STATE OF MICHIGAN

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CONSTITUTIONAL LAW: Constitutionality of the "sex-reassignment surgery" requirement of MCL 333.2831(c).

US CONST, AM XIV:

CONST 1963, ART 1, § 2:

CONST 1963, ART 1, § 17:

PUBLIC HEALTH CODE: Changing the sex designation on a birth certificate.

VITAL RECORDS:

The "sex-reassignment surgery" required by MCL 333.2831(c) to change the sex designation on a birth certificate is unconstitutional because it violates an individual's equal protection rights under the United States and Michigan Constitutions.

The "sex-reassignment surgery" required by MCL 333.2831(c) to change the sex designation on a birth certificate may also violate an individual's due process rights under the United States and Michigan Constitutions.

Opinion No. 7313 June 30, 2021

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You have asked "whether MCL 333.2831(c) violates the constitutional rights of Michigan-born persons who seek to amend their birth certificate to alter their sex designation assigned at birth to reflect their present gender identity."

Background

Section 2831(c) establishes the only method by which Michigan-born individuals can change the sex designation on their birth certificates. To take advantage of this provision, an individual is required to submit both: (1) a written "request that a new certificate be established to show a sex designation other than that designated at birth"; and (2) "an affidavit of a physician certifying that sex-reassignment surgery has been performed." MCL 333.2831(c). This opinion focuses only on the constitutionality of the second requirement.

Legal Principles

When addressing a constitutional challenge to a statute, the statute is "presumed to be constitutional" and there is a "duty to construe [the] statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Smithkline Beecham Corp,* 468 Mich 1, 6 (2003). A statute will be deemed invalid "only when [its] invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution." *Phillips v Mirac, Inc*, 470 Mich 415, 423 (2004) (internal quotation marks omitted).

Analysis

The "sex-reassignment surgery" requirement of section 2831(c) implicates at least two rights secured by both the United States and Michigan Constitutions: the right to equal protection under the law and the right to due process of law.[1] US

[1] That requirement may implicate other constitutional rights not addressed in this opinion, such as the First Amendment right to be free from compelled speech. See *Louisiana v Hill*, 2020 WL

Const, Am XIV; Const 1963, art 1, §§ 2, 17. Because the equal protection and the due process guarantees of the Michigan Constitution are often interpreted coextensively with their federal counterparts, *AFT Mich v Michigan*, 497 Mich 197, 245 (2015) (due process); *Harvey v Michigan*, 469 Mich 1, 11 (2003) (equal protection), federal and state caselaw may be instructive in analyzing the constitutionality of the "sex-reassignment surgery" requirement of section 2831(c).[2]

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." US Const, Am XIV. Likewise, the Equal Protection Clause of the Michigan Constitution states, in relevant part, that "[n]o person shall be denied the equal protection of the laws. . . ." Const 1963, art 1, § 2.

The Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike," *City of Cleburne v Cleburne Living Ctr*, 473 US 432, 439 (1985), and its guarantee extends to protection against "intentional and arbitrary discrimination" by the State, *Village of Willowbrook v Olech*, 528 US

6145294, opinion of the Supreme Court of Louisiana, issued Oct 20, 2020 (Case No. 2020-KA-0323), p *4–11 (reviewing First Amendment compelled-speech precedent and holding that branded-identification-card requirement for sex offenders constitutes compelled speech).

[2] The Due Process Clause of the Michigan Constitution may "afford protections greater than or distinct from those offered by" the United States Constitution "in particular circumstances," *AFT Mich*, 497 Mich at 245 & n 28, but there is no indication that the federal and state due process clauses would be interpreted differently in the context of section 2831(c).

562, 564 (2000). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *City of Cleburne*, 473 US at 440. But where the legislation targets certain "suspect" or "quasi-suspect" classes, a heightened form of scrutiny applies. *Id.*

By allowing for a change to the sex designation on a birth certificate only upon proof of "sex-reassignment surgery," section 2831(c) facially discriminates on the basis of sex and transgender status. See *Corbitt v Taylor*, 2021 WL 142282, opinion of the United States District Court for the Middle District of Alabama, issued Jan 15, 2021 (Case No. 2:18-cv-91), p *3 (holding that a policy allowing for a change to the sex designation on a driver license only upon proof of surgical modification was a sex-based classification subject to intermediate scrutiny because "[t]he policy . . . treats people differently based on the nature of their genitalia, [thus] classifying them by sex"); *Morris v Pompeo*, 2020 WL 6875208, opinion of the United States District Court for the District of Nevada, issued Nov 23, 2020 (Case No. 2:19-cv-00569), p *7 (holding, under the Fifth Amendment Equal Protection Clause, that a policy requiring transgender individuals applying for a passport to verify their gender identity by submitting a doctor's certification that the individuals have had "appropriate clinical treatment for gender transition" facially discriminated on the basis of transgender status).

It is well-established that sex-based classifications are subject to intermediate scrutiny under the Equal Protection Clause. E.g., *United States v*

Virginia, 518 US 515, 532–533 (1996). And while there does not appear to be binding precedent, many courts have determined that transgender individuals are part of a quasi-suspect class, and that state action that classifies based on transgender status is also a sex-based classification subject to intermediate scrutiny. See, e.g., *Grimm v Gloucester Cty Sch Bd*, 972 F3d 586, 608–609 (CA 4, 2020) ("Many courts, including the Seventh and Eleventh Circuits, have held that various forms of discrimination against transgender people constitute sex-based discrimination for purposes of the Equal Protection Clause because such policies punish transgender persons for gender non-conformity, thereby relying on sex stereotypes.") (collecting cases).[3] Moreover, in the context of disparate-treatment claims brought under Title VII of the Civil Rights Act of 1964, the United States Supreme Court recently held that, because "transgender status [is] inextricably bound up with sex," discrimination based on transgender status is necessarily sex-based discrimination. *Bostock v Clayton Co*, 140 S Ct 1731, 1742, 1747 (2020) ("[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second."). There is no reason to view a sex-discrimination claim under the Equal Protection Clause differently than a sex-discrimination claim under Title VII; in fact, the elements

[3] See also *Adams v Sch Bd of St Johns Co*, 968 F3d 1286, 1296 (CA 11, 2020); *MAB v Bd of Educ of Talbot Co*, 286 F Supp 3d 704, 721 (D Md, 2018); *Flack v Wis Dep't of Health Servs*, 328 F Supp 3d 931, 953 (WD Wis, 2018); *FV v Barron*, 286 F Supp 3d 1131, 1145 (D Idaho, 2018); *Evancho v Pine-Richland Sch Dist*, 237 F Supp 3d 267, 288 (WD Pa, 2017); *Bd of Educ of the Highland Local Sch Dist v United States Dep't of Educ*, 208 F Supp 3d 850, 872 (SD Ohio, 2016); *Norsworthy v Beard*, 87 F Supp 3d 1104, 1119–1121 (ND Cal, 2015); *Adkins v City of New York*, 143 F Supp 3d 134, 139–140 (SDNY, 2015); *Ray v McCloud*, 2020 WL 8172750, opinion of the United States District Court for the Southern District of Ohio, issued Dec 16, 2020 (Case No. 2:18-cv-272), p *8–9 (collecting cases).

necessary to establish the claims are the same. *Deleon v Kalamazoo Co Rd Comm,* 739 F3d 914, 917–918 (CA 6, 2014) ("The elements for establishing an Equal Protection claim under § 1983 and the elements for establishing a violation of Title VII disparate treatment claim are the same."). Thus, *Bostock* supports the application of intermediate scrutiny to transgender-based classifications in the equal-protection context.

To satisfy intermediate scrutiny, a state must demonstrate that its action "serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *United States v Virginia*, 518 US 515, 533 (1996) (internal quotation marks omitted). The State must provide an "exceedingly persuasive justification" for the sex-based classification. *Id.* at 531 (internal quotation marks omitted).

Here, while there may be a governmental interest in ensuring the accuracy of vital records, a "sex-reassignment surgery" requirement is not substantially related to the achievement of that goal. A review of vital-records laws of other jurisdictions—jurisdictions with similar governmental interests in vital-record accuracy—confirms that a "sex-reassignment surgery" requirement is unnecessary to ensure such accuracy. *Love v Johnson*, 146 F Supp 3d 848, 857 (ED Mich, 2015) ("The Court seriously doubts that these states have any less interest in ensuring an accurate record-keeping system.").

Several jurisdictions, including Connecticut, the District of Columbia, Hawaii, Illinois, Iowa, Maryland, and Massachusetts, allow for a birth-certificate-sex-designation change upon a showing of some lesser form of clinical intervention than "sex-reassignment surgery," accepting surgical, hormonal, or other treatment clinically appropriate for a gender transition.[4] Even the U.S. Department of State requires only that the individual have received "appropriate clinical treatment for transition" in order to change the sex marker on their individual passport, and gives physicians the discretion to determine what clinical treatment is "appropriate" for each individual.[5] And other states, such as California, Colorado, New Jersey, and New Mexico, do not mandate *any* form of medical or other clinical intervention, requiring only an affidavit from the individual attesting that they identify as a different gender.[6]

More to the point, the "sex-reassignment surgery" requirement under section 2831(c) does not further the interests of ensuring accurate vital records. After the initial recording of the vital records at birth, birth certificates are not used again for vital statistics. Thus, the only function that remains is one of identification, such as their use for the adoption of children, obtaining a driver license, or death

[4] See Conn Gen Stat § 19a-42(i); DC Code § 7-231.22(a); Haw Rev Stat § 338-17.7(a)(4); 410 Ill Comp Stat 535/17(1)(d); Iowa Code § 144.23(3); Md Code, Health-Gen § 4-211(b); and Mass Gen Laws ch 46, § 13(e)(1).

[5] See US State Dep't, *Change of Sex Marker*, https://travel.state.gov/content/travel/en/passports/need-passport/change-of-sex-marker.html (last visited June 30, 2021) (incorporating standards and recommendations of the World Professional Association for Transgender Health regarding clinical treatment).

[6] See Cal Health & Safety Code § 103426; Colo Rev Stat § 25-2-113.8(3); NJ Stat § 26:8-40.12(a); and NM Stat § 24-14-25(D).

certificates. MCL 710.26(1)(e) (adoption); MCL 257.307(1) (one of the documents that may be used to obtain a driver license); MCL 333.2833(5) (death certificates). And "it is universally acknowledged in leading medical guidance that not all individuals identify as the sex they are assigned at birth." *Barron*, 286 F Supp 3d at 1143. It is not clear why Michigan's law for changing the sex designation on birth certificates, when used for identification purposes, would require a transgender person to undergo invasive, often irreversible, and expensive surgery. Not only does it impose a unique burden on a transgender person, depending on the nature of the surgery required by section 2831(c), it may well result in that person's sterilization. No state interest supports such an unnecessary burden, as the laws of many other states confirm.

Further, to the extent the objective is to maintain accuracy of vital records in regard to biological sex, "[s]ex determinations made at birth are most often based on the observation of external genitalia alone." *Barron*, 286 F Supp 3d at 1136. But "[t]here is scientific consensus that biological sex is determined by numerous elements, which can include chromosomal composition, internal reproductive organs, external genitalia, hormone prevalence, and brain structure." *Id.* In other words, while it is generally accepted that multiple factors go into determining biological sex, there is no generally accepted test or definition by which to make that determination. And, significantly, section 2831(c) itself is silent on the nature and extent of the required "sex-reassignment surgery." Does it mean only external genital surgery is necessary? Is breast or chest surgery also required? What about

aesthetic procedures? Or is it whatever surgical options the physician deems appropriate for the individual? Bottom line, section 2831(c) mandates an undefined surgery to satisfy an undefined biological standard. Therefore, requiring an individual to undergo a "sex-reassignment surgery" is not substantially related to any state interest in maintaining the accuracy of vital records as they pertain to biological sex.

Additionally, it is worth noting that, outside of the sex designation, birth certificates are not always biologically driven nor are they static. For example, when a child is born to a wedded couple, each spouse is listed as a parent on the birth certificate, regardless of whether they conceived the child. And if a child is adopted later in life, the birth certificate may be changed to reflect the new adoptive parents. The fact that the state readily accounts for and acknowledges such biological falsity—sometimes even from birth—cuts against the importance of any state interest in maintaining the accuracy of vital records in regard to the biology of the child. [7]

Because the "sex-reassignment surgery" requirement is not substantially related to achieving an important governmental interest, it does not satisfy intermediate scrutiny. It is my opinion, therefore, that the "sex-reassignment

[7] This is also supported by the fact that individuals who choose to undergo any type of "sex-reassignment surgery" are not then required to change the sex designation on their birth certificate.

surgery" requirement of MCL 333.2831(c) violates the Equal Protection Clauses of the United States and Michigan Constitutions.

Due Process

As previously noted, the "sex-reassignment surgery" requirement of section 2831(c) may implicate multiple constitutional rights. See note 1, *supra*. In light of my opinion that the requirement violates equal protection, none of those other rights needs to be specifically and definitively addressed. That said, because of the significant similarities between the issues and interests presented here and the issues and interests presented in *Love*—a due process case out of the United States District Court for the Eastern District of Michigan addressing the rights of transgender individuals under the due process clause—a discussion of due process and *Love* is warranted.

The Due Process Clause of the Fourteenth Amendment of the United States Constitution states that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." US Const, Am XIV. Similarly, the Due Process Clause of the Michigan Constitution provides that "[n]o person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17.

"The Due Process Clause guarantees more than fair process[.]" *Washington v Glucksberg*, 521 US 702, 719 (1997). The Clause also contains a substantive component that "protects individual liberty against 'certain government actions

regardless of the fairness of the procedures used to implement them.' " *Collins v Harker Heights,* 503 US 115, 125 (1992), quoting *Daniels v Williams,* 474 US 327, 331 (1986). Specifically, the Due Process Clause provides "protection against government interference with certain fundamental rights and liberty interests" that "are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Glucksberg*, 521 US at 720–721 (internal quotation marks and citations omitted). As such, the first step in a substantive due process analysis is to determine whether a fundamental liberty interest is implicated. *Id.* at 721–722.

One such recognized fundamental liberty interest is an interest in "informational privacy," which arises "where the release of personal information could lead to bodily harm" or "where the information released was of a sexual, personal, and humiliating nature." *Lambert v Hartman*, 517 F3d 433, 440 (CA 6, 2008). Many courts have made clear that this interest in informational privacy extends to an individual's transgender status. *Love*, for example, held that " 'the excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.' " *Love*, 146 F Supp 3d at 855, quoting *Powell v Schriver*, 175 F3d 107, 111 (CA 2, 1999). See also *Doe v City of Detroit*, 2018 WL 3434345, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued July 17, 2018 (Case No. 18-cv-

11295), p *2 (describing transgender status as "information of the utmost intimacy" (cleaned up)).

In *Love*, the Eastern District of Michigan considered the Secretary of State's policy providing that, in order to change the sex on a Michigan driver license or personal identification card, an applicant had to provide a birth certificate showing the applicant's sex. *Love*, 146 F Supp 3d at 851. This policy meant that transgender individuals had to provide an amended birth certificate, which, for transgender individuals born in Michigan, meant that they needed to undergo the "sex-reassignment surgery" required by section 2831(c). *Id.* at 851–852. In analyzing the validity of this policy under the Due Process Clause, the court thoroughly detailed an individual's right to privacy in that person's transgender status, noting that, in right-to-informational-privacy cases, courts have "placed great emphasis on the risk of physical harm stemming from the disclosure of certain personal information." *Id.* at 853–856. The *Love* court considered the plaintiffs' personal experiences with harassment following disclosure of their transgender status, caselaw that recognizes "hostility and intolerance" toward transgender individuals, and studies and statistics that document the "high incidence of hate crimes among transgender individuals . . . when their transgender status is revealed." *Id.* at 855 (internal quotation marks omitted), citing, e.g., *Powell*, 175 F3d at 111–112. In light of these considerations, the court found that transgender individuals who are forced to disclose their transgender status face a very real threat to their personal security and bodily integrity—a threat that "cut[s] at the

'very essence of personhood' protected under the substantive component of the Due Process Clause." *Id.*, quoting *Kallstrom v City of Columbus*, 136 F3d 1055, 1063 (CA 6, 1998). Consequently, the court held that forced disclosure of transgender status "directly implicates [an individual's] fundamental right of privacy." *Id.* at 856.

State action that infringes on a fundamental liberty interest such as this—for example, statutes or policies that result in the forced disclosure of an individual's transgender status—are subject to strict scrutiny. *Love*, 146 F Supp 3d at 856. Under strict scrutiny, "the governmental action [must] further[ ] a compelling state interest, and [be] narrowly drawn to further that state interest." *Id.* (internal quotation marks omitted). Whether state action is narrowly tailored "will turn on whether it is the least restrictive and least harmful means of satisfying the government's goal." *United States v Brandon*, 158 F3d 947, 960 (CA 6, 1998).

There is a compelling state interest in section 2831(c) requiring the disclosure of an individual's transgender status—otherwise, no correction to the sex designation on the birth certificate could occur. But the statute is not narrowly tailored. A narrowly tailored law is one that provides the *least restrictive* means of accomplishing its goal.

Because section 2831(c) requires proof of "sex-reassignment surgery" as a precondition to change the sex designation on a birth certificate, transgender individuals who are unwilling or unable to undergo sex-reassignment surgery will

be forced to disclose their transgender status whenever they must show their birth certificate. For example, a transgender woman whose outward appearance conforms to her gender identity would disclose her transgender status by presenting a birth certificate that identifies her as male, as the sex designation would conflict with her outward appearance. That same disclosure would occur where the sex designation on her birth certificate is different than her driver license or passport. The presentation of an identification document that does not match an individual's lived gender is precisely the circumstance addressed in *Love.* It implicates the same privacy interests and creates the same potential threats to personal security and integrity. And in that circumstance, the court stated that it "need not spill a considerable amount of ink on the narrow tailoring requirement." *Love,* 146 F Supp 3d at 857. In fact, as the court did in *Love*, one need only look to the myriad laws and policies outside of Michigan.

Indeed, other states, which undoubtedly have similar goals in regard to the accuracy of birth certificates, have enacted laws with means that are much less restrictive and much less potentially harmful than those in section 2831(c). As mentioned, California, Colorado, New Jersey, and New Mexico, for example, allow for a change in the sex designation on a birth certificate with only an affidavit from the individual attesting under penalty of perjury that the change will conform the stated gender to their gender identity, and, in some instances, that the request is

not for fraudulent purposes.[8] Other jurisdictions—the District of Columbia, Illinois, and Maryland, for instance—allow for simply a statement or declaration by a physician.[9] Similarly, to change the sex designation on a passport, the U.S. Department of State requires only a statement from a physician indicating that the individual has undergone "appropriate clinical treatment" for transition.[10] These statutes and policies establish that there are less restrictive and less harmful means of accomplishing the goals of changing a sex designation on, and maintaining the accuracy of, a birth certificate. Because the "sex-reassignment surgery" requirement of section 2831(c) is not sufficiently narrowly tailored to satisfy the government's goals, it does not satisfy strict scrutiny. See *Brandon*, 158 F3d at 960.

It is my opinion, therefore, that the "sex-reassignment surgery" requirement of MCL 333.2831(c) may also violate an individual's right to privacy under the Due Process Clauses of the United States and Michigan Constitutions.

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[8] Cal Health & Safety Code § 103426; Colo Rev Stat § 25-2-113.8(3); NJ Stat § 26:8-40.12(a); and NM Stat § 24-14-25(D).

[9] DC Code § 7-231.22(a); 410 Ill Comp Stat § 535/17(1)(d); Md Code, Health-Gen § 4-211(b)(2)(i).

[10] See note 5, *supra*.