STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL
LAWRENCE G. WASDEN

February 28, 2020

TRANSMITTED VIA HAND DELIVERY AND EMAIL

The Honorable John Gannon
Idaho House of Representatives
Idaho State Capitol
700 West Jefferson Street, Room EG63
Boise, Idaho 83702
jgannon@house.idaho.gov

Re: Legal analysis of House Bill 509 concerning corrections and amendments to Idaho birth certificates

Dear Representative Gannon:

I am writing in response to your February 26, 2020 request for a legal review of House Bill 509 (also referred to as "H. 509") concerning corrections and amendments to Idaho birth certificates. Your legislation defines the term "sex," requires that certain facts of a child's birth, including sex, be recorded on a birth certificate, and establishes the process of recording a sex if the individual's sex is not recognizable at birth. House Bill 509 prohibits the amendment of a child's sex and other facts of birth after one year from the date of birth.

1. **House Bill 509's prohibition on changing the sex marker on a birth certificate after one year from a child's date of birth is inconsistent with the Federal District Court's Order in F.V. v. Barron.**

Section 4 of House Bill 509 prohibits amendment of the sex marker on a child's birth certificate more than one year after a child's date of birth. This prohibition is inconsistent with the order in F.V. v. Barron, 286 F. Supp. 3d 1131 (D. Idaho 2018), which directed the Department of Health & Welfare (DHW):

P.O. Box 83720, Boise, Idaho 83720-0010
Telephone: (208) 334-2400, FAX: (208) 854-8071
Located at 700 W. Jefferson Street, Suite 210

> IDHW Defendants and their officers, employees, and agents must begin accepting applications made by transgender people to change the sex listed on their birth certificates on or before April 6, 2018; such applications must be reviewed and considered through a constitutionally-sound approval process; upon approval, any reissued birth certificate must not include record of amendment to the listed sex and where a concurrent application for a name change is submitted by a transgender individual, any reissued birth certificate must not include record of the name change.

Id. at 1146. DHW was also enjoined from enforcing their policy of automatically rejecting applications from transgender people to change the sex listed on their birth certificates. *Id.* Currently, DHW is operating under a rule that complies with the order in F.V. v. Barron. *See* IDAPA 16.02.08.201.06. H. 509 would displace this rule with a new statute outlining the content of birth certificates with specificity. *See* Proposed Idaho Code § 39-245A(2). Recognizing that this statute will displace this rule, it is highly likely that this statute will be the subject of a legal challenge.[1]

Based Upon F.V. v. Barron and Karnoski v. Trump, House Bill 509 Will Be Subject To Heightened Scrutiny

The Equal Protection Clause of the Fourteenth Amendment requires that the government treat similarly situated individuals alike unless the government can show that a particular exception to this rule meets the relevant legal standard.[2] The applicable legal standard depends on the class of individuals that would be treated differently.[3] Courts have found that governmental actions distinguishing between transgender and non-transgender individuals is a type of sex-based discrimination.[4] As such, the Ninth Circuit Court of Appeals has applied "heightened scrutiny" in equal protection cases when an individual is treated differently because of his or her status as transgender.[5] In order to treat transgender individuals differently than non-transgender individuals

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[1] It is worth noting that in F.V. v. Barron, the Court did not have a rule before it which could be reviewed, and could therefore not extrapolate on the legal ramifications of such restrictions. The Court further noted that any new rule would need "constitutionally-appropriate justification" for more onerous burdens placed on transgender persons than on others. H. 509 appears to be an attempt at such justification and distinction.

[2] City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 439--40 (1985).

[3] *See Id.* at 439-41.

[4] *E.g.*, Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011); Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 285-86 (W.D. Pa. 2017).

[5] *See* Karnoski v. Trump, 926 F.3d 1180, 1199-1202 (9th Cir. 2019); F.V. v. Barron, 286 F. Supp. 3d 1131, 1144-45 (D. Idaho 2018). The U. S. Supreme Court has not specifically addressed the appropriate level of scrutiny in such a case, but it will be deciding this term whether discriminatory conduct against individuals based on their transgender status is discrimination based on sex and thus prohibited by Title VII. Three cases on this issue are pending before the Court: Bostock v. Clayton County, Georgia, Altitude Express Inc. v. Zarda, and R.G. & G.R. Harris Funeral Homes Inc. v. EEOC. The decisions in these cases will not specifically address Equal Protection challenges, but will shed light on whether the Court would apply heightened scrutiny in transgender Equal Protection challenges.

without running afoul of the U.S. Constitution, "the government must advance an important governmental interest, the [law] must significantly further that interest, and the [law] must be necessary to further that interest" (i.e., a less restrictive law could not achieve the government's interest).[6]

In both F.V. v. Barron and Karnoski v. Trump, the District of Idaho and the Ninth Circuit have held that a law that discriminates against transgender people must satisfy heightened scrutiny, not just rational basis review. Recent opinions from other courts agree. The State of Idaho will have to prove that the sex change prohibition furthers an important government interest by means substantially related to that interest.

H. 509 attempts to provide an important governmental interest through its proposed amendments to Idaho Code § 39-240 in which it outlines a number of legislative findings with regard to the need for certain specific types of vital statistics.[7] These findings are continued within proposed Idaho Code § 39-245A, which purports to institute a biologically based birth certificate regime. This appears to be in furtherance of a biologically based birth certificate regime. As recently as January 17, 2020, the 7th Circuit acknowledged: The Fourteenth Amendment does not forbid a state from establishing a birth-certificate regimen that uses biology rather than marital status to identify parentage.[8]

This provides the State with two legal alternatives. First, a State may adopt a biologically based birth certificate regime that only allows for biologically based amendments, if any, to the birth certificate. Likely, requiring a doctor to sign off on the amendment to a birth certificate for biological reasons would suffice. Second, if the State allows changes to the birth certificate by some but not transgender persons, then the State's restrictions must satisfy heightened scrutiny. The difficulty for the State thus becomes that it allows changes to birth certificates for some, while denying it to others.[9] H. 509 appears to try to thread the rapidly shrinking constitutional eye of a needle. This office cannot determine at this point whether that eye can be threaded with H. 509, but notes that based on the existent case law it will likely require the State to litigate this matter to the United States Supreme Court.

Defense of House Bill 509 will likely rely on the dissent in Pavan v. Smith, 137 S.Ct. 2075, 2079-2080 (2017). Within the *dissent*, Justice Gorsuch (joined by Justices Thomas and Alito) observed:

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[6] Karnoski, 926 F.3d at 1200.
[7] In furtherance of this governmental interest and the findings, the State would likely be required to identify medical professionals or other expert evidence that can support these findings.
[8] Henderson v. Box, 947 F. 3d 482, 487 (7th Cir. 2020).
[9] The State's position is complicated by two factors: (1) the State maintains an original of all birth certificates, even after amendment; and (2) the department allows certain changes, but H. 509 would prohibit other changes.

> And it is very hard to see what is wrong with this conclusion for, just as the state court recognized, nothing in *Obergefell* indicates that a birth registration regime based on biology, one no doubt with many analogues across the country and throughout history, offends the Constitution.[10]

Continuing on, the *dissent* recognized that Arkansas had established:

> [...]a set of rules designed to ensure that the biological parents of a child are listed on the child's birth certificate. Before the state supreme court, the State argued that rational reasons exist for a biology based birth registration regime, reasons that in no way offend *Obergefell*—like ensuring government officials can identify public health trends and helping individuals determine their biological lineage, citizenship, or susceptibility to genetic disorders.[11]

It is important to caution that although the State may maintain the arguments advanced in Pavan, they are unlikely to prevail for two reasons: (1) those arguments originate from a dissent, which means the arguments were not successful with the remainder of the Supreme Court; and (2) Pavan is a case that was summarily reversed—meaning it was not fully briefed and argued. This makes a successful defense of this statute particularly difficult.

Defense of House Bill 509 Will Likely Result in Substantial Costs to the State

As demonstrated by the above analysis, defense of H. 509 will likely require litigation to the U.S. Supreme Court in the hope that it will grant *certiorari* and then reverse or narrow existing precedent such as Pavan. Litigation of this nature is likely to be extremely expensive for the State because an award of attorney fees against the State is likely. Using the F.V. v. Barron case as an example, the State stipulated to most of the issues within that case and was still presented with an attorney fee request of approximately $100,000, which the State negotiated down to $75,000. Applying this example to a fully litigated case with appeals, the fee awards could exceed one million dollars.

2. House Bill 509 may conflict with current Vital Statistics Act statutes.

House Bill 509 codifies the current practice of the Bureau, at least with respect to the date and time of birth, place of birth, sex of the child, birth weight, and birth length. Any additional data fields on a birth certificate would be evaluated for compliance with the statutes and rules discussed below.

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[10] Pavan at 2080 (Gorsuch *dissenting*).
[11] *Id.*

Currently, Idaho Code § 39-245 provides that:

> The form of certificates used under the provisions of this chapter shall be prescribed by the director and shall include as a minimum the items required by the respective standard certificates as recommended by the national agency in charge of vital statistics; provided, however, that the provisions of section 39-1005, Idaho Code, shall be given effect on a certificate to which that section is applicable.

Idaho Code § 39-255 (Registration of Births), IDAPA 16.02.08.300 (Registration of Births), and Idaho Code § 39-278 (Delayed Birth Certificates) also address what information is required on a birth certificate.

3. Subsection 3's definition of sex is vague.

The phrases "immutable biological and physiological characteristics" and "generally recognized at birth" are vague and likely subject to challenge depending upon interpretation. If the intended purpose is to tie the designation of sex to a physical anatomical characteristic or chromosomal designation, a specific reference to those standards would provide clarity.

The legislation should define the generally recognizable immutable and biological characteristics which identify a person as a male or female. For example, if your intent is that only a woman has ovaries, a vagina, a uterus, and breasts, and only a man has testes, a penis, and facial hair, then the legislation should state that. Likewise, the legislation should identify which chromosomal patterns define a male and a female.

It would also be helpful to set out what sex marker should be identified on a birth certificate when a child is born who does not meet the definitions set out in law. For example, children are sometimes born with chromosomal varieties other than just XX or XY. Likewise, children are sometimes born with gonadal ambiguity, or external or internal sex organ ambiguity.

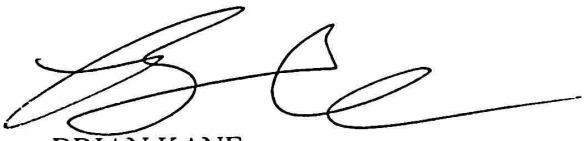
4. Subsection 5 conflicts with Subsection 3 and it is ambiguous.

Subsection 5 of House Bill 509 addresses situations in which an individual's biological sex cannot be recognized at birth based upon "externally observable genital anatomy." This section appears to conflict with Subsection 3, which defines sex as "genetically determined at conception." For example, if the sex of a person is determined by their genes at the time of conception then those genes should be the same at birth, regardless of their externally observable genital anatomy, and the sex should not change. The legislation appears to be internally inconsistent as to the definition of sex – is it determined by genetics, chromosomes, genital anatomy, or generally recognizable immutable and biological characteristics?

In addition, Subsection 5 is also ambiguous as to who makes the determination that an individual's biological sex cannot be recognized at birth as male or female based upon "externally observable genital anatomy." The person who makes the determination should be identified in the legislation. The legislation also fails to set out a process for later designating a person born as sexually indeterminate as "male or female based on the appropriate combination of genetic analysis and evaluation of the individual's naturally occurring internal and external reproductive anatomy." The legislation fails to identify who or how that determination is made and what the process is for changing the birth certificate's sex designation.

I hope this analysis is helpful. Please feel free to contact our office if you have any questions.

Sincerely,



BRIAN KANE
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