

**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-150

**AMENDED PETITION FOR JUDICIAL REVIEW OF A DECISION OF THE KANSAS
DEPARTMENT OF HEALTH AND ENVIRONMENT**

Comes now Petitioner, Stephanie Mott, and pursuant to K.S.A. 77-601, *et seq.*, by and through her attorneys of record, hereby petitions the District Court for judicial review of a final agency action of the Kansas Department of Health and Environment (“KDHE”). The final agency action at issue is the denial of Petitioner’s request for an amendment to the gender marker on her birth certificate by KDHE Secretary Susan Mosier, MD (the “Secretary”) dated November 20, 2013 (the “Denial Order”), as reaffirmed in KDHE’s subsequent denial dated January 22, 2016.

PARTIES

1. The names and addresses of the Petitioner and the Respondent agency whose action is at issue are as follows:

Petitioner:

Stephanie Mott, 119 SE 14th Street, Topeka, Kansas 66612.

Respondents:

Kansas Department of Health and Environment, Curtis State Office Building, 1000 SW Jackson St., Topeka, Kansas 66612-1367.

Susan Mosier, MD, Secretary, Kansas Department of Health and Environment, Curtis State Office Building, 1000 SW Jackson St., Suite 540, Topeka, Kansas 66612-1367.

2. Petitioner has been notified by KDHE that the agency officer to receive service of a petition for judicial review on behalf of the agency, pursuant to the KJRA, is Elizabeth Saadi, State Registrar, Kansas Department of Health and Environment, Curtis State Office Building, Suite 110, 1000 SW Jackson, Topeka, Kansas 66612. Accordingly, Ms. Saadi will be served with the instant Petition.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to K.S.A. 77-606, 77-607(a), and 77-609(a).

4. Pursuant to K.S.A. 77-609(b), venue is proper in Shawnee County because that is the county in which the Denial Order was entered and is effective.

AGENCY ACTION AT ISSUE

5. The agency action at issue is the Secretary's issuance of the Denial Order, a true and correct copy of which is attached hereto as Exhibit "A."

6. A true and correct copy of Petitioner's request as submitted to KDHE on December 14, 2015, was separately filed as Exhibit "B" to Petitioner's initial Petition for

Review, and the arguments and authorities therein are incorporated herein by reference.¹

Pursuant to the Court's May 31, 2016 Order granting Petitioner's Motion for Correction of Certified Agency Record, Exhibit B is part of the agency record.

7. A true and correct copy of the KDHE's response to Petitioner's December 14, 2015 request, which is dated January 22, 2016, and was received in the mail by Petitioner on February 1, 2016, is attached hereto as Exhibit "C."

ENTITLEMENT TO JUDICIAL REVIEW

8. Petitioner is entitled to judicial review under K.S.A. 77-607(a). Petitioner has standing to bring this action because she is a person to whom the agency action is specifically directed. *See* K.S.A. 77-611(a). The Denial Order pertains to Petitioner's request for an amendment to her birth certificate and is expressly directed at Petitioner. Petitioner also has standing to bring this action because she was a party to the agency proceedings that led to the agency action. *See* K.S.A. 77-611(b). Petitioner made the request for an amendment to her birth certificate, which led to the Denial Order.

9. Pursuant to K.S.A. 77-612, Petitioner has exhausted all available administrative remedies.

10. This Petition for Review is timely filed pursuant to K.S.A. 77-613(b) and (e) because it is filed within 33 days after service by mail of the January 22, 2016 letter from KDHE, which stated for the first time the agency officer to receive service of a petition for judicial review on behalf of the agency, as required for all final agency actions under the Kansas Judicial

¹ So as not to unnecessarily burden the Court with the re-filing of the same voluminous exhibit, Petitioner refers to and incorporates by reference the Exhibit B that was manually filed with Petitioner's initial Petition for Review on or about February 19, 2016.

Review Act, K.S.A. 77-613(e). *See Heiland v. Dunnick*, 270 Kan. 663, 671-72 (2001); *Reifschneider v. State*, 266 Kan. 338, 342 (1998).

FACTS RELEVANT TO ISSUES PRESENTED

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

11. Petitioner was born in Kansas and holds a Kansas birth certificate. Petitioner is a woman. She is also transgender. That means she was designated as “male” on her Kansas birth certificate, but her true sex, in accordance with her gender identity, is female. The gender designation on Petitioner's Kansas birth certificate thus inaccurately identifies her as male. As set forth more fully in Exhibit B, incorporated herein by reference, this is because the medical knowledge of what a person's sex is has evolved significantly in recent decades.

12. In April 2006, Petitioner was first diagnosed with gender identity disorder (“GID”), a diagnosis, recognized by the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (“DSM”), that 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. Petitioner worked closely with a therapist for about 18 months, during which she began the process of transitioning to live as a woman. By 2007, while under the treatment of her therapist, Petitioner began living full-time as a woman. In May 2012, Petitioner traveled to Bangkok, Thailand, and underwent sex reassignment surgery. In order to obtain the surgery, Petitioner was required to provide documentation from a medical provider of her GID diagnosis.

13. Petitioner's Kansas driver's license, social security card, and United States passport accurately reflect her true sex of female. However, because her Kansas birth certificate

reflects a male sex, her birth certificate is inaccurate and her identification documents are inconsistent.

14. Having inconsistent identification documents and identification documents that are incongruent with her gender regularly subjects Petitioner to embarrassment and harassment and exposes her to an increased risk of violence. Many of the people with whom Petitioner interacts 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 gender. Both the reality of having an incorrect gender marker on her birth certificate, and the fear of this information being disclosed, negatively impact Petitioner's mental health, causing her significant distress on a daily basis.

15. On November 18, 2013, Petitioner submitted to the Office of Vital Statistics ("OVS") 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") then in effect. Despite the fact that Petitioner's request complied with the Regulation, Timothy Keck, Deputy Chief Counsel for KDHE, responded by letter dated November 20, 2013, stating that 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 of a medical provider and affidavit that misidentification occurred at or around the time of birth." The letter invited Petitioner to contact Mr. Keck should she "have any questions or concerns." The letter did not notify Petitioner 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.

16. On December 14, 2015, Petitioner submitted her request, in which she responded to Mr. Keck’s invitation for her to share her questions and concerns, submitted additional evidence that misidentification of her gender had 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 request, submitted separately as Exhibit B, outlined KDHE’s legal obligations—particularly in light of intervening developments in binding Tenth Circuit and United States Supreme Court case law—and enclosed expert declarations and evidence in support of Petitioner’s request.

17. By letter dated January 22, 2016, KDHE denied Petitioner’s request and notified Petitioner of the agency officer to receive service of a petition for judicial review on behalf of the agency. *See* Exhibit C. Petitioner’s counsel received the January 22, 2016 letter in the mail on February 1, 2016.

B. *Background of KDHE’s Enforcement of the Regulation and Subsequent Unilateral Internal Policy Change*

18. In 2001, the Court of Appeals issued *In re Estate of Gardiner*, 29 Kan. App. 2d 92 (2001), *aff’d in part, rev’d in part*, 273 Kan. 191 (2002). In that decision, the Kansas Court of Appeals 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. 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.

19. The Kansas Supreme Court accepted review, affirming in part and reversing in part. *See In re Estate of Gardiner*, 273 Kan. 191 (2002). The Supreme Court held that the Kansas statute prohibiting same-sex couples from marrying also prohibited marriages involving transgender people. *See id.* at 213-14. The Supreme Court’s lengthy decision did not comment on the Court of Appeal’s dicta regarding the Regulation, K.A.R. 28-17-20(b)(1)(A)(i).

20. Shortly after the *Gardiner* Court of Appeals decision was issued, KDHE considered its impact on the state policy of allowing gender marker amendments if a medical certificate is provided as evidence of an anatomical change. 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.

21. There apparently was no further discussion of the matter until March 2004, when there was an email exchange between Ms. Wolfe and Lorne Phillips, then State Registrar. This communication, too, centered on information gathering about sex reassignment. 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.” He further suggested that they schedule a meeting with Ms. Cooper.

22. 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). In the April 23, 2004 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].” Notably, while the memorandum recommended that the regulation be amended, it did not conclude that the regulation had been expressly overruled by *Gardiner* and was no longer valid.

23. For almost 10 years after the *Gardiner* 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, apparently at the rate of about one amended certificate under the provision per year. From 2003 to 2011, KDHE sent several email responses to inquiries, which contained affirmative representations of the policy as set forth in the Regulation.

24. A year after Samuel Brownback became governor of Kansas on January 10, 2011, however, KDHE again considered 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 communications decided to cease enforcing the Regulation.

25. Specifically, on February 20, 2012, Mr. Keck drafted a memorandum to Dr. Robert Moser, (then KDHE Secretary), that purported to “follow[] up our conversation of last week concerning the historical policy of allow[ing] ‘correction’ to a birth certificate of a transsexual individual.” Although the Regulation and the effect of *Gardiner* had been previously analyzed in 2001 and 2004, Mr. Keck nonetheless stated in the memorandum that this “issue recently came to our attention.” The 2012 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).” 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.

26. Despite the February 20, 2012 memorandum’s recognition that the Regulation would need to be repealed, it was not.

27. On February 22, 2012, the policy was apparently changed internally. This decision to no longer enforce the Regulation was evidently documented only on internal handwritten notes, which stated that KDHE would no longer allow gender marker amendments following sex reassignment surgery. 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).” 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.”

28. On February 23, 2012, the website of the OVS was apparently ordered changed to delete FAQs about changing certificates based on sex reassignment surgery.

29. In summary, KDHE’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. The public was not notified of the possible change and was not afforded an opportunity for a hearing before the new “policy” went into effect, and KDHE never prepared a

statement of the principal reasons for adopting the policy, as required under K.S.A. 77-421(a)(1), (b)(1), and K.S.A. 77-425.

30. Following this internal decision to refuse to enforce the Regulation in late February 2012, KDHE has denied virtually all requests for birth certificate changes submitted by transgender individuals under the Regulation, citing *In re Estate of Gardiner*, 29 Kan. App. 2d 92 (2001).

31. 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 it 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. KDHE 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).

32. On March 3, 2016, after Petitioner filed her Petition for Review and long after KDHE had decided internally to stop enforcing the Regulation, KDHE sought amendment of the Regulation by noticing the amendment for public hearing. On June 24, 2016, K.A.R. 28-17-20(b)(1)(A)(i), was amended to, *inter alia*, remove the provision allowing for amendment "with a medical certificate substantiating that a physiological or anatomical change occurred."

GROUND FOR GRANTING RELIEF

33. Relief is warranted under K.S.A. 77-621(c)(1), (2), (4), (5), and (8). The grounds on which Petitioner seeks review of the Denial Order and appropriate relief are as follows:

A. KDHE is Statutorily Required to Grant Petitioner's Request

34. At all times relevant to this Petition, the Regulation, K.A.R. 28-17-20(b)(1)(A)(i), which was enacted pursuant to K.S.A. 65-2402(a)(5), provided that:

The items recording the registrant's sex may be amended if the amendment is substantiated with the applicant's affidavit, or a parent's affidavit if the registrant is under the age of 18, 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).

35. Pursuant to the Regulation, in order to correct the inaccuracy on her birth certificate, Petitioner requested that KDHE amend her birth certificate and correctly designate her sex as female, and she provided the requisite medical certificate substantiating that a physiological or anatomical change occurred.

36. At the time of Petitioner's request, KDHE had a statutory duty to enforce regulations that have been enacted under enabling statutes. *See* K.S.A. 65-2402(a)(5). The Regulation was duly adopted under the authority of K.S.A. 65-2422c.

37. Notwithstanding its statutory duty, KDHE issued the Denial Order, denying Petitioner's request for an amendment to the gender marker on her birth certificate and refusing to enforce the Regulation in reliance on *In re Estate of Gardiner*, 29 Kan. App. 2d 92 (2001).

38. KDHE's internal decision to stop enforcing the Regulation does not comply with the required procedures for revocations or amendments. *See* K.S.A. 65-2402(a)(4); K.S.A. 77-421; K.S.A. 77-415(c)(4). Because the Regulation had not been revoked or amended pursuant to applicable statutory procedure at the time of Petitioner's request, it remained in effect, and KDHE was required to enforce it. *See* K.S.A. 77-425.

39. Contrary to KDHE's contention, the Kansas 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 (2002),

did not invalidate the Regulation because: (1) the Court of Appeals’ holding in *Gardiner* regarding the weight to be afforded the amended birth certificate was not based on the validity of the Kansas Regulation, and thus is merely dicta without the force of law; (2) the Court of Appeals’ discussion of the Regulation in *Gardiner* holds no persuasive value because the central issue in that case (whether the Kansas marriage between the petitioner’s father and the father’s spouse, a “post-operative male-to-female transsexual,” was valid under the Kansas statute that prohibited marriages between persons of the same sex) has been decided differently by intervening cases at all levels of the federal courts, *see Bishop v. Smith*, 760 F.3d 1070, 1080-81 (10th Cir.), *cert. denied*, 135 S.Ct. 271 (2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1229-30 (10th Cir.), *cert. denied*, 135 S.Ct. 265 (2014). *Obergefell v. Hodges*, 576 U.S. ___, 135 S.Ct. 2584, 2589 (June 26, 2015); and (3) *Gardiner*’s analysis of the Regulation is not well reasoned, and thus is not persuasive.

40. In summary, the Regulation was duly adopted and had not been revoked or repealed at the time of Petitioner’s request. *Gardiner*, on the other hand, has been stripped of its central reasoning by intervening federal authority, and in any event, its analysis of the Regulation is poorly reasoned dicta. Therefore, KDHE’s refusal to enforce the duly adopted Regulation 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).

41. In addition to allowing for an amendment “with a medical certificate substantiating that a physiological or anatomical change occurred,” the Regulation also stated—and, as amended, continues to state: “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.” K.A.R. 28-17-20(b)(1)(A)(i).

42. As expert declarations and other evidence submitted to KDHE and attached hereto as Exhibit B demonstrate, Petitioner was at birth, and is now, female. As a result, the gender marker on her birth certificate is incorrect and should be changed to female. Under K.A.R. 28-17-20(b)(1)(A)(i), KDHE is required to amend Petitioner’s birth certificate based on the affidavit she submitted to KDHE substantiating that her sex was incorrectly recorded.

43. KDHE’s refusal to amend Petitioner’s birth certificate based on 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).

B. The Constitution Requires that KDHE Grant Petitioner’s Request

1. KDHE’s Actions Violate Petitioner’s Rights to Privacy and Autonomy under the Due Process Clause

44. The constitutionally protected due process 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.” *Eastwood v. Dep’t of Corr.*, 846 F.2d 627, 630-31 (10th Cir. 1988) (citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

45. Several federal circuit courts have recognized that a person has a right to maintain the privacy of his or her transgender identity. *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).

46. By preventing Petitioner from obtaining a birth certificate that is congruent with her gender identity and expression, KDHE is forcing disclosure of Petitioner’s transgender status to any person to whom she is required to show her birth certificate. KDHE’s action thus infringes on Petitioner’s constitutional privacy right not to have personal information disclosed, in violation of the Due Process Clause of the Fourteenth Amendment.

47. The Tenth Circuit has recognized the privacy interest in the confidentiality of one’s medical information. *See Herring v. Keenan*, 218 F.3d 1171, 1175 (10th Cir. 2000) (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 constitutes confidential medical information. *See Brown v. Zavaras*, 63 F.3d 967, 969 (10th Cir. 1995) (“The medical term for transsexuality is ‘gender dysphoria,’ and gender dysphoria is a medically recognized psychological disorder resulting from the ‘disjunction between sexual identity and sexual organs.’”) (citations omitted).

48. KDHE’s refusal to amend Petitioner’s birth certificate infringes Petitioner’s privacy interest in the confidentiality of her medical information because when Petitioner is required to show 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.

49. The Supreme Court recognized in *Obergefell v. Hodges* that 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.” 135 S.Ct. at 2589. 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.

50. KDHE’s refusal to amend Petitioner’s birth certificate impermissibly abridges her liberty interest in defining her own identity without undue interference from the state.

2. KDHE’s Actions Violate Petitioner’s Right to Equal Protection of the Laws

51. As a transgender person, Petitioner is a member of a protected class. Transgender status qualifies as a suspect classification under the Equal Protection Clause because transgender persons meet the indicia identified by the United States Supreme Court that indicate a “suspect” or, at a minimum, “quasi-suspect” classification. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

52. Because KDHE’s birth certificate amendment policy singles out the class of transgender individuals for particular deprivation of equal treatment, the policy is subject to heightened scrutiny.

53. Alternatively, discrimination against transgender individuals must, at a minimum, receive intermediate scrutiny as it is a form of sex discrimination. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).

3. KDHE’s Policy Cannot Survive Any Level of Scrutiny

54. In order for KDHE’s infringement of Petitioner’s fundamental rights to be constitutional under the Due Process Clause, it must pass strict scrutiny. *See Kitchen*, 755 F.3d at 1218 (*citing Reno v. Flores*, 507 U.S. 292, 302 (1993)). Similarly, because KDHE’s action “classifies individuals using a suspect classification,” under the Equal Protection Clause, it must

pass 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)).

55. KDHE's action cannot survive strict scrutiny because KDHE has no compelling state interest to justify its refusal to amend Petitioner's birth certificate, and because its refusal to amend the birth certificates of transgender individuals is not narrowly tailored because it is, among other defects, significantly underinclusive.

56. KDHE's action also cannot survive intermediate scrutiny because no "important" objective is advanced by subjecting transgender individuals 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.

57. KDHE's action cannot survive even rational basis review because KDHE permits birth certificate amendments to non-transgender individuals whose gender marker sex is incorrect, as well as to intersex individuals with ambiguous genitalia whose gender marker is incorrect, yet it does not permit such amendments for transgender individuals whose assigned gender marker is incorrect. KDHE can advance no rational basis for differentiating among transgender, non-transgender, and intersex individuals in this way.

58. Because KDHE's refusal to amend Petitioner's birth certificate violates Petitioner's due process rights and her right to equal protection of the laws and cannot survive under any level of scrutiny, it is unconstitutional. *See K.S.A. 77-621(c)(1)*.

RELIEF REQUESTED

59. For the reasons stated above, Petitioner respectfully requests that, pursuant to K.S.A. 77-622(b), this Court grant the Petition for Review, 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 Petitioner's birth certificate;
- (c) enter an order enjoining KDHE from denying requests from transgender individuals for amendments to the gender marker on their birth certificates;
- (d) render a declaratory judgment confirming the invalidity of the Regulation, as amended;
- (e) award Petitioner her attorneys' fees and costs to the extent authorized by law; and
- (f) grant all other relief the Court deems proper.

Respectfully submitted,

IRIGONEGARAY & ASSOCIATES

s/ Pedro L. Irigonegaray
Pedro L. Irigonegaray, #08079
Elizabeth R. Herbert, #09420
1535 SW 29th Street
Topeka, KS 66611
785-267-6115; 785-267-9458 fax
pli@plilaw.com; erh@plilaw.com
Attorneys for Petitioner Stephanie Mott

Christopher G. Caldwell (*pro hac vice*)
Kelly L. Perigoe (*pro hac vice*)
725 S. Figueroa St., 31st Floor
Los Angeles, CA 90017
213-629-9040; 213-629-9022 fax
caldwell@caldwell-leslie.com
perigoe@caldwell-leslie.com

Attorneys for Petitioner Stephanie Mott

Ilona M. Turner (*pro hac vice*)
Sasha Buchert (*pro hac vice*)
1629 Telegraph Ave., Suite 400
Oakland, CA 94612
415-865-0176; 877-847-1278 fax
ilona@transgenderlawcenter.org
sasha@transgenderlawcenter.org
Attorneys for Petitioner Stephanie Mott

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 August 17, 2016, to:

Darian P. Dernovish,
Interim Deputy Chief Counsel
Eugene Lueger, Associate Chief Counsel –
Public Health
KDHE Legal Services
1000 SW Jackson, Ste. 560
Topeka, KS 66612-1371
T: 785-296-0088; F: 785-296-7119
ddernovish@kdheks.gov; glueger@kdheks.gov

*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
Topeka, KS 66603
<https://filer.kscourts.org/>
F: 785-291-4911

s/ Pedro L. Irigonegaray



Robert Moser, MD, Secretary

Department of Health & Environment

Sam Brownback, Governor

November 20, 2013

Stephanie Mott
119 S.E. 14th
Topeka, Kansas 66612

RE: Request for Reissuance of Birth Certificate

Ms. Mott:

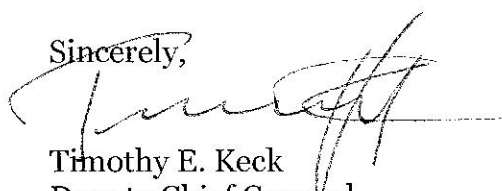
We have received your letter requesting an amendment to your birth certificate pursuant to K.S.A. 65-2422c changing the "gender marker" on the birth certificate from male to female. You make this request pursuant to a gender reassignment surgery you had in Thailand in May of 2013.

The Kansas Department of Health and Environment denies your request. Based on K.S.A. 65-2422c and *In re Estate of Gardiner*, 29 Kan.App.2d 92 (2001), the Kansas Department of Health and Environment does not have the authority to amend a birth certificate for the reason of gender reassignment surgery.

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.

Please let me know if you have any questions or concerns.

Sincerely,



Timothy E. Keck
Deputy Chief Counsel
Kansas Department of Health and Environment

EXHIBIT A

RECEIVED
FEB - 1 2016

IRIGONEGARAY, P.A.

Curtis State Office Building
1000 SW Jackson St., Suite 540
Topeka, KS 66612-1367



Phone: 785-296-0461
Fax: 785-368-6368
www.kdheks.gov

Susan Mosier, MD, Secretary

Department of Health & Environment

Sam Brownback, Governor

January 22, 2016

Pedro Irigonegaray
Irigonegaray and Associates
1535 S.W. 29th Street
Topeka, Kansas 66611-6115

Re: Stephanie Mott – Request for Amendment to Gender Marker on Birth Certificate

Dear Mr. Irigonegaray:

The Kansas Department of Health and Environment (KDHE) received your request, dated December 14, 2015, to amend Stephanie Mott's birth certificate. The KDHE previously responded to the request from Ms. Mott to amend the "gender marker" on her birth certificate in the attached letter dated November 20, 2013. As previously indicated, based on the information provided, the KDHE does not have the authority to amend the gender on Ms. Mott's birth certificate based on K.S.A. 65-2422c and *In re Estate of Gardiner*, 29 Kan. App. 2d 92 (2001). Ms. Mott did not file a petition for judicial review in response to the November 20, 2013 denial.

You have also requested, if Ms. Mott's request is denied, that the KDHE provide the agency officer to receive service of a petition for judicial review on behalf of the agency, pursuant to the KJRA. Any petition for judicial review filed in response to an agency order denying an amendment to a birth certificate shall be served upon Elizabeth Saadi, State Registrar, Kansas Department of Health and Environment, Curtis State Office Bldg., Ste. 110, 1000 SW Jackson, Topeka, Kansas 66612.

Sincerely,

Susan Mosier, MD, Secretary

cc: Eugene Lueger, Attorney, KDHE

EXHIBIT C