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CASE NUMBER: 2016-CV-000150

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
THIRD JUDICIAL DISTRICT OF KANSAS

STEPHANIE MOTT, Petitioner, v. KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT and SUSAN MOSIER, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT, Respondents.	Case No. 2016-cv-0150

PETITIONER'S MOTION FOR JUDGMENT ON PETITION FOR REVIEW

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Petitioner Stephanie Mott, by and through her attorneys of record, hereby moves for judgment on the Petition for Review in her favor and against Kansas Department of Health and Environment and Susan Mosier.

SUPPORTING MEMORANDUM

I. INTRODUCTION

Petitioner Stephanie Mott ("Ms. Mott") has filed a petition for judicial review of a final agency action of the Kansas Department of Health and Environment ("KDHE") denying her request for an amendment to the gender marker on her birth certificate pursuant to K.A.R. 28-17-20(b)(1)(A)(i) (the "Regulation").

Ms. Mott is a transgender woman. That means she was designated as "male" on her Kansas birth certificate, but this designation is inaccurate: her sex, as well as her gender identity, is female. The inaccurate male designation on her current birth certificate causes her recurring harm by compromising her privacy and placing her safety at risk. Beginning in 2013, Ms. Mott sought to amend her birth certificate so that the gender marker on her birth certificate would be congruent with her true sex, gender identity, and gender expression. At the time of Ms. Mott's request to KDHE, the Regulation allowed for an amendment to a birth certificate with a medical certificate substantiating that a physiological or anatomical change had occurred or with an affidavit from the applicant stating that his or her sex was incorrectly recorded at birth. Ms. Mott's request satisfied both bases for a birth certificate amendment.

KDHE, however, denied Ms. Mott's request summarily, relying on its own analysis of a decade-old Court of Appeals decision, *In re Estate of Gardiner*, 29 Kan.App.2d 92, 22 P.3d 1086 (2001), *aff'd in part, rev'd in part*, 273 Kan. 191, 42 P.3d 120 (2002). KDHE claimed that the decision had invalidated the Regulation, notwithstanding that KDHE previously had analyzed the

decision and continued to enforce the Regulation for nearly a decade after the decision was issued. Indeed, KDHE did not attempt to amend the Regulation to reflect the decision's purported effect on the Regulation for another 15 years after the decision was issued, and only did so when Ms. Mott filed her Petition for Review.

Ms. Mott is entitled to judgment on her Petition for Review for two independent reasons:

First, KDHE was statutorily required to grant Ms. Mott's request for a gender marker amendment pursuant to K.A.R. 28-17-20(b)(1)(A)(i) because the Regulation, by its terms, permitted amendment where, as here, the individual requesting the amendment provides a medical certificate substantiating that a physiological or anatomical change has occurred or provides an affidavit stating that his or her sex was incorrectly recorded at birth. At the time of Ms. Mott's request, that language had not been revoked, amended, or otherwise invalidated, and Ms. Mott's request complied with these requirements. Thus, KDHE was statutorily required to grant her request. *See* KSA 65-2402(a)(5) (KDHE has statutory duty to enforce regulations that have been enacted under enabling statutes). Indeed, even under the Regulation *as amended*, KDHE is statutorily required to grant Ms. Mott's request for a gender marker amendment because she provided an affidavit and supporting medical reports substantiating that her sex was incorrectly recorded at birth.

Second, the United States Constitution requires KDHE to grant Ms. Mott's request, because to deny it would violate her rights to both due process and equal protection. Ms. Mott has a significant privacy interest in maintaining her confidential medical information, including her transgender status, as well as her gender identity disorder diagnosis. *See Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999); *Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir. 2000). She also has a fundamental right to live in accordance with her gender identity without undue

interference by the state. *See Obergefell v. Hodges*, 576 U.S. __, 135 S.Ct. 2584, 2589 (June 26, 2015). KDHE's refusal to amend her birth certificate violates her right to due process because it infringes on these constitutional interests without being narrowly tailored to advance a compelling state interest. *See Kitchen v. Herbert*, 755 F.3d 1193, 1218 (10th Cir.), *cert. denied.*, 135 S.Ct. 265 (2014). KDHE's refusal also violates her right to equal protection because it is based in a policy that discriminates against transgender individuals and individuals who do not conform to sex stereotypes, and does not further an important state interest. *See Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011); *cf. Brown v. Zavaras*, 63 F.3d 967, 969 (10th Cir. 1995).

KDHE is thus required by statute and, independently, under the United States Constitution to grant Ms. Mott's request for a gender marker amendment to her birth certificate. KDHE's refusal to enforce the Regulation was procedurally improper, contrary to law, and arbitrary and capricious. *See* K.S.A. 77-621(c)(1), (2), (4), (5), and (8).

II. FACTUAL BACKGROUND

A. Ms. Mott's Request to Obtain a Gender Marker Amendment Pursuant to K.A.R. 28-17-20(b)(1)(A)(i)

1. The Sex Designation on Ms. Mott's Birth Certificate Is Inaccurate, Causing Her Significant Ongoing Harm

Ms. Mott was assigned the sex of male at birth, and that sex was recorded on her Kansas birth certificate. (Volume 1 of the Certified Record ("1CR") at 35, ¶ 2; 1CR at 41.) However, from Ms. Mott's earliest memories, she has known herself to be female. (1CR at 35, ¶ 4.) Ms. Mott began to express her female gender identity through clothing and other means as early as age six. Because she knew that she would not be allowed to express herself as the gender she

truly is, Ms. Mott lived a double life from the age of six, presenting as a girl in private whenever she could, but hiding her true self and presenting as a boy around other people. (*Id*.)

As Ms. Mott grew older, leading this double life that forced her to present as male in public became increasingly difficult, as she struggled between the need to live as the woman she is versus the man that others expected her to be. (*Id*.) Beginning in 2006, Ms. Mott saw a therapist about her growing discomfort with the male sex she was assigned at birth. (*Id.*, ¶ 5.) In April of that year Ms. Mott was first diagnosed with gender identity disorder. (*Id.*, ¶ 5, 1CR at 44-47.) Ms. Mott worked closely with the therapist for about 18 months, during which she began the process of transitioning to live as a woman. (1CR at 35, ¶ 5) By 2007, while under the treatment of her therapist, Ms. Mott began living full-time as a woman. (*Id*.)

To help alleviate her gender dysphoria, in May 2012, Ms. Mott traveled to Bangkok, Thailand to undergo gender confirmation surgery.[1] (1CR at 35, ¶ 6, 1CR at 50.) In order to obtain the surgery, Ms. Mott was required to provide documentation from a medical provider of her GID diagnosis. (1CR at 36, ¶ 7.) Since undergoing the surgery, Ms. Mott has finally felt a sense of "completeness in having [her] body more closely match [her] soul." (1CR at 37, ¶ 18.) Prior to that time, Ms. Mott had "daily thoughts of suicide, [felt] the shame of being unacceptable to society, [and lived with] the fear of being found out." (*Id.*, ¶ 19.) Since transitioning to live as a woman full-time, Ms. Mott has found "more joy than [she] can begin to describe." (*Id.*, ¶ 18.)

Ms. Mott's Kansas driver's license, social security card, and United States passport accurately reflect her true sex of female. (1CR at 36, ¶ 8, 1CR at 52, 54.) However, because her

[1] Gender confirmation surgery, Ms. Mott's preferred term, is also sometimes referred to as "sex reassignment surgery." (1CR at 35, ¶ 6.)

Kansas birth certificate reflects a male sex, her birth certificate is inaccurate and inconsistent with all of her other identification documents.

Having inconsistent identification documents that are incongruent with her gender regularly subjects Ms. Mott to embarrassment and harassment and exposes her to an increased risk of violence. For example, when Ms. Mott voted for the first time after beginning to live as a woman, she looked like any other woman but had not been able to update her driver's license which still identified her as her former name. The inconsistency confused the poll worker, who then challenged Ms. Mott loudly and publicly about her identity. (1CR at 36, ¶ 10.) To explain the discrepancy, Ms. Mott had to disclose her transgender status—highly personal and intimate medical information—in front of total strangers. (*Id.*) Additionally, when Ms. Mott registered for her Kansas fishing license, the clerk looked her up in the Department of Wild Life and Parks database and saw that she was listed as male. (*Id.*, ¶ 11.) The clerk then loudly and publicly questioned Ms. Mott's identity, again forcing her to disclose her transgender status. (*Id.*)

Beyond the humiliation involved in these encounters, Ms. Mott reasonably fears that future unwanted revelations of this kind could be potentially dangerous, and could even subject her to violence. Many of the people Ms. Mott interacts with on a daily basis do not otherwise know that she is transgender, and the incongruity between the gender marker on her birth certificate and her female gender remains one of the last remaining indications of her incorrect birth-assigned sex. Both the indignity of having an incorrect gender marker on her birth certificate and the fear of her transgender status and private medical information being disclosed negatively impact her mental health, causing her significant distress on a daily basis.

Ms. Mott has described the experience of having an incorrect gender marker on her birth certificate as follows:

> I am a woman and have always been a woman. The very first thing I remember about myself is that I was a girl. After nearly 50 years of trying to live as a man, and suffering great hardship, I finally began to accept myself for who I am. Now my life is so much better, but the State of Kansas is refusing to recognize me for the woman I am. I cannot express how badly that hurts after everything I have been through. After years filled with daily thoughts of suicide, the shame of being unacceptable to society, the fear of being found out; I came to know the joy of being the woman of my soul, the truth, the correctness. This issue with my birth certificate is a horrible situation that brings back much of the pain I thought I had left behind.

(1CR at 37, ¶ 19.)

2. Ms. Mott Requested an Amendment to the Gender Marker on Her Birth Certificate, Which KDHE Denied

In order to make her birth certificate congruous with her female sex, on November 18, 2013, Ms. Mott submitted to the Office of Vital Statistics a request for an amendment to her birth certificate, accompanied by a medical certification substantiating her anatomical change, as required by K.A.R. 28-17-20(b)(1)(A)(i) (the "Regulation"). (1CR at 1-3.) Despite the fact that Ms. Mott's request complied with the Regulation, Timothy Keck, Deputy Chief Counsel for KDHE, responded by letter dated November 20, 2013 (the "Denial Order"), stating that, based on the information submitted, the request would be denied, and further stating: "We do on occasion receive requests for correction under circumstances where gender misidentification has occurred. We will process these requests for correction when we can establish through documentation from a medical provider and affidavit that misidentification occurred at or around the time of birth." (1CR at 4.) The Denial Order invited Ms. Mott to contact Mr. Keck should she "have any questions or concerns." (*Id.*) The Denial Order did not notify Ms. Mott of the agency officer who was to receive service of a petition for judicial review on behalf of the agency, as required by K.S.A. 77-613(e) if the letter was intended to be notification of a final order. (*Id.*)

On December 14, 2015, Ms. Mott submitted a letter responding to Mr. Keck's invitation to provide her questions and concerns, enclosing evidence confirming that misidentification of her gender had indeed occurred at her birth, and sought a final agency determination of her request for an amendment to the gender marker on her birth certificate (the "December 2015 Letter"). (1CR at 5-33; 1CR at 35 – 2CR at 447.) The December 2015 Letter outlined KDHE's statutory and constitutional obligations—particularly in light of intervening developments in binding Tenth Circuit and United States Supreme Court case law—and enclosed and incorporated by reference supporting materials, which included expert physician declarations and documents obtained from KDHE pursuant to a Kansas Open Records Act ("KORA") request. (1CR at 35 – 2CR at 447.) The expert physician declarations stated, among other things, that for a transgender individual like Ms. Mott, the individual's gender is misidentified at birth and thus incorrectly recorded on the individual's birth certificate. (1CR at 178-79 – Expert Report of Dr. George R. Brown ("Brown Report") at 4-5; 1 CR at 192 Expert Report of Dr. Nick Gorton ("Gorton Report") at 2; 1 CR at 198 – Expert Report of Dr. Eli Coleman ("Coleman Report") Report at 1.)

By letter dated January 22, 2016, KDHE denied Ms. Mott's request, and for the first time notified Ms. Mott of the agency officer to receive service of a petition for judicial review on behalf of the agency pursuant to K.S.A. 77-613(e) (the "January 2016 Letter"). (1CR at 34.) Ms. Mott's counsel received the January 2016 Letter in the mail on February 1, 2016. Because the January 2016 Letter was served by mail, Ms. Mott was required to file her Petition for Review within 33 days of January 22, 2016. *See* K.S.A. 77-613(b), (e).

KDHE did not make any fact findings, either in the Denial Order or the January 2016 Letter, relying exclusively on its own idiosyncratic interpretation that the Regulation was no longer in effect. (1CR at 4, 34.)

3. Ms. Mott Timely Filed a Petition for Review

On February 19, 2016, Ms. Mott timely filed a Petition for Review of KDHE's Denial Order by filing within 33 days of the January 2016 Letter, which notified Ms. Mott of the agency officer to receive service of a petition for judicial review on behalf of the agency, as required by K.S.A. 77-613(e). (Petition.) In her Petition for Review, Ms. Mott argued—as she had before KDHE—that the Agency was statutorily required to grant her request, and that the refusal to do so violated the Equal Protection and Due Process clauses of the United States Constitution. On April 7, 2016, KDHE filed its Answer to the Petition. (Answer.)

On March 21, 2016, KDHE filed its Certification of Record, and on November 21, 2016, it filed a Revised Certification of Agency Record, which included the complete correspondence transmitted by Ms. Mott to KDHE, including the materials in support of her December 2015 Letter.

4. The Court Denied KDHE's Motion to Dismiss, Allowing the Petition to Proceed on the Merits

On April 15, 2016, KDHE filed a motion to dismiss Ms. Mott's Petition for Review. KDHE argued that the Court lacked jurisdiction because the "action being appealed by Ms. Mott is not an agency action subject to appeal"; the Petition was not timely under K.S.A. 77-613(b); the petition was time-barred by K.S.A. 60-513(a)(4); enforcing the Regulation is beyond the legislative authority granted to KDHE under K.S.A. 65-2422c; and enforcing the Regulation is contrary to *In re Estate of Gardiner*, 273 Kan. 191, 42 P.3d 120 (2002).

On July 29, 2016, this Court denied KDHE's motion to dismiss, concluding that the Petition for Review was timely and allowing Ms. Mott's case to proceed on the merits. The Court first noted that it "[could] not conclude at this initial stage of review, that the Respondents' arguments regarding K.A.R. 28-17-20 and the *Gardiner* case are so overwhelming as to subject the case to dismissal for failure to state a claim." (Order at 7.) The Court thus limited its analysis to KDHE's subject matter jurisdiction and the statute of limitations arguments, and held that the Petition for Review was timely because KDHE triggered the 30-day response period only when it satisfied the service requirements of K.S.A. 77-613(e) on January 22, 2016 (Order at 10-11 (citing *Reifschnieder v. State*, 266 Kan. 338, 342-43, 969 P.2d 875 (1998)), and that even if the two-year statute of limitations in K.S.A. 60-513(a)(4) applied to KJRA actions, the claim did not accrue until that same date. (Order at 12-14.)

On August 17, 2016, Ms. Mott filed an Amended Petition for Review, pursuant to the Court's order. (Amended Petition.) KDHE filed an Answer to the Amended Petition for Review on September 1, 2016. (Answer to Amended Petition.)

B. Medical and Scientific Consensus Regarding the Importance of Recognizing the Gender Identity of Transgender Individuals on Birth Certificates

Critical to assessing the necessity of allowing Ms. Mott to change her gender marker under the Regulation and the United States Constitution is an understanding that having a birth certificate that accurately reflects a person's lived gender is essential for a variety of reasons: facilitating identification for administrative purposes, respecting the individual's core autonomy about the fundamental question of identity, protecting the privacy of a person's transgender status, and serving as a vital part of the recognized course of medical treatment for gender dysphoria.

1. How Medical Science Defines "Sex"

The medical understanding of what a person's sex is has evolved significantly during the past few decades. Previously, sex was understood to mean (only) the appearance of a person's genitalia—whether they had a penis or a vagina. However, scientists now understand that sex is significantly more complex than that, and that determining a person's sex requires consideration of a number of factors including their anatomy, gender identity, sexual orientation, hormonal levels, and chromosomal identity. (1CR at 177 – Brown Report at 3; 1CR at 192 – Gorton Report at 2.) Of these factors, it is widely accepted that gender identity—a person's internal understanding of themselves as male or female, believed to be irreversibly established by two to three years of age—is the most relevant in determining sex. (1CR at 177-179 – Brown Report at 3-6; 1CR at 194 – Gorton Report at 4.) *See also*, *e.g.*, *In Re Lovo-Lara*, 23 I. & N. Dec. 746, 752 (BIA 2005) (discussing eight components that determine an individual's sex); *Schroer v. Billington*, 424 F.Supp.2d 203, 212-13 (D.D.C. 2006) (discussing "real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological—interact with each other"); *In re Heilig*, 816 A.2d 68, 73 (Md. 2003) (noting that the medical community recognizes seven different factors composing a person's sex).[2]

Typically, the factors that make up sex are more or less in alignment. (1CR at 177 – Brown Report at 3; 1CR at 192 – Gorton Report at 2.) Thus, when a child is born, a doctor or

[2] The Kansas Court of Appeals in *Gardiner* also accepted this understanding of the complexity of defining a transgender individual's sex. 29 Kan.App.2d at 127 ("[W]e adopt the criteria set forth by Professor Greenberg. On remand, the trial court is directed to consider factors in addition to chromosome makeup, including: gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity. The listed criteria we adopt as significant in resolving the case before us should not preclude the consideration of other criteria as science advances.") (citing Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 Ariz. L. Rev. 265, 278–92 (1992)).

nurse will conduct a cursory visual examination of the external genitalia and indicate the corresponding "sex" on the birth certificate. (1CR at 178 – Brown Report at 4; 1CR at 192 – Gorton Report at 2; 1CR at 198 – Coleman Report at 1.) While this assessment is usually consistent with the individual's gender identity, children are sometimes born with variations in anatomy, chromosomes, hormones, or identity that may or may not align with the determination that was recorded at birth. (1CR at 178-79 – Brown Report at 4-5; 1CR at 192 – Gorton Report at 2; 1CR at 198 – Coleman Report at 1.)

Approximately 0.6% of the population is transgender. *See* Andrew R. Flores et al., *How many adults identify as transgender in the United States?*, Williams Institute (June 2016), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf. The terms "transgender" or "transsexual" describe people whose gender identity is different from the sex they were assigned at birth.[3] (1CR at 179 – Brown Report at 5.) Many studies establish that there is a biological basis for transgender identity. (1CR at 179 – Brown Report at 6 & n.6; 1CR at 192-93 – Gorton Report at 2.) These studies indicate that gender identity is a biological characteristic of the brain influenced heavily by the prenatal environment—specifically what hormones or chemicals the developing brain is exposed to. (1CR at 180-81 – Brown Report at 6-7; 1CR at 192 – Gorton Report at 2.) The prevailing understanding of the development of gender identity is that it is determined by this prenatal environment and because of genes that predispose an individual to male or female brain developmental pathways. (1CR at 192 – Gorton Report at 2.)

[3] Gender identity is distinct from sexual orientation, which describes whether one's sexual and affectional preference is for people of the same sex (homosexual), the opposite sex (heterosexual), or both sexes (bisexual). (1CR at 177-78 – Brown Report at 3-4; 1CR at 192 – Gorton Report at 2.)

2. Gender Dysphoria

An individual who experiences clinical distress as a result of being assigned the incorrect sex at birth may be diagnosed with gender dysphoria. Gender dysphoria refers to the profound distress many transgender people experience as a result of the incongruence between the sex they were assigned at birth and their gender identity. (1CR at 180-81 – Brown Report at 6-7.) The gender dysphoria diagnosis was first recognized by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM")[4] in 1980, and was previously called "transsexualism" or "gender identity disorder."[5] (*Id*. at 181-82.) The American Psychiatric Association changed the name and diagnostic criteria for the DSM-V to "focus[] on dysphoria as the clinical problem, not identity per se." (*Id*. at 182 (citing American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders at 451 (5th ed. 2013)).)

As with virtually all of the diagnoses in the DSM, there are no biological or laboratory tests that diagnose gender dysphoria. (*Id*. at 183.) Rather, diagnosis of gender dysphoria is made by a mental health professional who has training and experience with this condition and who conducts an in-depth evaluation of the client. (*Id*.) Efforts to change an individual's gender identity to become congruent with his or her sex assigned at birth have been demonstrated ineffective, and indeed are widely considered unethical. (*Id*. at 179, 182-83.) Instead, the only recognized treatment for gender dysphoria is to facilitate the individual's transition to live in

[4] The DSM is the generally recognized authoritative handbook on the diagnosis of mental disorders and other conditions treated by mental health professionals and is relied upon by such professionals in the United States, Canada, and other countries. (1CR at 180 – Brown Report at 6.) *See Olsen v. Layton Hills Mall*, 312 F.3d 1304, 1317 (10th Cir. 2002) (recognizing DSM as "a definitive source for the classification of mental illnesses"). The DSM is currently in its fifth edition, or "DSM-V," published in 2013. (1CR at 179-80 – Brown Report at 5-6.)

[5] For ease of reference, both gender identity disorder and gender dysphoria are generally referred to herein as gender dysphoria.

accordance with his or her true sex. (1CR at 183-86 – Brown Report at 9-12; 1CR at 195 – Gorton Report at 5; 1CR at 198-99 – Coleman Report at 1-2.)

3. Treatment for Gender Dysphoria Includes Obtaining Identity Documents That Accurately Reflect Gender Identity

The only recognized treatment for the distress associated with Gender Dysphoria is to undergo gender transition, aligning the person's physical, social, and legal gender with the person's gender identity. (*See* 1CR at 238-43 – Am. Med. Ass'n, *Report of the Board of Trustees 26-A-14: Conforming Birth Certificate Policies to Current Medical Standards for Transgender Patients (Resolution 5-A-13)* (2014) ("AMA Report") ("The only effective treatment of [Gender Dysphoria] is medical care to support the person's ability to live fully consistent with one's gender identity."); *see also* 1CR at 183-86 – Brown Report at 9-12; 1CR at 195 – Gorton Report at 5; 1CR at 198-99 – Coleman Report at 1-2.) Fortunately, it is also clear that such treatment is in fact quite effective: an "established body of medical research studies demonstrates the effectiveness and medical necessity of mental health care, social transition, hormone therapy and sex reassignment surgery as forms of therapeutic treatment for people diagnosed with [Gender Dysphoria]." (1CR at 239 – AMA Report at 2.)

As recognized by the American Medical Association, the World Professional Association for Transgender Health ("WPATH"), a 501(c)(3) non-profit, interdisciplinary professional and educational organization made up of experts who specialize in healthcare for transgender individuals, has "established internationally accepted Standards of Care for providing medical treatment for people with GID, . . . which are designed to promote the health and welfare of persons with GID and are recognized within the medical community to be the standard of care

for treating people with GID." (1CR at 203-36 – Am. Med. Ass'n House of Delegates, *Resolution: 122, available at* http://www.tgender.net/taw/ama_resolutions.pdf.)

As the WPATH Standards of Care make clear, transition typically includes medical, social, and legal components. Medical transition involves the steps taken to relieve a transgender person's gender dysphoria—the distress caused by the incongruence between the individual's identity and the appearance of their body—through hormones, surgery, psychotherapy, or other treatment as recommended by the individual's healthcare providers. (2CR at 384, 435 – WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, at 171, 222 (7th ed. 2011) ("Standards of Care").) Social transition involves the steps that the individual takes to live and be recognized by others as a member of the gender with which the individual identifies, such as "coming out" to family and friends and adopting clothing and a hairstyle commonly associated with their gender identity. (2CR at 384-85, 397 – Standards of Care at 171-72, 184.)

Legal transition involves the steps that the individual takes to change the individual's legal documents to accurately reflect the person's lived gender rather than the sex assigned at birth. These steps may include obtaining a legal name change and changing the name and gender marker on birth certificates, driver's licenses, passports, and other identity documents. (*See, e.g.*, 2CR at 385 – Standards of Care at 172.)

In 2015, WPATH issued a Statement on Identity Recognition, underlining the medical necessity of legal recognition of an individual's gender identity:

> [F]or optimal physical and mental health, all persons must enjoy the right to freely express their gender identity, whether or not that identity conforms to the expectations of others. Legally recognized documents matching self-identity are essential to the ability of all people to find employment, to navigate everyday transactions, to obtain health care, and to travel safely; transgender, transsexual, or gender-nonconforming status should not preclude individuals from enjoying

> the legal recognition all citizens expect and deserve. Barriers to legal recognition for transgender and transsexual individuals may harm physical and mental health.

(2CR at 447 – WPATH, *Statement on Identity Recognition* (2015); *see also* 1CR at 189 – Brown Report at 12.)[6]

Indeed, research shows that a person who is denied access to identity documents that accurately reflect their lived gender is at risk of suffering increased dysphoria or psychological distress as well as stigma, discrimination, and harassment when their transgender status is thereby revealed to others without their consent, as discussed in more detail below. (1CR at 185-87 – Brown Report at 11-13; 1CR at 194-95 – Gorton Report at 4-5; 1CR at 198 – Coleman Report at 2.)

4. Having Incongruous Identity Documents Subjects Transgender People to Serious Harms

For transgender people, not only does having identity documents that are consistent with their gender identity have critical therapeutic value, but not having such identity documents can be a barrier to full engagement in society and can subject transgender people to harassment, discrimination, and even violence. For these reasons, every state permits transgender people to update the gender marker on a driver's license; the federal government permits transgender people to update the gender marker on passports and Social Security records; and 47 of the 50

[6] (*See also* 2CR 246 – Am. Psychological Ass'n, Resolution, *Transgender, Gender Identity, & Gender Expression Non-Discrimination* (2008) ("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."), ***available at*** **http://www.apa.org/about/policy/transgender.**aspx.)

U.S. states currently provide a mechanism for transgender people to correct the gender marker on a birth certificate.[7]

Birth certificates are a critical identity document used in many settings to verify an individual's identity. In the ordinary course of life, people are asked to show identity documents to use a credit card, vote, apply for a loan, board a plane, obtain permits and licenses, and apply for a job. (*See, e.g.* 1CR at 141 (request to KDHE for gender marker amendment, noting "I need this to keep my job!").) A birth certificate is often either required directly by employers and educational institutions upon enrollment, or at a minimum is needed as a gateway document to securing other identification documents, such as drivers' licenses and U.S. passports, that could be accepted as a substitute.[8] Though the Kansas DMV permits transgender individuals to update the gender marker on licenses and identification cards even absent a changed birth certificate, in many states updated birth certificates are among the few documents accepted to update the gender marker on a person's driver's license. In some of these states, absent a court-ordered legal gender change, a birth certificate with an updated gender marker is the *only* documentation accepted, *see, e.g.*, http://www.dps.texas.gov/DriverLicense/changes.htm, and thus unless the person lives in a state that permits legal gender change orders, an updated birth certificate is *de facto* necessary for a change to the gender on a driver's license.[9] Thus, KDHE's birth certificate policy may control whether people who were born in Kansas and are now living in other states can update the gender on their licenses.

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[7] For a search engine with information regarding each state's procedures for correcting the gender marker on a birth certificate, see http://transequality.org/documents.

[8] *See* Dep't of State, Apply for Passport First Time Applicants, https://travel.state.gov/content/passports/en/passports/applyinperson.html (listing "certified birth certificate" as "evidence of U.S. citizenship" required for passport).

[9] For a search engine with information regarding each state's procedures for correcting the gender marker on a driver's license, see http://transequality.org/documents.

For transgender people unable to access identity documents consistent with their gender identity, the simple act of presenting these inconsistent documents can subject them to harassment and ridicule, denial of services, and even violence. Transgender people experience exceptionally high rates of violence and harassment in numerous contexts, including public accommodations, health care, and employment. In a recent nationwide study, 44% of transgender people reported having been denied service, harassed, or assaulted when presenting identity documents inconsistent with their gender presentation.[10]

In addition, a growing number of laws and policies around the country seek to exclude transgender people from using sex-segregated restrooms that do not correspond to the sex listed on the person's birth certificate. Traveling through jurisdictions with such policies, a transgender woman like Ms. Mott who lives and is recognized as a woman in every aspect of her life would be forced to use men's restrooms or face the possibility of criminal liability, due to KDHE's refusal to amend her birth certificate. For example, in 2016 the North Carolina legislature passed a law, known as H.B. 2, that prohibits transgender people from entering multiple-occupancy restrooms or changing facilities corresponding to the person's gender identity in any state-owned building unless the person has amended the gender marker on their birth certificate.[11] Similar legislation has recently been introduced in Kentucky, Missouri, South Carolina, and Texas.[12]

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[10] (*See* 2CR 324-25 – Jaime M. Grant *et al*., National Center for Transgender Equality & National Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.)

[11] The North Carolina law (HB2) defines sex as the "physical condition of being male or female, which is stated on a person's birth certificate." N.C. Gen. Stat. Ann. § 143-760(1) (2016).

[12] *See* H.B. 106, 17 Reg. Sess. (Ky. 2017) (defining sex as "the physical condition of being male or female as stated on the person's birth certificate."); S.B. 98, 99th Gen. Assemb., Reg. Sess. (Mo. 2017) (defining sex as "the physical condition of being male or female which is determined by a person's chromosomes, and is identified at birth by a person's anatomy and indicated on their birth certificate."); H. 3012, 122nd Gen. Assembly., Reg. Sess. (S.C. 2017) (prohibiting

C. Background of KDHE's Enforcement of the Regulation

Consistent with the medical and scientific consensus confirming the importance of recognizing the gender identity of transgender individuals on birth certificates, KDHE amended K.A.R. 28–17–20(b)(1)(A)(i) on December 5, 1986, effective May 1, 1987, to allow individuals to amend the gender marker on a Kansas birth certificate based upon a medical certificate substantiating that a physiological or anatomical change occurred. As set forth below, however, after years of enforcement, KDHE began to refuse to enforce its own regulation.

1. The Regulation Was Duly Enacted Pursuant to K.S.A. 65-2422c

The regulatory scheme governing birth certificate amendments in the state of Kansas flows from K.S.A 65-2402(a)(5), which prescribes the duties of the Secretary of the Department of Health & Environment to enforce the Uniform Vital Statistics Act and the regulations made pursuant to the Uniform Vital Statistics Act, K.S.A. 65-2401 *et seq*. The statutory duties of the Secretary of Health & Environment include making and amending, after notice and hearing, necessary regulations. K.S.A 65-2402(a)(4); *see also* K.S.A. 77-421. Authority is conferred upon the Secretary of the Department of Health & Environment in Kansas to prescribe by regulation procedures for making minor corrections to birth certificates. K.S.A. 65-2422c. In accordance with that authority, in 1986, the Department adopted Kansas regulation K.A.R. 28–17–20(b)(1)(A)(i), which allows a person to amend the gender marker on a Kansas birth certificate based upon an affidavit that the sex was incorrectly recorded, or with a medical

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local political subdivisions from enacting ordinances that protect transgender people who have not amended their birth certificate and defining sex as the "physical condition of being male or female, which is stated on a person's birth certificate."); S.B. 6, 84th Gen. Assemb., Reg. Sess. (Tex. 2017) (defining sex as the "physical condition of being male or female, which is stated on a person's birth certificate.").

certificate substantiating that a physiological or anatomical change occurred. K.A.R. 28–17–20(b)(1)(A)(i).

2. KDHE Consistently Issued Gender Marker Amendments Pursuant to the Regulation, Including for Almost a Decade After *Gardiner*

Following the enactment of its Regulation, which became effective in 1987, KDHE enforced the Regulation as it was required to do. This enforcement continued for years, including for nearly a decade following the Court of Appeals decision in *In re Estate of Gardiner*, 29 Kan.App.2d 92 (2001), *aff'd in part, rev'd in part*, 273 Kan. 191, 42 P.3d 120 (2002) (the "*Gardiner* Court of Appeals decision").

In re Estate of Gardiner was a 2001 case regarding the validity of a marriage involving a transsexual woman. A son filed a petition for letters of administration after his father died intestate in 1999 leaving a surviving spouse, J'Noel, a "post-operative male-to-female transsexual" who the father had married in Kansas. *Id.* at 95, 99. The son argued that he was his father's sole heir because the marriage between his father and J'Noel was void since, pursuant to K.S.A. 2000 Supp. 23–101, marriages between persons of the same sex were prohibited.[13] *Id.* at 95. J'Noel countered that the marriage was valid because she was a biological female as confirmed by a Wisconsin court order that changed her sex to female on her Wisconsin birth certificate, and that the court order and new birth certificate were entitled to full faith and credit in Kansas. *Id.* at 95-96. In support of her full faith and credit argument, J'Noel argued that K.A.R. 28–17–20(b)(1)(A)(i) demonstrated that Kansas public policy supports treating her amended Wisconsin birth certificate as conclusive proof of her legal sex. *Id.* at 123.

[13] As discussed in greater detail *infra*, recent rulings from the United States Supreme Court, the Tenth Circuit, and the Kansas federal district court have now invalidated this statute as unconstitutional in contravention of the Due Process and Equal Protection Clauses. *See Obergefell v. Hodges*, 135 S.Ct. 2584; *Kitchen v. Herbert*, 755 F.3d 1193; *Marie v. Moser*, 65 F.Supp.3d 1175 (D. Kan. 2014).

The Kansas Court of Appeals, in its 2001 decision, acknowledged that "Kansas law allows individuals to change the sex designation on their birth certificates 'with a medical certificate substantiating that a physiological or anatomical change occurred.'" *Id.* at 120 (citing K.A.R. 28–17–20(b)(1)(A)(i)). However, the court went on in dicta to state:

> [I]t appears likely that, to the extent the regulation appears to allow for the change of a sex designation on a Kansas birth certificate to respond to anatomical changes, it oversteps. It is highly unlikely a fundamental change of that nature was contemplated by the legislature when it passed K.S.A.2000 Supp. 65–2422c on "minor corrections."

Id. at 123-24. The court expressly did not reach that question, however, and ultimately concluded that in any event the Regulation was not relevant to its analysis:

> Regardless, J'Noel's effort to rely on K.A.R. 28–17–20 to determine Kansas public policy in this case fails. The legislature sets public policy, not administrative agencies. We read the Kansas regulation as neutral, favoring neither J'Noel's nor Joe's positions on the effect of the Wisconsin birth certificate.

Id. at 124. The Court of Appeals ultimately affirmed the trial court's decision not to give significant weight to the amended birth certificate, due to a provision in Wisconsin law that expressly ceded to trial courts the responsibility for determining the evidentiary weight to be granted to vital records that have been amended. *Id.* at 125. Nonetheless, the Court of Appeals remanded the case to the trial court for further fact-finding on the question of J'Noel's biological sex. *Id.* at 127-28. At no point did the Court of Appeals rule on the validity of the Kansas Regulation, nor could it have, since no birth certificate amendment pursuant to the Regulation was at issue in the case.

Shortly after the *Gardiner* Court of Appeals decision was issued in 2001, KDHE first considered its impact on the state policy of allowing gender marker amendments if a medical certificate is provided as evidence of an anatomical change. First, in June 2002, Robin Wolfe (the Amendment Unit Supervisor) requested a meeting with counsel, Martha Cooper, to discuss

the impact of *Gardiner*. It appears that information was gathered about the sex reassignment surgery process, but there was apparently no effort to change the agency's policies. (1CR at 76.)

There appears to have been no further discussion of the matter until March 2004, when there was an email exchange between Ms. Wolfe and Lorne Phillips, then State Registrar. (1CR at 84.) This communication, too, centered on information gathering about sex reassignment surgery. (*Id*.) However, Mr. Phillips suggested that Ms. Wolfe write up the process into "a 'policy and procedure' statement so that we will always be consistent in how we respond to requests or questions related to this issue." (*Id.*) He further suggested that they schedule a meeting with Ms. Cooper. (*Id.*)

The next month, Ms. Cooper drafted an "attorney-client privileged" memorandum, dated April 23, 2004, to Mr. Phillips analyzing the Supreme Court decision, *In re Estate of Gardiner*, 273 Kan. 191 (2002). (1CR at 86-89.) In the memorandum, Ms. Cooper concluded that "[i]n light of the *Gardiner* decision and to avoid any confusion on what is allowed to be amended or not, it is my recommendation that this regulation be amended to delete the second option [for amendment based on sex reassignment surgery]." (1CR at 89.) Notably, the memorandum recommended that the regulation be *amended*; it did not conclude that the regulation had been expressly overruled by the *Gardiner* Court of Appeal decision and was no longer valid.

Similarly, almost eight years later, when the issue was revisited in Timothy Keck's February 20, 2012 memorandum to the KDHE Secretary, Mr. Keck's memorandum stated: "It is my opinion that KDHE does not have the authority under statute to have the regulation in place. . . . We should *also explore the concept of repealing the regulation* since we believe it to be unauthorized and inconsistent with the purpose of issuing the certificates." (1CR at 110 (emphasis added).) Again, despite the memorandum's recognition that the Regulation would

need to be repealed, KDHE did not do so. While the legislative history of K.A.R. 28–17–20 shows that it was amended in both November 2004 and February 2005, KDHE apparently did not take either of those opportunities to make any changes to this provision.

In fact, nothing in the research and analysis that KDHE conducted after the *Gardiner* Court of Appeals decision caused the agency to decide to stop enforcing the regulation. For almost 10 years after the *Gardiner* Court of Appeals decision and for almost six years after the April 23, 2004 memorandum, KDHE, pursuant to the Regulation, continued to allow gender marker amendments for individuals who provided a medical certificate substantiating a physiological or anatomical change.[14] From 2003 to 2011, KDHE sent several email responses to inquiries, which contained affirmative representations of the policy as set forth in the Regulation—namely, allowing amendment of birth certificates with medical documentation of a physiological or anatomical change. (1CR at 79-82, 91-105.)

3. KDHE Unilaterally Changed Its Policy Without Any Notice, Hearing, or Opportunity for Comment Following a Change of Political Administration

A year after Samuel Brownback became governor of Kansas on January 10, 2011, KDHE again reconsidered the impact of the 2001 *Gardiner* Court of Appeals decision, and—although there had been no intervening change in law—unilaterally and by way of purely internal communication decided to cease enforcing the Regulation.

On February 20, 2012, Mr. Keck drafted a memorandum to Dr. Robert Moser, KDHE Secretary, that "follows up our conversation of last week concerning the historical policy of allow[ing] 'correction' to a birth certificate of a transsexual individual." (1CR at 107.)

[14] According to the February 20, 2012 KDHE internal memorandum, KDHE issued about one amended certificate under the provision per year. (1CR at 109 – Ex. 12.)

Although the Regulation and the effect of *Gardiner* had been previously analyzed in 2001 and 2004, the memorandum nonetheless indicated that this "issue recently came to our attention." (1CR at 109.) The memorandum then analyzed the *Gardiner* Court of Appeals decision, stating that the Court "addresses KDHE's authority to adopt the regulation and strongly supports the proposition that KDHE is without authority to allow a 'correction' of the birth certificates as provided in K.A.R. 28-17-20(b)(1)(A)(i)." (*Id*.) The memorandum concluded:

> The birth certificate reflects an event in time. It is my opinion that KDHE does not have the authority under statute to have the regulation in place. I would recommend that we remove any reference to this issue from the agency website and if asked, we refuse to grant a corrected birth certificate for a physiological or anatomical change. We should also explore the concept of repealing the regulation since we believe it to be unauthorized and inconsistent with the purpose of issuing the certificates.

(1CR at 110.)

The next day, on February 21, 2012, Ms. Cooper re-circulated the memorandum she drafted in 2004. (1CR at 112.) And the day after that, the policy was apparently changed internally. This decision to no longer enforce the Regulation was evidently documented only on internal notes and emails, which stated that KDHE would no longer allow gender marker amendments following sex reassignment surgery. (1CR at 131, 133, 135-36.) For example, a handwritten note dated February 22, 2012 read: "KDHE is no longer changing certificates for gender reassignment. – It has been determined by our Legal Counsel that the Regulation is not in effect (it is not supported statutorily)." (1CR at 131.) Another handwritten note of the same date reads: "Per Tim Keck – We are not enforcing the Reg. re: changing gender on birth cert. upon completion of gender re-assignment surgery. . . . KDHE Legal Decision- The Reg. for changing birth cert. is not supported statutorily. Therefore, the Reg. is not in effect." (1CR at 133.) The following day, February 23, 2012, the website of the Office of Vital Statistics was

apparently ordered changed to delete FAQs about changing certificates based on sex reassignment surgery. (1CR at 135-36.)

In summary, the Department's longstanding policy based on a duly enacted regulation was changed internally, apparently over the course of less than a week, and documented on intra-office post-it notes. (1CR at 131 & 133.) The public was not notified of the change, and certainly was not afforded an opportunity for a hearing before the new "policy" went into effect, and the agency never prepared a statement of the principal reasons for adopting the policy. *See* K.S.A. 77-421(a)(1), (b)(1); K.S.A. 77–425.

Following this internal decision to refuse to enforce the Regulation in late February 2012, KDHE apparently has denied all requests for birth certificate changes submitted by transgender individuals under the Regulation, citing the *Gardiner* Court of Appeals decision. (1CR at 138-47.)

Even after the decision not to enforce the Regulation, however, KDHE did not deny all requests for gender marker amendments. KDHE continued to allow amendments where the agency deemed the sex had been incorrectly recorded at birth. It also appears to have considered a gender marker change back to one's original gender. (1CR at 152.) The agency has also allowed changes based on sex reassignment surgery where there is support that the person's genitalia at birth was "ambiguous" (*i.e.*, for intersex individuals). (1CR at 154-70.)

4. After Ms. Mott Filed a Petition for Review, KDHE Amended the Regulation to Remove the Language Permitting Transgender Individuals to Amend Their Birth Certificates

On March 3, 2016, three months after Ms. Mott sent her December 2015 Letter and a month after Ms. Mott filed her Petition for Review, KDHE issued a Notice of Hearing on

Proposed Administrative Regulations to consider the adoption of a proposed amended K.A.R. 28-17-20 to "[u]pdate[] the procedures when making minor corrections to existing birth, death, stillbirth, marriage and divorce certificates." State of Kansas Dep't of Health and Environment, Notice of Public Hearing on Proposed Administrative Regulations, *Proposed Amended Regulations K.A.R. 27-17-10 and 28-17-20 and the Revocation of K.A.R. 28-17-11* (May 12, 2016), *available at* https://www.crrb.ks.gov/docs/default-source/28---kansas-department-of-health-environment-(kdhe)/department-of-health-and-environment-k-a-r-28-17-10-28-17-11-28-17-208aafc39303bb697b9169ff00003f007c.pdf?sfvrsn=0. The proposed amendment changed the Regulation by removing language providing that a birth certificate could be amended upon submission of "a medical certificate substantiating that a physiological or anatomical change occurred" or an "affidavit . . . that the sex was incorrectly recorded." *Id.* Instead, under the amendment to the Regulation, an applicant would be required to submit an affidavit that the sex was incorrectly recorded as well as "medical records substantiating the registrant's sex at the time of birth." *See* Kansas Register, Vol. 35, No. 23, June 9, 2016 at 567.

After a public hearing was held on May 12, 2016, the Regulation was amended on June 24, 2016.

III. LEGAL STANDARD FOR A PETITION FOR REVIEW

A petitioner is entitled to relief on his or her petition for review if he or she establishes one or more of the following grounds:

> (1) The agency action, or the statute or rule and regulation on which the agency action is based, is unconstitutional on its face or as applied; (2) the agency has acted beyond the jurisdiction conferred by any provision of law; . . . (4) the agency has erroneously interpreted or applied the law; (5) the agency has engaged in an unlawful procedure or has failed to follow prescribed procedure; . . . or (8) the agency action is otherwise unreasonable, arbitrary or capricious.

K.S.A. 77-621(c).

On judicial review of an agency action, "matters of statutory and constitutional interpretation . . . 'raise pure questions of law subject to unlimited appellate review.'" *Katz v. Kansas Dep't of Revenue*, 45 Kan. App. 2d 877, 884, 256 P.3d 876, 883 (2011) (citation omitted); *see also Villa v. Kansas Health Policy Auth.*, 296 Kan. 315, 323, 291 P.3d 1056, 1064 (2013); *Nat'l Council on Comp. Ins. v. Todd*, 258 Kan. 535, 539, 905 P.2d 114, 117 (1995) (court has unlimited appellate review of whether regulation violates the constitution or exceeds statutory authorization); *Yeasin v. Univ. of Kansas*, 51 Kan. App. 2d 939, 947, 360 P.3d 423, 428 (2015) ("this court exercises unlimited review on questions of statutory interpretation"). In the Court's analysis of that legal question, the agency's interpretation is *not* entitled to judicial deference. *See Yeasin*, 51 Kan. App. 2d at 947 (courts "no longer apply the doctrine of operative construction or extend deference to an agency's . . . statutory interpretation"); *see also In re LaFarge Midwest/Martin Tractor Co.*, 293 Kan. 1039, 1044, 271 P.3d 732, 736 (2012) ("our recent cases have clearly eschewed the concept that an agency is better equipped to interpret a statute than an appellate court"); *Villa*, 296 Kan. at 323 ("an agency's interpretation of a statute or regulation is not afforded any significant deference on judicial review").

IV. KDHE WAS REQUIRED BY STATUTE TO GRANT PETITIONER'S REQUEST FOR AN AMENDMENT TO HER BIRTH CERTIFICATE

KDHE was statutorily required to grant Ms. Mott's request for a birth certificate amendment—*both* under the Regulation then in effect and under the Regulation as subsequently amended. Ms. Mott thus is entitled to judgment in her favor on statutory grounds.

A. KDHE Was Required to Apply the Regulation in Effect at the Time of Ms. Mott's Request and Amend Her Birth Certificate

KDHE's refusal to amend Ms. Mott's birth certificate—based on either (1) the medical certificate Ms. Mott submitted to KDHE substantiating that a physiological or anatomical change occurred or (2) the affidavit she submitted to KDHE substantiating that her sex was incorrectly recorded—is an action beyond the jurisdiction conferred on KDHE by statute, is an erroneous application of the law, demonstrates a failure by KDHE to follow prescribed procedure, and is unreasonable, arbitrary, and capricious. *See* K.S.A. 77-621(c)(2), (4), (5), (8).

1. Ms. Mott Met All Legal Requirements Necessary to Request a Gender Marker Change Pursuant to K.A.R. 28-17-20(b)(1)(A)(i)

At all times relevant to this Petition, the Regulation, K.A.R. 28-17-20(b)(1)(A)(i) provided that:

> The items recording the registrant's sex may be amended if the amendment is substantiated with the applicant's affidavit . . . that the sex was incorrectly recorded, or with a medical certificate substantiating that a physiological or anatomical change occurred.

K.A.R. 28-17-20(b)(1)(A)(i).

Ms. Mott satisfied both of the alternate bases for a birth certificate amendment in the Regulation. *First*, in connection with both her November 2013 Letter and her December 2015 Letter, Ms. Mott submitted her May 28, 2012 "Certificate of Postopsurgery," documenting her gender confirmation surgery. (1CR at 2, 50.) *Second*, in connection with her November 2013 Letter, Ms. Mott stated that "[t]o hold consistent and accurate identification documents, it is critical that I am able to change my birth certificate as well to reflect my accurate gender," (1CR at 1) and in connection with her December 2015 Letter, Ms. Mott submitted a sworn affidavit stating, "I am female. The sex on my birth certificate was incorrectly recorded." (1CR at 35,

¶ 3.) Ms. Mott thus met the legal requirements necessary to request a birth certificate amendment pursuant to the Regulation on two separate, independent grounds.

2. The Regulation Was Duly Enacted and Had Not Been Amended or Revoked at the Time of Ms. Mott's Request

KDHE has a statutory duty to enforce regulations that have been enacted under enabling statutes. *See* K.S.A. 65-2402(a)(5). The Regulation, KAR 28-17-20(b)(1)(A)(i), was duly enacted under the authority of K.S.A. 65-2422c, which confers authority upon the Secretary of the Department of Health & Environment in Kansas to prescribe by regulation procedures for making minor corrections to birth certificates. K.S.A. 65-2422c. Because, at the time of Ms. Mott's request, the Regulation had not been revoked or amended pursuant to applicable statutory requirements or been otherwise invalidated, KDHE had a statutory duty to enforce it.

Kansas statutes prescribe the processes for agency rulemaking. *See* K.S.A 65-2402(a)(4) (statutory duties of the Secretary of Health & Environment include making and amending necessary regulations "after notice and hearing"); K.S.A. 77-421 (setting forth procedure for adopting and amending regulations, including notice, hearing, and statement of reasons). These statutory requirements for rulemaking apply with equal force to revocations and amendments as they do to enactments. *See* K.S.A. 77-415(c)(4) ("'Rule and regulation,' 'rule,' and 'regulation' means a standard, requirement or other policy of general application that has the force and effect of law, *including amendments or revocations thereof*, issued or adopted by a state agency to implement or interpret legislation.") (emphasis added). Where such revocations and amendments do not comply with statutory procedure, they have no force or effect. *See* K.S.A. 77–425 ("*Any rule and regulation not filed and published as required by this act shall be of no force or effect*, except that any error or irregularity in form or any clerical error or omission of

the secretary of state in the filing of such regulation not affecting substantial rights shall not invalidate the same.") (emphasis added); *Tew v. City of Topeka Police & Fire Civil Serv. Comm'n*, 237 Kan. 96, 99-100, 697 P.2d 1279, 1282 (1985) ("The rules and regulations adopted by an administrative board to carry out the policy declared by the legislature in the statutes have the force and effect of laws. Agency regulations are issued for the benefit of both the agency *and the public*, and an agency must be held to the terms of its regulations.") (citations omitted) (emphasis in original).

Here, KDHE's internal decision to stop enforcing the Regulation, as well as its subsequent denial of Ms. Mott's Request in November 2013 and in December 2015, does not comply with the required procedures for revocations or amendments. Because the Regulation had not been revoked or amended pursuant to applicable statutory procedure at the time of Ms. Mott's request, it remained in effect, and KDHE was required to enforce it.

Ms. Mott thus is entitled to judgment in her favor on her Petition for Review on statutory grounds. *See* K.S.A. 77-621(c)(2), (4), (5), (8). That KDHE subsequently amended the Regulation to attempt to deprive transgender individuals of the ability to change a birth certificate *after* Ms. Mott made her request does not relieve KDHE of the statutory obligations it was under at the time Ms. Mott made her request. This is because "administrative regulations operate prospectively unless a contrary intent is clearly indicated." *State v. Ernesti*, 291 Kan. 54, 70, 239 P.3d 40, 50 (2010). Indeed, by Kansas statute, "[t]he revocation of a rule and regulation by a state agency shall not be construed as . . . affecting any right which accrued . . . under or by virtue of the rule and regulation revoked." K.S.A. 77-425. Because Ms. Mott's right to an amendment to her birth certificate had already accrued when she made her request and when the Regulation was amended in June 2016, the amendment of the Regulation must not be construed

as affecting that right. *See Ernesti*, 291 Kan. at 69 (holding that K.S.A. 77-425 "preserves the validity" of certificate issued pursuant to certain regulation "even after the regulation was revoked.")

3. *Gardiner* Did Not Invalidate the Regulation

In its summary denials of Ms. Mott's request, KDHE relied conclusorily on the Kansas Court of Appeals decision *In re Estate of Gardiner*, 29 Kan.App.2d 92 (2001), *aff'd in part, rev'd in part*, 273 Kan. 191, 42 P.3d 120 (2002). The *Gardiner* Court of Appeals decision, however, did not invalidate the Regulation as KDHE claims.

As an initial matter, as discussed above, it is clear that even KDHE does not truly believe that the *Gardiner* Court of Appeals decision invalidated the Regulation. Throughout KDHE's internal analysis of the case in 2001, 2004, KDHE personnel concluded that the Regulation should be amended or repealed, but KDHE continued to enforce it. It was not until 2012 that KDHE implemented an internal policy to stop enforcing the Regulation, and KDHE did not seek to amend the Regulation to remove the language that allowed transgender individuals to amend their birth certificates until spring of 2016.

KDHE's enforcement of the Regulation for years after the *Gardiner* Court of Appeals decision is consistent with the case itself. As set forth above, *Gardiner* was a case regarding the validity of a Kansas marriage involving a transsexual woman whose sex had been changed to female on her Wisconsin birth certificate pursuant to a Wisconsin court order, which the woman argued was entitled to full faith and credit in Kansas. In performing its analysis of the validity of the marriage, the court indicated in dicta its view that "it *appears likely that*, to the extent [K.A.R. 28-17-20(b)(1)(A)(i)] appears to allow for the change of a sex designation on a Kansas birth certificate to respond to anatomical changes, it oversteps." *Id.* at 123-24 (emphasis added).

Importantly, however, the court expressly did not reach that question, instead confirming that the Kansas Regulation was not relevant to its analysis. *See id.* at 124. At no point did the Court of Appeals rule on the validity of the Kansas Regulation, nor could it have, since no amendment pursuant to the Regulation was at issue in the case.

Because the Court of Appeals' holding regarding the weight to be afforded the amended birth certificate was not based on the validity of the Kansas Regulation, the court's casual speculation that the Regulation might "overstep[]" the statutory grant of authority is merely dicta and thus does not have the force of law. *See Denton v. Sunflower Elec. Coop., Inc.*, 242 Kan. 430, 432, 748 P.2d 420, 421-22 (1988) (affirming district court's "conclu[sion] that . . . statements made in cases where it was not necessary for the appellate disposition of the case were dicta"); *Matter of Loughmiller's Estate*, 229 Kan. 584, 589-90, 629 P.2d 156, 160-61 (1981) (court's prior opinion on a subject not before it, which "was couched in speculative terms and was unnecessary to the holding of the case," "was dicta" and thus would not be applied in later case); *Allen v. Holtzman*, 63 Kan. 40, 64 P. 966, 967 (1901) (noting that prior Supreme Court case contained "expressions . . . which tend to the view" espoused by appellant, but refusing to apply those statements, stating, "[t]hey are dicta, however, and not necessary to a decision of the case"); *Rinehart v. Colvin*, No. Civ. 12-2793-JWL, 2014 WL 1910055, at *5 (D. Kan. May 13, 2014) ("[T]he court finds that [the cited case] is not controlling here because the . . . portion of that opinion cited by Plaintiff was admittedly not necessary to that decision, and as such it is merely dicta.").[15]

[15] Similarly, the Kansas Supreme Court's decision, *In re Gardiner*, 273 Kan. at 191, does not hold that the Regulation is invalid or unenforceable; indeed, it does not even address the Regulation. *See id.*

Thus, notwithstanding KDHE's interpretation of the *Gardiner* Court of Appeals decision as invalidating the Regulation—to which this Court owes no deference—it is clear that *Gardiner* had no impact on the validity of the Regulation, which remained in effect.

4. The Regulation Was Well Within the Scope of the Enabling Statute, and *Gardiner*'s Dicta to the Contrary is Not Persuasive

Even if the Court of Appeals' discussion of KAR 28-17-20(b)(1)(A)(i) in *Gardiner* were not dicta, it holds no persuasive value because the central issue in *Gardiner* has been decided differently by intervening cases at all levels of the federal courts; moreover, the *Gardiner* dicta regarding the Regulation was poorly reasoned, as the Regulation was well within the scope of the enabling statute.

The sole legal question that was presented in *Gardiner* was whether the Kansas marriage between the petitioner's father and the father's wife, a "post-operative male-to-female transsexual," was valid under the Kansas statute that prohibited marriages between persons of the same sex. 29 Kan.App.2d at 99. Since the *Gardiner* Court of Appeals decision was decided, however, the Tenth Circuit has concluded in two separate cases that state laws prohibiting marriages between persons of the same sex are unconstitutional. *See Bishop v. Smith*, 760 F.3d 1070, 1081-82 (10th Cir.), *cert. denied*, 135 S.Ct. 271 (2014) (concluding that Oklahoma's prohibition on same-sex marriage violates due process and equal protection); *Kitchen v. Herbert*, 755 F.3d at 1229-30 ("[W]e hold that under the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same sex are entitled to exercise the same fundamental right as is recognized for persons who wish to marry a person of the opposite sex, and that [Utah's ban on same-sex marriage] and similar statutory enactments do not withstand constitutional scrutiny."). The United States Supreme Court similarly ruled on

June 26, 2015 that state laws barring same-sex couples from marrying abridge the fundamental right to marry in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment. *Obergefell v. Hodges*, 135 S.Ct. 2584.

The holdings in *Obergefell*, *Bishop*, and *Kitchen* apply to invalidate any Kansas law that prohibits same-sex marriages, as the federal district court in Kansas has already held. *See Marie v. Moser*, 65 F.Supp.3d at 1203 ("*Kitchen* and *Bishop* establish a fundamental right to same-sex marriage, and state laws prohibiting same-sex marriage infringe upon that right impermissibly. . . . Kansas' same-sex marriage ban does not differ in any meaningful respect from the Utah and Oklahoma laws the Tenth Circuit found unconstitutional.") (citations omitted). The Tenth Circuit and the United States Supreme Court both denied the state's request to stay the district court's order. *Marie v. Moser*, No. 14-cv-3246, Doc. No. 01019337192 (10th Cir. Nov. 7, 2014); __ U.S. __, 135 S.Ct. 511 (Nov. 12, 2014). Every county in Kansas has now recognized that the state law purporting to prohibit same-sex couples from marrying—the only law that allegedly posed a barrier to recognition of the marriage at issue in *Gardiner*—is unconstitutional and invalid, and every county now issues marriage licenses to all couples regardless of gender. (*See* 2CR at 375-76 – John Hanna, *All Counties in Kansas Allowing Same Sex Marriage Licenses*, Wash. Times, June 30, 2015, *available at* http://www.washingtontimes.com/news/2015/jun/30/most-counties-in-kansas-allowing-same-sex-marriage/.)

Even if the *Gardiner* Court of Appeals decision had not been stripped of its central reasoning by intervening federal authority—which it has—and even if the Court of Appeals' analysis of the Regulation were not dicta—which it is—the analysis is not well reasoned, and thus is not persuasive. That the reasoning of the *Gardiner* Court of Appeals decision's dicta is flawed is not surprising given that the issue was not squarely before the court.

The *Gardiner* Court of Appeals read the enabling statute as permitting the Secretary to prescribe regulations only for "minor corrections," and opined that a gender marker change to "respond to anatomical changes" was not "minor." 29 Kan.App.2d at 123-24. However, the court gave no guidance as to what constitutes a "minor" change, or explanation as to why a gender marker change following a "mistake"—or, as the Department now interprets the statute, for individuals who undergo surgery on previously ambiguous genitalia—is "minor" and thus permissible, but a correction following sex reassignment surgery is not. No such distinction is authorized by the statute. Changing the gender marker on a birth certificate is logically equally "major" or "minor" in all cases.

To the extent that the *Gardiner* Court of Appeals decision's dicta is read to mean that a gender marker amendment based on sex reassignment surgery is not a "correction" at all, this logic is also flawed. *Gardiner* defined "correct" in accordance with Black's Law Dictionary (7th ed. 1999): "to make right what is wrong." *Id.* at 123. As demonstrated in Part II.B., *supra*, the prevailing practice is to assign a sex to newborns based on an often cursory examination of the external genitals—a practice that, in the majority of cases, results in a correct assignment. However, the appearance of a person's genitals is only one of several characteristics that define their sex as male or female. As the medical evidence shows, the most reliable indicator of sex is an individual's gender identity. For many transgender individuals, their sex was incorrectly denoted on their birth certificate because this designation was made solely upon an examination of the external genitalia. This inaccurate designation stands in need of correction just as urgently as any other mistaken identification on a vital record.

Moreover, the Regulation has been in effect for years, expressly and unmistakably authorizing amendments to birth certificates following gender confirmation surgery. If the

Legislature felt the Regulation contravened its intent in K.S.A. 65-2422c, it had plenty of time in which to amend that statute to override the rogue Regulation. That it did not do so, while updating the statute numerous times to make other changes, indicates its acquiescence. The Regulation, remaining in place, must be presumed valid. *See Mitchell v. Petsmart, Inc.*, 291 Kan. 153, 168, 239 P.3d 51, 62 (2010) ("Regulations an administrative agency is authorized to adopt are presumed valid, and the party challenging a regulation bears the burden to establish its invalidity.").

Accordingly, KDHE's decision not to enforce a valid Regulation based on dicta from a non-binding Kansas Court of Appeals decision with no persuasive value can only be considered contrary to law and arbitrary and capricious.

B. KDHE Also Is Required to Grant Ms. Mott's Request Under KAR 28-17-20(b)(1)(A)(i) as Amended Because Her Sex Was Incorrectly Recorded at Birth

Ms. Mott is entitled to a birth certificate amendment pursuant not only to the portion of the now-repealed portion of KAR 28-17-20(b)(1)(A)(i) that allowed for amendment "with a medical certificate substantiating that a physiological or anatomical change occurred," or an "affidavit . . . that the sex was incorrectly recorded," but also under the Regulation as subsequently amended. As amended in June 2016, the Regulation provides for a birth certificate amendment based on the "registrant's affidavit . . . that the sex was incorrectly recorded and with medical records substantiating the registrant's sex at the time of birth." K.A.R. 28-17-20(b)(1)(A)(i).

In addition to an affidavit stating that her sex was incorrectly recorded at birth (CR at 35), Ms. Mott submitted reports of medical experts that substantiated that, as a transgender person, Ms. Mott has a birth certificate that incorrectly recorded her sex at the time of her birth. As set

forth in those reports, when a child is born, a doctor or nurse will conduct a cursory visual examination of the external genitalia and indicate the corresponding "sex" on the birth certificate. (1CR at 178 – Brown Report at 4; 1CR at 192 – Gorton Report at 2; 1CR at 198 – Coleman Report at 1.) For transgender individuals like Ms. Mott, the person's sex does not align with the determination that was recorded at birth. (1CR at 178-79 – Brown Report at 4-5; 1CR at 192 – Gorton Report at 2; 1CR at 198 – Coleman Report at 1.) Thus, Ms. Mott's sex was incorrectly recorded as male at birth based upon the medical evidence available at that time—namely, a physician's opinion as to what a female infant should "look like." Though it could not be known at the time, Ms. Mott was then and is now female. As a result, the sex designator on her birth certificate is incorrect, and Kansas law provides for a correction. *See* KAR 28-17-20(b)(1)(A)(i).

Accordingly, whether or not Ms. Mott had undergone sex reassignment surgery, and whether or not the *Gardiner* Court of Appeals decision actually invalidated the portion of the Regulation permitting amendment based on an anatomical change, KDHE should grant Ms. Mott's request to amend her birth certificate based on the affidavit and medical reports substantiating that her sex was incorrectly recorded. KDHE's refusal to do so is an action beyond the jurisdiction conferred on KDHE by statute, is an erroneous application of the law, demonstrates a failure by KDHE to follow prescribed procedure, and is unreasonable, arbitrary, and capricious. *See* K.S.A. 77-621(c)(2), (4), (5), (8).

V. KDHE'S POLICY OF DENYING BIRTH CERTIFICATE AMENDMENTS TO TRANSGENDER KANSANS IS UNCONSTITUTIONAL

KDHE's policy of denying birth certificate amendments to transgender Kansans like Ms. Mott is unconstitutional under both the Due Process Clause and the Equal Protection Clause of

the Fourteenth Amendment. Ms. Mott thus is entitled to judgment in her favor on constitutional grounds.

A. KDHE's Policy Violates Ms. Mott's Rights to Privacy and Autonomy under the Due Process Clause

When the government infringes on a fundamental right and the infringement is not narrowly tailored to achieve a compelling interest, the government runs afoul of the Due Process Clause of the United States Constitution. *See Kitchen v. Herbert*, 755 F.3d at 1218. That clause protects from infringement not only those specific liberties enumerated in the Bill of Rights, but also "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell*, 135 S.Ct. at 2589. These fundamental rights include the right to privacy, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992), and the right to autonomy in "defin[ing] and express[ing] [one's] identity," *Obergefell*, 135 S.Ct. at 2593.

1. The Forced Disclosure of the Sex Ms. Mott Was Assigned at Birth Violates Her Right to Privacy

KDHE's refusal to permit a gender marker amendment to Ms. Mott's birth certificate results in a violation of Ms. Mott's privacy right not to have personal information disclosed. By preventing Ms. Mott from obtaining a birth certificate that is congruent with her gender identity and expression, KDHE is forcing disclosure of Ms. Mott's transgender status to any person to whom she is required to show her birth certificate.

"While the Constitution does not explicitly establish a right of privacy, the Supreme Court has recognized for nearly 100 years that a right of personal privacy does exist." *Eastwood v. Dep't of Corr.*, 846 F.2d 627, 630-31 (10th Cir. 1988). The constitutionally protected right of

privacy "protects two kinds of privacy interests: the individual's interest in avoiding disclosure of personal matters and the interest in being independent when making certain kinds of personal decisions." *Id*. at 630-31 (citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977)). "The first interest protects the individual from governmental inquiry into matters in which it does not have a legitimate and proper interest." *Eastwood*, 846 F.2d at 631.

Several federal circuit courts have recognized that a person has a right to maintain the privacy of his or her transgender status. *See Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) ("The excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate."); *see also Franklin v. McCaughtry*, 110 F.App'x 715, 719 (7th Cir. 2004) (citing *Powell* with approval); *Moore v. Prevo*, 379 F.App'x 425, 428 (6th Cir. 2010) (same). A federal district court in Michigan similarly recognized that transgender people have a cognizable constitutional privacy claim under the Fourteenth Amendment when prohibited from changing the gender marker on their state-issued identification documents pursuant to state policy. *Love v. Johnson*., 146 F.Supp.3d 848, 851-52, (E.D. Mich. 2015). Rejecting the state's motion to dismiss, the court held that when a transgender person is denied access to official documents with the gender marker consistent with their gender identity, such "forced disclosure of their [transgender] status," *id.* at 851, plausibly infringed both the well-established "fundamental privacy interest[s] in the disclosure of personal information likely to lead to the threat of bodily harm," particularly "in the context of 'personal sexual matters." *Id.* at 854.

Under this authority, it is clear that the refusal to amend Ms. Mott's birth certificate infringes on her privacy rights. Contrary to KDHE's position that a birth certificate is simply a record of an event in time, a birth certificate is a document that is used as a verification

document for numerous purposes and each time Ms. Mott is required to show a birth certificate with a male sex marker, she is "outed" as transgender. *See, e.g.*, *Adkins v, City of New York*, 143 F.Supp.3d 134, 139-40 (S.D.N.Y. 2015) ("[M]any forms of identification required for asserting legal rights, such as birth certificates, indicate the bearer's gender. A mismatch between the gender indicated on the document and the gender of the holder calls down discrimination, among other problems."). This places her at serious risk of harm, as demonstrated by the high rates of harassment and violence transgender people experience when their transgender status is known. *See id.* at 140 ("Document troubles aside, transgender people often face backlash in everyday life when their status is discovered."); Sections II.A.1 and II.B.4, *supra*. By preventing transgender people, like Ms. Mott, from obtaining identity documents that are congruent with their gender identity, and thereby forcing disclosure of those people's transgender identity, KDHE infringes on their constitutional right to privacy in violation of the Due Process Clause of the Fourteenth Amendment.

KDHE's refusal to amend Ms. Mott's birth certificate also infringes on Ms. Mott's privacy interest in the confidentiality of her medical information. Although the Tenth Circuit has not been called upon to analyze a person's right to privacy over his or her transgender identity, it has recognized a right to privacy regarding medical information, such as HIV status. *See Herring v. Keenan*, 218 F.3d at 1175 (recognizing a constitutional right to privacy in the non-disclosure of information regarding one's HIV status by a government official); *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994) ("There is no dispute that confidential medical information is entitled to constitutional privacy protection.").

Whether someone is transgender and whether someone has been diagnosed with GID or gender dysphoria constitute confidential medical information. *See Brown v. Zavaras*, 63 F.3d at

969 ("The medical term for transsexuality is 'gender dysphoria,' and gender dysphoria is a medically recognized psychological condition resulting from the 'disjunction between sexual identity and sexual organs.'") (citations omitted). When Ms. Mott is required to present a birth certificate with a male sex marker, she is forced to disclose the medical information that she is transgender and/or has gender dysphoria. By preventing transgender people, like Ms. Mott, from obtaining identity documents that are congruent with their gender identity and expression, and thereby forcing disclosure of those people's medical information, KDHE infringes on those people's privacy rights.

2. The Refusal to Correct Ms. Mott's Birth Certificate Impermissibly Abridges Her Liberty Interest in Defining Her Own Identity Without Undue Interference From the State

As Justice Kennedy wrote in the Supreme Court's 2015 ruling striking down laws that discriminate against same-sex couples, the liberties protected by the Due Process Clause "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." *Obergefell*, 135 S.Ct. at 2589. Justice Kennedy addressed the same subject at even greater length in *Lawrence*:

> 'These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.'

Lawrence v. Texas, 539 U.S. 558, 574 (2003) (*quoting Casey*, 505 U.S. at 851).

Among the "intimate and personal choices" that the fundamental right to autonomy forbids the state to compel is the right of a transgender person to self-determine his or her gender identity and live in accordance with that identity without undue interference from the state. Such

a decision is indeed among the most "intimate" imaginable, relating to matters that the individual is uniquely positioned to understand and define for his- or herself.

When the state denies recognition of a transgender person's true sex, it is necessarily imposing significant harm on that individual. The state's refusal to recognize a person's sex not only denies a transgender person equal dignity and respect by undermining their very existence, but authorizes and invites other public and private entities to similarly discriminate and deny recognition. *See United States v. Windsor*, 133 S.Ct. 2675, 2695 (2013) (by denying recognition to marriages of same-sex couples, "the principal purpose and the necessary effect of [the Defense of Marriage Act] are to demean those persons who are in a lawful same-sex marriage").[16]

Courts and agencies have held repeatedly that to deny recognition to a transgender person's gender identity constitutes unlawful discrimination under nondiscrimination laws like Title VII and Title IX, by singling the transgender person out for stigma and harassment. *Cf., e.g., Lusardi v. McHugh*, App. No. 0120133395 (E.E.O.C. March 27, 2015) (denying transgender woman access to communal restroom consistent with her female gender identity "perpetuated the sense that she was not worthy of equal treatment and respect," "deprived [her] of equal status, respect, and dignity," and "refused to recognize [her] very identity").

Context is significant for understanding the reach of fundamental rights. As noted above, every state and the federal government currently permit transgender people to update the gender marker on critical identity documents, and 47 states allow transgender people to correct the gender marker on birth certificates. Kansas is an extreme outlier and its policy works a severe

[16] The European Court of Human Rights has also recognized that a right to gender autonomy is included within the right to privacy under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18 (2002) and *I v. United Kingdom*, 2 F.C.R. 613 (2002). *Cf. Lawrence*, 539 U.S. at 576-77 (citing several decisions from the European Court of Human Rights as relevant to Due Process analysis).

hardship on transgender individuals born in this state. *Cf. Windsor*, 133 S.Ct. at 2689 (charting the history of marriage laws: "[t]he limitation of lawful marriage to heterosexual couples, which for centuries had been deemed both necessary and fundamental, came to be seen in New York and [10] other States as an unjust exclusion"); *Lawrence*, 539 U.S. at 573 (in concluding that criminal prohibitions on same-sex intimacy violate the Due Process Clause, noting the majority of states had abolished such prohibitions). As the Court noted in *Lawrence*, "times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress." *Id.* at 579. While policies like KDHE's new policy once may have been commonplace among the states, today it can no longer be viewed as anything other than a bare violation of the liberty interests of transgender individuals born in this state.

B. KDHE's Policy Violates Ms. Mott's Right to Equal Protection of the Laws

KDHE's birth certificate amendment policy singles out for particular deprivation of equal treatment transgender people, whose gender identity and expression by definition does not conform to their recorded anatomy-based birth sex. Because the policy facially discriminates based on transgender status and sex, and it cannot survive heightened scrutiny, it is unconstitutional under the Equal Protection Clause.

Transgender status qualifies as a suspect classification under the Equal Protection Clause. Transgender persons easily meet the indicia identified by the United States Supreme Court that indicate a "suspect" or, at a minimum, "quasi-suspect" classification: (1) transgender persons have experienced a long history of discrimination[17]; (2) the characteristics that distinguish

[17] *See, e.g.*, Williams Institute, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* (2009), *available at* http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment; (2CR at 261-373 – J.M. Grant, *et al*., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), *available at*

members of this group plainly have "no relation to [their] ability to perform or contribute to society,"[18] *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion); (3) "the characteristic that defines the members of the class as a discrete group is immutable or otherwise not within their control,"[19] *Kerrigan v. Comm'r of Pub. Health*, 289 Conn. 135, 166 (2008) (holding that discrimination against gays and lesbians should receive heightened scrutiny); and (4) the group is a minority or otherwise lacks political power.[20] *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

In addressing this question two decades ago, the Tenth Circuit recognized that "[r]ecent research concluding that sexual identity may be biological suggests reevaluating" older holdings from other circuits—primarily the Ninth Circuit's 1977 decision in *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977)—that concluded transgender individuals were not entitled to heightened protection under the Equal Protection Clause. *Brown*, 63 F.3d at 971. In the decades since, that outdated case law from those other circuits has been resoundingly rejected by the federal courts, including the Ninth Circuit itself. *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) ("*Holloway* has been overruled by the logic and language of [the U.S. Supreme Court's 1989 decision in] *Price Waterhouse*."); *see also, e.g.*, *Norsworthy v. Beard*, 87 F.Supp.3d 1104, 1118-19 (N.D. Cal. 2015) (noting that "*Holloway* is no longer good law" and rejecting arguments based on *Holloway* that transsexuals are not a discrete and insular minority,

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http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.) *Cf. Obergefell*, 135 S.Ct. at 2590 (noting history of discrimination against gays).

[18] *Cf.*, *Windsor v. United States*, 699 F.3d 169, 182-83 (2nd Cir. 2012), *aff'd*, 133 S.Ct. 2675 (2013) ("The aversion homosexuals experience has nothing to do with aptitude or performance.").

[19] *See, e.g.*, *Latta v. Otter*, 771 F.3d 456, 464-65 n.4 (9th Cir. 2014) ("We have recognized that [both] '[s]exual orientation and sexual [gender] identity are immutable; they are so fundamental to one's identity that a person should not be required to abandon them.'") (citation omitted). *Cf. Obergefell*, 135 S.Ct. at 2594 (noting the "immutable nature" of sexual orientation).

[20] *Cf. Obergefell*, 135 S.Ct. at 2590 (noting history of discrimination against gays).

that transsexuality is not an immutable characteristic determined solely by the accident of birth like race or national origin, and that "the complexities involved in merely defining the term 'transsexual' would prohibit a determination of suspect classification for transsexuals" on the basis that "*Schwenk* unmistakably overruled those holdings").

Brown, however, did not even reach the question of whether the transgender plaintiff could claim an Equal Protection violation, finding that the allegations in the complaint before it were too conclusory to allow proper analysis. 63 F.3d at 971. Similarly, in *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1222 (10th Cir. 2007), an employment case, the Tenth Circuit also noted that the plaintiff's equal protection claim as argued was far too "conclusory" to admit sufficient analysis, and ultimately concluded that "with the record and arguments before this court," it did not have sufficient basis to find that transgender individuals constitute a separately protected class under the Equal Protection Clause. *Id.* at 1222, 1227-28.

Scientific research published since these two cases makes clear that the issue should not only be revisited, as *Brown* instructs, but that transgender status is a suspect classification, as transgender individuals constitute a discrete and insular minority and transgender status is an immutable characteristic. Indeed, courts are increasingly reaching this conclusion. For example, in one recent decision, a federal court applied the four-factor *Carolene Products* test to hold that transgender people are entitled to intermediate scrutiny. *Adkins*, 143 F.Supp.3d at 139. That court concluded that (1) "transgender people have suffered a history of persecution and discrimination" which "is 'not much in debate,'" *id.*, *quoting Windsor v. United States*, 699 F.3d at 182; (2) that "transgender status bears no relation to ability to contribute to society," *id.*; (3) that "transgender status is a sufficiently discernible characteristic to define a discrete minority class," *id.*; and (4) that "transgender people are a politically powerless minority . . . although

there are and were gay members of the United States Congress (since *Windsor,* in both houses), as well as gay federal judges, there is no indication that there have ever been any transgender members of the United States Congress or the federal judiciary," *id.*at 140. Another federal court similarly held squarely that "discrimination based on transgender status . . . qualifies as a suspect classification under the Equal Protection Clause because transgender persons meet the indicia of a 'suspect' or 'quasi-suspect classification' identified by the Supreme Court." *Norsworthy,* 87 F.Supp.3d at 1119.

Most recently, a federal court similarly concluded that transgender people were entitled to heightened scrutiny because (1) "there is not much doubt that transgender people have historically been subject to discrimination," (2) "there is obviously no relationship between transgender status and the ability to contribute to society," (3) "transgender people have immutable and distinguishing characteristics that define them as a discrete group," and (4) "as a tiny minority of the population, whose members are stigmatized for their gender non-conformity in a variety of settings, transgender people are a politically powerless minority group." *Board of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ*., No. 2:16-CV-524, 2016 WL 5372349, at *16 (S.D. Ohio Sept. 26, 2016). *Cf. SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481 (9th Cir. 2014) (holding that *United States v. Windsor,* 133 S.Ct. 2675 (2013) "requires that heightened scrutiny be applied to equal protection claims involving sexual orientation").

In any event, at a minimum, discrimination against transgender individuals must receive intermediate scrutiny as it is a form of sex discrimination. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989), the United States Supreme Court recognized that discrimination against an individual for failing to conform to sex stereotypes is a form of unlawful sex discrimination.

See Etsitty, 502 F.3d at 1221; *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 394 F.Supp.2d 1299, 1304 (D. Kan. 2005). Following *Price Waterhouse*, the vast majority of federal courts to consider the question have reversed contrary case law that predated *Price Waterhouse* and concluded that discrimination against transgender individuals is a form of sex discrimination entitled to at least intermediate scrutiny under the Equal Protection Clause. *See, e.g.*, *Glenn v. Brumby*, 663 F.3d at 1318 n.5, 1319 ("[S]ince the decision in *Price Waterhouse*, federal courts have recognized with near-total uniformity that 'the approach in *Holloway* . . . has been eviscerated' by *Price Waterhouse*." . . . "[D]iscrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause."); *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004) (same).

C. KDHE's Policy Cannot Survive Any Level of Scrutiny

In order for KDHE's infringement of Ms. Mott's fundamental rights to be permissible under the Due Process Clause, it must pass strict scrutiny. "The Due Process Clause 'forbids the government to infringe certain fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'" *Kitchen*, 755 F.3d at 1218 (*citing Reno v. Flores*, 507 U.S. 292, 302 (1993); *see also Casey*, 505 U.S. at 929 (requiring that restriction be both necessary and narrowly tailored to the achievement of the compelling interest). Similarly, when a government action challenged under the Equal Protection Clause "classifies individuals using a suspect classification, . . . a court will review that challenged action applying strict scrutiny." *See Price-Cornelison v. Brooks*, 524 F.3d 1103, 1109 (10th Cir. 2008) (citing *Johnson v. California*, 543 U.S. 499, 505 (2005); *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002)).

"A provision subject to strict scrutiny 'cannot rest upon a generalized assertion as to the classification's relevance to its goals.'" *Kitchen*, 755 F.3d at 1218 (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989)). Rather, "'the means chosen [must] fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate.'" *Id*. (citing *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)). "Only 'the most exact connection between justification and classification' survives." *Id*. at 1219 (citing *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)). KDHE's policy cannot survive this demanding standard.

KDHE has offered no compelling state interest to justify its refusal to amend Ms. Mott's birth certificate. Rather, the *only* basis KDHE has provided is its own interpretation that *Gardiner* invalidated the Regulation. However, it is clear from the timing of the choice to refuse to enforce the Regulation that it was a political decision aimed at removing certain rights from transgender individuals and not a neutral attempt to follow appellate case law. Based on the stated reason within KDHE for the decision to refuse to amend Ms. Mott's birth certificate—that *Gardiner* had invalidated the Regulation—the change should have come into effect as soon as *Gardiner* was issued, or at the very least as soon as KDHE analyzed *Gardiner*, which occurred as early as 2001 and again in 2004. Instead, as detailed above, the Regulation was consistently enforced to allow people who could demonstrate that they had undergone sex reassignment surgery to amend the gender markers on their birth certificates even after the *Gardiner* decision—until almost 10 years later when Governor Brownback took office and KDHE's administration changed. And KDHE did not seek to amend the Regulation until spring 2016, when this Petition for Review had been filed.

Even assuming compliance with KDHE's interpretation of *Gardiner* were a compelling state interest, however, the refusal to amend the birth certificates of transgender individuals is not

narrowly tailored because it is significantly underinclusive. *See Kitchen*, 755 F.3d at 1221-22 ("[The] state may not impinge upon the exercise of a fundamental right as to some, but not all, of the individuals who share a characteristic urged to be relevant."). KDHE's decision does not completely abandon the Regulation allowing for amendments based on sex reassignment surgery. Rather, it allows for amendments where an individual has undergone sex reassignment surgery on "ambiguous" genitalia, or to correct other "mistakes" in gender determination. (1CR at 154-61 & 163-70 – Irigonegaray Decl., Exs. 21 & 22.) Because KDHE permits other birth certificate amendments for individuals that share the same characteristic with Ms. Mott and other transgender individuals—a gender identity that is inconsistent with the sex assigned at birth—such underinclusiveness reveals the absence of narrow tailoring. *See Kitchen*, 755 F.3d at 1221 ("Utah law sanctions many marriages that share the characteristic—inability to procreate—ostensibly targeted by [amendment banning same-sex marriage]. The absence of narrow tailoring is often revealed by such under-inclusiveness."). KDHE's policy cannot survive scrutiny.

Even if the intermediate scrutiny standard applicable to gender-based discrimination applies, KDHE's action cannot stand. Under that standard, the government must demonstrate that the challenged action "serve[s] important governmental objectives" and is "substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). *See also United States v. Virginia*, 518 U.S. 515, 531, 533 (1996) (under intermediate scrutiny, government "must demonstrate an exceedingly persuasive justification for that action"; "The burden of justification is demanding and it rests entirely on the state.") (internal quotation marks and citations omitted). No such "important" objective is advanced by subjecting transgender people to uniquely disfavored treatment under KDHE's birth certificate amendment policy,

denying them access to corrected birth certificates when all other people born in Kansas can obtain records that accurately reflect their lived gender.

Finally, even if no fundamental right were implicated and even if transgender people were not part of a protected class, KDHE's refusal to allow transgender people to amend the gender markers on their birth certificates cannot survive rational basis review. KDHE permits such amendments to non-transgender people whose assigned birth sex is incorrect, as well as to intersex people with ambiguous genitalia whose assigned birth sex is incorrect, yet it does not permit such amendments for transgender people whose assigned birth sex is incorrect. KDHE can advance no rational basis for differentiating among transgender, non-transgender, and intersex people in this way. Accordingly, the refusal to amend Ms. Mott's birth certificate does not survive even rational basis review. *See Price-Cornelison*, 524 F.3d at 1114 ("[Defendant] has not asserted, and we cannot discern on this record, a rational reason to provide less protection to lesbian victims of domestic violence than to heterosexual domestic violence victims. [Plaintiff], therefore, has sufficiently established that [Defendant] violated her constitutional rights.").

The policy also contravenes the state's own policy of permitting transgender people to change the gender marker on a driver's license or state ID card. It is inconceivable that such a contradictory state of affairs constitutes sensible public policy; rather, such disparity in the state's own policy is evidence that the policy is founded only in impermissible animus toward transgender people. *See Windsor*, 133 S.Ct. at 2694 ("DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. . . . By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for

the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect.").

VI. CONCLUSION

For all of the foregoing reasons, Ms. Mott respectfully requests that the Court enter judgment in Ms. Mott's favor and grant the following relief: (a) set aside the Denial Order; (b) enter an order requiring the KDHE to approve the amendment to the gender marker on Ms. Mott's birth certificate; (c) enter an order enjoining KDHE from denying requests from transgender people for amendments to the gender marker on their birth certificates; (d) render a declaratory judgment confirming the invalidity of the Regulation, as amended; and (e) award Ms. Mott her attorneys' fees and costs to the extent authorized by law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned person hereby certifies that a true and correct copy of the above and foregoing document was served on counsel of record by (____) placing the same in the United States mail, postage prepaid; by (__) courier service; (**X**) **electronic mail**; by (___) facsimile, to telephone number _____ and that the transmission was reported as complete and without error, and that the facsimile machine complied with Supreme Court Rule 119(b)(3); or by (__) hand delivery, on January 17, 2017, to:

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and the original was filed with the Court using the eFlex System at:

Angela M. Callahan, Clerk of Court
Shawnee County District Court
Third Judicial District
200 SE 7th Street, Suite 209
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s/ Pedro L. Irigonegaray