce v. Society of the Sisters*, 268 U.S. 510 (1925), the Court has defined the parental right in broad, universal terms—encompassing the liberty “to establish a home and bring up children,” *Meyer*, 262 U.S. at 399, and to “direct the upbringing and education of children under their control.” *Pierce*, 268 U.S. at 534–35. And *Stanley v. Illinois*, 405 U.S. 645 (1972), rejected marital status as a basis for exclusion, extending due-process protection to unwed fathers. *Id.* at 658. *Stanley* observed that “[t]o say that the test of equal protection should be the ‘legal’ rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such ‘legal’ lines as it chooses.” *Id.* at 652 (quoting *Glon v. American Guarantee & Liab. Ins. Co.*, 391 U.S. 73, 75–76 (1968)). These cases reveal a consistent rule: the Fourteenth Amendment secures family-related liberties for “any person” regardless of class or status. U.S. Const. amend. XIV § 1.

Despite these precedents, Alabama argues that *Dobbs* and *Glucksberg* require qualifying Henry’s liberty interest by his class as a convicted sex offender under Alabama law. *E.g.*, Appellants’ En Banc Br. at 1–2, 19. They do not. *Glucksberg* reaffirmed that “the ‘liberty’ specially protected by the Due Process Clause includes the right[] . . . to direct the education and upbringing of one’s children.” 521 U.S. at 720 (citing *Meyer*, 262 U.S. 390; *Pierce*, 268 U.S. 510). *Troxel*, decided just a few years after *Glucksberg*, said that “the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests.” 530 U.S. at 65. And the Court didn’t need to perform a history-and-tradition test because it had already recognized the parental-liberty interests. *See Littlejohn v. Sch. Bd. of Leon Cnty., Fla.*, 132 F.4th 1232, 1238 n.5 (11th Cir. 2025) (noting that the Supreme Court has recognized familial rights); *Eknes-Tucker*, 80 F.4th at 1224 (recognizing the *Troxel* and *Pierce* are binding precedent for the rights recognized in those decisions).

As for *Dobbs*, even while overturning *Roe v. Wade*, the Supreme Court cautioned lower courts that its decision “concern[ed] the constitutional right to abortion and no other right,” and instructed that “[n]othing in [the *Dobbs*] opinion should be understood to cast doubt on precedents that do not concern abortion.” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 290 (2022). *Dobbs* even reaffirmed the Court’s longstanding parental-rights precedents by distinguishing

them from abortion-rights precedents. *See id.* at 256–57, 273 (criticizing *Casey* and *Roe* for relying on non-abortion cases such as *Pierce* and *Meyer*). And the Court rejected the Solicitor General’s argument that overturning *Roe* would “threaten the Court’s precedents holding that the Due Process Clause protects other rights” because abortion was a “unique act” presenting different circumstances. *Id.* at 289–90 (quoting *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 852 (1992) (plurality op.)).

Binding precedent thus confirms that Henry has a fundamental right to “establish a home and raise his children.” *Meyer*, 262 U.S. at 399. The fact of Henry’s conviction has no place in the definition of his liberty interest.

II. The Fourteenth Amendment protects any person’s liberty interest even if they have a prior conviction.

Even setting aside the Supreme Court’s parental-rights precedent, neither *Glucksberg* nor *Dobbs* hold that the method for identifying a liberty interest requires *or even permits* including a person’s conviction status in that interest’s definition. The Fourteenth Amendment guarantees liberty to “any person” and forbids limits based on class or criminal history. U.S. Const. amend. XIV § 1.

Alabama argues otherwise, suggesting that *Glucksberg*’s “careful description” inquiry requires defining liberty by the status of who exercised a right in the past. Appellants’ En Banc Br. at 22. That reading misinterprets *Glucksberg* and finds no support in precedent.

A. The Fourteenth Amendment protects “any person[’s]” exercise of fundamental rights.

Though many dispute how to identify fundamental rights protected by substantive due process,¹ no Supreme Court precedent defines fundamental rights by the classes who once exercised them. Once identified, fundamental rights cannot be denied to any class without a compelling justification. *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *accord Hisp. Int. Coal. of Alabama v. Governor of Alabama*, 691 F.3d 1236, 1244 (11th Cir. 2012) (“Apart from certain [suspect] classifications, the Supreme Court has recognized that where a statute significantly interferes with the exercise of a protected right, it must also be reviewed under a similarly heightened level of scrutiny.”). If instead “rights were defined by who exercised them in the past, then received practices could serve as their own continued justification” for denying those rights. *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015).

Alabama’s contrary approach defies the Fourteenth Amendment’s promise that liberty belongs to “any person,” not just those whom the government deems deserving. *See Plyler v. Doe*, 457 U.S. 202, 210 (1982) (protections extend to

¹ The Briefing Notice invited the parties to address whether “the fact of [Henry’s] conviction [should] be included in the description of his liberty interest.” Briefing Notice at 1. As explained below, defining a fundamental right does not mean qualifying it by class or status. The question the Notice raises is therefore distinct from the separate challenge of identifying which rights are fundamental.

“anyone, citizen or stranger, who is subject to the laws of a State”); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality.”). The Supreme Court has long refused to let states limit constitutional liberty by class or status. *See Skinner*, 316 U.S. at 541 (rejecting “invidious discrimination” in access to “one of the basic civil rights of man”); *Stanley*, 405 U.S. at 658 (holding that “the rights to conceive and to raise one’s children have been deemed essential” and cannot be withheld from unwed fathers as a class). Alabama’s attempt to redefine a fundamental right by carving out a subclass of people contradicts that settled principle.

Alabama’s logic would even limit fundamental rights to those who exercised them before 1868. *See Appellants’ En Banc Br.* at 29 (claiming that “substantive due process is about maintaining old traditions rather [than] crafting new ones”). But the “[t]he Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation.” *Plyler*, 457 U.S. at 213. “That objective is fundamentally at odds with the power [Alabama] asserts here to classify persons subject to its laws as nonetheless excepted from its protection.” *Id.* The Equal Protection Clause forbids Alabama to “turn back the

clock to 1868.” *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 492 (1954).²

B. The liberty protected by the Due Process Clause is not defined by the class of people who historically exercised such freedoms.

To support its contrary position, Alabama argues that “[t]he Court should . . . focus on the statutorily prohibited *conduct* to define the asserted right.”

Appellants’ En Banc Br. at 21 (emphasis added). But Alabama misapplies that principle. It argues that the conduct prohibited by the statute is “a man convicted of

² Chief Judge Pryor’s concurrence in *United States v. Dubois*, 139 F.4th 887 (11th Cir. 2025), articulates a key tension between history-and-tradition methodology and the Equal Protection Clause. *Id.* at 896 (W. Pryor, C.J., concurring). As he noted in that Second Amendment case, colonies and states often disarmed entire classes of people. *Id.* That history leads to a central difficulty: how to define fundamental rights by reference to “history and tradition” when many were barred from exercising them. *See id.* “Fortunately,” he observed, “most of these regulations would be impermissible if enacted today” because “[o]ther constitutional provisions, including the First and Fourteenth Amendments, prohibit categorical disarmaments based on religion or race.” *Id.*

But the Equal Protection Clause prohibits *more* than just religious and racial discrimination. It prohibits all “statutory classification[s] [that] significantly interfere[] with the exercise of a fundamental right” unless “supported by sufficiently important state interests and . . . closely tailored to effectuate only those interests.” *Zablocki*, 434 U.S. at 388. It would be anomalous for this Court to hold that class-based restrictions on liberty that existed in 1868 should now define the scope of constitutional rights. *See* Cary Franklin, *History and Tradition’s Equality Problem*, 133 Yale L.J. Forum 946, 950–51 (2024) (arguing that, even in history-and-tradition cases, “courts are constitutionally obligated not to uniformly adhere to the past” as “[t]he Equal Protection Clause was ratified in 1868 to disrupt history and tradition” and “was designed to be forward-looking, to put an end to the oppressive practices of the past and to effectuate a new promise of equal citizenship”).

a sex offense against a child . . . liv[ing] with his child.” *Id.* at 22. That view conflates the prohibited *conduct* (living with one’s child) with the *class* it targets (those convicted of certain offenses).

In several cases, the Supreme Court has focused on the *conduct* addressed by a statute to narrowly define the asserted liberty interest. In *Glucksberg* itself, the Supreme Court narrowly defined the conduct at issue as the “right to commit suicide with another’s assistance” rather than “a general tradition of ‘self-sovereignty’” or “personal autonomy.” 521 U.S. at 724. In *Reno*, 507 U.S. 292, the Supreme Court rejected a claimed liberty interest in “freedom from physical restraint,” instead describing “the right at issue [as] the alleged right of a child . . . for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government-selected child care institution.” *Id.* at 302. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the Supreme Court rejected the notion that the Due Process Clause required California to recognize a father’s claimed parental rights to a child “adulterously begotten” or “adulterously conceived.” *Id.* at 127 n.6, 130 (plurality op.). And in *Dobbs*, the Supreme Court rejected liberty interests in “privacy” and “autonomy,” instead asking whether there is “a right to obtain an abortion.” 597 U.S. at 234, 257.

But Alabama cites no Supreme Court precedent to support its notion that *Glucksberg*'s careful-description prong requires defining a liberty interest to exclude a *class* of people from a right's definition. When the Court identifies a fundamental right, it asks what the right is—not who may claim it or which classes may exercise it. *Obergefell*, 576 U.S. at 671 (“inquir[ing] about the right in its comprehensive sense” and then asking “if there was a sufficient justification for excluding the relevant class from the right”). Consider two examples of this practice:

In *Skinner*, the Court addressed a statute mandating sterilization for certain categories of people treated as habitual offenders—those convicted of “felonies involving moral turpitude,” such as theft, but not others, like embezzlement. 316 U.S. at 536–37. The Court did not define the liberty interest by reference to the historical permissibility of sterilizing certain classes of criminals. Instead, it began by recognizing that the statute implicated “one of the basic civil rights of man,” since “[m]arriage and procreation are fundamental to the very existence and survival of the race.” *Id.* at 541. Only after identifying the right to procreate as fundamental did the Court examine the classification itself, concluding that strict scrutiny was required “lest unwittingly or otherwise invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.” *Id.* *Skinner* exemplifies the Court's consistent

practice: it identifies the fundamental right in comprehensive terms and only then asks whether excluding a particular group from exercising that right can be justified. *Obergefell*, 576 U.S. at 671.

Similarly, in *Loving v. Virginia*, 388 U.S. 1 (1967), the Supreme Court, in its due process analysis, did not define the right at issue as the right of persons of the same race to marry or the right of persons of different races to marry, much less as the right of white persons to marry nonwhite persons. *Id.* at 12. It recognized that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men” and that “[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” *Id.* (quoting *Skinner*, 316 U.S. at 541). Only after defining the right in universal terms did the Court state that “[t]o deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.” *Id.*

Cases like *Skinner* and *Loving* confirm that courts define the conduct protected by a right, not the class of people entitled to exercise it. Alabama’s argument elides that distinction: it does not contest that people have a fundamental right to “establish a home and bring up children,” *Meyer*, 262 U.S. at 399, but

insists that one class of people—those convicted of certain offenses—falls outside that protection. Such an approach collapses substantive due process into a regime of selective personhood, where the Fourteenth Amendment’s guarantee of liberty for “any person” would apply only until they were convicted of a crime deemed out-of-bounds by the state. That is an “unusual way of thinking about rights.”

Kanter v. Barr, 919 F.3d 437, 452 (7th Cir. 2019) (Barrett, J., dissenting).

Thankfully, the Fourteenth Amendment does not tolerate a system that acknowledges “one of the basic civil rights of man” while reserving its enjoyment to a “selective group.” *Skinner*, 316 U.S. at 541. As the Supreme Court reaffirmed in *Obergefell*, the Constitution “grants . . . protection to certain personal choices central to individual dignity and autonomy” and requires that those liberties “be made available on the same terms to all.” 576 U.S. at 672–73. Alabama’s class-based narrowing of Henry’s liberty interest is incompatible with both *Glucksberg*’s careful-description principle and the Fourteenth Amendment’s core promise of equal liberty.

Once that distinction between conduct and class is clear, many of Alabama’s arguments collapse. Alabama warns that the panel’s reasoning could open the door to polygamy, dueling, prostitution, or drug use. *Compassion in Dying v. Washington*, 85 F.3d 1440, 1444 (9th Cir. 1996) (O’Scannlain, J., dissenting from denial of rehearing). Alabama argues that the only way to avoid such results “is to

require plaintiffs to define and prove them at a more granular level.” Appellants’ En Banc Br. at 25. But those examples concern conduct, not class-based exclusions. *Glucksberg*’s history-and-tradition test already addresses such conduct-based claims without importing status and class into the definition of liberty.

Alabama next invokes three groups—people with felony convictions, noncitizens, and children—to suggest that fundamental rights can depend on status. But none of these examples supports its argument.

Alabama argues that people with felony convictions “may forfeit their right to vote,” implying that people with felony convictions lack fundamental rights. Appellants’ En Banc Br. at 27 (quoting *Wesley v. Collins*, 791 F.2d 1255, 1261 (6th Cir. 1986)). But it ignores *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974), which upheld disenfranchisement only because Section 2 of the Fourteenth Amendment expressly contemplates it. *Id.* at 54–56; accord *Jones v. Governor of Fla.*, 975 F.3d 1016, 1029 (11th Cir. 2020) (en banc) (“Based on the express provision for felon disenfranchisement in section 2 of the Fourteenth Amendment, the Supreme Court held in *Richardson v. Ramirez* that the Equal Protection Clause in section 1 of the same amendment does not forbid the practice.”). That explicit textual carveout makes voting unique; it does not imply that states may withhold other rights by class. Apart from voting, courts subject restrictions on the fundamental rights of people with felony convictions to strict scrutiny. *See Skinner*,

316 U.S. at 541 (applying strict scrutiny to a statute that sterilized certain classes of felony convictions); *cf. Dubois*, 139 F.4th at 894 (W. Pryor, C.J., assuming under *Bruen* and *Rahimi* that the Second Amendment “presumptively protects” the firearm rights of people convicted of felonies).

Alabama also observes that “[n]oncitizens lack the privileges or immunities of citizens” and “can be excluded or removed from the country.” Appellants’ En Banc Br. at 29. But that observation offers no guidance on the Due Process and Equal Protection Clauses because other constitutional provisions address those topics. *See* U.S. Const. amend. XIV § 1 (privileges-and-immunities clause); *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) (“the power to exclude aliens is inherent in sovereignty” (citation modified)).³ In any case, noncitizens are protected by the Due Process and Equal Protection Clauses, *Yick Wo*, 118 U.S. at 369, and “classifications based on alienage” face “close judicial scrutiny,” *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (citation modified).⁴

³ Similarly, the relevance of Alabama’s observation that “[c]itizens can relinquish their citizenship and the rights that come with it,” Appellants’ En Banc Br. at 29, is unclear.

⁴ There are certain exceptions where strict scrutiny does not apply to noncitizens. *See Ambach v. Norwick*, 441 U.S. 68, 74 (1979) (government function exception); *Plyler*, 457 U.S. at 223–26 (“undocumented status” exception). But such groups still have rights under the Fourteenth Amendment, *Yick Wo*, 118 U.S. at 369, and those limited exceptions to strict scrutiny cannot justify class-based restrictions on who has fundamental rights in the first place.

Finally, Alabama argues that children are another example of restrictions of “rights tied to one’s status.” Appellants’ En Banc Br. at 28. But “[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority.” *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976) (collecting cases). “Minors, as well as adults, are protected by the Constitution and possess constitutional rights,” though states have greater leeway to regulate their exercise. *Id.*

The Fourteenth Amendment’s guarantee of liberty cannot be parsed by class. Once a court recognizes a right as fundamental to ordered liberty, the State may regulate its exercise only as needed to serve a compelling interest; it may not redefine the right itself to exclude disfavored groups. Limiting rights by class would invert the Fourteenth Amendment’s purpose. The Amendment bars the government from fencing citizens out of rights the Constitution secures to all. Liberty, once identified, belongs to “any person.” U.S. Const. amend. XIV § 1.

C. This Court’s precedent does not require including a person’s conviction status in the definition of their liberty interest.

The undersigned’s review of this Court’s precedent identified two cases—*Doe v. Moore*, 410 F.3d 1337, 1344 (11th Cir. 2005), and *Lofton v. Sec’y of Dep’t of Child. & Fam. Servs.*, 358 F.3d 804, 817 (11th Cir. 2004)—that did state class-based definitions of liberty interests.

Doe upheld Florida’s sex offender registration and notification system from a constitutional challenge. *Doe*, 410 F.3d at 1346. In doing so, *Doe* described the plaintiff’s claimed liberty interest as the right of a person “convicted of ‘sexual offenses,’ to refuse subsequent registration of his or her personal information with Florida law enforcement and prevent publication of this information to Florida’s Sexual Offender/Predator website.” *Id.* at 1344. Yet, as the panel noted, that description did not affect the outcome “nor did it lead [the Court] to discount the importance of the sex offender’s familial rights.” *Henry*, 135 F.4th at 1300 n.8. *Doe* turned instead on the Court’s conclusion that publication of a conviction had only an incidental effect on family relationships. 410 F.3d at 1345–46. The reference to conviction status was thus *dicta*. See *Henry*, 135 F.4th at 1300 n.8; *United States v. Files*, 63 F.4th 920, 929 (11th Cir. 2023) (*dicta* includes “aside-like statements about irrelevant legal matters”); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 764 (11th Cir. 2010) (*dicta* includes “broad statement[s]” of law “unnecessary to the decision in that case”).

Doe is also unpersuasive. It reasoned that the statute’s classification could define “the scope of the claimed fundamental right.” 410 F.3d at 1344. But its only support—*Williams v. Attorney General of Alabama*, 378 F.3d 1232 (11th Cir. 2004)—involved a statute banning the sale of sexual devices, not a class-based distinction among people. *Williams* defined the right narrowly as “the right to use

[sexual] devices,” *id.* at 1241, illustrating a conduct-based, not status-based, definition. *Williams* thus does not justify importing statutory classifications into a right’s definition.⁵

Alabama’s attempt to rehabilitate *Doe* is also unpersuasive. It claims that “*Doe v. Moore* is an exemplar of a disciplined and objective approach to the careful-description requirement, seeking to ‘hew[] as closely as possible to the statute or the complaint.’” Appellants’ En Banc Br. at 20 (quoting *K.C. v. Indiv. Mem. of Med. Licensing Bd. of Ind.*, 121 F.4th 604, 623–25 (7th Cir. 2024)). But besides *Doe*, nearly all the cases Alabama cites define rights by the conduct prohibited, not by the status of the claimant. *See id.* at 20–21 (collecting cases).

One exception is *Lofton*, which addressed the “right to adopt for homosexual persons.” 358 F.3d at 817. But that description contradicts *Obergefell*’s holding that courts must “inquire[] about the right . . . in its comprehensive sense.” *Obergefell*, 576 U.S. at 671. Had the plaintiffs asserted a right to adopt,⁶ *Lofton*

⁵ This Court once “granted rehearing en banc to review the constitutionality of a municipal ordinance prohibiting the sale of sexual devices in light of several recent Supreme Court decisions which, it was argued, call [*Williams*] into question.” *Flanigan’s Enters., Inc. of Ga. v. City of Sandy Springs, Ga.*, 868 F.3d 1248, 1252 (11th Cir. 2017). After rehearing was granted, the defendant “repealed the challenged portion of its municipal code,” and the Court held that the appeal was moot. *Id.* at 1253.

⁶ In *Lofton*, the plaintiffs were gay foster parents and legal guardians, as well as their children. 358 F.3d at 807–08. One plaintiff had raised his child since birth. *Id.* The parents sought to adopt their children but were barred by a Florida statute

should have asked whether there was a fundamental right to adopt “in its comprehensive sense,” and, if so, “ask[] if there was a sufficient justification for excluding the relevant class from the right.” *Obergefell*, 576 U.S. at 671. *Lofton*’s substantive due process methodology is suspect for the same reason as *Doe*, although, since the classification at issue did not involve the fact of conviction, the Court need not reconsider it here.

In short, precedent does not support defining liberty by class. For decades, the Supreme Court has held that classifications burdening the exercise of fundamental rights are subject to strict scrutiny, not used to redefine the right itself. *See Zablocki*, 434 U.S. at 388; *Stanley*, 405 U.S. at 658; *Skinner*, 316 U.S. at 541.

III. Defining rights by conviction status would be unworkable.

Linking rights to conviction status would also be unworkable. Courts would have to decide whether people with certain convictions historically possessed the liberty to engage in the conduct at issue. As Judge Newsom and others have observed, historical inquiries of this kind are notoriously indeterminate. Hon.

Kevin C. Newsom, *The Road to Tradition or Perdition? An Originalist Critique of*

prohibiting adoption “[b]y any homosexual person.” *Id.* at 807. They *agreed* there was “no fundamental right to adopt, nor any fundamental right to be adopted.” *Id.* at 811. They argued instead that “that parental and familial rights should be extended to individuals such as foster parents and legal guardians and that the touchstone of this liberty interest is not biological ties or official legal recognition, but the emotional bond that develops between and among individuals as a result of shared daily life.” *Id.* at 813.

Traditionalism in Constitutional Interpretation, 47 Harv. J.L. & Pub. Pol’y 745, 753–54 (2024) (citing Justice Barrett’s “reservations” toward “traditionalist reasoning”). That challenge would intensify if courts had to ask what “felons” before 1868 could do, given that both the definition of “felony” and its consequences varied widely across jurisdictions. *See United States v. Campbell*, 743 F.3d 802, 811 (11th Cir. 2014) (“At the time of the Founding, there was ambiguity in the meaning of a felony.” (citation modified)); *Kanter*, 919 F.3d at 459 (Barrett, J., dissenting) (“Because it was no longer defined with reference to a list of specific crimes or even a specific punishment, the definition of ‘felony’ was difficult to pin down at the time of the founding.”). Such approaches becomes still more speculative when courts apply inquire about modern crimes unknown to the common law. *See Smith v. Doe*, 538 U.S. 84, 86 (2003) (noting that “sex offender registration and notification statutes are of fairly recent origin”).

Even with a historical record, courts would then have to decide whether a particular plaintiff’s conviction matches those early offenses. As this Court’s experience with the Armed Career Criminal Act and the Career Offender Guideline shows, determining whether a modern offense is like another modern offense is difficult enough. *See, e.g., Taylor v. United States*, 495 U.S. 575, 589–95 (1990) (acknowledging the varied definitions of burglary in modern statutes and under the common law). That problem would be worse when comparing modern offenses to

19th-century ones. *See id.* at 593 (explaining how burglary’s modern “statutory development” “has resulted in a modern crime which has little in common with its common-law ancestor except for the title of burglary” (citation modified)). As Judge Newsom has observed, drawing historical analogues is fraught with indeterminacy. *Newsom*, 47 Harv. J.L. & Pub. Pol’y at 753.

These practical problems show why strict scrutiny makes sense. That approach—individualized, justification-focused, and administrable—asks whether the State’s restriction is justified as to this person now. It aligns with precedent and to the Fourteenth Amendment’s guarantee of liberty to “any person.” U.S. Const. amend. XIV § 1.

CONCLUSION

The Court should reaffirm that the Fourteenth Amendment protects every parent’s liberty to live with and raise a child, regardless of past conviction.

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Respectfully submitted this 7th day of November 2025.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 29(a)(5), 32(a)(7). This brief contains 5,293 words.

I further certify that this brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type-style requirement of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

This 7th day of November, 2025.

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CERTIFICATE OF SERVICE

I certify that, on October 8, 2025, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

This 7th day of November, 2025.

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