

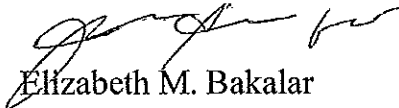
IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

K.L.,)
)
 Appellant,)
)
 vs.)
)
 STATE OF ALASKA, DEPARTMENT)
 OF ADMINISTRATION,)
 DIVISION OF MOTOR VEHICLES,)
)
 Appellee.)
) Case No. 3AN-11-05431 CI

APPEAL FROM THE STATE OF ALASKA, DEPARTMENT OF
ADMINISTRATION, DIVISION OF MOTOR VEHICLES

**BRIEF OF APPELLEE STATE OF ALASKA,
DEPARTMENT ADMINISTRATION, DIVISION OF MOTOR VEHICLES**

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
AUTHORITIES PRINCIPALLY RELIED UPON	vii
JURISDICTION.....	1
PARTIES.....	1
ISSUES PRESENTED.....	1
STATEMENT OF THE CASE.....	2
I. Introduction.....	2
II. Facts and Proceedings.....	3
STANDARD OF REVIEW	5
ARGUMENT	5
I. The hearing officer correctly determined that K.L.’s new license was issued in error because the DMV lacks authority to change the gender designation on a driver’s license until it adopts a valid regulation	5
II. Because K.L.’s female-designated license was issued in error, Alaska law required the DMV to cancel it	8
III. The DMV is not constitutionally required to change gender designation on a license in the manner K.L. requests.....	10
A. K.L.’s constitutional rights to privacy and liberty do not include the right to have gender designation changed on a driver’s license.....	11
B. Equal protection does not require the DMV to change the gender designation on K.L.’s driver’s license	16

i.	A person seeking to change the gender designation on a driver's license is not similarly situated to a person applying for an original driver's license.....	17
ii.	A person seeking to change the gender designation on a driver's license is not similarly situated to a person seeking a change in secondary appearance information	17
iii.	The absence of a procedure for changing gender on a driver's license survives rational basis scrutiny.....	18
CONCLUSION		20

TABLE OF AUTHORITIES

CASES

<i>Alaska Civil Liberties Union v. State</i> , 122 P.3d 781 (Alaska 2005)	16
<i>Alaska Inter-Tribal Council v. State</i> , 110 P.3d 947 (Alaska 2005)	16
<i>Alaska Trademark Shellfish, LLC v. State</i> , 91 P.3d 953 (Alaska 2004)	10
<i>Alaska Wildlife Alliance v. Rue</i> , 948 P.2d 976 (Alaska 1997)	12, 14, 15
<i>Alyeska Pipeline Service Company v. State, Department of Environmental Conservation</i> , 145 P.3d 561 (Alaska 2006)	6
<i>Ashwander v. Tennessee Valley Authority</i> , 297 U.S. 288 (1936).....	10
<i>Batterton v. Marshall</i> , 648 F.2d 694 (D.C. Cir 1980).....	7
<i>Bickford v. State, Department of Education and Early Development</i> , 155 P.3d 302 (Alaska 2007)	5
<i>Breese v. Smith</i> , 501 P.2d 159 (Alaska 1972)	12
<i>Cook v. Botelho</i> , 921 P.2d 1126 (Alaska 1996)	9
<i>Guin v. Ha</i> , 591 P.2d 1281 (Alaska 1979)	5
<i>Jones v. Jennings</i> , 788 P.2d 732 (Alaska 1990)	12
<i>Kachemak Bay Watch, Inc. v. Noah</i> , 935 P.2d 816 (Alaska 1997)	7

<i>Kalmakoff v. State</i> , 257 P.3d 108 (Alaska 2011)	5
<i>Kelly v. Zamarello</i> , 486 P.2d 906 (Alaska 1971)	6
<i>Lauth v. State</i> , 12 P.3d 181 (Alaska 2000)	16
<i>Malabed v. North Slope Borough</i> , 70 P.3d 416 (Alaska 2003)	16
<i>Messerli v. State</i> , 626 P.2d 81 (Alaska 1980)	12
<i>Ranney v. Whitewater Engineering</i> , 122 P.3d 214 (Alaska 2005)	19
<i>Ravin v. State</i> , 537 P.2d 494 (Alaska 1975)	11
<i>Roberts v. State</i> , 700 P.2d 815 (Alaska 1985)	19
<i>State v. Glass</i> , 583 P.2d 872 (Alaska 1978)	12
<i>State v. Morry</i> , 836 P.2d 358 (Alaska 1992)	7
<i>State, Department of Health & Social Services v. Planned Parenthood of Alaska, Inc.</i> , 28 P.3d 904 (Alaska 2001)	19
<i>Turpin v. North Slope Borough</i> , 879 P.2d 1009 (Alaska 1994)	7

STATUTES

AS 9.55.010..... 9

AS 22.10.020..... 1

AS 28.05.011..... 6

AS 28.05.071..... 9

AS 28.15..... *passim*

AS 28.15.061..... 7, 18

AS 28.15.111..... 7, 18

AS 28.15.161..... 4, 8, 9, 10

AS 28.15.166..... 1, 5

AS 44.62.060..... 7

AS 44.62.190..... 7

AS 44.62.215..... 7

AS 44.62.560..... 1

REGULATIONS

2 AAC 90.400 6

2 AAC 90.420 9

2 AAC 90.470 6

RULES

Appellate Rule 601..... 1

Appellate Rule 602..... 1

CONSTITUTIONAL PROVISIONS

Alaska Const. Article I § 1 11

Alaska Const. Article I § 22 11

AUTHORITIES PRINCIPALLY RELIED UPON

ALASKA STATUTES:

AS 28.15.061: Application for driver's license or instruction permit; notice of anatomical gift and living will procedure.

(a) Application for an instruction permit or for a driver's license must be made on a form furnished by the department and must be accompanied by the fee required under AS 28.15.271 .

(b) An application under (a) of this section must

(1) contain the applicant's full legal name, date and place of birth, sex, and mailing and residence addresses;

(2) state whether the applicant has been previously licensed in the past 10 years as a driver and, if so, when and by what jurisdiction;

(3) state whether any previous driver's license issued to the applicant has ever been suspended or revoked or whether an application for a driver's license has ever been refused and, if so, the date of and reason for the suspension, revocation, or refusal;

(4) contain the applicant's social security number; the requirement of this paragraph only applies to an applicant who has been issued a social security number; and

(5) contain other information that the department may reasonably require to determine the applicant's identity, competency, and eligibility.

(c) When an application is received from a person previously licensed in another jurisdiction, the department may request a copy of the applicant's driving record from the other jurisdiction. Upon receipt of that record by the department, it becomes a part of the driver's record in this state with the same effect as if the record originated in this state.

(d) An employee of the department who processes a driver's license application, other than an application received by mail, shall ask the applicant orally whether the applicant wishes to execute an anatomical gift. The department shall make known to all applicants the procedure for executing an anatomical gift under AS 13.52 (Health Care Decisions Act) by displaying posters in the offices in which applications are taken, by providing a brochure or other written information to each person who applies in person or by mail, and, if requested, by providing oral advice. The department shall inform each applicant in writing that, if the applicant executes a gift under AS 13.52 and if the gift is made with the driver's license application, the department will transmit the information on the license to a

donor registry created under AS 13.50.110 . The department shall also direct the applicant to notify a procurement organization or the department under AS 13.50.140 if the license is destroyed or mutilated or the gift is revoked under AS 13.52.183 . The department shall carry out the requirements of AS 13.50.100 - 13.50.190.

(e) *[Repealed, Sec. 17 ch 70 SLA 1984].*

(f) At the time of application for a driver's license or an instruction permit, or renewal of a driver's license or an instruction permit, the department shall provide the applicant written information explaining the state's financial responsibility and mandatory motor vehicle insurance laws and potential penalties for failure to comply with those laws.

(g) Upon request, the department shall provide a social security number provided under this section to the child support services agency created in AS 25.27.010 , or the child support agency of another state, for child support purposes authorized by law.

AS 28.15.111: License issued to drivers, anatomical gift and living will document.

(a) Upon successful completion of the application and all required examinations, and upon payment of the required fee, the department shall issue to every qualified applicant a driver's license indicating the type or general class of vehicles that the licensee may drive. The license must (1) display a distinguishing number assigned to the license; (2) display the licensee's full name, address, date of birth, brief physical description, and color photograph; (3) display either a facsimile of the signature of the licensee or a space upon which the licensee must write the licensee's usual signature with pen and ink; (4) display a holographic symbol intended to prevent illegal alteration or duplication; (5) display, for a qualified applicant who is under 21 years of age, the words "UNDER 21"; and (6) to the extent the department is able, be designed to allow the electronic reading and electronic display of the information described under (2) of this subsection and the electronic reading and display and a physical display on the license that the person is restricted from purchasing alcoholic beverages under AS 04.16.160 . A license may not display the licensee's social security number and is not valid until signed by the licensee. If facilities are not available for the taking of the photograph required under this section, the department shall endorse on the license, the words "valid without photograph."

(b) The department shall provide a method, at the time that an operator's license is issued, by which the owner of a license may make an anatomical gift under AS 13.52. The method must provide a means by which the owner may cancel the anatomical gift. The department shall inform each applicant in writing that, if the applicant executes a gift under AS 13.52 and if the gift is made with the license, the department will transmit the information on the license to a donor registry created under AS 13.50.110 . The department shall also direct the applicant to notify a procurement organization or the department under

AS 13.50.140 if the license is destroyed or mutilated or the gift is revoked under AS 13.52.183 . The department shall carry out the requirements of AS 13.50.100 - 13.50.190.

AS 28.15.161: Cancellation of driver's license

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

(1) the licensee is not medically or otherwise entitled to the issuance or retention of the license, or has been adjudged incompetent to drive a motor vehicle;

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

(3) the licensee failed to give the required or correct information in the licensee's application;

(4) the license was obtained fraudulently; or

(5) the licensee is restricted from purchasing alcoholic beverages under AS 04.16.160 ; if a license is cancelled under this paragraph, when a new license is issued, it must reflect that restriction and the requirements of AS 28.15.111 if the period of restriction under AS 04.16.160 is still in effect.

(b) The licensee may apply for a new license at any time after cancellation upon removal of the cause for the cancellation.

REGULATIONS:

2 AAC 90.400: Applicability of 2 AAC 90.400 – 2 AAC 90.470.

Under the authority of the department under AS 28, the provisions of 2 AAC 90.400 - 2 AAC 90.470 provide standards for the issuance of an original driver's license, and standards and procedures for the evaluation of persons who possess a driver's license.

2 AAC 90.420: Application for driver's license.

(a) An application for a driver's license must be made on the form prescribed and provided by the department. The application will include questions concerning the applicant's eligibility for a license, including the existence of a physical or mental disability that may impair the ability of the applicant to operate a motor vehicle safely. If the applicant's answers to these questions indicate the existence of a physical or mental disability that may affect the safe operation of a motor vehicle by the applicant, the department may require an examination of the applicant by a licensed physician,

psychiatrist, optometrist, or other competent medical authority before issuance of a driver's license. The expense of the examination must be paid by the applicant. The results of an examination within the previous six months meets the requirement of this subsection, unless the condition began or changed since that examination was conducted.

(b) An applicant for an original driver's license must furnish valid documentary proof of the applicant's date of birth, and one form of identification to verify the applicant's full legal name. The form of identification for proof of date of birth and full legal name must consist of one of the following:

(1) a certified original or certified copy of the applicant's United States birth certificate;

(2) a United States passport issued by the United States Department of State;

(3) a foreign passport with the appropriate Immigration Status forms, issued by the United States Department of Homeland Security, United States Citizenship and Immigration Service;

(4) a resident alien, temporary resident alien, or employment work authorization document issued by the United States Department of Homeland Security, United States Citizenship and Immigration Service;

(5) a United States armed forces active duty, retiree, or reservist identification;

(6) other evidence of comparable validity; in this paragraph, "evidence of comparable validity" includes items such as a United States government issued Consular Report of Birth Abroad or a court order.

(c) An applicant must provide a second form of identification as verification of the primary document presented. If the applicant has had a name change, the applicant must also provide legal documentation, determined acceptable by the department, to verify the name change. An applicant must provide a translation to English of any document that is not written in English.

(d) An applicant must present the applicant's valid social security card for verification of the applicant's social security number or other valid document issued by the United States Social Security Administration or the United States Department of Treasury, Internal Revenue Service.

(e) An applicant for an original license must present documentation, acceptable to the department, that contains both the applicant's name and address of principal residence.

(f) The department may require that the applicant surrender the applicant's previously issued driver's license to the department at the time of issuance or renewal of a driver's license.

(g) If an applicant's driving privileges are under suspension or revocation in another jurisdiction, proof must be received from that jurisdiction showing that the suspension or revocation has terminated before issuance of a driver's license in this state.

(h) An applicant for an original license, or renewal of a license that has expired for more than one year, must take the vision and knowledge tests. A road test must be taken by an applicant for an original license, to remove an off highway restriction, or by an applicant whose previous license was expired, suspended, revoked, or cancelled for five years or more from the date of application. The department may waive the road test if the applicant possesses a valid driver's license issued by another state of the United States or a province of Canada. A test will be conducted as follows:

(1) the vision test will be conducted each time the applicant applies for a driver's license;

(2) the knowledge test will be conducted when the applicant applies for a driver's license; if the applicant does not pass the knowledge test the first time, the applicant may retake the test the following day; if the applicant does not pass the second, third, and subsequent tests, the department may continue to allow the applicant to retake the test once per day until the applicant passes the test; the following standards apply to the use of aids in taking the knowledge test:

(A) an applicant for a driver's license who has difficulty reading may have another person read the test questions orally to the applicant; an applicant for a non-commercial driver's license who does not comprehend the English language may have another person translate and read the test questions orally to the applicant; a reader may not aid an applicant in answering or attempting to answer the test questions; a reader who assists an applicant with determining the correct answers to the test questions will be disqualified from acting as a reader for a minimum of six months;

(B) an applicant may not use a cell phone, text messaging, crib notes, hand signals, the driver's manual, or other types of assistance while taking the knowledge test; an applicant who uses a reader that is disqualified under (A) of this paragraph or uses other aids to determine the correct answers to the test questions will be disqualified from testing for seven days;

(3) the department may conduct the first road test when the applicant satisfactorily meets all other requirements; a second road test will be conducted at least one week after the first test if the department determines it is necessary; further testing will be

at the department's discretion and the department may require proof that additional driver training has been completed.

(i) An applicant for renewal of a driver's license must take the vision test unless renewing under AS 28.15.101 (c), and must meet requirements set out in 2 AAC 90.440(f).

(j) The department will waive the road test requirement of this section for an applicant for an original or renewal of a driver's license if the

(1) applicant previously possessed the same class of driver's license under AS 28.15.041 or a similar statute of another state of the United States or a province of Canada; and

(2) driver's license was expired, suspended, revoked, disqualified, or cancelled for less than five years from the current date of application.

(k) The department may waive the motorcycle skills test for an applicant who submits to the department proof of the applicant's successful completion of a Motorcycle Safety Foundation Course.

(l) The department will waive the road test requirement in this section for a Class R license.

(m) An applicant for an identification card must provide the same documentary evidence as required in (a) - (f) of this section.

2 AAC.90.470: Release of driving record.

(a) If a motor vehicle insurance policy as described in AS 28.20.440 (b)(2) and (3) or in AS 28.20.440 (c) is applied for by a person, or on a person's behalf, and the application signed by the applicant contains a statement that a traffic driving record report may be obtained by the insurer, the person will be considered as having given consent as required in AS 28.15.151 (d) for the insurer to obtain a traffic driving record report on the applicant or any person named in the application as driver of the insured vehicle.

(b) An employer, person, or organization, under circumstances other than those described in (a) of this section, requesting a copy of a person's driving record must provide a release from the person authorizing the requestor to receive a copy of the record. A signed release is valid for 90 days from the date of signature on the release.

(c) A driving record released to an organization or person will contain convictions for traffic offenses, and actions on a person's driving record, as follows:

(1) convictions for offenses listed in AS 28.15.181 and 28.15.291 will be released if the offense was committed within the five years before the date the department processes the record request;

(2) convictions for traffic offenses other than those listed in AS 28.15.181 and 28.15.291 will be released if the offense was committed within the three years before the date the department processes the record request;

(3) the department may release a record of a person's revocation, cancellation, suspension, disqualification, or limitation that has occurred within the three years after the ending date of the last revocation, cancellation, suspension, disqualification, or limitation.

(d) A driving history released to a law enforcement or governmental agency or released to a person having commercial motor vehicle license, or that person's employer will include convictions for all offenses and actions on the person's driving record and maintained on the driver record system.

(e) Unless exempt under AS 28.15.151 (c), a person's driving record or history may be obtained, under the provisions in this section, by submitting to the department, along with the request, \$10 for each individual record or \$5 per electronic batch record.

CONSTITUTIONAL PROVISIONS:

Alaska Const. Article I § 1: Inherent Rights.

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

Alaska Const. Article I § 22: Right of Privacy.

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section. *[Approved August 22, 1972]*

JURISDICTION

This is an appeal from the January 31, 2011 decision of the State of Alaska, Department of Administration, Division of Motor Vehicles, cancelling K.L.'s driver's license. The Court has jurisdiction to hear this appeal pursuant to AS 44.62.560(a), AS 22.10.020(d), AS 28.15.166(m), and Rules of Appellate Procedure 601(b) and 602(a)(2).

PARTIES

K.L. is the appellant. The State of Alaska, Department of Administration, Division of Motor Vehicles (DMV), is the appellee.

ISSUES PRESENTED

1. The DMV had a procedure for changing the gender designation on a driver's license, but the hearing officer invalidated it because it was not promulgated as a regulation in compliance with the Administrative Procedure Act (APA).¹ Did the DMV correctly conclude that it lacks authority to change the gender designation on a license until it promulgates a valid regulation?

¹ The DMV does not seek to overturn the portion of the hearing officer's decision that invalidated its policy requiring proof of sexual reassignment surgery to change the gender designation on a license. R. 2, 11; Brief of Appellant at 1. The DMV does not, however, concede that the invalidated policy would be unlawful if it were validly promulgated under the APA.

2. Did the DMV hearing officer correctly conclude that K.L.'s female-designated driver's license was issued in error and must be cancelled because the gender designation was changed from male to female absent legal authority?

3. Do the privacy or liberty clauses of the Alaska Constitution require the DMV to amend the gender designation on K.L.'s license?

4. Does equal protection require the DMV to amend the gender designation on K.L.'s license?

STATEMENT OF THE CASE

I. INTRODUCTION

K.L., a male-to female transgendered person, appeals the cancellation of her Alaska driver's license. K.L. applied for a renewed Alaska driver's license, seeking to change the gender designation on her license from male to female. The DMV issued K.L. a new license with the change, but then cancelled it upon realizing that K.L. had not provided evidence of sexual reassignment surgery consistent with an internal DMV policy requiring such documentation to change gender on a license. After an administrative hearing, a DMV hearing officer invalidated the policy requiring documentation of surgery because it was not promulgated as a regulation in compliance with the APA. The hearing officer then affirmed the cancellation of K.L.'s license because the gender designation was changed absent legal authority.²

² The effective date of the cancellation was stayed pending the outcome of this appeal, so K.L. still carries her female-designated driver's license.

K.L. challenges the hearing officer's decision on both statutory and constitutional grounds. The DMV does not contest the hearing officer's invalidation of the policy requiring documentation of surgery, so K.L.'s arguments attacking that defunct policy are moot.³ Because the hearing officer correctly concluded that the DMV may not change the gender designation on a license absent a valid regulation providing a procedure for doing so, and because the Constitution does not require the DMV to change the gender designation on K.L.'s driver's license, the Court should affirm the hearing officer's decision.

II. FACTS AND PROCEEDINGS

K.L.'s original Alaska driver's license identified her as male. [R. 253-256] In May 2010, K.L. applied for a renewed Alaska driver's license, listing her gender on the application as female rather than male and submitting a Certificate of Name Change changing her name to a more traditionally female name. [R. 253-256] The DMV issued a new license to K.L. with a female gender identifier, but shortly thereafter sent K.L. an order cancelling that license. [R. 248] The reason the order gave for the license cancellation was that K.L. changed her gender designation without providing evidence that her gender had changed:

A review of our records indicates that an error was made when a driver license was issued to you on 6/12/2010. The card has an incorrect sex code of female. To avoid this cancellation please comply with the following: Bring the driver

³ The DMV does not, however, concede that the policy was unconstitutional or otherwise illegal.

license issued to you on 06/12/2010 into a DMV office to have the error corrected or present verification from a doctor which verifies a surgical change was performed. [R. 248]

When the DMV cancelled K.L.'s new license, it had in effect a policy, Standard Operating Procedure D-24, entitled "Change of Information on License." [R. 103-104] This policy provided in part that the DMV should "[a]ccept the applicant's word for [changes in] weight, height, hair and eye color." [R. 104] If a person wanted to change the gender designation on a license, the policy required medical certification, which had to "specify that the sex change is surgically complete and ... be signed by the performing surgeon." [R. 104] The DMV cancelled K.L.'s female-designated license because she had not submitted the required documentation for change of gender. [R. 7]

K.L. challenged the cancellation at an administrative hearing in January 2011. She argued that policy D-24 was invalid because the DMV had not promulgated it in accordance with the APA, and also that it was unconstitutional. The hearing officer agreed with K.L. that the policy was invalid under the APA, but nonetheless affirmed the cancellation of her license, finding that (1) the DMV lacked authority to change gender on a license until it properly adopted a regulation under the APA; (2) K.L.'s new license was issued in error because the gender designation was changed without legal authority; and (3) AS 28.15.161(a)(2) requires the DMV to cancel a license if it detects an error.

The hearing officer later clarified that her decision invalidated only that portion of policy D-24 dealing with changing gender on a license. [R. 2, 6-11] K.L. appeals.

STANDARD OF REVIEW

The Court should apply the substitution of judgment standard in this case. All of the issues raised present questions of law that do not involve agency expertise.⁴ When reviewing conclusions of law, the court “will adopt the rule of law that is most persuasive in light of precedent, reason, and policy.”⁵

ARGUMENT

- I. **The hearing officer correctly determined that K.L.’s new license was issued in error because the DMV lacks authority to change the gender designation on a driver’s license until it adopts a valid regulation.**

Because the hearing officer invalidated the DMV’s policy on changing gender on a driver’s license, the DMV now has no authority to change gender on a license and will not until it validly adopts a regulation that establishes such a procedure. Under the APA, the DMV must adopt a regulation to create the authority to change a licensee’s gender information. The Alaska Supreme Court has held that the APA requires rulemaking “in cases in which an agency’s interpretation of a statute is expansive or unforeseeable, or in cases in which an agency alters its previous interpretation of a statute,” although “obvious, commonsense interpretations of statutes do not

⁴ *Bickford v. State, Dep’t of Educ. and Early Dev.*, 155 P.3d 302, 309 (Alaska 2007) (“For issues of law not involving agency expertise, ‘such as statutory interpretation and constitutional issues,’ [the Supreme Court utilizes] a ‘substitution of judgment’ ... standard.”).

⁵ *See, e.g., Kalmakoff v. State*, 257 P.3d 108, 118 (Alaska 2011) (citing *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979)). Alaska Statute 28.15.166(m) further allows this Court to reverse legal errors where the DMV “misinterpreted the law, acted in an arbitrary and capricious manner, or made a determination unsupported by evidence in the record.”

require rulemaking.”⁶ There is no dearth of existing authority on the licensure of drivers. A full chapter of the Alaska Statutes governs the licensing of drivers⁷ and a full article of the Alaska Administrative Code implements these statutes.⁸ But no existing statute or regulation allows for changes in gender information. Because the power to change gender information is not an “obvious, commonsense interpretation” of any existing statute or regulation, the DMV must adopt a regulation.

The APA requires the DMV to undergo an extensive, “quasi-legislative” process to adopt regulations.⁹ The agency must work with the Department of Law to prepare and revise draft regulations, publish public notice of the proposed regulations 30 days before adoption, allow for a designated time for public comment, consider all relevant matter presented during the public comment period, and maintain records of those comments prior to adoption.¹⁰ “The essential purpose of according ... notice and comment opportunities is to reinforce public participation and fairness to affected parties

⁶ *Alyeska Pipeline Service Co. v. State, Dept. of Environmental Conservation*, 145 P.3d 561, 573 (Alaska 2006).

⁷ See AS 28.15.

⁸ See 2 AAC 90.400-2 AAC 90.470.

⁹ *Kelly v. Zamarello*, 486 P.2d 906, 909 (Alaska 1971) (“When administrative rule making is based upon clear authority from the legislature to formulate policy in the adoption of regulations, the rule-making activity takes on a quasi-legislative aspect.”). The DMV has statutory authority to adopt regulations pursuant to AS 28.05.011(b)(2).

¹⁰ AS 44.62.060; AS 44.62.190-44.62.215.

after governmental authority has been delegated to unrepresentative agencies.”¹¹ Regulations are invalid if not adopted in substantial compliance with the APA notice and comment process.¹²

But while a change of gender requires a procedure promulgated in a regulation, changing other physical descriptive information appearing on a license does not. Gender information is the only physical descriptor that is required by statute or regulation. Alaska Statute 28.15.061(b) provides that an application for a driver’s license “must contain the applicant’s full legal name, date and place of birth, *sex*, and mailing and residence addresses.”¹³ The law does not require any other specific appearance information, and AS 28.15.111(a) requires only that a license display “a brief physical description.”

The law thus treats gender as a critical factor necessary to adequately identify a person. The mention in AS 28.15.061(b)(1) of gender but no other physical characteristics indicates that the legislature viewed gender as fundamental identifying information unlike other physical descriptors—more analogous to a person’s name than to a person’s hair color. Because gender is considered fundamental identifying information that usually does not vary during a person’s lifetime, a policy allowing changes to gender information is not an obvious, foreseeable statutory interpretation.

¹¹ *Kachemak Bay Watch, Inc. v. Noah*, 935 P.2d 816, 825 (Alaska 1997) (citing *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C.Cir.1980)).

¹² *See, e.g., Turpin v. North Slope Borough*, 879 P.2d 1009 (Alaska 1994); *State v. Morry*, 836 P.2d 358 (Alaska 1992).

¹³ Emphasis added.

By contrast, a policy allowing changes to other “brief physical description” information not specifically required by statute is a foreseeable statutory interpretation because a person’s “physical description” usually varies in many ways throughout life.

The DMV cannot take an action not otherwise authorized by a valid statute, regulation, or policy. Because the hearing officer’s decision invalidating policy D-24 left the DMV with no procedure for changing the gender on a driver’s license, it may not make this change until it adopts a regulation providing such a procedure. And because the DMV had no legal authority to change the gender designation on K.L.’s license, the hearing officer correctly concluded that K.L.’s female-designated license was issued in error.

II. Because K.L.’s female-designated license was issued in error, Alaska law required the DMV to cancel it.

The driver’s licensing statutes require the DMV to cancel a license if an error is detected, so the DMV properly cancelled the license it had erroneously issued to K.L. Alaska Statute 28.15.161(a)(2) provides that the DMV “*shall* cancel a driver’s license upon determination that ... there is an error or defect in the license.”¹⁴ The term “shall” as used in this provision is mandatory language that offers the DMV no discretion as to whether to cancel a license upon detection of an error.¹⁵

¹⁴ Emphasis added.

¹⁵ See e.g., *Cook v. Botelho*, 921 P.2d 1126, 1134 (Alaska 1996) (statute requiring that legislative appointments “shall” be made in specified manner constituted “mandatory language” that left the governor “no discretion” to reconsider appointments or refuse to present the name of an appointee).

K.L. cites no authority for her position that “[t]he legislature’s intent in granting the DMV the authority to cancel a license under AS 28.15.161(a)(2) is to prevent fraudulent or unintentional errors in an applicant’s information”¹⁶ Of course, neither the legislature nor the DMV intends to promote fraud or errors in the licensure of drivers, and indeed the statute contains another provision specifically providing for cancellation of a license upon determination of fraud.¹⁷ But nothing in the language of AS 28.15.161(a)(2) limits its reach to a fraudulent “error or defect” or a typographical “error or defect”; the statute’s plain language covers *any* “error or defect in the license.”

And fraud is not alleged in this case. The error the hearing officer found was the modification of a license without legal authority. By analogy, if the DMV had issued a license to K.L. with a changed name without the proof of a legal name change required by statute and regulation,¹⁸ that license would have been issued in error because the DMV has no legal authority to change the name on a license absent proof of a legal name change. In this situation, AS 28.15.161(a)(2) would require the DMV to cancel the license upon detection of the error unless the applicant could provide the necessary proof.

K.L. disputes the hearing officer’s conclusion to this effect, arguing that because her gender identity is female, the female gender designation on her license was not an “error.” But the Court need not examine the substantive issue of K.L.’s gender expression, because the hearing officer’s finding was based on the simple

¹⁶ Brief of Appellant at 37.

¹⁷ AS 28.15.161(a)(4).

¹⁸ *See* AS 28.05.071; 2 AAC 90.420; AS 9.55.010.

legal conclusion—and its necessary procedural consequence—that a change had been made to K.L.’s license without legal authority to make that change. The hearing officer never reached the issue of what gender should be listed on K.L.’s license. The hearing officer correctly determined that changing a license absent legal authority and a valid procedure is an error for which AS 28.15.161(a)(2) requires the DMV to cancel a license.

III. The DMV is not constitutionally required to change gender designation on a license in the manner K.L. requests.

The Alaska Constitution does not require the DMV to change the gender on a driver’s license under the terms K.L. demands.¹⁹ Most of K.L.’s constitutional arguments attack policy D-24, but the hearing officer’s decision invalidated the relevant portion of that policy. Because the DMV currently has no procedure for changing gender on a driver’s license, the Court must decide whether the Constitution *affirmatively requires* the DMV to change gender on a driver’s license, and do it in the manner requested by K.L. The Court need not examine whether defunct policy D-24 is constitutional. Because the absence of a procedure for changing the gender designation on a driver’s license does not infringe on K.L.’s right to privacy or liberty, and because

¹⁹ The Court need not, and should not, reach these issues of constitutionality if the Court can dispose of the case on statutory or regulatory grounds. *See, e.g., Alaska Trademark Shellfish, LLC v. State*, 91 P.3d 953, 957 n. 12 (Alaska 2004) (“It is a well-established principle governing the prudent exercise of this Court’s jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.”) (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345–49 (1936) (internal quotations omitted)).

the DMV does not treat similarly situated people differently in providing driver's licenses, K.L. fails to identify a constitutional problem.

A. K.L.'s constitutional rights to privacy and liberty do not include the right to have gender designation changed on a driver's license.

The rights to privacy and liberty do not include the right to have a person's gender designation changed on a driver's license. Article I, section 1 of the Alaska Constitution provides that "all persons have a natural right to life, liberty, and the pursuit of happiness." Article I, section 22 provides that "[t]he right of the people to privacy is recognized and shall not be infringed."²⁰ There is an enormous body of case law in Alaska interpreting the scope of this latter provision, in part because the Alaska Supreme Court has found that "[t]he fact that privacy is among the specifically enumerated rights in the Alaska Constitution does not, in and of itself, yield answers concerning what scope should be accorded to this right"²¹ Indeed, whether the right to privacy is infringed in any given case "must vary depending on the factual context and the often competing interests of society and the individual."²² And the right to privacy is not absolute or without limitations.²³ In order for disclosure of a state document to implicate the right

²⁰ Because K.L.'s arguments about liberty and privacy are entwined, they are addressed together.

²¹ *Ravin v. State*, 537 P.2d 494, 501 (Alaska 1975).

²² *State v. Glass*, 583 P.2d 872, 880 (Alaska 1978).

²³ *Messerli v. State*, 626 P.2d 81, 84 (Alaska 1980).

to privacy, the person seeking to invoke the privacy clause must show “a legitimate expectation that the materials or information will not be disclosed.”²⁴

The test for whether the right to privacy has been violated is well established:

Once a fundamental right under the constitution of Alaska has been shown to be involved and it has been further shown that this constitutionally protected right has been impaired by governmental action, then the government must come forward and meet its substantial burden of establishing that the abridgment in question was justified by a compelling governmental interest.²⁵

Because policy D-24 has been invalidated, the question is not whether that policy, or the DMV’s use of it, violates the right to privacy. The question is whether the right to privacy includes the right to have the DMV change gender on a driver’s license.

To prove a privacy clause violation, K.L. has the initial burden of showing that the DMV’s action—failing to change the gender designation on her driver’s license—impairs a fundamental right. Only then would the DMV need to justify the abridgment with reference to a compelling state interest. But K.L. cannot make this initial showing, because the right to change information on a driver’s license is not constitutionally protected.

First, the absence of a procedure for changing gender on a driver’s license places no restrictions on K.L.’s personal autonomy or the right to control her appearance.

²⁴ *Alaska Wildlife Alliance v. Rue*, 948 P.2d 976 (Alaska 1997) (citing *Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990)).

²⁵ *Messerli*, 626 P.2d at 84 (citing *Breese v. Smith*, 501 P.2d 159, 169 (Alaska 1972)).

By leaving a male designation on her driver's license, the DMV is not, as K.L. contends, exerting control over K.L.'s body and appearance, imposing its own notions of morality and propriety, or interfering with her choice to live as a woman.²⁶ K.L. remains free to dress as she wishes and live her life as a woman. The right to personal autonomy and control over one's own appearance does not include the right to control the appearance of one's *driver's license*. A driver's license is a form of government identification, not an extension of one's physical appearance.

Second, the absence of a procedure for changing gender on a driver's license does not violate K.L.'s right to privacy or liberty by "forc[ing] the disclosure of sensitive, personal information."²⁷ To the extent this argument is based on the disclosure of medical information that was required by now-defunct policy D-24, it is moot. But K.L. also argues that by allowing a discrepancy between the gender designation on her driver's license and her apparent gender, the DMV violates her right to privacy because the discrepancy could reveal her transgender status and put her at risk of harassment and harm.²⁸ She thus argues that the DMV is constitutionally required to help her keep her transgender status private by changing the gender designation on her driver's license. But while K.L. may have an administrative expectation that her apparent gender and that designated on her driver's license will match, she does not have a constitutional right to that consistency, nor can she have a legitimate expectation that her

²⁶ Appellant's Brief at 13-17.

²⁷ *Id.* at 17.

²⁸ *Id.*

gender designation, whatever it may be, will not be disclosed on a form of public identification.

K.L. cites a study finding a correlation between discrepancies in gender designation on a license and gender identity and various forms of reported harassment and discrimination against transgendered persons.²⁹ She then cites *Alaska Wildlife Alliance v. Rue*³⁰ for the proposition that because this discrepancy could theoretically result in harassment or harm, the DMV violates her constitutional right to privacy by allowing the discrepancy to exist. But the plaintiffs in *Alaska Wildlife Alliance* filed suit to require the state to publicly disclose certain sensitive records, and the court found that this would violate the right to privacy. Here, by contrast, the DMV has not taken any action to disclose K.L.'s transgender status to anyone. K.L.'s complaint is that the DMV will not assist her in keeping her transgender status private by modifying her driver's license, not that the state is in any way affirmatively disclosing K.L.'s transgender status.

Even leaving aside the fact that the DMV has not publicly disclosed K.L.'s transgender status, the privacy holding in *Alaska Wildlife Alliance* was based on actual, credible threats made against specific individuals. K.L. does not cite to evidence that she herself has been or will be harassed or harmed because of the discrepancy on her license. In *Alaska Wildlife Alliance*, the Court held that the state properly redacted the otherwise-

²⁹ *Id.* at 6-7.

³⁰ 948 P.2d 976 (Alaska 1997).

public names of public employees and private contractors from documents requested under the Public Records Act, where the individuals involved had received credible threats against their lives.³¹ The Court held that “where there are credible threats against the lives of public employees and private contractors, their expectation that the state will protect them by not disclosing their names is legitimate.”³² The Court’s holding in favor of non-disclosure was rooted in the fact that actual, credible threats were made against specific individuals, and that this justified the non-disclosure of an otherwise public document based on an asserted constitutional right to privacy. The Court specifically noted that it was the “significant burden” of the party alleging such threats “to show that the threats are both real and credible.”³³ K.L. has not made that showing.

Finally, K.L.’s argument that policy D-24 infringes on her right to medical decision-making by burdening her decisions regarding gender reassignment surgery is moot. The hearing officer invalidated the portion of policy D-24 that required K.L. to provide proof of gender reassignment surgery and the DMV is not contesting the hearing officer’s decision. K.L. has thus failed to show that the privacy and liberty clauses of the Alaska Constitution require the DMV to change the gender designation on her driver’s license.

³¹ *Id.* at 980.

³² *Id.*

³³ *Id.* at 980 n.5. The Court did not actually reach this question, because the veracity and credibility of the threats was not an issue that was properly preserved for appeal.

B. Equal protection does not require the DMV to change the gender designation on K.L.'s driver's license.

Equal protection also does not require the DMV to change the gender designation on K.L.'s driver's license. K.L. argues that the DMV treats similarly-situated people differently and that the DMV's actions merit strict scrutiny because fundamental rights are at stake.³⁴ But people who wish to change the gender on their driver's license are not similarly situated to original driver's license applicants or people who wish to change other appearance information. "If it is clear that two classes are not similarly situated, this conclusion necessarily implies that the different legal treatment of the two classes is justified by the differences between the two classes."³⁵ Moreover, as explained above, the absence of a procedure for changing gender on a driver's license does not implicate K.L.'s fundamental rights, so strict scrutiny would not be warranted even if K.L. were able to show disparate treatment of similarly-situated people.

³⁴ Appellant's Brief at 33-36. See *Alaska Civil Liberties Union v. State*, 122 P.3d 781, 787 n.7 (Alaska 2005). ("To implement Alaska's more stringent equal protection standard, we have adopted a three-step, sliding-scale test that places a progressively greater or lesser burden on the state, depending on the importance of the individual right affected by the disputed classification and the nature of the governmental interest at stake....") (citing *Malabed v. North Slope Borough*, 70 P.3d 416, 421 (Alaska 2003)). First, the Court determines "the weight of the individual interest impaired by the classification"; second, the Court examines "the importance of the purposes underlying the government's action"; Finally, the Court evaluates "the means employed to further those goals to determine the closeness of the means-to-end fit."

³⁵ *Alaska Inter-Tribal Council v. State*, 110 P.3d 947, 967 (Alaska 2005) (citing *Lauth v. State*, 12 P.3d 181, 187 (Alaska 2000)).

1. **A person seeking to change the gender designation on a driver's license is not similarly situated to a person applying for an original driver's license.**

New applicants for driver's licenses and current license holders are not similarly situated. An applicant for a new driver's license is presenting identifying information to the DMV for the first time, so the DMV has no pre-existing record of that information. A current license holder seeking to change identifying information on a license is asking the DMV to amend identifying information previously submitted to the agency. It stands to reason that the agency will seek some sort of justification or documentation for such changes, and indeed, this is supported by the still-valid portions of policy D-24 providing procedures to make certain changes to a driver's license. No such policy exists for new applicants, so new applicants for driver's licenses and current license holders are not similarly situated.

2. **A person seeking to change the gender designation on a driver's license is not similarly situated to a person seeking a change in secondary appearance information.**

Someone who seeks to amend the gender designation on a driver's license is not similarly situated to someone who seeks to make another change to physical appearance information. As noted above, gender information is the only physical descriptor required by statute or regulation. Alaska Statute 28.15.061(b)(1) requires that an application for a driver's license "contain the applicant's full legal name, date and

place of birth, *sex*, and mailing and residence addresses.”³⁶ A driver’s license itself is required only to display “a brief physical description.”³⁷ The decision to include “sex” but not other physical characteristics in the statute implies that the legislature considered gender to be more fundamental identifying information than other physical descriptors.

Unlike other physical characteristics, gender generally does not vary over a person’s lifetime. And clearly, gender is far less likely than most other physical characteristics to change. So a person seeking to make a change to the gender designation on a driver’s license is not similarly situated to persons seeking to make other types of changes.

3. **The absence of a procedure for changing gender on a driver’s license survives rational basis scrutiny.**

As discussed above, the absence of a procedure for changing gender on a driver’s license does not burden any fundamental right. Thus, even if K.L. were able to show disparate treatment of similarly-situated people, deferential, rational basis scrutiny would apply. Under rational basis scrutiny, the government may treat similarly situated people differently “if the distinction between the persons rests upon some ground of difference having a fair and substantial relation to the object of the legislation.”³⁸ Such a

³⁶ Emphasis added.

³⁷ AS 28.15.111(a).

³⁸ *State, Dep’t of Health & Social Services v. Planned Parenthood of Alaska, Inc.*, 28 P.3d 904, 911 (Alaska 2001) (internal citations and quotations omitted).

distinction may be upheld if the state action at issue has a broader, legitimate purpose, notwithstanding that its reach may or may not encompass all affected individuals.³⁹

Here, the driver's licensing statutes reflect the legislature's intent to "adopt a statutory scheme that deals with the licensing of Alaska drivers in a comprehensive and uniform manner."⁴⁰ And as also previously discussed, the legislature intentionally distinguished gender as an identifying characteristic distinct from other, more fungible physical traits. The ability to change these other traits, but not gender, on a driver's license bears a fair and substantial relation to the clear legislative goal of having driver's licenses that do not contain errors, misinformation, or inaccuracies that could be used to perpetuate identification theft, fraud, or other malfeasance. Absent a duly-adopted regulation providing a standardized procedure for changing gender designation on driver's licenses, the DMV's current laws substantially further the legitimate state goal of issuing accurate and fixed forms of identification that cannot readily be changed or manipulated, and of dealing with the licensure of drivers in "a comprehensive and uniform manner."⁴¹

³⁹ See, e.g., *Ranney v. Whitewater Engineering*, 122 P.3d 214, 223 (Alaska 2005) (decision of Workers' Compensation Board to deny death benefits to unmarried cohabitant did not violate equal protection where Workers' Compensation Act served "another, even broader purpose: to provide benefits in a manner that is 'quick, efficient, fair, and predictable,' at a reasonable cost to the employer." The Workers' Compensation Act's spousal benefit substantially furthered this "overarching purpose, even if it might fall short in compensating all potential 'dependents.'").

⁴⁰ *Roberts v. State*, 700 P.2d 815, 817-818 (Alaska Ct. App. 1985).

⁴¹ *Id.*

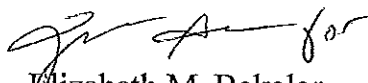
A person seeking to change the gender designation on an existing driver's license is not similarly situated to a new applicant for a driver's license, nor is a person seeking to make such a change similarly situated to a person seeking to change secondary appearance information. Even if these classes of persons can be viewed as similarly situated, the absence of a procedure to make the requested change does not burden any fundamental right, and the lack of procedure would therefore be subject to rational basis scrutiny. Under such scrutiny, the distinction furthers legitimate state goals.

CONCLUSION

For these reasons, this Court should affirm the DMV hearing officer's decision.

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