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By email to miag@michigan.gov

Attorney General Dana Nessel
G. Mennen Williams Building
525 W. Ottawa St.
P.O. Box 30212
Lansing, MI 48909

Re: Attorney General Opinion on Constitutionality of MCL 333.2831(c)

Dear Attorney General Nessel:

On February 18, 2021, the Director of the Michigan Department of Health and Human Services (MDHHS) requested your opinion under MCL 14.32 regarding the constitutionality of MCL 333.2831(c), which governs changes to the sex designation on birth certificates under Michigan law. The question presented is of vital importance to the rights of transgender people who were born in this state. For the reasons set forth below, the ACLU and its coalition partners urge you to issue an opinion finding that MCL 333.2831(c) is unconstitutional.¹

Introduction and Background

Birth certificates are a crucial identity document for everyone in Michigan. However, many transgender people born in Michigan are unable to obtain a birth certificate that accurately reflects their gender identity, because their ability to do so requires them to provide “an affidavit of a physician certifying that sex-reassignment surgery has been performed,” MCL 333.2831(c), to the registrar at MDHHS. Moreover, MDHHS currently requires transgender people wishing to correct the sex designation on their birth certificate to identify themselves as either male or

¹ The American Civil Liberties Union of Michigan is the Michigan affiliate of the American Civil Liberties Union (together, the “ACLU”), a nationwide, non-profit, nonpartisan organization with 1.5 million members dedicated to the principles of liberty and equality embodied in the Constitution and this Nation’s civil rights laws. Through its national and Michigan LGBT Projects, the ACLU works in courts, legislatures, and communities to protect the rights of lesbian, gay, bisexual, and transgender individuals from discrimination. The following coalition partner organizations join this letter in requesting an Attorney General opinion that MCL 333.2831(c) is unconstitutional: Affirmations, Equality Michigan, Gender Identity Network Alliance, Grand Rapids Pride Center, Out Center of Southwest Michigan, Out Front Kalamazoo, Ruth Ellis Center, Stand with Trans, Transgender Michigan, Trans Sistās of Color, and Transcend the Binary.

female,² even though many transgender people born in Michigan do not identify themselves as either male or female.³

Those born in Michigan may change or update their birth certificate in many other ways so that it accurately reflects who they are. An adoptive parent, for example, may replace the birth parent's name with that of the adoptive parent. MCL 333.2831(a). Someone who has undergone a legal name change may change the name of their birth certificate to reflect their new name. MCL 333.2872(2). Michigan law allows for other changes that allow a person born in the state to possess an identity document that correctly identifies them. MCL 333.2871. Michigan law recognizes the importance for transgender people of a birth certificate that correctly identifies their sex MCL 333.2831(c), but restricts that right to those who prove they have undergone a surgical procedure that they may not want, need, or be able to afford. *Id.*

In recent years, courts in Ohio, Puerto Rico, and Idaho have recognized that restrictions on the ability of transgender people to update their birth certificates are unconstitutional. See *Ray v McCloud*, __ F Supp 3d __; 2020 WL 8172750 (SD Ohio, 2020) (Docket No. 2:18-CV-272); *Arroyo Gonzalez v Rossello Nevaes*, 305 F Supp 3d 327, 333 (D PR, 2018); *FV v Barron*, 286 F Supp 3d 1131, 1142 (D Idaho, 2018). A federal court here in Michigan reached a similar conclusion in 2015 regarding this state's former restrictions on changes to driver's licenses. See *Love v Johnson*, 146 F Supp 3d 848, 856 (ED Mich, 2015). As explained below, Michigan's outdated and harmful requirement for transgender people to undergo surgery in order to have a birth certificate that accurately reflects their sex likewise violates the United States Constitution's equal protection, due process, and freedom of speech guarantees.

Equal Protection

Michigan's birth certificate law violates equal protection by denying transgender people, and only transgender people, the right to obtain a birth certificate that accurately reflects their gender without proving they have undergone surgery. MCL 333.2831(c) facially discriminates based on sex and transgender status. The law explicitly concerns sex, and prevents only transgender people from obtaining an accurate birth certificate without undergoing surgery and producing documentation of surgery to the government.

MCL 333.2831(c) must be reviewed under a heightened level of scrutiny, because it classifies based on sex. See *Bostock v Clayton Co, Ga*, 140 S Ct 1731, 1742–1743 (2020) (finding that “sex play[ed] an unmistakable and impermissible role” in the decision to terminate an employee, assigned male at birth, for living and working full-time as a woman, when someone assigned female at birth would not have been fired for the same conduct); see also *id.* at 1741 (“[I]t is impossible to discriminate against a person for being . . . transgender without discriminating

² See Division for Vital Records, Medical Affidavit (attached as Exhibit A).

³ See National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (2016), p 45 (reporting that 35% of national survey respondents identified themselves as either non-binary or genderqueer) <<http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>>.

against that individual based on sex.”)⁴ Sex-based classifications have long been reviewed under heightened scrutiny. See *United States v Virginia*, 518 US 515, 555 (1996). MCL 333.2831(c) must likewise be reviewed under heightened scrutiny because it discriminates against transgender people. See *Grimm v Gloucester Co Sch Bd*, 972 F.3d 586, 610–613 (CA 4, 2020), and cases cited therein.

Courts in Alaska, Idaho, Michigan, Ohio and Puerto Rico have all held that policies barring transgender people from obtaining identity documents matching their gender identity lack any adequate government justification. See *Ray*, 2020 WL 8172750, at *11; *Arroyo Gonzalez*, 305 F Supp 3d at 333; *FV*, 286 F Supp 3d at 1142; *Love*, 146 F Supp 3d at 856; *KL v State, Dep’t of Admin, Div of Motor Vehicles*, unpublished decision of the Superior Court of Alaska, issued March 12, 2012 (Docket No. 3AN–11–05431 CI); 2012 WL 2685183, at *6–8. Most recently, a federal court also found that an Alabama policy requiring surgery in order to correct the gender on a person’s identity document violated heightened scrutiny. *Corbitt v Taylor*, ___ F Supp 3d ___, 2021 WL 142282 (MD Ala, 2021) (Docket No. 2:18cv91-MHT). MCL 333.2831(c) similarly lacks any adequate justification and would not survive judicial scrutiny.

The reasons sometimes put forward for laws or policies that restrict transgender people’s ability to obtain identity document that accurately reflects their gender identity are wholly insufficient to justify the restrictions in Michigan’s birth certificate statute. Any claim that Michigan’s surgical proof requirement serves a state interest in the accuracy of birth certificates for purposes, for example, of matching them with death records, is belied by the fact that birth certificates can be changed from their original version in a number of ways already to reflect adoptive parents, name changes, and even gender changes for those who undergo some form of surgical treatment. *Ray*, 2020 WL 8172750, at *10 (rejecting the same argument as to Ohio law); see also *Love*, 146 F Supp 3d at 856–857 (rejecting state’s argument that requiring an amended birth certificate to change the gender on a Michigan driver’s license or state ID card served an interest in “maintaining accurate state identification documents” because “[a]t least 25 of the states and the District of Columbia do not require a transgender person to undergo surgery to change the gender on his or her driver’s license or state ID card” and “[t]he Court seriously doubts that these states have any less interest in ensuring an accurate record-keeping system,” among other reasons). Fraud prevention is equally unjustified as an explanation for Michigan’s surgical requirement, since it is utterly implausible to suggest that someone would change the gender on their birth certificate in order to perpetuate fraud or that such a gender change would assist them in committing fraud. What supporters of the surgical requirement fail to connect is *how* criminals would use the change of a sex marker on a birth certificate to perpetuate fraud and why this change would result in fraud, let alone how this would will prevent the state from verifying the accuracy of birth records as part of a criminal investigation. *Ray*, 2020 WL 8172750, at *10 (rejecting the argument as to Ohio law).

Additionally, nonbinary transgender people born in Michigan are entitled to obtain birth certificates that accurately reflect their sex for the same reasons that that the state must permit

⁴ See *Deleon v Kalamazoo Co Rd Comm’n*, 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.”).

transgender people who are unable or unwilling to prove they have undergone “sex-reassignment surgery” to amend the sex designation on their birth certificates. No legitimate governmental interest justifies Michigan’s refusal to allow either binary or non-binary transgender people to have a birth certificate that accurately identifies their gender.

Due Process Right to Privacy

Michigan’s birth certificate law violates the due process right to privacy. MCL 333.2831(c) forces transgender people to reveal that they are transgender every time they produce their birth certificate to an employer, a state official, or anyone else. It does so by revealing that their assigned sex at birth differs from their gender identity. Because many transgender people have gender dysphoria, a condition associated with an incongruence between sex assigned at birth and gender identity, and because surgery is required to change the sex designation on a birth certificate, the policy also forces disclosure of medical information. The incorrect birth certificate reveals highly intimate information and puts transgender people at risk of bodily harm.

Federal courts have repeatedly found that one’s transgender status qualifies as information protected by the due process right to privacy. Indeed, there is hardly anything that is more intimate or that involves more core aspects of one’s personhood. See, e.g., *Ray*, 2020 WL 8172750, at *4; *Arroyo Gonzalez*, 305 F Supp 3d at 334; *Love*, 146 F Supp 3d at 855; *Darnell v Lloyd*, 395 F Supp 1210, 1214 (D Conn, 1975). Just being transgender “is likely to provoke both an intense desire to preserve one’s medical confidentiality, as well as hostility and intolerance from others.” *Powell v Schriver*, 175 F3d 107, 111–112 (CA 2, 1999). “The excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.” *Id.* “Much like matters relating to marriage, procreation, contraception, family relationships, and child rearing, there are few areas which more closely intimate facts of a personal nature than one’s transgender status.” *Arroyo Gonzalez*, 305 F Supp 3d at 333 (citations omitted).

The court in *Ray* found that “forced disclosure of an individual’s transgender status could subject them to risk of bodily harm.” *Ray*, 2020 WL 8172750, at *3, citing *Kallstrom v City of Columbus*, 136 F3d 1055, 1063 (CA 6, 1998); see also *Love*, 146 F Supp at 856 (“[W]here disclosure of this [highly intimate] information may fall into the hands of persons’ harboring such negative feelings, the ... Policy creates a very real threat to Plaintiffs’ personal security and bodily integrity.”), quoting *Kallstrom*, 136 F3d at 1063; *Powell*, 175 F3d at 111 (holding that given the “hostility and intolerance” towards transgender people, “the Constitution does indeed protect the right to maintain the confidentiality of one’s transsexualism”).

Because MCL 333.2831(c) implicates transgender people’s due process rights to privacy, it is subject to strict scrutiny. See, e.g., *Ray*, 2020 WL 8172750, at *4; *Ray v Himes*, unpublished opinion of the United States District Court for the Southern District of Ohio, issued September 12, 2019 (Docket No. 2:18-CV-272); 2019 WL 11791719, at *11, citing *United States v Brandon*, 158 F3d 947, 959–960 (CA 6, 1998). As the state obviously does not have a compelling interest in preventing transgender people from obtaining accurate birth certificates, and MCL 333.2831(c)’s restrictions are not narrowly tailored to promote any compelling interest that the state does have, MCL 333.2831(c) would not survive strict scrutiny and is therefore unconstitutional.

Due Process Right to Refuse Medical Treatment

Michigan's birth certificate law violates transgender people's due process right to refuse medical treatment. See *Washington v Glucksberg*, 521 US 702, 720 (1997) (acknowledging fundamental right to bodily integrity and to receive abortion, use contraception, and refuse unwanted lifesaving medical treatment); *Whalen v Roe*, 429 US 589, at 599–600 (recognizing an “interest in independence in making certain kinds of important decisions”). “The right to identify our own existence lies at the heart of one’s humanity.” *Arroyo Gonzalez*, 305 F Supp 3d at 334. Part of this liberty protected by the Fourteenth Amendment is the right to refuse medical treatment. See *Cruzan v Dir, Mo Dep’t of Health*, 497 US 261, 278 (1990) (“[A] competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment[]”); *Washington v Harper*, 494 US 210, 221 (1990) (recognizing “significant liberty interest in avoiding the unwanted administration of antipsychotic drugs”). MCL 333.2831(c) implicates transgender people's liberty interests by requiring them to undergo surgery they may not want, need, or be able to afford, in order to obtain an accurate birth certificate.

Because the right to refuse healthcare is fundamental, any infringement on it is subject to strict scrutiny. See *Washington*, 521 US at 721 (“The Fourteenth Amendment forbids the government to infringe fundamental liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.”) (internal punctuation omitted). As with the right to privacy, MCL 333.2831(c) fails this demanding test because the surgery requirement is not narrowly tailored to promote any compelling state interest.

Freedom of Speech

Michigan's birth certificate law violates transgender people's right to freedom of speech, which includes freedom from compelled speech. See *Riley v Nat’l Fed’n of the Blind of North Carolina, Inc*, 487 US 781, 796–798 (1988). MCL 333.2831(c) requires transgender people born in Michigan to convey to others that they are not the sex they know themselves to be. They are required to express the outdated viewpoint that a person's sex is determined by that associated with their external genitalia at birth, unless they have had “sex-reassignment surgery,” regardless of the sex with which they identify. The ideological view about gender and transgender people espoused through MCL 333.2831(c) and the sex designation on transgender people's Michigan birth certificates is one with which many transgender people emphatically disagree.

The Supreme Court has repeatedly struck down laws forcing people to express a viewpoint that they disagree with, including through the forced disclosure of information. See *Janus v Am Fed’n of State, County, and Municipal Employees*, 138 S Ct 2448, 2464 (2018) (“Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning.”); *Bartnicki v Vopper*, 532 US 514, 527 (2001). “[T]he people lose when the government is the one deciding which ideas should prevail.” *Nat’l Inst of Family & Life Advocates v Becerra*, 138 S Ct 2361, 2375 (2018). Compelling any speech, whether ideological or factual, violates the Constitution. *Riley*, 487 US at 797–798 (“These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of ‘fact’: either form of compulsion burdens protected speech”).

While a state may adopt and express a particular viewpoint about sex so long as it does not conflict with other constitutional protections, the First Amendment does not allow it to force transgender people born in Michigan to endorse that message by repeatedly communicating it to others with their birth certificate. See *Walker v Texas Div, Sons of Confederate Veterans, Inc*, 135 S Ct 2239, 2253 (2015), quoting *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (“[J]ust as Texas cannot require SCV to convey ‘the State’s ideological message,’ SCV cannot force Texas to include a Confederate battle flag on its specialty license plates.”). “Government communication is legitimate as long as the government does not abridge an individual’s ‘First Amendment right to avoid becoming the courier for such message.’” *NAACP v. Hunt*, 891 F.2d 1555, 1566 (CA 11, 1990), quoting *Wooley*, 430 U.S. at 717.

MCL 333.2831(c) not only forces transgender people to endorse Michigan’s outdated views regarding the meaning of sex, but it also prohibits them from conveying their own constitutionally-protected message about their identity and sex. Forcing transgender people to repeatedly communicate through their birth certificate that their sex is the one they were assigned at birth violates their right to express their authentic gender identity and sex. See, e.g., *Doe v. Bell*, 754 N.Y.S.2d 846, 851 (Sup. Ct. 2003) (expression of gender was protected message). It forces transgender people to publicly contradict something at the very core of their personal identity, as well as their moral, political, and religious beliefs. And it may have a chilling effect on their participation in public life more broadly. See *Arroyo Gonzalez*, 305 F. Supp. 3d at 333 (“Forcing disclosure of transgender identity chills speech and restrains engagement in the democratic process in order for transgender[] [people] to protect themselves from the real possibility of harm and humiliation.”).

Because MCL 333.2831(c) infringes upon transgender people’s First Amendment rights, it must be reviewed under strict scrutiny. *Riley*, 487 U.S. at 800. As with due process, it plainly fails that test.

Conclusion

For all these reasons, the ACLU and its coalition partners respectfully request that you find that MCL 333.2831(c) unconstitutional.

Sincerely,



Jay Kaplan, LGBT Project Staff Attorney
Dan Korobkin, Legal Director
American Civil Liberties Union of Michigan

John Knight, Senior Staff Attorney
American Civil Liberties Union

Cc: Josh Booth, Opinions Division Chief, Michigan Department of Attorney General
Elizabeth Hertel, Director, Michigan Department of Health and Human Services

Exhibit A



MEDICAL AFFIDAVIT

In compliance with statute 333.2831(c) of the Michigan Compiled Laws, I certify that sex-reassignment surgery has been performed on the individual listed below.

Patient's Name (please print): _____
(Current Full Name)

Date of Birth: ____/____/____
Month Day Year

New Name (please print): _____
(New Name to be on Birth Certificate, if applicable)

I am the attending physician of the patient named above, with whom I have a doctor/patient relationship. The individual named above has had appropriate surgical procedures completed for gender transition to the new gender of female.
 male.

I declare that the foregoing is true and correct*.

Physician's Full Name (please print): _____

Medical License Number: _____ Issuing State: _____

Drug Enforcement Administration (DEA) Registration Number: _____

Specialty: Internist Endocrinologist Gynecologist
 Urologist Psychiatrist Other: _____

Mailing Address: _____

City/State/Zip: _____

Telephone Number: _____

Physician's Signature: _____ Date: _____

Notary Statement:

Signed and sworn before me on the ____ day of _____, in the year _____.

Notary in _____ County, State of _____.

My commission expires on _____.

Printed Name of Notary

Signature of Notary

* Supplying false information to be used in the preparation of a vital record is prohibited by Michigan law (MCL 333.2894)