

Driver's License

+ ACLU

**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE**

K.L.,

Appellant,

v.

STATE OF ALASKA, DEPARTMENT OF
ADMINISTRATION, DIVISION OF
MOTOR VEHICLES,

Appellee.

CASE NO. 3AN-11-05431 CI

BRIEF OF APPELLANT

**APPEAL FROM THE DEPARTMENT OF ADMINISTRATION,
DIVISION OF MOTOR VEHICLES**

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BRIEF OF APPELLANT

*K.L. v. State of Alaska, Department of
Administration, Division of Motor Vehicles*
Case No. 3AN-11-05431 CI

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AUTHORITIES PRINCIPALLY RELIED UPON

Alaska Const. art. I, § 1

This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and the protection under the law; and that all persons have corresponding obligations to the people and to the State.

Alaska Const. art. I, § 22

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

AS 28.15.161

(a) The department shall cancel a driver's license upon determination that

...

(2) there is an error or defect in the license

STATEMENT OF JURISDICTION

On January 3, 2011, the Department of Administration, Division of Motor Vehicles (“DMV”) held a hearing with regard to this matter. The hearing officer entered a decision on January 31, 2011. The hearing officer affirmed the cancellation of K.L.’s Alaska driver’s license based on a determination that there was an “error” in the license. Under AS 22.10.020(d), AS 28.05.141, and AS 28.15.166, this Court has jurisdiction over an appeal of that decision. Furthermore, pursuant to AS 22.10.020(g) and AS 44.62.300, this Court may issue declaratory relief with respect to this matter.

ISSUES PRESENTED FOR REVIEW

Every jurisdiction has a policy which permits drivers to correct the sex designation on his or her license so that it accurately reflects the individual’s gender identity and expression. Alaska’s policy at the time of the January 3, 2011 hearing, Standard Operating Procedure (“SOP”) D-24, required a driver to furnish proof of sex reassignment surgery before a correction was permitted. In contrast, a growing number of states, and the federal government, have enacted less restrictive policies, which do not require proof of surgical treatment.

Inaccurate identity documents, that do not reflect an individual’s lived gender identity, result in harassment, discrimination, and even violence. Likewise, a driver’s license that does not reflect a transgender person’s lived gender identity forces the involuntary disclosure of personal medical information.

K.L.’s driver’s license was amended to identify her as female, but because K.L. has not undergone sex reassignment surgery, the DMV issued an order of cancellation. Pursuant to an appeal of this cancellation, the hearing officer rightly determined that SOP D-24 is a regulation that was not promulgated in accordance with the Administrative Procedure Act,

but nevertheless, the officer affirmed the cancellation of K.L.'s license. This decision raises three issues on appeal:

Privacy Rights. Does a blanket refusal by the DMV to correct the sex designation on a driver's license or, in the alternative, condition correction on proof of sex reassignment surgery violate K.L.'s fundamental or important liberty and privacy rights?

Equal Protection. Does a blanket refusal by the DMV to correct the sex designation on a driver's license or, in the alternative, condition correction on proof of sex reassignment surgery abridge K.L.'s right to equal protection?

Hearing Officer's Decision. Did the hearing officer commit reversible error when she misinterpreted and misapplied AS 28.15.161 to find that K.L.'s license contained an "error" because it identifies K.L. as female?

STATEMENT OF THE CASE

K.L. is a respected airline pilot for a private shipping company. Exc. 67. Her United States passport identifies her as female. (Exc. 50, 71-72), as does her medical certificate to operate as a pilot (Exc. 49, 74), her airman certificate (Exc. 49, 75), and her work identification (Exc. 76). Likewise, her Alaska driver's license identifies her as female, but it is for that reason that the DMV cancelled her license, pursuant to an order of cancellation issued July 9, 2010. Exc. 1.

K.L. is a male-to-female transgender person. Exc. 46, 68. In other words, her gender identity and expression is female (she looks, dresses, and expresses herself as a woman), but her sex assigned at birth was male. Exc. 68. Since September 2009, K.L. has lived her life as a woman, consistent with her female gender identity. Exc. 70-71. Her name was officially changed in 2010, along with her name and/or gender on her other identification documents, including loan documents, bank accounts, Visa account, and mortgage. Exc. 70-76.

K.L.'s family, co-workers, and social acquaintances know her as a woman. Exc. 71. K.L. receives hormone therapy (Exc. 73), that causes the feminization of certain physical features. Exc. 23. To appear more feminine, she has also undergone electrolysis to remove facial hair. Exc. 4. K.L. could not imagine a circumstance in the future in which she would no longer identify as a woman; K.L.'s transition to identifying and expressing herself as a woman is permanent. Exc. 81.

Gender Identity Disorder

The term "transgender" refers to individuals whose gender identity or expression differs from the sex they were assigned at birth. Exc. 18. Gender identity is a person's basic sense of being a man or a woman, which in rare instances may differ from a person's anatomical sex. Exc. 18-19. Gender identity is distinct from sexual orientation, which refers to a person's emotional attachments, attractions and sexual behavior. Exc. 19. Likewise, "transgender" is distinct from "cross-dresser," the latter of which concerns a desire to dress and express oneself as the opposite sex, but has no direct relationship to an ingrained desire to identify completely and permanently with and become the opposite sex.¹

An individual's gender identity develops in early childhood and is usually firmly established by early childhood.² K.L. became aware of her female gender identity at age 6 or 7. Exc. 2. Contemporary medical knowledge indicates that gender identity cannot be changed and that attempts to change a person's gender identity are futile and unethical.³

¹ A. Evan Eyler, *Primary Medical Care of the Gender-Variant Patient*, in *Principles of Transgender Medicine and Surgery* (Randi Ettner, Stan Monstrey, & A. Evan Eyler eds. 2007).

² See WPATH, *WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.* (June 2008), available at <http://www.wpath.org/documents/Med%20Nec%20on%202008%20Letterhead.pdf>

³ Gerald Mallon, *Practice with Transgendered Children*, in *Social Services with Transgendered Youth* 49, 55-58 (Gerald P. Mallon ed., 1999).

The medical diagnosis applied to transgender people is Gender Identity Disorder, more commonly known as transsexualism.⁴ Gender Identity Disorder is defined by a strong and persistent cross-gender identification and a persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex. This discomfort is called gender dysphoria. Exc. 19. According to one standard medical text, individuals with Gender Identity Disorder “are cruelly imprisoned in a body incompatible with their subjective gender identity.”⁵ Gender Identity Disorder is recognized in the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV, 1994, and DSM-IV-TR, 2000) published by the American Psychiatric Association. Transsexualism is also recognized in the International Statistical Classification of Diseases and Related Health problems, Ninth Revision, published by the World Health Organization, for which the United States is a signatory.⁶

The treatment of Gender Identity Disorder is guided by the Standards of Care set forth by the World Professional Association for Transgender Health (“WPATH” formerly named the Harry Benjamin International Gender Dysphoria Association). Exc. 20. These guidelines are widely respected and reflect the professional consensus about the psychological, psychiatric, hormonal, and surgical management of Gender Identity Disorder. *Id.*

Based on an assessment by a mental health professional with expertise in the treatment of Gender Identity Disorder, an individualized treatment plan is developed that

⁴ In 1994, the Diagnostic and Statistical Manual of Mental Disorders committee replaced the diagnosis of Transsexualism with Gender Identity Disorder. Shortly thereafter, the term transgender began to replace transsexualism. R. 202-03.

⁵ Merck Research Laboratories, *Merck Manual of Diagnosis and Therapy* 1732 (Mark H. Beers, Robert Berken 18th ed. 2006).

⁶ ICD-10, F64.0, *available at* <http://apps.who.int/classifications/apps/icd/icd10online/>.

typically consists of psychotherapy and gender role transition and may include hormone therapy and surgery to feminize or masculinize the body. *Id.* Treatment, however, is not the same for everyone. Instead, it is a highly personal decision made by the individual patient and his or her medical providers. *Id.* The goal of treatment is to alleviate the person's gender dysphoria and allow the person to live consistently with their gender identity. And once one embarks on a Real-Life Experience (living full time in the cross-gender role), very few transgender individuals revert back to their original gender role. Exc. 21.

"Transition" refers to the process of changing one's gender role to be consistent with one's gender identity. Exc. 22. What constitutes a "complete transition" varies from person to person. Some individuals only change gender roles, others also take feminizing or masculinizing hormones, and others elect to also have breast/chest, genital surgery, or other surgical procedures (e.g., facial feminization surgery). *Id.*

Very few female-to-male transgender individuals undergo genital reconstructive surgery because of the almost insurmountable barriers to obtaining it caused by its expense, the failure of many insurance policies to cover its cost⁷, and the limitations on achieving satisfying outcomes. Exc. 25-26. Genital reconstructive surgery is more common among male-to-female transgender individuals, but it is also cost prohibitive and not always necessary to alleviate dysphoria and achieve adjustment in the female gender role. Exc. 26.

⁷ The vast majority of private health insurance plans continue to exclude most or all coverage for transition-related health care. See Human Rights Campaign, *Health Insurance Discrimination for Transgender People*, available at <http://www.hrc.org/issues/9568.htm>. In an NCTE/Task Force Survey transgender men and women reported a number of barriers to transition-related health care, including lack of insurance, refusal of care because they are transgender, harassment and violence in medical settings, and lack of provider knowledge. Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, 72-79, Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force (2011), available at http://www.thetaskforce.org/reports_and_research/ntds.

In contrast to genital reconstructive surgery (also sometimes referred to as “sex reassignment surgery”), changing one’s legal name and sex/gender marker on identity documents, such as a driver’s license, is integral to an individual’s transitioning into a new gender role and conducting his or her Real-Life Experience. Exc. 20-21. Accurate identity documents are necessary in order to function successfully in the appropriate gender role (e.g., to apply for and start a new job, to vote, travel, and enter secure or age-restricted buildings, or to gain access to government services or employment benefits). Exc. 21. Likewise, a sex marker that does not match an individual’s gender identity is inherently distressing and perpetuates gender dysphoria, causing unnecessary psychological pain and interpersonal discomfort, conflict, and distress. Exc. 24-25.

Moreover, a driver’s license with a sex marker that does not match an individual’s gender identity and expression often leads to harassment, discrimination, violence, and groundless accusations of fraud. Exc. 24. In a 2011 study by the National Center for Transgender Equality and National Gay and Lesbian Task Force, 40% of transgender respondents who presented identification that did not match their gender presentation reported being harassed, 3% reported being attacked or assaulted, and 15% reported being asked to leave.⁸

This study also provided compelling additional evidence of wide-spread anti-transgender bias. Of the 6000 plus participants, 90% reported experiencing harassment, mistreatment or discrimination on the job;⁹ 53% reported being verbally harassed or disrespected in a place of public accommodation;¹⁰ and 61% reported being a victim of

⁸ *Injustice at Every Turn*, 5, 139.

⁹ *Id.* at 3.

¹⁰ *Id.* at 5.

physical assault.¹¹ Given this wide-spread prejudice, it is not surprising that transgender individuals wish to keep their identity private. Exc. 78.

Despite this legitimate desire for privacy, an inaccurate driver's license forces transgender persons to publicly "out" themselves as transgender and to reveal their medical condition every time a business or individual asks to see their license. In addition, this public "outing" often results in questioning and unwelcome intrusions into personal information. Exc. 76-77.

Alaska's Current Policy: SOP D-24

K.L.'s license was cancelled pursuant to an internal DMV policy, SOP D-24. Under this policy, the DMV permitted a change to an individual's sex marker if they submitted proof of a surgical "sex change." The policy states: "For change of sex, other than a DMV error, a medical certification is required. The medical certification must specify that the sex change is surgically complete and must be signed by the performing surgeon." Exc. 48. The DMV apparently interprets SOP D-24 to require genital surgery, rather than another form of transition-related surgery. Exc. 61. The policy is limited to "chang[es] of information on [a] license." Exc. 47. To change other information related to a person's descriptive physical traits – "weight, height, hair and eye color" – the DMV "[a]ccept[s] the applicant's word"; only for changes of sex is medical certification required. Exc. 48.

SOP D-24 largely reflects an outdated clinical perspective of Gender Identity Disorder. When Gender Identity Disorder first came to professional attention, clinical perspectives were largely focused on how to identify candidates for sex reassignment surgery. Exc. 34. As the field has matured, however, professionals now recognize that some

¹¹ *Id.* at 2.

persons with Gender Identity Disorder neither desire nor have a medical necessity for sex reassignment surgery. *Id.*

In light of the evolving medical appreciation and understanding of Gender Identity Disorder, there is a growing trend among states to discard rules requiring medical treatment in favor of a standard based on gender identity. Exc. 36. This new standard requires an applicant to sign a form under penalty of perjury attesting to the fact that he or she seeks a correction of the sex marker on his or her driver's license to reflect his or her gender identity/expression. Exc. 36-37. A medical or social service provider must also affirm under penalty of perjury that in his or her professional opinion the applicant's requested sex marker reflects the applicant's gender identity, which is expected to continue as such for the foreseeable future. *Id.*

On the federal level, the Department of State also eliminated its long-standing surgery requirement for correcting gender markers on passports. Exc. 39. Under this new policy, a transgender person may acquire or amend his or her passport to reflect his or her gender identity. *Id.* The new policy makes clear that "[s]exual reassignment surgery is not a prerequisite for passport issuance." *Id.* Instead, it requires applicants to provide a letter from a doctor stating that they had "appropriate clinical treatment," which may not include medical treatment if such treatment is not appropriate or necessary for the individual. Exc. 39-40.

DMV's Cancellation of K.L.'s License

The DMV originally issued K.L. a license with a female sex designation. Exc. 2. About a month later, however, an order of cancellation was issued. *Id.* According to the order, K.L.'s license would be cancelled under AS 28.15.161 unless she replaced the license with one listing her sex as male or "[p]resent[ed] verification from a doctor which verifies a surgical change was performed." Exc. 1-2.

K.L. timely requested an administrative hearing to appeal the DMV's order of cancellation. Exc. 52. A hearing was held on January 3, 2011. *Id.* The hearing officer made the following findings of fact and conclusions of law:

1. I find the Standard Operating Procedure D-24 is a regulation that was not promulgated in accordance with the Administrative Procedure Act of AS 44.62.
2. I find the Division has no authority to change the sex on a license until such time that a regulation is adopted that complies with the Administrative Procedure Act.
3. I find the license issued to [K.L.] on June 12, 2010, was done so in error and is not valid as the sex code was changed from male to female without any legal authority by the Division.
4. I find Alaska Statute 28.15.161(a)(2) provides the State with the authority to cancel a license if an error is detected.

Exc. 56.

The hearing officer declined to address K.L.'s constitutional claims concerning SOP D-24. Exc. 55, 58. K.L. does not take issue with the hearing officer's decision that SOP D-24 is a regulation that was not promulgated in accordance with the Administrative Procedures Act.

STANDARD OF REVIEW

This appeal involves pure issues of law, including statutory interpretation and constitutional claims, and therefore, the court applies "a substitution of judgment" standard.¹²

¹² See *Church v. State, Dep't of Revenue*, 973 P.2d 1125 (Alaska 1999) ("We apply the substitution of judgment standard to issues of law not involving agency expertise, such as statutory interpretation and constitutional claims."); *Moore v. State, Dep't of Transp. & Public Facilities*, 875 P.2d 765, 767 (Alaska 1994) ("We have previously recognized that '[e]valuations of constitutionality and other 'pure' issues of law are within the special expertise of the courts rather than [agencies].").

ARGUMENT

I. INTRODUCTION

The Alaska Constitution provides greater protections for liberty, privacy, and equal treatment under the law than the federal constitution.¹³ The Alaska Constitution's opening provision declares "that all persons have a natural right to life, liberty, the pursuit of happiness, and . . . that all persons are equal and entitled to equal rights, opportunities, and protection under the law[.]" Alaska Const. art. I, § 1.

The right of individuals to express themselves in conformance with their gender identity is a fundamental right. Gender identity has been described as "one of the most intimate and defining aspects of our lives."¹⁴ The DMV's refusal to acknowledge an individual's gender identity or to condition acknowledgment on sex reassignment surgery is an infringement of this fundamental right. Furthermore, a driver's license that does not reflect a person's lived gender identity forces a public outing of sensitive, personal information. This encroachment on fundamental liberty and privacy rights is impermissible because the DMV fails to demonstrate a compelling state interest and an alternative, less restrictive policy is available. Likewise, for many of the same reasons, the DMV's actions violate K.L.'s constitutional right to equal protection.

¹³ *Myers v. Alaska Psychiatric Inst.*, 138 P.3d 238, 245 (Alaska 2006) ("Although the federal constitution sets the minimum protections afforded to individual liberty and privacy interests, the Alaska Constitution often provides more protection. . . . We have specifically recognized that Alaska's guarantee of privacy is broader than the federal constitution's We have similarly declared Alaska's constitutional guarantee of individual liberty to be more protective.") (citing *Valley Hosp. Ass'n v. Mat-Su Coalition*, 948 P.2d 963, 966-67 (Alaska 1997) and *Breese v. Smith*, 501 P.2d 159, 170 (Alaska 1972)).

¹⁴ Samuel E. Bartos, *Letting "Privates" Be Private: Toward a Right of Gender Self-Determination*, 15 Cardozo J.L. & Gender 67, 68 (2008-2009) (quoting Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families*, in *Transgender Rights*, 32, n.6 33 (Paisley Currah, et al. eds., 2006)).

II. THE DMV'S REFUSAL TO PERMIT A TRANSGENDER PERSON TO CORRECT THE SEX DESIGNATION ON HIS OR HER DRIVER'S LICENSE OR, IN THE ALTERNATIVE, PERMIT A CORRECTION ONLY UPON PROOF OF SURGERY VIOLATES FUNDAMENTAL LIBERTY AND PRIVACY RIGHTS.

This Court's inquiry with regard to an abridgment of fundamental rights is two-fold.¹⁵ First, this Court must determine the nature of the rights abridged.¹⁶ Second, if any rights have been infringed upon, it must then resolve the further question as to whether the infringement is justified.¹⁷ *Id.*

When the state encroaches on fundamental liberty and privacy rights, it must demonstrate a "compelling state interest" and the "absence of a less restrictive means to advance that interest."¹⁸ On the other hand, when government action interferes with an individual's freedom in an area that is not characterized as fundamental, the state must show a "legitimate interest and a close and substantial relationship between its interest and its chosen means of advancing that interest."¹⁹

A. Under the DMV's policy, fundamental liberty and privacy rights are infringed.

Unlike the federal Constitution, Alaska's constitution provides an explicit right to privacy. "The right of the people to privacy is recognized and shall not be infringed."

¹⁵ See *Ravin v. State*, 537 P.2d 494, 498 (Alaska 1975).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Myers*, 138 P.3d at 245-46.

¹⁹ *Id.* at 246.

Alaska Const. art. I, § 22. “Because this right to privacy is explicit, its protections are necessarily more robust and ‘broader in scope’ than those of the implied federal right to privacy.”²⁰

“The right of privacy protects ‘fundamental rights of personal autonomy,’ including a person's right to control his appearance, [and] a patient's ‘privacy interest in protecting sensitive personal information from public disclosure’”²¹ The fundamental privacy right also includes the “right to make decisions about medical treatments for oneself”²²

Here, the DMV infringes on K.L.’s fundamental privacy rights in each of these three distinct ways. It violates her privacy rights by:

1. Restricting her personal autonomy and right to control her appearance;
2. Forcing the involuntary disclosure of her sensitive, personal information;
3. Infringing on her right to medical decision making.

²⁰ *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 581 (Alaska 2007) (quoting *Ravin*, 537 P.2d at 514-15); see also *Anchorage Police Dep't Employees Ass'n v. Municipality of Anchorage*, 24 P.3d 547, 550 (Alaska 2001) (quoting *Ravin*, 537 P.2d at 514-15) (internal quotation marks omitted) (“Since the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that the right is broader in scope than that of the Federal Constitution.”).

²¹ *Ranney v. Whitewater Eng'g*, 122 P.3d 214, 221-22 (Alaska 2005) (citing *Sampson v. State*, 31 P.3d 88, 94 (Alaska 2001); *Breese*, 501 P.2d at 169; *Falcon v. Alaska Pub. Offices Comm'n*, 570 P.2d 469, 480 (Alaska 1977)).

²² *Huffman v. State*, 204 P.3d 339, 346 (Alaska 2009).

1. The fundamental right to privacy is infringed because the DMV's policy restricts personal autonomy and the right to control one's appearance.

The right to gender self determination – to look, act, and present oneself as either a man or a woman – is implicit in Alaska's fundamental right to privacy. "The right to privacy protects fundamental rights of personal autonomy, including a person's right to control his appearance" ²³

The fundamental right of privacy involves "situations involving personal autonomy to control our appearance or to direct the course of our lives." ²⁴ Nothing is more integral to controlling one's appearances or directing the course of one's life than gender identity and self image. Gender is "one of the most intimate and defining aspects of our lives." ²⁵

[O]f all the things we have to say to each other, first and foremost among them is our gender. It's the reason we dress as we do every morning, style our hair specific ways, stand and walk and gesture and inflect our voices the way we do In fact, throughout our entire waking lives we are carrying on a continuous nonverbal dialogue with the world saying, "This is who I am, this is how I feel about myself, this is how I want *you* to see *me*." ²⁶

For this reason, the Alaska Supreme Court has already determined that the right to control personal appearance, as it relates to a departure from traditional notions of gender

²³ *Ranney*, 122 P.3d at 221-22 (internal citations and quotation marks omitted).

²⁴ *Sampson*, 31 P.3d at 94 ("Valley Hospital, Breese, Ravin, and McCracken collectively set the framework for recognizing fundamental rights of personal autonomy implicit in our constitution. . . . All of these cases address situations involving personal autonomy to control our appearance or to direct the course of our lives")

²⁵ *Bartos, Letting "Privates" Be Private*, 68 (internal citations and quotation marks omitted).

²⁶ Elaine Craig, *Trans-Phobia and the Relational Production of Gender*, 18 *Hastings Women's L.J.* 137, 146 (2007) (emphasis added) (quoting Riki Wilchius, *A Continuous Nonverbal Communication, in Gender Queer: Voices from Beyond the Sexual Binary* 12 (Joan Nestle, et al. eds., Alyson Books 2002)).

conformity, is a fundamental right.²⁷ The *Breese* court held that young men have a fundamental right to wear long hair.²⁸ *Id.* “Whatever else ‘liberty’ may mean as used in article 1, section 1 of the Alaska constitution, we hold that the term at least encompasses the fundamental personal right of students in our public schools to select their own individual hair styles without governmental direction.”²⁹

At the heart of the *Breese* decision was the court’s emphasis on personal liberty. The court held that “at the core of this concept [of liberty] is the court’s notion of total personal immunity from governmental control”³⁰ Fundamental to this notion of liberty is the right to control one’s appearance; “[t]he specter of governmental control of the physical appearances of private citizens, young and old, is antithetical to a free society, contrary to our notions of a government of limited powers, and repugnant to the concept of personal liberty.”³¹ “[T]here are few things more personal than one’s body and its appearance, and there could be few laws more destructive of the notion that there is a range of decision making within which the individual is autonomous than a rule regulating physical makeup.”³²

²⁷ *Breese*, 501 P.2d at.169.

²⁸ *Id.*

²⁹ *Id.* *Breese* was decided before the 1972 passage of the privacy amendment now found in article I, section 22 of the Alaska Constitution. Therefore, *Breese* relied on the inherent rights provision found in article I, section 1 of the Alaska Constitution.

³⁰ *Id.* at 168.

³¹ *Id.* at 169.

³² *Id.* (quoting 84 Harv. L. Rev. 1702, 1711 (1971)) (internal quotation marks omitted).

Presenting one's self as a man or woman necessarily falls within the "range of decision making within which the individual is autonomous."³³ Our right to dress and present ourselves in conformance with our self-determined gender identity is a right directly bearing upon personal liberty and the fundamental right to control one's appearance.

Likewise, the DMV's action infringes on K.L.'s fundamental right to possess and control her person. The court has stated on numerous occasions that "few things [are] more personal than one's body."³⁴ K.L.'s decision to express herself in conformity with her gender identity is a direct exercise of her right to control her person.

The DMV's policy, refusing to correct the sex marker on a driver's license, or conditioning correction on proof of surgery, places at odds the right to control one's person with legitimate privacy interests and concerns for personal safety. Burdening a person's fundamental right in this way is as much a violation as a direct prohibition on the exercise of a right.³⁵

Gender identity is also an inherently "private matter." "[O]ne aspect of a private matter is that it is private, that is, that it does not adversely affect persons beyond the actor, and hence is none of their business."³⁶ K.L.'s gender identity and expression as a woman

³³ *Id.*

³⁴ *Id.* at 169; *Valley Hosp. Ass'n*, 948 P.2d at 968.

³⁵ See *Huffman v. State*, 204 P.3d at 345-47 (conditioning children's ability to attend school on their willingness to be tested for tuberculosis may have violated privacy interests in medical-decision-making). See also *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 651 (1974) (conditioning employment as teacher on not becoming pregnant violated fundamental right to procreate); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (conditioning property tax exemptions on taking a loyalty oath violated fundamental right to freedom of speech); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (conditioning eligibility for unemployment benefits on willingness to work on the Sabbath, despite religious beliefs, violated fundamental right to freedom of religion).

³⁶ *Ravin*, 537 P.2d at 504

does “not adversely affect persons beyond the actor,” and is, therefore, a “private matter.”³⁷ “The state cannot impose its notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals.”³⁸

Additionally, Alaska’s heightened constitutional protections and historical jurisprudence is grounded upon a respect of personal autonomy and a fundamental right “to be let alone.”³⁹ This deeply held respect for personal autonomy was similarly noted by the court in *Ravin*: “[o]ur territory and now state has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a measure of control over their own lifestyles which is now virtually unattainable in may of our sister states.”⁴⁰

Alaska’s deference for personal liberty and the right to be “let alone” distinguishes this state’s jurisprudence. The court in *Breese* noted, “Alaska in particular[] reflect[s] a pluralistic society, grounded upon such basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles.”⁴¹ To interfere with K.L.’s choice to live as a woman would ‘erode Alaska’s ‘basic value’ of ‘maximum individual choice.’”⁴²

³⁷ *Id.*

³⁸ *Id.* at 509.

³⁹ *Breese*, 501 P.2d at 171 (“[T]he right ‘to be let alone’ . . . without the interference of governmental officials or agents - is fundamental right under the constitution of Alaska[.]”).

⁴⁰ *Ravin*, 537 P.2d at 504.

⁴¹ *Breese*, 501 P.2d at 169.

⁴² Leslie Dubois-Need & Amber Kingery, *Transgendered in Alaska: Navigating the Changing Legal Landscape for Change of Gender Petitions*, 26 Alaska L. Rev. 239, 263 (2009) (quoting *Breese*, 501 P.2d at 169).

The European Court of Human Rights (“ECHR”) pronounced gender self-determination as an act within an individual’s fundamental right to privacy.⁴³ “[T]he ECHR’s gender recognition jurisprudence has emphasized the individual’s ‘freedom to define herself [or himself] as a female [or male] person.’ The ECHR identifies this freedom as an aspect of the right to private life under the European Convention . . . and characterizes it as ‘one of the most basic essentials of self-determination.’”⁴⁴

2. The fundamental right to privacy is infringed because the DMV’s policy forces the involuntary disclosure of sensitive, personal information.

A driver’s license that does not match a person’s expressed gender identity forces disclosure of a sensitive medical condition. This “outing,” in turn, results in discrimination, harassment, and even assault. The DMV’s refusal to allow K.L. to have a female sex designation, and the resulting involuntary disclosure of sensitive personal information, is a violation of K.L.’s fundamental liberty and privacy rights.

The state supreme court has held “that the right of privacy embodied in the Alaska Constitution is implicated by the disclosure of *personal information* about oneself.”⁴⁵

A common thread woven into our decisions is that privacy protection extends to the communication of “private matters,” or, phrased differently, “sensitive personal information,” or “a person’s more intimate concerns[.]” This is the type of personal information which, if disclosed even to a friend, could cause embarrassment or anxiety.⁴⁶

⁴³ *Id.* at 247.

⁴⁴ *Id.* (original emphasis) (quoting Jean Tobin, *Against the Surgical Requirement for Change of Legal Sex*, 38 Case W. Res. J. Int’l L. 393, 425 (2006-2007) (internal quotations omitted).

⁴⁵ *Doe v. Alaska Superior Court*, 721 P.2d 617 (Alaska, 1986) (original emphasis).

⁴⁶ *Id.* (internal citations omitted) (quoting *State v. Glass*, 583 P.2d 872, 880 (Alaska 1978) (original emphasis); *Falcon v. Alaska Pub. Offices Comm’n*, 570 P.2d at 480; *Pharr v. Fairbanks N. Star Borough*, 638 P.2d 666, 670 (Alaska 1981)) (citing *Ravin*, 537 P.2d at 503-04).

Accordingly, Gender Identity Disorder is a “private matter” regarding “sensitive personal information.” It is the type of information “which, if disclosed even to a friend, could cause embarrassment or anxiety.”⁴⁷ Thus, the DMV’s policy, which causes a forced outing of this *personal* information infringes on the fundamental right to privacy.

The Second Circuit is of the same opinion, and, accordingly, held that the federal constitution protects the right to privacy with regard to disclosure of Gender Identity Disorder.⁴⁸ “The excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate. . . . It is similarly obvious that an individual who reveals that she is a transsexual ‘potentially exposes herself . . . to discrimination and intolerance.’”⁴⁹ Because transsexualism “is likely to provoke both an intense desire to preserve one’s medical confidentiality, as well as hostility and intolerance from others[,]” individuals “who are transsexuals are among those who possess a constitutional right to maintain medical confidentiality.”⁵⁰

The Alaska Supreme Court also recognizes a constitutional right to privacy in sensitive medical information. In *Rollins*, the court held that medical marijuana registration

⁴⁷ *Id.* (citing *Falcon*, 570 P.2d at 479).

⁴⁸ *Powell v. Schriver*, 175 F.3d 107, 112 (2nd Cir. 1999).

⁴⁹ *Id.* at 111-12 (quoting *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994)).

⁵⁰ *Id.* at 111-12.

requirements implicated an individual's right to privacy.⁵¹ The court went so far as to say that "[i]t can hardly be disputed that the medical marijuana registry requires disclosure of sensitive information: mere presence in the registry identifies a person as suffering from a debilitating medical condition; and as being a marijuana user."⁵² "[T]he general publication of this information could be stigmatizing and invasive of the right to privacy."⁵³ Similarly, here the disclosure of K.L.'s condition as transgender can be *stigmatizing* and is invasive of her right to privacy.

The *Rollins* decision was based on a similar holding in *Falcon*.⁵⁴ At issue in *Falcon* was a conflict of interest law that required a physician, serving on the school board, to disclose the names of his patients.⁵⁵ The court held that "the governmental interest in promoting fair and honest government . . . does not outweigh the individual's privacy interest in protecting sensitive personal information from public disclosure."⁵⁶ The court in *Falcon* was particularly concerned about situations involving a "specialized practice" where "disclosure of the patient's identity also reveals the nature of the treatment, and the particular

⁵¹ *Rollins v. Ulmer*, 15 P.3d 749 (Alaska 2001). Nevertheless, the court in *Rollins* ultimately held that the registry requirements were constitutional because "[potentially stigmatizing] information will be available only to authorized personnel in the context of a valid governmental program." *Id.* at 753 (alteration in original). Here, unlike in *Rollins*, K.L. and other transgender motorists are forced to disclose sensitive, stigmatizing information regarding their transgender condition on a routine and continual basis.

⁵² *Id.* at 752.

⁵³ *Id.*

⁵⁴ *Falcon*, 570 P.2d at 469.

⁵⁵ *Id.* at 470-71.

⁵⁶ *Id.* at 480.

type of treatment is one which patients would normally seek to keep private.”⁵⁷ Examples of this particularly sensitive information would include “patients of a psychiatrist, psychologist or of physician who specialized in treating sexual problems . . .”⁵⁸ Similarly, Gender Identity Disorder is a condition of a particularly sensitive nature, involving “psychiatrist[s], psychologist[s] or . . . physician[s],” and concerning the type of treatment one may “seek to keep private.”

The Alaska Supreme Court has also recognized a legitimate right to privacy in information that, if disclosed, could place an individual at risk of harm.⁵⁹ *Alaska Wildlife* concerned disclosure of employee and private contractor’s names on timesheets subject to disclosure under the Public Records Act. The court upheld the redaction of the names, even though such information generally is not of a personal nature, because the employees and private contractors worked for a controversial program.⁶⁰ It was believed that disclosure of their names could result in “harassment or harm.”⁶¹ The court, therefore, determined that the employees and private contractors’ had a “legitimate expectation” that their identity would not be disclosed.⁶² The state’s interest in disclosing such information did “not justify putting the Department’s employees, private contractors, and their respective families in harm’s way.”⁶³

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976 (Alaska 1997).

⁶⁰ *Id.* at 980-81.

⁶¹ *Id.* at 978 (internal quotation marks omitted)

⁶² *Id.* at 980.

⁶³ *Id.* at 981.

Here, K.L. and other transgender persons risk harassment and harm should their medical condition be disclosed to the greater public. Similarly to the employees and private contractors in *Alaska Wildlife*, K.L. has a legitimate expectation that her male-to-female transgender condition will not be disclosed to every individual and business that request her driver's license. Thus, K.L.'s right to privacy is implicated by the DMV's failure to correct the sex designation on her driver's license.

3. A requirement of sex reassignment surgery in order for an individual to amend the sex designation on his or her driver's license infringes on the fundamental right to medical decision making.

A state statute, regulation, or policy requiring transgender individuals to undergo sex reassignment surgery before the DMV will issue a driver's license that accurately reflects their gender identity infringes on the fundamental right to medical decision making. "[A] patient's right to determine the course of his medical treatment [is] paramount"⁶⁴

The Alaska Supreme Court has long recognized an individual's fundamental right to make medical decisions free from government interference.⁶⁵ A government requirement that transgender persons undergo an invasive, personal, and intensely private medical procedure in order to change the gender designation on a driver's license infringes on this "right to make decisions about medical treatments for oneself."⁶⁶

⁶⁴ *Myers*, 138 P.3d at 251 n. 88 (internal citations and quotation marks omitted).

⁶⁵ See e.g. *Valley Hospital*, 948 P.2d at 968 ("The reasons a doctor and patient choose a medical procedure, so long as it is legal, must not be subject to approval of a [quasi-public] hospital's board of directors, according to their own values.") (internal citations and quotation marks omitted); *Myers*, 138 P.3d 238 (right to refuse psychotropic medication is fundamental); *Huffman v. State*, 204 P.3d 339, 346 (Alaska 2009) ("[T]he right to make decisions about medical treatments for oneself . . . is a fundamental liberty and privacy right in Alaska.").

⁶⁶ *Huffman*, 204 P.3d at 346.

The decision whether to undergo sex reassignment surgery as a medical treatment to alleviate gender dysphoria should only be influenced by the opinion of a medical doctor. There is no legally adequate justification for the state to burden this very serious and personal medical decision by coercing transgender persons to undergo medical treatment they may not want or need.

Likewise, it is irrational and inhumane for the state to require sex reassignment surgery for individuals to obtain a driver's license listing their correct sex designation when they do not need the surgery or may not be able to access it.⁶⁷ Some transgender individuals only change gender roles, living full time and permanently in the new gender role, without pursuing either hormone therapy or surgery either because they have no medical need for these treatments or cannot afford them. Exc. 25-26. For other transgender individuals, the significant physical changes brought about by hormones are sufficient to alleviate their gender dysphoria. Exc. 22. Others undergo one or more transition-related surgeries but not every available form of such surgery. *Id.* In any of these cases, it would be unconscionable for the government to force transgender persons to undergo surgeries or other medical treatment that are not medically necessary or recommended. Such a requirement has no medical foundation and does not further any legitimate purpose.

Because genital reconstructive surgery is not always medically necessary and cost prohibitive, WPATH strongly renounces a surgical requirement, like Alaska's, as inappropriate and harmful. In 2008, WPATH declared:

Genital reconstruction is not required for social gender recognition, and such surgery should not be a prerequisite for document or record changes; the Real Life Experience component of the transition process is crucial to psychological adjustment, and is usually completed prior to any genital reconstruction, when appropriate for the patient, according to the WPATH Standards of Care.

⁶⁷ See, e.g., *Huffman*, 204 P.3d at 345-47; *Cleveland Bd. of Educ.*, 414 U.S. at 640.

Changes to documentation are important aids to social functioning, and are a necessary component of the pre-surgical process; delay of document changes may have a deleterious impact on a patient's social integration and personal safety.⁶⁸

WPATH's statement echoes the view of the American Psychological Association ("APA"). The APA issued a policy in 2008 stating:

Therefore, be it further resolved that the APA encourages legal and social recognition of transgender individuals consistent with their gender identity and expression, including access to identity documents consistent with their gender identity and expression which do not involuntarily disclose their status as transgender for transgender people who permanently socially transition to another gender role.⁶⁹

A state statute, regulation, or policy requiring K.L. to undergo sex reassignment surgery to obtain an accurate drivers license impermissibly infringes on her fundamental right to medical decision making. There is no legally adequate justification for the state to burden this very serious and personal medical decision, a conclusion shared by leading medical organizations.

⁶⁸ WPATH Clarification on Medical Necessity of Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A. (June 17, 2008), at 2, *available at* http://www.wpath.org/medical_necessity_statement.cfm

See also WPATH, Identity Recognition Statement (June 16, 2010) ("No person should have to undergo surgery . . . as a condition of identity recognition. If a sex marker is required on an identity document, that marker should recognize the person's lived gender The WPATH Board of Directors urges governments and other authoritative bodies to move to eliminate requirements for identity recognition that require surgical procedure."), *available at* http://www.wpath.org/announcements_detail.cfm?pk_announcement=18

⁶⁹ American Psychological Association, Policy Statement: Transgender, Gender Identity, and Gender Expression Non-Discrimination (August 2008), *available at* <http://www.apa.org/about/governance/council/policy/transgender.aspx>

B. The DMV has failed to meet its substantial burden of showing that its encroachment into K.L.'s fundamental right to privacy and liberty was justified by a compelling state interest.

Because the DMV's action infringes on K.L.'s fundamental right to privacy and liberty, the Alaska Supreme Court requires the DMV to meet a substantial burden:

Once a fundamental right under the constitution of Alaska has been shown to be involved and it has been further shown that this constitutionally protected right has been impaired by governmental action, then the government must come forward and meet its substantial burden of establishing that the abridgement in question was justified by a compelling governmental interest.⁷⁰

The DMV fails to meet this substantial burden. The DMV's denial of an accurate driver's license or, alternatively, requiring proof of sex reassignment surgery to obtain an accurate license, is not justified by a compelling state interest.

Accurate Documentation: Even if the DMV's interest in accurate documentation is compelling, the *denial* of a driver's license that accurately reflects an individual's gender identity does not serve this interest, but rather, undermines it.

According to the DMV, a surgical requirement for a change in an individual's sex designation, similar to SOP D-24, serves the Department's interest for an accurate record of documentary proof:

[W]e want to make sure our records are as accurate as possible based on the birth documents that we receive . . . we want to make sure that the record is accurate, based on the documents that . . . were given to us to establish the record. . . . Or at least have a trail of why [the new documents don't match the old documents.]

Exc. 59.

⁷⁰ *Ravin*, 537 P.2d at 497 (quoting *Breese*, 501 P.2d at 171).

Thus, the DMV purports to have two goals in mind with regard to accurate documentation: (1) that a license matches the “primary documentation” originally provided by an applicant, or (2) if there is a change in his or her information, documentation is provided to explain the discrepancy. “Primary documentation” refers to identity documents the DMV accepts as documentary proof of an applicant’s date of birth and legal name.⁷¹ These documents include a birth certificate or United States passport.⁷²

Pursuant to the DMV’s own statements, the DMV is *not* concerned with the specific medical treatment, physical attributes, or overall physical appearance of the applicant. The surgical change, by itself, is irrelevant. The important element is documentation to support the change in the DMV’s internal records. Thus, there exists no legitimate reason why the required documentation to substantiate a change of gender must be based on genital surgery.

Moreover, a policy based on the existence and appearance of genitalia—a physical feature concealed from public view—undermines the DMV’s interest for accuracy. The DMV admits that a driver’s license “is the most nationally recognized form of identification.” Exc. 60. The day-to-day use of a license as a means of identification relies on the accuracy of *visible* characteristics (age, sex, weight, height, hair color and eye color).

A law enforcement officer attempting to verify a person’s identity based on information provided by a computer program has a greater chance of positive identification if the sex designation on a driver’s license accurately reflects an individual’s lived gender identity and expression, as opposed to the appearance of concealed genitalia.

Thus, any policy based on the appearance of physical features concealed from public view, rather than an individual’s gender identity and overall gender expression, will

⁷¹ 2 AAC 90.420(b).

⁷² 2 AAC 90.420(b)(1), (2).

undermine the accuracy of a driver's license. Similarly, and for largely the same reasons, the DMV's blanket refusal to change the sex designation on a driver's license, no matter the circumstances, also undermines the accuracy of Alaska's driver's licenses.

Second, a policy requiring proof of surgery is based on the mistaken belief that a sex change consists of a single surgery that changes a man into a woman or vice-versa. This mistaken belief is both uninformed and insensitive to the personal and medical challenges of genital reconstructive surgery. Transition is not the same for everyone. Some transgender persons only change gender roles. Exc. 22. Others pursue hormone therapy, but no surgery. *Id.* And for those who do pursue surgery, there is a range of surgical procedures undertaken, including breast/chest surgery, hysterectomy, oophorectomy (surgical remove of the ovaries), and facial feminization surgery. Exc. 22-23. Genital reconstructive surgery is only appropriate for the most severe cases of Gender Identity Disorder and, even then, is especially uncommon in female-to-male transgender individuals due to the overwhelming challenges to accessing it and achieving satisfying outcomes. Exc. 26. Even among male-to-female transgender persons, a majority have not completed genital surgery.⁷³ A policy based on the premise of a simple "surgical change" is medically baseless.

Third, the DMV's refusal to correct the sex marker on K.L.'s license or, in the alternative, to condition correction on proof of sex reassignment surgery creates a discrepancy (or inaccuracy) between other forms of government-issued identification and an Alaska driver's license. K.L.'s passport, visa, and pilot's license identify her as female. Thus, not only is K.L.'s driver's license inaccurate when compared to the majority of her other forms of identification, it is likewise, inaccurate when compared to her primary form of

⁷³ *Injustice at Every Turn*, 79.

identification (United States passport). In contrast, a policy based on gender identity as opposed to surgery would resolve these inaccuracies.

Finally, the DMV's policy of refusing to change the sex designation or conditioning that change on surgery creates conflicting (or inaccurate) rules for current license holders who wish to renew or amend their licenses as compared to new applicants. The DMV's SOP D-24 only relates to changes of information; the DMV has not pointed to any SOP that relates to verifying a person's gender when an applicant first applies for a license. The driver's license application statute, 2 AAC 90.420, requires documentary proof of an applicant's date of birth and name, but not of sex. Consequently, a new applicant, whether or not the applicant is transgender, may obtain a driver's license that accurately reflects his or her gender identity without undergoing sex reassignment surgery by simply identifying his or her lived sex. And under 2 AAC 90.420, documentary proof of an applicant's date of birth or legal name can consist of a United States passport, which may be based on gender identity as opposed to anatomical sex. Therefore, even if the DMV relies on these forms of identification as proof of sex, the license of a new applicant would be based on gender identity (not assigned sex at birth), while a current license holder is required to undergo sex reassignment surgery despite having the same documentary proof of gender identity.

Fraud/Falsification of Identity Documents. Similarly, the DMV has failed to meet its substantial burden of showing that its denial of an accurate driver's license, or its policy of conditioning the right to an accurate license on the completion of sex reassignment surgery, is justified by a compelling interest in preventing fraud and the falsification of state identity documents.

The prevention of fraud and falsification of identity documents is addressed through criminal statutes, not SOP D-24. It is absurd to imagine that the mere change in one's sex designation could effectively perpetuate a fraudulent identity. Falsification of a driver's

license includes an erroneous name, address, date of birth, and/or social security number. Suitable safeguards are in place to prevent unlawful changes to this information, and such safeguards do not include the requirement for medical certification of sex reassignment surgery. Likewise, with respect to instances where individuals have requested a change in the sex marker on their driver's license, the DMV admits that it has seen no evidence of fraud. Exc. 65-66.

Additionally, it is irrational to assume that transgender persons who transition for a medical purpose are “prone to commit crimes” or are transitioning for a criminal purpose.⁷⁴ Thus, a surgery-based policy, like SOP D-24, or the outright refusal to amend an individual's sex designation, has no discernable affect on the prevention of fraud and falsification of identity documents.

Moreover, to the extent the DMV's concern regarding fraud has any merit, state policies that rely on gender identity address this concern without intruding on fundamental rights. These policies require the applicant and a medical or social service provider to attest to the applicant's gender identity and expectation that the gender identity is not expected to change under penalty of perjury. Exc. 37. In addition, the applicant must state that the requested change to his or her gender marker “is not for any fraudulent or other unlawful purpose.” Exc. 41-45.

⁷⁴ *City of Chicago v. Wilson*, 75 Ill.2d 525, 532-33 (1978) (finding that asserted interest “to protect citizens from being misled or defrauded” was not a rational justification for ban on cross-dressing). *See also Lopez v. River Oaks Imaging & Diagnostics Grp.*, 542 F. Supp. 2d 653, 663-64 (S.D. Tex. 2008) (rejecting argument that “any person who dresses in a manner inconsistent with traditional gender stereotypes is necessarily deceptive”).

Administrative Efficiency: A state interest for administrative efficiency and convenience cannot outweigh the infringement of a fundamental or important right.⁷⁵

Moral and/or Religious Concerns: A state interest based upon moral or religious concerns is neither compelling nor legitimate. The courts have routinely admonished the state for attempting to impose its own notions of morality or propriety.⁷⁶ Likewise, irrelevant to this Court's inquiry are the personal, moral, or religious beliefs held by Alaskans.⁷⁷ "It is the duty of the courts 'to define the liberty of all, not to mandate [their] own moral code.'"⁷⁸

⁷⁵ *Commercial Fisheries Entry Comm'n v. Apokedak*, 606 P.2d 1255, 1266 (Alaska 1980) ("Although the purpose of promoting administrative convenience is legitimate, it cannot outweigh the important right to engage in economic endeavor.").

⁷⁶ See *Ravin*, 537 P.2d at 509 ("The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals."); see also *Valley Hospital*, 948 P.2d at 972 ("VHA has a 'sincere moral belief' that elective abortion is wrong. However, constitutional rights 'cannot be allowed to yield simply because of disagreement with them.'") (quoting *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955)).

⁷⁷ See e.g. *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 783 (Alaska 2005) ("Irrelevant to our analysis must be personal, moral, or religious beliefs-held deeply by many-about whether persons should enter into intimate same-sex relationships or whether same-sex domestic partners should be permitted to marry."); see also, *State v. Planned Parenthood of Alaska*, 171 P.3d 577, 579 (Alaska 2001) (quoting *State, Dep't of Health & Soc. Servs. v. Planned Parenthood of Alaska*, 28 P.3d 904, 906 (Alaska 2001)) ("From time to time, we are called upon to decide constitutional cases that touch upon the most contentious moral, ethical, and political issues of our day. In deciding such cases, we are ever mindful of the unique role we play in our democratic system of government. . . . We are not philosophers, ethicists, or theologians, and 'cannot aspire to answer' fundamental moral questions or resolve societal debates. We are focused only on upholding the constitution and laws of the State of Alaska.").

⁷⁸ *Alaska Civil Liberties Union*, 122 P.3d at 783 (alterations in original) (quoting *Lawrence v. Texas*, 539 U.S. 558, 559, 123 S. Ct. 2472 (2003)).

C. The DMV has failed to meet its substantial burden of proving that its blanket prohibition on correcting the sex designation or, in the alternative, requiring proof of surgery is the least restrictive means of achieving any compelling state interest.

When state action places substantial burdens on the exercise of a fundamental right, the state must “articulate a compelling [state] interest” and “demonstrate the ‘absence of a less restrictive means to advance [that] interest.’”⁷⁹ There should be no debate that the DMV’s policy under SOP D-24, or a blanket refusal to correct the sex designation on a driver’s license, are not the least restrictive means of achieving the state’s interests. Less restrictive policies enacted in at least seven other states and by the federal government prove this fact.⁸⁰ Exc. 35-45.

Likewise, the DMV conceded that a state regulation similar to the less restrictive policies discussed above would not “present any difficulties” for the DMV and would satisfy the “internal consistency of records” interest advanced by the DMV as justification for SOP D-24. Exc. 64-65.

D. In the alternative, if the right infringed is merely important and not fundamental, the DMV’s refusal to permit a transgender individual from correcting his or her sex designation on his or her driver’s license or, in the alternative, permitting a correction only upon proof of surgery, does not bear a close and substantial relationship to the government interests advanced.

In the alternative, when the law “interferes with an individual’s freedom in an area that is not characterized as fundamental,” the state must “show a legitimate interest and a close and substantial relationship between its interest and its chosen means of advancing that

⁷⁹ *Myers*, 138 P.3d at 245-46 (alterations in original) (quoting *Sampson*, 31 P.3d at 91).

⁸⁰ *See Planned Parenthood*, 171 P.3d 577, 583 (statutory regime that prohibited doctors from performing abortions on minors without parental consent was not the least restrictive means of achieving state’s compelling interest when a review of statutory schemes enacted around that nation revealed a widely used legislative alternative: parental notification).

interest.”⁸¹ Stated differently, “even at the lowest level of scrutiny, the connection must be *substantial*.”⁸² For the reasons discussed above in Section II.B, the state fails to satisfy this “means to end” inquiry.

Accurate Documentation: The DMV’s refusal to correct the sex marker on K.L.’s license or, in the alternative, to condition correction on proof of sex reassignment surgery does not bear a close and substantial relationship to the DMV’s interest for accurate documentation. It causes a license to inaccurately describe the discernable appearance of a license holder by not reflecting the holder’s lived gender expression and identity. It is based on an inaccurate model about what constitutes a sex change. It creates a discrepancy between primary forms of identification (United States passport) and an Alaska license. Likewise, it creates conflicting rules between new applicants and applicants who wish to renew or correct their licenses.

Fraud/Falsification of Identity Documents: There is no rational connection, much less a close and substantial one, between the DMV’s policy and the state’s efforts to prevent fraud and the falsification of state identification.⁸³ Additionally, the existence of less restrictive, non-surgical policies more aptly address this concern by requiring an applicant to state under penalty of perjury that the request “is not for any fraudulent or other unlawful purpose,” throws even more doubt on any asserted connection between fraud prevention and the DMV’s refusal to correct the sex marker on driver’s licenses or condition those changes on proof of surgery. Exc. 41-45.

⁸¹ *Myers*, 138 P.3d at 245-46 (quoting *Sampson*, 31 P.3d at 91).

⁸² *Alaska Civil Liberties Union*, 122 P.3d at 791 (original emphasis) (citing *Isakson v. Rickey*, 550 P.2d 359, 362 (Alaska 1976) (approving of “less speculative, less deferential, more intensified means-to-end inquiry” for traditional rational basis test)).

⁸³ *City of Chicago*, 75 Ill.2d at 532-33.

Administrative Efficiency: The DMV's refusal to correct the sex marker on K.L.'s license or, in the alternative, to condition correction on proof of sex reassignment surgery does not bear a close and substantial relationship to the DMV's interest in administrative efficiency. There is no reason why a standard based on a person's lived gender would present any greater burden than the current policy. Additionally, the prevalence of these less restrictive state policies prove that "administrative difficulties are not an insurmountable barrier" to eliminating SOP D-24.⁸⁴

In *ACLU*, the court dismissed the state's asserted interest of administrative efficiency because other jurisdictions managed to enact alternative policies that did not infringe on constitutional protections.⁸⁵ *ACLU* concerned the government's refusal to extend employment benefits to same-sex domestic partners. The court noted that "[t]he availability of these benefits elsewhere persuades us that administrative difficulties are not an insurmountable barrier to providing benefits if our constitution requires that they be provided."⁸⁶ Consequently, the court "conclude[d] that the absolute exclusion of same-sex couples is not substantially related to the goal of maximizing administrative efficiency."⁸⁷

Similarly, here, the proliferation of less-restrictive policies proves that "administrative difficulties are not an insurmountable barrier[.]" Accordingly, the DMV's refusal to permit transgender persons from correcting the sex designation on their driver's license, or

⁸⁴ *Alaska Civil Liberties Union*, 122 P.3d at 792.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

permitting correction only upon proof of surgery, is “not substantially related to the goal of maximizing administrative efficiency.”⁸⁸

III. THE DMV’S REFUSAL TO PERMIT A TRANSGENDER PERSON FROM CORRECTING THE SEX DESIGNATION ON HIS OR HER DRIVER’S LICENSE OR, IN THE ALTERNATIVE, PERMITTING CORRECTION ONLY UPON PROOF OF SURGERY VIOLATES THE RIGHT OF EQUAL PROTECTION

The Alaska Constitution’s opening provision declares “that all persons have a natural right to life, liberty, the pursuit of happiness, and . . . that all persons are equal and entitled to equal rights, opportunities, and protection under the law” Alaska Const. art. I, § 1. Referred to as the equal protection clause, “this clause actually guarantees not only equal protection, but also equal rights and opportunities under the law.”⁸⁹ The court has “long recognized that the Alaska Constitution’s equal protection clause affords greater protection to individual rights than the United States Constitution’s Fourteenth Amendment.”⁹⁰

“To implement Alaska’s more stringent equal protection standard, the court has adopted a three-step sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interest at state.”⁹¹ This sliding scale mirrors the standard of review outlined above with respect to an infringement of fundamental rights. If the constitutional interest impaired is significant, “the regulation cannot survive

⁸⁸ *Id.*

⁸⁹ *Alaska Civil Liberties Union*, 122 P.3d at 785 (internal citations and quotation marks omitted).

⁹⁰ *Malabed v. North Slope Borough*, 70 P.3d 416, 420 (Alaska 2003).

⁹¹ *Alaska Civil Liberties Union*, 122 P.3d at 787 (quoting *Malabed*, 70 P.3d at 420-21) (internal citations and quotation marks omitted).

constitutional challenge unless it serves a compelling state interest.”⁹² Likewise, the “State must demonstrate . . . that its goals could not be accomplished by less restrictive means.”⁹³

On the lower end of the scale, “if the burden placed on constitutional rights by the regulation is minimal, then the State need only show that its objectives were legitimate.”⁹⁴ Likewise, under minimum scrutiny, the state must demonstrate a substantial relationship between the means and the “object of the legislation.”⁹⁵ In other words, “Alaska’s Equal Protection Clause requires more than just a rational connection between a classification and a governmental interest; even at the lowest level of scrutiny, the connection must be *substantial*.”⁹⁶

As discussed above, the individual rights implicated by the DMV’s refusal to change the gender on a driver’s license, or to change the gender only if an applicant undergoes surgery, are fundamental, and thus, strict scrutiny is applied. Under strict scrutiny, the DMV’s policy violates equal protection because the policy fails to serve a compelling state interest and a less restrictive policy is available.

Likewise, even under minimum scrutiny, the policy violates equal protection. Although the DMV may assert legitimate interests there is not a substantial relationship between SOP D-24’s differential treatment of transgender persons seeking to change the sex

⁹² *Planned Parenthood of Alaska*, 28 P.3d at 909 (“We have explained in the past that [strict] scrutiny is appropriate where a challenged enactment affects ‘fundamental rights[.]’”

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Alaska Civil Liberties Union*, 122 P.3d at 790 (internal citation and quotation marks omitted).

⁹⁶ *Id.* at 791 (citing *Isakson*, 550 P.2d at 362 (approving of “less speculative, less deferential, more intensified means-to-end inquiry” for traditional rational basis test)).

on their license and other persons who seek to change one of the other descriptive traits on their license such as weight, height, hair color, and eye color and those interests (as discussed above).

Furthermore, the DMV's policy of refusing to change the gender on a license or, in the alternative to make such a change only upon proof of surgery, violates equal protection because it precludes transgender people from obtaining an accurate driver's license while non-transgender persons are not faced with these burdens. "[I]f a person does not have identification that accurately reflects his or her gender identity, that person is put in a position of potential danger on a daily basis and may be forced to live on society's margins because of an inability to obtain gainful employment, credit, or bank accounts."⁹⁷

Additionally, a driver's license is an important property interest; "[its] continued possession may become essential in the pursuit of a livelihood."⁹⁸

Additionally, the DMV discriminates between new license applicants and current license holders. A new license applicant may acquire a license that identifies his sex according to gender identity, absent proof of surgery, by simply identifying his or her sex on the driver's license application and presenting an amended or recently acquired United States passport under the federal government's revised policy, per State Department regulations.⁹⁹ On the other hand, a current license holder, like K.L., is precluded from this right.

⁹⁷ *Transgendered in Alaska*, 26 Alaska L. Rev. at 263 (2009) (quoting Spencer Bergstedt, *Estate Planning and the Transgender Client*, 30 W. New Eng. L. Rev. 675, 681 (2008)).

⁹⁸ *Whitesides v. State, Dep't of Pub. Safety, Div. of Motor Vehicles*, 20 P.3d 1130, 1135 (Alaska 2001) (quoting *Bell v. Burson*, 402 U.S. 535, 539 (1971)).

⁹⁹ 7 FAM 1300 App. M (2008), available at <http://www.state.gov/documents/organization/143160.pdf> 32-39; R. 32-39.

IV. THE HEARING OFFICER COMMITTED REVERSIBLE ERROR BY MISINTERPRETING AND MISAPPLYING AS 25.15.161 TO FIND THAT K.L.'S LICENSE CONTAINED AN "ERROR."

"Questions regarding the interpretation and application of a statute are questions of law to which" the court applies its independent judgment.¹⁰⁰ When interpreting a statute, the court "is to give effect to the intent of the law-making body with due regard for the meaning that the language in the provision conveys to others."¹⁰¹ The court "will adopt the rule of law that is most persuasive in light of precedent, reason, and policy after considering the plain meaning of the statute, the legislative purpose of the statute, and the intent of the statute."¹⁰² "When reviewing an agency decision involving statutory interpretation and determination of legislative intent, [the court] appl[ies] the substitution of judgment standard."¹⁰³

The court reviews license cancellation hearings under AS 28.15.166(m), which provides that the court may reverse the department's determination if the court finds that the department misinterpreted the law, acted in an arbitrary and capricious manner or made a determination unsupported by the evidence in the record.

The hearing officer's determination was based on the erroneous finding that K.L.'s license contained an "error." Exc. 56. Per AS 28.15.161, the DMV may cancel a driver's license "upon a determination that . . . there is an error or defect in the license." AS 28.15.161(a)(2). The legislature's intent in granting the DMV the authority to cancel a

¹⁰⁰ *Bradshaw v. State Dep't of Admin., Div. of Motor Vehicles*, 224 P.3d 118, 122 (Alaska 2010) (internal citation and quotations marks omitted).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

license under AS 28.15.161(a)(2) is to prevent fraudulent or unintentional errors in an applicant's information, neither of which is applicable here. Moreover, K.L.'s current license, listing her as a woman, is accurate under AS 28.15.161(a)(2) because K.L. furnished the necessary documentary proof required under the DMV's own standards for licensing drivers, and her license accurately reflects her day-to-day appearance as a woman.

First, there is no error in identifying K.L. as female. Her gender identity and expression is female. Listing her sex as male, conversely, would create an error in her license based on her gender identity and expression.

Secondly, sufficient documentary proof was furnished, under 2 AAC 90.420, to substantiate K.L.'s female gender marker. In order to obtain an Alaska driver's license, an applicant must furnish three forms of identification: (1) a primary form of identification to provide "documentary proof of the applicant's date of birth . . . and full legal name[.]" (2) a secondary form of identification as verification of the primary document presented, and (3) a social security card.¹⁰⁴ A United States passport may serve as a primary form of identification,¹⁰⁵ and according to the DMV's website, a pilot's license may serve as a secondary form of identification.¹⁰⁶ K.L. furnished copies of both of these documents, and they both identified her as female.

If these documents are sufficient to "provide documentary proof of an applicant's date of birth . . . and full legal name," they are also sufficient to provide documentary proof of an applicant's sex. Thus, there is no "error" in K.L.'s license, per AS 28.15.161(a)(2), and

¹⁰⁴ 2 AAC 90.420; see also the DMV's website, <http://doa.alaska.gov/dmv/akol/original.htm>.

¹⁰⁵ 2 AAC 90.420(b)(2).

¹⁰⁶ <http://doa.alaska.gov/dmv/akol/original.htm>.

accordingly, the DMV lacks the authority to cancel her license. The hearing officer's decision affirming the cancellation misinterpreted the law and represents reversible error.

Similarly, the hearing officer's decision, that the negation of SOP D-24 left the DMV with "no authority to change the sex on a license," ignores the DMV's current statutory and regulatory scheme regarding standards for licensing. Exc. 56. SOP D-24 was not intended to *permit*, but to *restrict* the opportunity of people to change or correct the sex designated on his or her driver's license. In general, the DMV allows information on a license to be updated, changed or corrected as relevant information changes or errors come to light. Accordingly, where no statutes or regulations exist, information on a license (including change of height, weight, hair color, etc.) may be modified based solely on the applicant's request. Exc. 57.

Thus, the elimination of SOP D-24, and the absence of statute or regulation expressly limiting an individual from correcting the sex marker on his or her license, requires the DMV to treat changes in an individual's sex designation in accordance with changes to other information. Either the applicant's requested gender change should be respected in a similar fashion as changes to weight, eye color, hair color, etc., or a change should be permitted upon an applicant furnishing an amended passport. The DMV has explicitly determined that a United States passport provides sufficient documentary proof of an applicant's name and date of birth. Likewise, this document provides the necessary documentary proof of an applicant's sex - at least until such time as new authority requiring a different course of action is promulgated.

The hearing officer's decision, therefore, was based on the incorrect determination that K.L.'s license contained an error. Under AS 28.15.166(m), this Court may reverse the decision for a misinterpretation of the law and a determination unsupported by the evidence in the record.

V. THE APPROPRIATE REMEDY IS THE PROMULGATION OF AN ADMINISTRATIVE REGULATION, SIMILAR TO POLICIES IN A GROWING NUMBER OF STATES, WHICH DOES AWAY WITH PROOF OF SURGICAL TREATMENT, FOCUSING INSTEAD ON GENDER IDENTITY AND EXPRESSION.

Upon a finding that the DMV's blanket refusal to correct an individual's sex marker or, in the alternative, to permit a correction upon proof of sex reassignment surgery represents an impermissible infringement on fundamental privacy rights and a violation of equal protection, K.L. asks this Court, in part, to instruct the DMV to promulgate a rule that is consistent with the constitutional protections on citizens' liberty and privacy interests such as those in the growing number of states that permit the correction to an individual's sex designation based on gender identity. Exc. 35-45.

The Alaska Supreme Court has previously instructed the state to promulgate rules in accordance with constitutional protections.¹⁰⁷ In *Falcon*, the court instructed the Alaska Public Offices Commission to promulgate new regulations in accordance with its decision that the state's Conflict of Interest Law violated a patient's privacy interest.

We do not suggest the form or scope of such regulations. They may be specific or very general in nature so long as they provide a method by which a physician may present a claim or exemption to the Commission for its ruling in such a manner as to preserve the confidentiality of the patient's name.¹⁰⁸

Likewise, the Court has recommended other state policies as a model for this state to follow. For example, in *Alaska Civil Liberties Union*, the court held that the denial of benefits to public employees with same-sex domestic partners violated the Alaska

¹⁰⁷ *Falcon*, 570 P.2d at 480.

¹⁰⁸ *Id.*

Constitution's equal protection clause.¹⁰⁹ In light of this violation, the court encouraged Alaska and its municipalities to model a new policy off of benefit programs currently offered by other public employers. "One possible remedy would be to give the state and the municipality a reasonable opportunity to adopt standards for making these benefits available to persons deemed eligible. Many other public employers now have programs that may be useful models, and private employers may also."¹¹⁰

Therefore, similar to the Alaska Supreme Court's decisions in *Falcon* and *Alaska Civil Liberties Union*, K.L. asks this Court to instruct the DMV to promulgate a rule consistent with Alaska's heightened liberty and privacy protections. A rule modeled off of the growing trend of state policies based on gender identity, not surgery. A rule that would create consistency between K.L.'s Alaska driver's license and her United States passport, her medical certificate to operate as a pilot, and her airman certificate.

CONCLUSION

Denying K.L. a driver's license that accurately reflects her gender identity and expression because she has not undergone sex reassignment surgery, violates her right to privacy and equal protection as guaranteed by the Alaska Constitution, article I, §§ 1, 7, 22. Accordingly, K.L. respectfully requests this Court to vacate the order cancelling her license; to declare that all current and future holders of an Alaska driver's license, and similar documents issued by the DMV, shall be entitled to change the designation of sex on such documents, subject to conditions imposed by valid, constitutional regulations; and likewise,

¹⁰⁹ *Alaska Civil Liberties Union*, 122 P.3d at 783.

¹¹⁰ *Id.* at 795 (internal citations omitted).

that proof of surgery may not be demanded as a condition to change the sex designation on such documents, as this requirement violates the rights of equal protection and privacy.

DATED: this 18th day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2011, a true and correct copy of the Brief of Appellant, the Appellant's Excerpts of Record, the Notice of Unopposed Motions, the [Proposed] Motion for Substitution of Exhibits, the [Proposed] Motion to Supplement the Record, and the Certificate of Typeface were served by hand on the following party of record: Division of Motor Vehicles, c/o Erling Johansen, Department of Law, State of Alaska.

Thomas Stenson, Attorney