No. 24-10139

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRUCE HENRY,
Plaintiff-Appellee,
v.
RON ABERNATHY, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Alabama
Case No. 2:21-cv-00797-RAH-JTA

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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 that the following listed persons and parties may have an interest in the outcome of this case:

1. Abernathy, Ron (Defendant-Appellant, Sheriff, Tuscaloosa County);
2. Adams, Magistrate Judge Jerusha T. (U. S. District Court, Middle District of Alabama);
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9. Dubbeling, Paul M. (Attorney for Henry);
10. Harris, Andrew Reid (Terminated in lower court 7/27/2023);
11. Henry, Bruce (Plaintiff-Appellee);
12. Huffaker, Jr., Hon. Judge R. Austin (U. S. District Court, Middle District of Alabama);
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23. 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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INTRODUCTION AND SUMMARY OF ARGUMENT

There is no dispute that people who have committed cruel crimes against children can be prevented from sharing a home with children. For centuries, such conduct has justified States stepping in, even to completely sever the parent-child relationship. Likewise, there is no dispute that some of the sex crimes that trigger Alabama's ban on residing with children are sufficient grounds to justify that protection. The dispute here is whether a man's conviction beyond a reasonable doubt for a sex crime against a child is reason enough to limit his future access to children. Both the historical and contemporary examples of States relying on such convictions as evidence of a parent's unfitness confirm that the State can limit the parental rights of someone who commits the sort of heinous crimes that trigger Alabama's law. And the fit here between sex crimes against children and limiting overnight access to children is sufficiently tailored to survive any level of scrutiny.

Henry's response is sweeping: "No single fact about a parent"—including conviction for child rape or sex trafficking—"is sufficient" to limit a man's access to children without "an individualized hearing." Henry.Br.4. Clinging to *Stanley v. Illinois*, 405 U.S. 645 (1972), he argues that "the Court rejected the idea that the State can categorically deny parental rights based on membership in a class." Henry.Br.19. But the "class" at issue here isn't just couples who decided not to have their marriage blessed by church or State. It is people who have been convicted

beyond a reasonable doubt of sex crimes against children. While "the law" has "recognize[d] those family relationships unlegitimized by a marriage ceremony," *Stanley*, 405 U.S. at 651, the law has also recognized the State's right to protect children from parents based on the very relevant data point of a criminal conviction. Just as the right to bear arms can be forfeited by the "single fact" of conviction for a violent felony, the right to reside with a child can be lost by a conviction for crimes that signal an offender's unique danger to children.

This case is a good reminder why this Court requires a careful description of a fundamental right before expanding its substantive due process jurisprudence. Henry claims "[t]he right at issue … is the rights of parents to the 'care, custody, and control' of their children." Henry.Br.16. But the issue here is whether that right extends to parents with convictions for sex crimes against children, and history confirms no absolute right along those lines. Thus, Henry's claim is that he has a substantive due process right to "an individualized hearing in which the totality of the circumstances is considered." Henry.Br.4. But even if that claim sounds in substantive, as opposed to procedural, due process, Henry has not shown that any abrogation of parental rights must be preceded by an individualized hearing, no matter what "single fact" may be true about the parent.

Much less has Henry shown that *non-parents* who have victimized children have a right to live with children. Whatever the Court thinks of Henry's parental

rights argument, States can bar a stepbrother who previously raped a child from sleeping down the hall from his stepsister. Yet even this application of the law has been enjoined by the district court's universal injunction. The judgment should be reversed.

ARGUMENT

Before the district court, Henry bore the burden of establishing that parents convicted of criminal offenses targeting children have a right to reside and visit overnight with their children, or at a minimum, some sort of individualized hearing before losing that right. Defendants used the historical record to foreclose any assertion that sex offenders in Henry's circumstances possess a fundamental right to reside with a child, including their own, because they pose a danger to children. Contra Henry's assertion here (at 1), Defendants never conceded that "there is no historical precedent" for Alabama Code §15-20A-11(d)(4). And Henry has not cited history showing that an individualized hearing beyond a criminal trial for child rape must occur before the State has the power to keep a convicted child rapist away from other children.

Henry's conviction was for possessing child pornography, which he argued below put him alongside the safest sex offenders. Now, he emphasizes that half of such offenders have not committed contact offenses against children. Henry.Br.30. But that means half of them have, which is striking evidence that a conviction for

child pornography is a great way to predict who might sexually abuse children in person. And Henry's case shows how well-tailored the State's policy is. Henry was denied a preliminary injunction because the district court feared that he remained a risk to victimize his child, and even after Henry prevailed on the merits, the district court quickly stayed its order. All this underscores that the State is not indiscriminately removing parents from homes. It is placing a tailored restriction on people whose criminal convictions for specific sexual crimes involving children make it unacceptably likely that they will harm children again if given the ready opportunity. The Constitution does not deprive the State of the power to do so.

I. No One Convicted Of Sex Offenses Involving Children Has A Substantive Due Process Right To Reside With Or Have Overnight Access To Children.

A. No Binding Precedent Recognizes the Right of Child Sex Offenders to Reside With or Have Overnight Access to Their Children.

Henry admits there is no established history recognizing the right of convicted sex offenders to continue residing with their children. "This is perhaps technically correct." Henry.Br.18 n.11 ("This is perhaps technically correct."). Thus, Henry's claim would require this Court to "break new ground in this field," which necessitates "first crafting a careful description of the asserted right." *Doe v. Moore*, 410 F.3d 1337, 1343 (11th Cir. 2005). Yet, that careful description is not forthcoming: he asserts "the right of *parents* to the 'care, custody, and control' of their children." Henry.Br.16. But a careful description of a parental right includes a

parent's circumstances as well as the claimed parental prerogative at issue. *See e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (plurality op.) (certain adulterous natural father); *Eknes-Tucker v. Governor of Alabama*, 80 F.4th 1205 (11th Cir. 2023) ("obtain[ing] a particular medical treatment for one's children as long as a critical mass of medical professionals approve"). "When analyzing a request for . . . an extension of an existing [fundamental right]," courts "must begin with a careful description of the asserted right," *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1242 (11th Cir. 2004), including in the parental-rights context, where the Supreme Court has not "set out exact metes and bounds to the protected interest of a parent in the relationship with his child," *Troxel v. Granville*, 530 U.S. 57, 78 (2000) (Souter, J., concurring in judgment).

Henry assumes that every fundamental right of presumptively fit parents is retained by persons adjudged beyond a reasonable doubt to have sexually exploited children, at least until some additional hearing is held. Henry describes the qualifying circumstance as "convict[ion] of criminal offenses that fall under 11(d)(4)" and the right he asserts as "parental rights"—asking whether 11(d)(4) is an "abrogation of those rights." Henry.Br.17. This framing fails to acknowledge that the criminal offenses are sex offenses against children, and 11(d)(4) does *not* abrogate all "parental rights." It restricts primary residential custody and all physical custody at night, leaving other important parental prerogatives intact. Aplt.Br.25-26.

While there is a "constitutional presumption that 'fit parents act in the best interests of their children,'" that presumption can be overcome by "evidence calling into question the fitness of a parent." *Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003) (quoting *Troxel*, 530 U.S. at 68).[1] Misconduct of a certain sort—established by clear and convincing evidence—will erase that presumption. *See Santsoky v. Kramer*, 455 U.S. 745 (1982). Henry asserts that the facts inherent in the criminal sexual exploitation of children are constitutionally insufficient to establish unfitness to exercise child custody because there may be reformed child rapists or other criminals with comparatively less egregious facts underlying their convictions. *See* Henry.Br.34 (noting that a 16-year-old who has sex with an 11-year-old could be guilty of first-degree rape). This is akin to a convicted murderer asserting that the single fact of his murder conviction is insufficient to determine whether he is a "law-abiding, responsible citizen[]" fit to own a gun. *District of Columbia v. Heller*, 554

[1] To support his assertion that "[c]ourts that have considered the question have universally found that persons convicted of sex offenses have parental rights[,] Henry cites *Doe v. Harris*, 772 F.3d 563, 572 (9th Cir. 2014), which does mention parental rights. He also cites federal sentencing cases. Henry.Br.17. Federal "[s]pecial conditions of supervised release must 'involve[ ] no greater deprivation of liberty than is reasonably necessary" to achieve the purpose of deterring criminal activity, protecting the public, and promoting the defendant's rehabilitation." *United States v. Bear*, 769 F.3d 1221, 1229 (10th Cir. 2014) (quoting § 18 U.S.C. § 3583(d)(2)). Since a statutory means-end test resembling strict scrutiny is supplied by statute, the cases largely go to tailoring. Moreover, *United States v. Widmer* upheld a no-contact provision between a child pornography offender and his child, without explicitly applying strict scrutiny. 785 F.3d 200, 209 (6th Cir. 2015).

U.S. 570, 635 (2008). In this view, no legislature could determine that one murder is enough; rather, states and the federal government must give the murderer one more chance to explain his "circumstances," that he lacked a full "sense of responsibility," or that he had been "rehabilitat[ed]." Henry.Br.1,34. But, of course, the "single fact" (*id.* at 4) of a murder conviction tells society a lot about whether someone should be included among the "law-abiding" and "responsible" who retain the right to bear arms. Likewise, a State can constitutionally conclude that the "single fact" of a conviction for sexually exploiting children is enough evidence to conclude that the convicted should have limited access to children going forward.

Henry's no-single-fact approach to substantive due process has no apparent limit. Many States conclusively consider a parent unfit based on a past termination of parental rights for a different child.[2] And §11(d)'s scheme prevents convicted offenders from living with any children if their sex crime was against a family member or a child who lived with them, or involved the element of "forcible compulsion."[3] ALA. CODE §15-20A-11(d)(2), (3), (5). By restricting parental custody based on a past adjudication of a particular kind of crime, the provisions

[2] Vivek S. Sankaran, *Child Welfare's Scarlet Letter: How a Prior Termination of Parental Rights can Permanently Brand a Parent as Unfit*, 41 N.Y.U. REV. L. & SOC. CHANGE 685, 695 (2017) ("[T]he prior TPR—regardless of how long ago it occurred—relieves the State from proving that a parent is currently unfit.").

[3] 11(d)(4) independently covers child rapists who are charged with first degree rape that does not include "forcible compulsion" as an element. *See* Aplt.Br.49 n.10.

"not at issue in this case" are nonetheless infirm under Henry's arguments. Henry.Br.9. No conviction for any crime could ever be enough with more context.

Dicta in *Stanley v. Illinois* indicates classifications for terminating parental rights should not "explicitly disdain[] present realities in deference to past formalities" and "needlessly risk[] running roughshod over the important interests of both parent and child." 405 U.S. 645, 657 (1972). The present reality is that private access to children directly facilitates child sexual abuse. Doc.86-11 at 15.[4] The targeted victimization of children is a relevant course of conduct—arguably *the most* relevant course of conduct. The State's decision to deny persons who have sexually victimized children residential or overnight access to children without terminating their parental rights reflects the important interests at stake. *Id*. While "the incremental cost of offering unwed fathers an opportunity for individualized hearings on fitness" may have been "minimal," *id*. at 657 n.9, the cost is exponentially higher to offer a person *known* to have victimized children an opportunity to gain physical custody over a child.

[4] In his statement of facts, Henry asserts that Defendants "hired a second expert, Dr. Scurich, to contradict Dr. DeLisi's testimony." Henry.Br.14. But in reality, Defendants retained a psychologist versed in actuarial risk assessment tools, Dr. Nicholas Scurich, only because of the court's reservations about Dr. DeLisi discussing "research from psychologists when he is not a psychologist." Doc. 57 at 218:24–25.

B. There Is an Enduring Historical Tradition of Denying Child Custody to Cruel Parents Who Feloniously Abuse Children.

The criminal sexual exploitation of children is "gross misconduct" providing ample "reason to apprehend" that children residing with the perpetrator "will be in danger of being personally abused." *Striplin v. Ware*, 36 Ala. 87, 90 (1860). Thus, "[i]t would violate Alabama's stated public policy to award custody of a minor to a parent who resides with or shares a living accommodation with a registered criminal sex offender convicted of crimes against children." *K.E.W. v. T WE.*, 990 So.2d 375, 381 (Ala. Civ. App. 2007). Henry and the district court's judgment depend on the faulty premise that a father's conviction for a sex crime against children cannot—without more—constitute "clear and convincing evidence that the father is unsuited or unfit to assume the place of a father in providing a safe and comfortable home[.]" *Ex parte Sullivan*, 407 So. 2d 559, 563 (Ala. 1981). But history and tradition, evidenced by treatises, cases, and relevant statutes, tell a different story. The right to custody of one's child enjoyed by presumptively fit parents can be forfeited when there is a judicial finding of serious criminal abuse of children. Aplt.Br.28-35. Thus, history confirms there is no fundamental right for a person to be convicted of a sex offense involving a child and thereafter reside and conduct overnight visits with their own child.

"[E]ven if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough" to dictate that a law does not run afoul

of the Constitution. *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, 597 U.S. 1, 30 (2022). Defendants never conceded below that "there is no historical precedent for" §15-20A-11(d). *Contra* Henry.Br.12. Defendants' response to the Court's highly specific briefing order focused on statutory limitations on certain offenders and identified felony conviction as having always affected parental rights to some extent. Doc. 131 at 2-6.[5]

Henry is correct that the treatises reveal a "special solicitude" for the father as the presumed protector of his children, Aplt.Br.30-31, but does not explain whether Blackstone, Story, or anyone alive at this Nation's founding would have considered a felony conviction for criminally abusing a child to be consistent with that presumption. Henry.Br.20-21. Henry characterizes the treatises as showing that the State could interfere with a father's physical custody "only in cases of extreme unfitness" where there was an additional showing that "such interference is in the best interests of the child." Henry.Br.21. But the historical sources consider "gross misconduct" as in and of itself sufficient so long as it is "regarded with reference rather to the interests of the child than" to the parent's immorality. JAMES SCHOULER, THE LAW OF THE DOMESTIC RELATIONS § 246 (1905). In other words, the *elements*

[5] Henry asserts in a footnote (at 20 n.13) that Defendants waived their opportunity to expound on their argument that this Nation's traditions and history foreclose the right asserted by Henry. He is mistaken. Defendants argued in their motion for summary judgment that a more careful description of the right asserted would reveal that it is not deeply rooted in the Nation's tradition and history. Doc. 94 at 20-28.

of the misconduct relevant to the father's dangerousness or willingness to harm children would be relevant to determining whether the State could deny child custody to the father. Along these lines, the treatises recognize an "apprehension of cruelty," as well as documented abuse of one's own child, as sufficient to deny custody to a father. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 228 (10th ed. Boston, Little, Brown & Co. 1860); *Cocke v. Hannum*, 10 George 423, 441 (Miss. 1860).

Henry ignores or misunderstands the many state statutes that "protect[] children from parents who pose[] a threat to their own children." Aplt.Br.34-37. An 1866 Massachusetts statute authorized cities and towns to make "arrangements concerning children" who were "growing up without salutary parental control" because of the "crime … or other vices of parents." *Id.* at 34. Enacted contemporaneously with the 14th Amendment, this statute empowered local governments to intervene when a parent's criminal behavior rendered them unfit.

Contemporary statutes bolster that conclusion, even if they result in a judge determining that a conviction is dispositive rather than a Legislature making that judgment ahead of time. Henry.Br.24. Henry emphasizes hearings are held in the various states to terminate the parental rights of certain offenders, but the conviction may still be deemed conclusive evidence of unfitness. *See In re Welfare of Child of M.Z.*, No. 274V-17-5407, 2019 WL 2167826 *4 (Minn. Ct. App. 2019) ("Appellant

was convicted of ... possession of child pornography … requiring that appellant register as a predatory offender—that satisfies a statutory basis for termination ....”); *see also In re S.B.G.*, 981 N.W.2d 224, 226 (Minn. Ct. App. 2022) (“S.B.G.’s parental rights to a child were terminated because he is required to register as a predatory offender.”). In Minnesota, status as a registered predatory offender has weighed heavily in resolving both parental fitness and the best-interests analysis. *See In re S.B.G.*, 981 N.W.2d at 226 (“Any relationship that could potentially exist in the future would have to be limited due to the risk level that Father poses to the child based on his prior conduct and convictions. Additionally, the social stigma of having a father who is a registered predatory offender does not benefit the child.”).

As in Minnesota, Wisconsin law makes proof of valid conviction for certain sex offenses against children to be grounds for a finding of unfitness. WIS. STAT. 48.415(9m)(a)-(am). There, district attorneys likewise have an affirmative *obligation* to file a parental rights termination petition against convicted child traffickers and shall determine that “efforts to make it possible for the child to return safely to his or her home are not required.” WIS. STAT. § 48.417. “If grounds for the termination of parental rights are found by the court or jury, the court shall find the parent unfit.” WIS. STAT. 48.424(4) (fact-finding hearing).

True, state statutory schemes maintain the “best interests of the child” prong for terminating *all* parental rights “on the basis of crimes in which a child was the

victim." But the salient point is that past criminal conduct, if sufficiently serious and related to children, can establish *unfitness*. Aplt.Br.35. A legislature may properly determine that the elements inherent in egregious criminal conduct directed against children—especially when proved beyond a reasonable doubt—warrant a finding that a parent is unfit. *Trawick v. Trawick*, 173 So. 2d 341, 343 (La. Ct. App. 1965); *Matter of Pima Cnty., Juvenile Action Nos. S-826 and J-59015*, 643 P.2d 736, 738 (Ariz. Ct. App. 1982); *see also Jensen v. Jensen*, 170 N.W. 735, 736 (Wis. 1919) ("class" of misconduct may "stamp" a parent "as unfit to bring up her child"); *Dumain v. Gwynne*, 10 Allen 270, 272-73 (Mass. 1865). Once a sufficient finding of unfitness is established (which may be by the "mere fact" of conviction), the fundamental constitutional right to physical custody of one's child falls away.

C. Section 11(d)(4) Satisfies Any Level of Scrutiny Because Sex Offenders Who Target Children Present a Risk to Children.

"Substantive due process claims not involving a fundamental right are reviewed under the rational basis test." *TRM, Inc. v. United States*, 52 F.3d 941, 945 (11th Cir. 1995). It is easy to conceive of a rational basis for preventing persons convicted of sexually abusing children from living with child relatives: protecting children from those who have previously targeted children for abuse. *See* ALA. CODE §15-20A-2(1)-(5).

Even if the universe of information on sex offenders were restricted to the data presented or corroborated by *Henry's* proffered experts, §11(d)(4) would easily clear

rational basis review. Henry's own witnesses establish that 93% of all officially recorded sexual abuse is committed by someone known to the victim before the crime, and 60% occur "in the victim's home or the home of someone they know." Aplt.Br.8-9. Dr. Helmus concurs with Dr. DeLisi that one in five convicted sex offenders abuse both biologically related and non-related victims. *Compare* Doc.86-11 at 24, *with* Doc.86-8 at 23 ("I concur."). According to Dr. Helmus, child pornography offenders are a subgroup with "substantially lower risk" than other sex offenders "to commit a contact offense." Doc.86-8 at 7. Yet, under her reading of the available data, it is safe to assume that *half* of child pornography offenders have already committed a physical sexual crime against a child. Aplt.Br.10. If we credit Burkhart's older research, possibly, up to 85% of child pornography offenders have committed a contact sex offense. Doc.86-15 at 51:21-23. So, a massive proportion of sexual abuse occurs by known persons in the home environment, with a substantial portion of sex offenders abusing family members, and of the supposedly least risky subgroup, half have admittedly already physically victimized a child. There is an obvious connection between protecting children and preventing child sex offenders, even those with children, from living with any child.[6]

[6] To refute the rational basis of §11(d)(4), Henry relies on Dr. Burkhart's opinion that, in the aggregate, it is more psychologically damaging for children to grow up in a home without a child sex offender parent than it is to grow up with one. Henry.Br.26. But Henry cannot offer unreliable speculation by an expert to

Henry cites Dr. Hersh to argue "that the rate of sexual recidivism for sex offenders as a class is low generally" and "lower still" for child pornography offenders. Henry.Br.2. But Dr. Hersh's profile of child sex offenders includes only those sex offenses that result in an *arrest* or *conviction* within *3-5 years of release*, despite the fact that "reliable self-report data from offenders" would be "the best quality data," Doc.86-17 at 254, and data show that a quarter of recidivist "molesters"—i.e., contact child sex offenders—may reoffend *after 10 years* free in the community. Doc.86-18 at 77:22–79:13. If anything is a *fact*, it is "that arrests as a measure of recidivism will miss some percentage of actual offenses," Doc.87:17-19, as do short follow-up times. These facts are relevant unless the unreliable opinions of Henry's psychologists (none of whom have assessed Henry) are credited over the unchallenged testimony of Dr. DeLisi.

The only other recidivism data are found in Dr. Helmus's rebuttal report,[7] which is likewise overwhelmingly based on arrests or convictions that do not

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overcome rational predictions by the Alabama Legislature. This value judgment by Dr. Burkhart is unsupported by relevant research. Half of the eleven articles Dr. Burkhart relies upon to reach this conclusion address family separation in the context of deportation and immigration policy. Doc. 64-2 (Exhibit E to Rule 26 objections) at 2. The remaining five also have no apparent connection to sex offenders whatsoever. *Id*.

[7] Dr. Burkhart does not cite any studies to support his general statements estimating the incidence of recidivism among sex offenders, generally. *See* Doc. 64-2. Wells does not offer an opinion on the broad risk posed by sex offenders, as a class, and thus does not present any studies. *See* Doc. 92 (Wells Redacted Daubert motion).

account for probation violations that may be sexual in nature. *See* Doc.86-11 at 18 (explaining at least 19% of child pornography offenders commit probation violation that could be sexual in nature). As a *rebuttal* witness, she primarily discusses a subgroup of sex offenders—child pornography and child pornography-only offenders. Doc.86-8 at 3; *id*. at 67 ("Summary of Child Pornography (CP) Recidivism Studies).

In this case, Defendants' interest in protecting children is advanced by preventing "sexual recidivism," which is the *commission* of another sex crime, and the risk posed by known offenders is a function of probability and harm. Evidence in this case establishes that child pornography offenders are five times more likely to be rearrested for another sexual crime than federal offenders not convicted for a sex crime. Doc.86-11 at 18. Based on official data, offenders with Henry's conviction are more dangerous than other felons whose physical custody rights are not curtailed. Henry responds that "every expert in this case ... agrees that" it "is possible to assess individualized risk" of child sex offenders, Henry.Br.13, but the dispute is whether it can be done with a sufficient degree of accuracy to achieve the State's interest in protecting children. The *only* risk assessment expert offering a reliable opinion on that point is Dr. Scurich, who explains, "The question, I think, for science would be to what extent can [judgments about who is more and less risky] be accomplished accurately." Doc.86-14 at 35:2-4; *but see* Doc.86-8 at 3 (Dr.

Helmus offering opinion that "risk of sexual recidivism can be assessed with sufficient reliability and validity to inform legal decisions"). Contra Henry (at 11), "child pornography has been shown to be the only type of pornography usage that is associated with contact sexual offending against children," and "[a]ccess to children is a significant predictor of child pornography offenders perpetrating contact sexual offenses against children." Doc.86-11 at 14-15. The statute is tailored to a narrow group of convicted offenders, whose proven criminal behavior is a marker of future risk.

The state has provided both "empirical support" and "sound reasoning" for its measure, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994), which is "a rule without exception for the protection of the children of Alabama." Aplt.Br.22. Henry does not take issue with courts considering a child pornography conviction when restricting parental rights, he just wants a more considered determination that he thinks will produce more accurate results. To that end, his chief complaint is that 11(d)(4) does not provide for a hearing after the criminal conviction—a sort of substantive-due-process right to more process. But the increased "value" of "additional" procedures is dubious, and the "societal costs" of individualized determinations are potentially enormous if future offenders slip through the cracks. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 347 (1976). Henry hails "a variety of risk assessment tools," Henry.Br.14, but the current risk assessment instruments that

denoted Henry as low risk, were invalid. Doc.86-12. In fact, Dr. Scurich's analysis revealing the invalidity of the CPORT—the primary basis for the risk assessment in this case—has now been independently peer-reviewed and published.[8]

II. *Salerno* Governs Henry's Facial Challenge.

Henry challenged 11(d)(4) on its face. For that reason, he must show that it is unconstitutional in all applications. *See United States v. Salerno*, 481 U.S. 739, 745 (1987); *United States v. Gruezo*, 66 F.4th 1284, 1293 (11th Cir. 2023) (per curiam). The standard is "strict." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 286 & n.60 (2022). Relying on *Club Madonna Inc. v. City of Miami Beach*, 42 F.4th 1231 (11th Cir. 2022), Henry claims that *Salerno* doesn't apply here and that it is irrelevant whether there is "a constitutional application of the statute." Henry.Br.32.

But *Club Madonna* did not reject the *Salerno* standard. To the contrary, the Court agreed that "a facial challenge ... generally" requires a plaintiff to demonstrate that there are "*no* set of circumstances" where it may constitutionally be applied. 42 F.4th at 1256 (quoting *Salerno*, 481 U.S. at 745). In fact, the Court held the statute at issue there unconstitutional after "applying *Salerno*." *Id.* at 1256. True, *Salerno*

[8] Scurich, N. & Krauss, DA. *Risk assessment of child-pornography-exclusive offenders*, 47 LAW HUM BEHAV. 499 (Aug. 2023); *see also* Thomas H. Cohen, *Building a Risk Tool for Persons Placed on Federal Post-Conviction Supervision for Child Sexual Exploitation Material Offenses: Documenting the Federal System's Past, Current, and Future Efforts*, U.S. PROBATION AND PRETRIAL SERVICES OFFICE (June 2023) (rejecting validity of CPORT in federal system and suggesting "self-reporting methods [for risk assessment] should be more fully explored").

applied somewhat differently in *Club Madonna*, *id.* at 1257, but only because of "the relevant constitutional test," which was federal conflict preemption, *id.* at 1256. The challenged statute *itself* was unconstitutional under the Court's formulation of the test if the statute acted as "an obstacle to the objective[s] of ... federal law," *id.* at 1253, "as a general matter" rather than in every application, *id.* at 1257.[9] Even after *Club Madonna*, "some conceivable" unconstitutional application is not enough for a facial challenge in all cases except some "First Amendment" cases. *United States v. Pugh*, 90 F.4th 1318, 1325 (11th Cir. 2024) (quoting *Salerno*, 90 F.4th at 1325).

Henry is also wrong to argue (at 32-33) that this case is like *Club Madonna.* In his view, strict scrutiny is the single "constitutional test" applicable to a statute covering all sorts of parents, grandparents, siblings, stepparents, and stepsiblings who have committed all sorts of sex crimes against children. Henry.Br.32. But even if some applications trigger (and fail) strict scrutiny, some applications of the statute—*e.g.,* to stepsiblings—do not implicate fundamental rights at all and are thus reviewed for rational basis. *See infra* Part III.

To the extent Henry suggests 11(d)(4) must pass strict scrutiny to survive a facial challenge even if rational basis applies to some applications, *e.g.,* Henry.Br.6, he is wrong again. That is basically a First Amendment overbreadth argument, which

[9] The Court did say that it "can't be right" that one potential application could defeat a facial challenge, but that was in context of deciding how federal conflict preemption interacted with *Salerno*. *See id.* at 1256.

applies only to First Amendment claims. *Pugh*, 90 F.4th at 1325. Nor would it make any sense to apply a rule like overbreadth. An estranged stepbrother bringing an as-applied challenge to 11(d)(4) could not invoke others' parental rights; a court would review a claim based on his own rights for rational basis; and his as-applied challenge would fail. *See supra* Part I.C; *infra* 21-22.

Because 11(d)(4) is subject to and survives rational basis review at least as applied to some sex offenders, strict scrutiny is not the "applicable test," and Henry's facial challenge fails.

III. At Least Some Sex Offenders Covered By 11(d)(4) Lack A Right To Reside With Or Have Overnight Access to Children.

To prevail on his facial claim, Henry must show that 11(d)(4) is unconstitutional as applied outside of Henry's circumstances—*e.g.,* parents with no relationship to their children, parents convicted for raping a child 11 or younger, parents convicted for child trafficking, and siblings, stepsiblings, stepparents, and grandparents who are child sex offenders. Henry attacks the State for bringing up these so-called "hypothetical" applications. Henry.Br.16, 32, 33, 37. But his facial challenge seeks to wipe away these protections, and the facial relief granted by the district court may soon expose children to such offenders. Before reaching that drastic result, the Court should consider whether 11(d)(4) even implicates a fundamental right in all its applications.

1. When 11(d)(4) applies to parents with an attenuated relationship to their child, it does not burden fundamental rights. *See* Aplt.Br.44-46. As Henry recognizes, parental rights cases from the Supreme Court emphasize "the unitary family," Henry.Br.19, 20, 36, typically, "the marital family" or "unmarried parents" living with their children. *Michael H*, 491 U.S. at 123 n.3. Section 11(d)(4) does not apply only to unitary families. And Henry makes no real argument that 11(d)(4) burdens the fundamental right of every parent no matter their relationship with the child, for good reason. *See Lehr v. Robertson,* 463 U.S. 248, 260-62 (1983).

2. Even if it were unconstitutional as applied to parents, 11(d)(4) would not be unconstitutional in every circumstance. Section 11(d)(4) applies to grandparents, siblings, stepparents, and stepsiblings too, which does not implicate Henry's rights as a parent.

With only his parental rights claim before the Court, it's perplexing that Henry argues that 11(d)(4) is unconstitutional as applied to grandparents, siblings, stepparents, and stepsiblings under the First Amendment right to intimate association. Henry.Br.35-36. Because the associational rights of those people are not before the Court, Henry's facial challenge cannot succeed. Henry did not challenge 11(d)(4) as violating such associational rights, *see e.g.,* Doc.1 at 7; Doc.1 at 12-14, and this is the first time he has even made the argument. He would not have even had standing to bring the claim. His injury stems from 11(d)(4) stopping him from

living with his wife and son, *id.* at 6, so he has no personal stake in 11(d)(4) preventing an abusive stepbrother from sharing a roof with his stepsister, *see* Aplt.Br.45. Nor can he assert rights on behalf of those unknown offenders who are free to bring their own lawsuits. *See Kowalski v. Tesmer*, 543 U.S. 125, 130-33 (2004) (raising rights of third parties generally requires showing a close relationship with the third-party and that the right-holder is hindered in their ability to assert it). Henry does not respond to the State's standing argument.

Henry's response on the merits is unpersuasive anyway. He rests his position on the importance of the "unitary family." *See* Henry.Br.35-36. The "relationships formed by close familial relationships," he continues, "are entitled to constitutional protection." *Id.* at 36. But he cites no specific authority remotely supporting his particular claim here.

Moreover, as Henry notes, some offenders "may be no more than passing acquaintances" with their minor relatives. Henry.Br.36. Sex offenders have no constitutional right to reside or conduct overnight visits with minor "acquaintances," so Henry's facial claim on behalf of non-parents fails too.

3. Whether or not every crime covered by 11(d)(4) falls within the tradition of denying parental rights to those whose misconduct renders them unfit for custody rights, some do. *See* Aplt.Br.47-50 & n.10. For example, the State pointed to serious child pornography offenders (discussed *supra* Part I.C), first degree rape of a child,

and sex trafficking, *id.* States make predictive judgments about risks, including those associated with registered sex offenders, all the time. In our system of government, legislatures, as well as courts, are capable of drawing appropriate lines. Case-by-case determinations are useful in many contexts. But a State can permissibly conclude that at least some offenses like rape or child sex trafficking are so "egregious and despicable" (*United States v. Irey*, 612 F.3d 1160, 1206 (11th Cir. 2010)) that whoever so victimizes a child must be limited in his ability to do so again. The State acts within its power to protect the "health or safety" of children (*Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972)) when it determines that a convicted child rapist or child trafficker's "gross misconduct" creates an unacceptable risk that children residing or being visited overnight by that offender "will be in danger of being personally abused," *Striplin v. Ware*, 36 Ala. 87, 90 (1860).

The risk of sex offenders recidivating is "frightening and high." *Smith v. Doe*, 538 U.S. 84, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 34 (2002)). If a child rapist recidivates, the harm is devastating. Raping a child is an "attack" on their "childhood" and "has a permanent psychological, emotional, and sometimes physical impact." *Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008). And a child trafficker facilitates that harm. *See* ALA. CODE § 13A-6-125. "[N]o just or humane society can tolerate" children being treated this way. *Irey*, 612 F.3d at 1207 (quoting *Kennedy*, 612 U.S. at 468 (Alito, J., dissenting)). The elected representatives of

Alabama are free to conclude that convicted child rapists or traffickers are too dangerous to have unfettered access to children again.[10]

In response, Henry faults 11(d)(4) for not being "narrowly tailored" as applied to child rapists and traffickers. Henry.Br.35. But the upshot of the alarming recidivism rates and resulting harm to children is that these parents no longer possess a fundamental right to custody after their conviction, so strict scrutiny is irrelevant. In any event, ALA. CODE § 13A-6-61(a)(3) only covers the rape of children 11 or younger. The legislature is free to act on a 16-year old's conviction for raping or trafficking a fifth grader without having to analyze the "specific circumstances." Henry.Br.35.

IV. The District Court Exceeded Its Authority And Abused Its Discretion When It Entered a Universal Injunction Barring Enforcement Of §15-20A-11(d)(4).

"[R]emedies should be limited" to addressing the plaintiff's "injury in fact" and "no more burdensome" than needed to provide "complete relief." *Georgia v. President of the United States*, 46 F.4th 1283, 1303 (11th Cir. 2022) (cleaned up).

[10] Henry (at 2 & n.1) stretches the Supreme Court's decision in *Kebodeaux*, which did not "disclaim" anything about the risk of recidivism posed by sex offenders. In *Kebodeaux,* the Supreme Court cited evidence that showed released sex offenders are "four times more likely to be rearrested for a sex crime" than non-sex offenders and ultimately concluded that legislators have "the power to weigh the evidence and reach a rational conclusion." *United States v. Kebodeaux,* 570 U.S. 387, 395–96 (2013). It also recognized "conflicting evidence on this point," *id.,* but that is nowhere near "disclaiming" the *risk* posed by sex offenders as a basis for decision.

Henry's injuries result is his inability to reside with his son. *See* Aplt.Br.51. An injunction allowing that and nothing more would have provided him complete relief, and he lacks standing to receive anything more. *See id.* at 50-51.

Henry's responses are unserious. He first repeats his flawed strict scrutiny argument, Henry.Br.36-37, and tries to claim that *Georgia* is in his favor, *id.* at 37, because it said that "the nature of the remedy is dependent on the nature of the defendant's action," *id.* (quoting *Georgia,* 46. F.4th at 1303). There, the Court was explaining that sometimes redressing a plaintiff's injury will necessarily "affect nonparties," such as when a defendant takes one action, like drawing legislative districts, that harms multiple people. *See Georgia,* 46. F.4th at 1306. The "defendant's action" here permits the Court to grant relief to Henry without extending it to non-parties. *See id.*

He also claims that *Gill v. Whitford*, 548 U.S. 48 (2018), is irrelevant because it is a standing case. Henry.Br.37. But *Georgia* relied on that case, and remedies are designed to address a plaintiff's "injury in fact." 46 F.4th at 1303, 1306. Last, Henry claims that the remedy is "facial invalidation of the statute." Henry.Br.37. Common rhetoric aside, injunctions operate on "officials" not "statute[s]." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923); *see also Lester v. United States*, 921 F.3d 1306, 1314 (11th Cir. 2019) (Pryor, C.J., respecting denial of rehearing en banc) (an "order of a court" does not "invalidit[ate]" a statute).

CONCLUSION

The Court should reverse. At a minimum, this Court should remand and direct the district court to limit its injunction to Henry alone.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B) as it contains 6,473 words, excluding those parts exempted by FED. R. APP. P. 32(f).

I further certify that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5), and the type style requirements of FED. R. APP. P. 32(a)(6), as this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that, on April 15, 2024, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

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