

“I Know Who I Am:” Applying Sex-Based Equal Protection Jurisprudence to Transphobic ID Policies in Alabama

I. OVERVIEW	275
II. BACKGROUND.....	276
A. <i>Sex-Based Classification</i>	277
B. <i>Levels of Scrutiny</i>	279
III. COURT’S DECISION.....	280
IV. ANALYSIS.....	283
A. <i>Gender, Sex, and Transgender Litigants</i>	283
B. <i>Policing Transgender Identity</i>	284
C. <i>Identification Policies, Transgender Populations, and Alternative Legal Theories</i>	286

I. OVERVIEW

Darcy Corbitt, Destiny Clark, and Jane Doe are three transgender women from Alabama who were deprived of appropriate and accurate driver’s licenses after they failed to meet the discriminatory standards of a policy invoked by the Alabama Law Enforcement Agency (ALEA).¹ Policy Order 63, enacted in 2012, required applicants who requested a changed sex designation on their driver’s license to provide medical documentation from their care provider verifying gender affirming² surgery.³ The state demanded a “complete” surgical standard, which according to defendant deposition entailed altering the applicant’s genitals and potentially their chest.⁴ The state outlined two exceptions to medical documentation: an updated Alabama birth certificate or an

1. Corbitt v. Taylor, 513 F. Supp. 3d 1309, 1311 (M.D. Ala. 2021).

2. LGBTQ+ and Trans-led advocacy organizations encourage the term “gender affirming” or “gender confirming” in lieu of “sex change” or “sex reassignment” terminology. The ALEA/State of Alabama uses the latter terminology. Throughout this case note, citations to the text will use this terminology and original writing will use the current, encouraged “gender affirming” terminology. *LGBTQIA+ Glossary of Terms for Health Care Teams*, LGBTQIA+ HEALTH EDUC., <https://www.lgbtqihealtheducation.org/wp-content/uploads/2020/02/Glossary-2022.02.22-1.pdf> (last visited Nov. 20, 2022).

3. Corbitt, 513 F. Supp. 3d at 1312.

4. *Id.*

updated out-of-state driver's license or birth certificate.⁵ Under the Alabama Code, amending a birth certificate's sex marker requires a court order "indicating that the sex of an individual born in this state has been changed by surgical procedure and that the name of the individual has been changed."⁶ The out-of-state updated driver's license exception was intended for applicants who never lived in Alabama, and the state recognized other states may not have an equivalent surgical requirement for a changed driver's license.⁷

The three plaintiffs invoked the Equal Protection Clause of the Fourteenth Amendment along with right to privacy, liberty interest in refusing medical treatment, and First Amendment claims.⁸ The parties agreed to rely solely on the evidence and briefs presented.⁹ Judge Myron Thompson utilized a sex-based Equal Protection Clause analysis of Policy Order 63.¹⁰ Although the policy is state-based, the U.S. District Court had jurisdiction on a federal question¹¹ and civil rights¹² basis.¹³ The United States District Court for the Middle District of Alabama, Northern Division, *held* that the ALEA's Policy Order 63 did not survive the intermediate scrutiny required in a sex-based Equal Protection Clause action. *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1311 (M.D. Ala. 2021).

II. BACKGROUND

Corbitt relied on an Equal Protection Clause (EPC) analysis to determine the constitutionality of Policy Order 63.¹⁴ The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution dictates:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁵

5. *Id.* at 1313.

6. Ala. Code, § 22-9A-19(d) (1975).

7. *Corbitt*, 513 F. Supp. 3d at 1313.

8. *Id.*

9. *Id.* at 1314.

10. *Id.*

11. 28 U.S.C. § 1331.

12. 28 U.S.C. § 1343.

13. *Corbitt*, 513 F. Supp. 3d at 1314.

14. *Id.*

15. U.S. CONST. amend. XIV, § 1.

The Equal Protection Clause applies in instances of discriminatory classification, including sex. *Corbitt* used a sex-based classification, this background section primarily addresses sex-based Equal Protection Clause jurisprudence.¹⁶

A. *Sex-Based Classification*

Reed v. Reed, the first successful sex-based Equal Protection Clause interpretation, explained that “the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways” but rather “den[ies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute.”¹⁷ Quoting *Royster Guano Co. v. Virginia*, *Reed* expressed “[a] classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.’”¹⁸ Subsequently, the *Reed* Court held that an Idaho probate provision, which mandated the appointment of males over females as administrators of estates, violated the Equal Protection Clause when both men and women were similarly situated as administrators.¹⁹

Other notable sex-based Equal Protection Clause precedents include *Miss. Univ. for Women v. Hogan* and the *United States v. Virginia*.²⁰ Both cases involved public universities with single-sex student body policies: the Mississippi University for Women only admitted female students, and the Virginia Military Institute (VMI) only admitted male students.²¹ In *Miss. Univ. for Women*, a male plaintiff (Hogan) was barred entry to the Mississippi University for Women’s nursing program despite being “otherwise qualified.”²²

Hogan claimed that the school’s admissions policy violated the Equal Protection Clause.²³ The Court established that in sex-based Equal

16. *Corbitt*, 513 F. Supp. 3d at 1312.

17. *Reed v. Reed*, 404 U.S. 71, 75 (1971) ; *see also* *United States v. Virginia*, 518 U.S. 515, 532 (1996).

18. *Reed*, 404 U.S. at 75 (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

19. *Id.* at 77.

20. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 720 (1982); *United States v. Virginia*, 518 U.S. at 519.

21. *See Miss. Univ. for Women*, 458 U.S. at 720; *U.S. v. Virginia* 518 U.S. at 520.

22. *Miss. Univ. for Women*, 458 U.S. at 720-21.

23. *Id.* at 721.

Protection Clause analysis, the burden falls on parties upholding the policy at odds and must show an ‘exceedingly persuasive justification[.]’²⁴ Further, analysis “must be applied free of fixed notions concerning the roles and abilities of males and females . . . if the statutory objective is to exclude or ‘protect’ members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate.”²⁵

The state of Mississippi provided a primary justification for the admission policy and an alternative justification.²⁶ The state’s primary justification was to create a form of “educational affirmative action” benefitting women.²⁷ The alternative justification was that the university was protected under Title IX, § 901(a) of the Education Amendments of 1972 which allowed single-sex admission policies so long as the institution “traditionally and continually” utilized them.²⁸ The court found neither of these justifications sufficient to pass the muster of being “exceedingly persuasive” and thus, the admission policy violated the Equal Protection Clause.²⁹

Similarly in *Virginia*, a qualified female plaintiff raised an equal protection claim when she was denied entry into the Virginia Military Institute on account of its male-exclusive admission policy.³⁰ The Commonwealth of Virginia argued two justifications for the male-exclusive policy: (1) educational and diversity benefits and (2) specific, existing VMI training approaches considered ill-suited for women.³¹ *Virginia* also expressed governmental justifications “must be genuine, not hypothesized or invented *post hoc* in response to litigation.”³² The *Virginia* decision applied principles from *Reed* and *Miss. Univ. for Women*, and ultimately determined that VMI’s justifications were not exceedingly persuasive enough to withstand intermediate scrutiny.³³

Transgender plaintiffs may also utilize a sex-based classification in an equal protection claim. The United States Court of Appeals for the Eleventh Circuit in *Glenn v. Brumby* applied intermediate scrutiny to a

24. *Id.* at 724 (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)).

25. *Miss. Univ. for Women*, 458 U.S. at 718, 725.

26. *Id.* at 727, 731-32.

27. *Id.* at 718 (internal citation omitted).

28. *Id.* at 731, 732 (internal citation omitted).

29. *Id.* at 733.

30. *United States v. Virginia*, 518 U.S. 515, 523 (1996) (internal citation omitted).

31. *Id.* at 534-35 (internal citations omitted).

32. *Id.* at 533.

33. *See id.* at 556-8.

sex discrimination claim.³⁴ Like the plaintiffs in the noted case, the plaintiff in *Glenn* was transgender.³⁵ Glenn faced workplace discrimination based on her transgender identity and sought relief under the Equal Protection Clause.³⁶ The Eleventh Circuit found that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described on the basis of sex or gender.”³⁷ Under this interpretation of sex discrimination, *Glenn* cited *Smith v. City of Salem* in the Sixth Circuit as another instance of gender stereotyping a transgender individual prohibited by the Equal Protection Clause along with a slew of supporting district court decisions.³⁸

B. Levels of Scrutiny

Craig v. Boren elucidated that in sex-based Equal Protection Clause review, “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.”³⁹ This standard is referred to as intermediate scrutiny. Equal protection actions gave rise to three standards of review: strict scrutiny, intermediate scrutiny, and rational basis review.

Differing classifications prompt varying levels of scrutiny—for example, policies preventing African-Americans from serving on juries in the post-Civil War era or sending Japanese-Americans to internment camps during World War II were race-based and national-origin-based classifications, respectively.⁴⁰ These classifications invoked strict scrutiny, which required the government to demonstrate that its policy was “precisely tailored to serve a compelling government interest.”⁴¹ Intermediate scrutiny utilizes a lower judicial threshold: the government must show that its classification serves important governmental objectives and that the classification is *substantially related* to achieving those objectives.⁴²

34. *Glenn v. Brumby*, 663 F.3d 1312, 1315 (11th Cir. 2011).

35. *Id.* at 1314.

36. *Id.*

37. *Id.* at 1317.

38. *Id.*

39. *Craig v. Boren*, 429 U.S. 190, 197 (1976).

40. *See Strauder v. W. Virginia*, 100 U.S. 303 (1879); *Korematsu v. United States*, 323 U.S. 214 (1944).

41. *Regents of University of California v. Bakke*, 438 U.S. 265, 299 (1978).

42. *Reed v. Reed*, 404 U.S. 71, 77 (1971) (emphasis added).

Alternatively, rational basis review is delegated to polices requiring the lowest level of review. Rational basis review requires the government's classifications to rationally further a legitimate end.⁴³ This creates the lowest burden on the government of all levels of scrutiny. Rational basis scrutiny has been applied in cases such as *Romer v. Evans* and *U.S. v. Windsor*, which involved discriminatory policies against gay and lesbian people.⁴⁴

A controversial aspect to the application of scrutiny in Equal Protection Clause jurisprudence is the level of deference given to judges. Justice Rehnquist decried the “diaphanous and elastic” nature of determining whether objectives are “important” and the policies in question “substantially” advance them.⁴⁵ Justice Rehnquist feared “subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgements whether such legislations is directed at ‘important’ objectives or, whether the relationship to those objectives is ‘substantial’ enough.”⁴⁶ While judges may refer to precedent when determining what level of scrutiny to apply, there is latitude on less established classifications, which could vastly impact the burden imposed on the government.

III. COURT’S DECISION

In the noted case, the U.S. District Court for the Middle District of Alabama determined that the state’s justifications for the sex-based classifications in Policy Order 63 did not withstand intermediate scrutiny.⁴⁷ The court addressed the basis of the equal protection claim and the appropriate legal standard of review in response. Judge Thompson specified that Policy Order 63 “treat[ed] people differently based on the nature of their genitalia, classifying them by sex.”⁴⁸ Although the court acknowledged both the hypothetical and actual harm faced by the plaintiffs, it drew the vital distinction that Policy Order 63 was a sex-based discrimination issue because of the licenses’ sex-based classification, and not because of the harm faced by transgender people.⁴⁹

43. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442 (1985).

44. *See generally* *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a Colorado statute that prohibited anti-discrimination policies protecting LGBTQ+ people); *U.S. v. Windsor*, 570 U.S. 744 (2013) (affording certain marital benefits to same-sex couples).

45. *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting).

46. *Id.*

47. *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1323 (M.D. Ala. 2021).

48. *Id.* at 1314.

49. *Id.*

Since this was a sex-based classification, the court applied intermediate scrutiny.⁵⁰ In accordance with this standard, the ALEA, a state-run agency, was required to demonstrate Policy Order 63 fulfilled two prongs: (1) that the decision served important governmental objectives and (2) that the policy was substantially related to the achievement of those objectives.⁵¹ Additionally, the state was required to prove its interests were the actual interests considered at the time the policy was adopted.⁵²

The defendants relied on two justifications for Policy Order 63.⁵³ First, the policy⁵⁴ Second, for the ease of law enforcement officers in identification during post-arrest procedures.⁵⁵

The ALEA relied on a theory that because Policy Order 63 was based on the same process as amending an Alabama birth certificate, the policy “serve[d] the important government interests in maintaining consistency between the sex designation on an Alabama birth certificate and an Alabama driver license.”⁵⁶ The process to amend an Alabama birth certificate required a court order that a “surgical procedure and that the name of the individual has been changed.”⁵⁷

After the court applied the first prong of intermediate scrutiny, it found the ALEA’s interest in matching birth certificate and license sex-marker amendment procedures was not an important governmental interest. The state asserted the “important government interest” hinged on a uniform understanding of sex on identity documents.⁵⁸ The opinion argued that the ALEA relied on a flawed premise that “an alignment of procedures should generate an alignment of documents—that is, that having uniform processes form amending licenses and birth certificates is likely in practice to produce uniformity between individuals’ licenses and birth certificates.”⁵⁹ The state provided no further support.⁶⁰ Further, the interest of “administrative ease and convenience” was not applicable under intermediate scrutiny.⁶¹ A state witness emphasized the importance of a

50. *Id.*

51. *Id.* at 1315.

52. *Id.* at 1316.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Ala. Code, §22-9A-19(d)(2020); *Corbitt*, 513 F. Supp. 3d at 1316.

58. *Corbitt*, 513 F. Supp. 3d at 1320.

59. *Id.* at 1317.

60. *Id.*

61. *Id.*

government “paper trail” for those who change their sex-marker.⁶² The court rejected this argument as well: “while a government may appropriately choose to advance an important interest by means that promote effective and efficient administration, [the] ALEA’s asserted desire to avoid paperwork cannot suffice as the interest itself.”⁶³

Upon analysis of the “substantially related” second prong, the court found no substantial relationship on consistency grounds.⁶⁴ The opinion cited evidence that the state inconsistently applied “complete surgery” standard of Policy Order 63 and found the policy “d[id] not hit any more often than it misse[d].”⁶⁵ In conclusion, the state’s first justification failed: uniformity was not a sufficient important governmental interest, and there was no “direct, substantial relationship between [the] objective and means” between Policy Order 63 and Alabama Code § 22-9A-19(d).⁶⁶

The second objective also failed under intermediate scrutiny. The state’s alternative objective related to ease in law enforcement identification.⁶⁷ The state asserted “providing information related to physical identification” assisted in the important governmental interest of developing law enforcement “search, seizure, and booking policies” and thus fulfilled the first prong of intermediate scrutiny.⁶⁸ The state continued: because there were sex-based law enforcement policies in a “correctional context,” the policy “serve[d] this purpose by ‘proving an accurate description of the bearer.’”⁶⁹

The court acknowledged the importance of certain sex-based practices by law enforcement, but rejected the state’s justification on the basis that it did not play “any part in [the] ALEA’s calculus when it developed Policy Order 63 . . . conformity with the State’s birth certificate amendment procedures was the only interest . . . considered[.]”⁷⁰ The state argued in response that “the contemporaneous reason for adopting Policy Order 63—consistency with birth certificates—d[id] not show that the law enforcement interest [was] hypothesized or *post hoc*” because birth certificates provide descriptions for driver licenses and law enforcement

62. *Id.* at 1318.

63. *Id.*

64. *Id.* at 1319.

65. *Id.* at 1320.

66. *Id.*

67. *Id.* at 1321.

68. *Id.*

69. *Id.* at 1316.

70. *Id.* at 1321.

officers use licenses to identify.⁷¹ The state’s evidence did not demonstrate “officers use[d] birth certificates to decide any part of booking procedures.”⁷² The state “d[id] not clarify why it would matter, at the moment of booking, whether the sex designations on arrestees’ licenses match the designations on their birth certificates.”⁷³ Further, the state did not “explain why an interest in conformity with the birth certificate amendments [was] the same as an interest in ensuring appropriate post-arrest booking procedures.”⁷⁴

Ultimately, this alternative objective failed due to not being the actual interest asserted at the time of drafting the policy.⁷⁵ Both objectives advanced by the state failed under intermediate scrutiny and rendered Policy Order 63 unconstitutional discrimination under a sex-based Equal Protection Clause analysis.⁷⁶ Policy Order 63 was struck down and the ALEA was required to issue the plaintiffs changed licenses.⁷⁷

IV. ANALYSIS

A. *Gender, Sex, and Transgender Litigants*

Transgender individuals face unique challenges in the American legal system. A significant issue is the difference between the vocabulary transgender people and advocacy groups use in comparison to the courts. Courts often do not draw a distinction between sex and gender and use the terms interchangeably.⁷⁸ However, transgender people and advocacy groups define sex as assigned at birth (“based on the appearance of . . . external anatomy”) and gender as an identity—an “internal, deeply held knowledge of [your] own gender.”⁷⁹ Transgender people define themselves as those “whose gender identity differs from the sex they were assigned at birth.”⁸⁰

71. *Id.* at 1322.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1323.

76. *Id.*

77. *Id.* at 1323, 1324.

78. Genesis Martinez, *Gender Identity and The Equal Protection Clause*, FIU L. REV., (2019), [https://law.fiu.edu/2019/04/22/gender-identity-and-the-equal-protection-clause/#:~:text=The%20Equal%20Protection%20Clause%20\(%E2%80%9CEPC,%2C%20national%20origin%2C%20and%20alienage.](https://law.fiu.edu/2019/04/22/gender-identity-and-the-equal-protection-clause/#:~:text=The%20Equal%20Protection%20Clause%20(%E2%80%9CEPC,%2C%20national%20origin%2C%20and%20alienage.)

79. *Trans Terms*, GLAAD, <https://www.glaad.org/reference/trans-terms> (last visited Nov. 20, 2022).

80. *Id.*

As part of the LGBTQ+ community, transgender people are associated with lesbian, gay, and bisexual people. Lesbian, gay, and bisexual identities are not exclusive, and transgender people may also share those identities. However, gender identity is a different concept than sexual orientation. As noted above, in equal protection analysis, gender identity and sexual orientation classifications prompt different levels of scrutiny.⁸¹ Therefore, in equal protection causes of action, it is imperative to not conflate transgender identity with sexual orientation. The *Corbitt* decision, through the application of intermediate scrutiny, successfully demonstrated an awareness of this concept.

If courts are unsure how to classify transgender discrimination in Equal Protection Clause analysis, judges might use a sexual orientation classification over a sex classification and thus apply a lower standard of scrutiny. Therefore, transgender litigants and their counsel must carefully draft and customize their complaints and arguments to ensure an appropriate level of review and chance of adequate relief.

This practice is unduly burdensome for transgender litigants and their counsel—despite advancements in cultural and medical understanding of transgender identity, the legal system can treat transgender litigants as “strangers to the law” subject to the discretion of potentially biased judges.⁸² The Middle District of Alabama in *Corbitt* did not treat the three plaintiffs in that manner, which led to an optimal outcome.

B. Policing Transgender Identity

When states have policies such as Policy Order 63 in Alabama, transgender populations face unnecessary hardship, transgender legal advocate Gabriel Arkles explained: “[t]ransgender and non-binary people in Alabama and states across the country are being put in a double bind: it is impossible to get gender-affirming care, but surgery ‘proving’ their gender is required for them to get the identification documents they need to live their lives[.]”⁸³ The Middle District of Alabama in *Corbitt* appeared to understand this hardship.

81. See *Craig v. Boren*, 429 U.S. 190 (1976); *Romer v. Evans*, 517 U.S. 620 (1996); *United States v. Windsor*, 570 U.S. 744 (2013).

82. M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 VT. L. REV. 943, 965 (2015) (internal citations omitted).

83. Press Release, ACLU, Transgender Alabamians Tell Federal Appeals Court Lack of Accurate IDs Puts Their Lives at Risk, (Mar. 15, 2022) (on file with organization), <https://www.acclu.org/press-releases/transgender-alabamians-tell-federal-appeals-court-lack-of-accurate-ids-puts-their-lives-at-risk>.

Corbitt excelled in its analysis of issues facing transgender populations impacted by transphobic ID policies. *Corbitt* not only included the individual strife of the plaintiffs but also the transgender community at large.⁸⁴ The decision referenced the psychological toll of incorrect identification documents and involuntary disclosure of identity, violence, and hostility.⁸⁵ The Middle District of Alabama acknowledged that establishing plaintiff injury was not needed to proceed in an equal protection analysis, but deliberately chose to highlight the harm faced by transgender Alabamians.⁸⁶

The 2015 U.S. Transgender Survey (Alabama State Report) revealed twenty-eight percent of transgender Alabamians reported verbal harassment, were denied benefits or service, were asked to leave, or assaulted when their ID did not match their gender presentation.⁸⁷ As of 2015, only nine percent of transgender Alabamians had all IDs with the name and gender they preferred in comparison to eighty percent who had no IDs that matched their name or gender.⁸⁸ Beyond risks of transphobic violence, having an inaccurate ID has practical implications. Darcy Corbitt shared “[a]fter my out-of-state license expired, I had to rely on friends and family to help me pick up groceries, get to church, and get to my job. I missed a family member’s funeral because I just had no way to get there.”⁸⁹ Even activities as simple as “heading to a club with friends or going out for a drink” may become risks with an inaccurate ID.⁹⁰

A concerning component of Policy Order 63 and the state’s policy was the use of the term “complete” when referring to gender confirming surgery and transitioning.⁹¹ Policy Order 63 attempted to use surgery to categorize transgender people as either “completely” transitioned; however, “not all transgender people want or need surgery[.]”⁹² Genital-centric surgery is also not the only kind of gender affirming procedure and

aclu.org/press-releases/transgender-alabamians-tell-federal-appeals-court-lack-accurate-ids-puts-their-lives.

84. *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1313-14 (M.D. Ala. 2021).

85. *Id.*

86. *Id.* at 1314.

87. 2015 U.S. Transgender Survey: Alabama Report, NAT’L CTR. FOR TRANSGENDER EQUALITY (2017), [https://transequality.org/sites/default/files/docs/usts/USTSALStateReport\(1017\).pdf](https://transequality.org/sites/default/files/docs/usts/USTSALStateReport(1017).pdf).

88. *Id.*

89. ACLU Press Release *supra* note 83.

90. Gabriel Arkles, *How Alabama’s Driver’s License Law Injures Transgender People*, ACLU (Feb. 6, 2018), <https://www.aclu.org/news/lgbtq-rights/how-alabamas-drivers-license-law-injures-transgender-people>.

91. *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1312, 1320 (M.D. Ala. 2021).

92. ACLU Press Release *supra* note 83.

may include facial surgery, chest surgery, hormone therapy, voice therapy or hair removal.⁹³ The *Corbitt* decision echoed these sentiments.⁹⁴ For those who do want surgery or medical procedures, there may be additional setbacks such as cost or accessibility.⁹⁵ Because “[p]eople transition in different ways, orders and paces . . . Transgender people who don’t transition in certain ways are just as ‘real’ as those who do[,]” there is no concrete “complete” transition nor is it appropriate to categorize transgender individuals as “completely” transitioned or not.⁹⁶

C. *Identification Policies, Transgender Populations, and Alternative Legal Theories*

Identification documents, because of their sex-designations, lead to legal thickets for transgender populations. Identification documents are either federally or state provided: for example, passports and social security cards are federally provided whereas driver’s licenses or birth certificates are state provided. Litigants must defer to state policies when attempting to change designations on their driver’s licenses. States and U.S. territories vary widely on their gender-marker alteration procedures: as of July 2021, twenty states (and the District of Columbia) require no medical provider certification.⁹⁷ Some states require certification from a provider but from a range of licensed professionals (such as a mental health provider) rather than one’s personal physician.⁹⁸ Alternatively, some states and territories require either a birth certificate, court order, or proof of surgery.⁹⁹ Pre-*Corbitt*, Alabama fell into the latter category. These categories are non-exhaustive and broad, as some states and territories fall in between categories, have unclear or unknown policies,

93. Fan Liang, *Gender Affirmation: Do I Need Surgery?*, JOHNS HOPKINS MEDICINE, <https://www.hopkinsmedicine.org/health/wellness-and-prevention/gender-affirmation-do-i-need-surgery> (last visited Nov. 20, 2022); *Gender Affirmation (Confirmation) or Sex Reassignment Surgery*, CLEVELAND CLINIC, (May 3, 2021), <https://my.clevelandclinic.org/health/treatments/21526-gender-affirmation-confirmation-or-sex-reassignment-surgery>.

94. *Corbitt*, 513 F. Supp. 3d at 1319 (Explaining that “[t]he evidence in the record shows that there is no one sex-reassignment surgery and that different surgeries are appropriate for different people.”).

95. ACLU Press Release *supra* note 83; Transgender Survey *supra* note 87.

96. *What Do I Need To Know About Transitioning?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/gender-identity/transgender/what-do-i-need-know-about-transitioning> (last visited Nov. 20, 2022).

97. *How Trans Friendly Is the Driver’s License Gender Marker Change Policy In Your State?*, NAT’L CTR. FOR TRANSGENDER EQUALITY (July 2021), https://transequality.org/sites/default/files/Drivers%20License%20Grades%20July%202021a_0.pdf.

98. *Id.*

99. *Id.*

or have unique qualifications (for example, in Utah an individual may provide an updated U.S. passport or a birth certificate).¹⁰⁰

Corbitt is not the first piece, nor will it be the last, of driver's license gender-marker litigation. However, *Corbitt* is unique due to its sex-based Equal Protection Clause analysis. By straightforwardly using a sex-based equal protection analysis, Judge Thompson narrowed the scope of the opinion and prevented the parties from arguing over definitions of gender and sex. Other cases have been less straightforward in their analysis and relied on arguments other than the Equal Protection Clause. Other recent and successful cases in Ohio and Alaska involving transgender plaintiffs who attempted to alter their gender-marker on driver's licenses were decided on privacy grounds under the Due Process Clause.¹⁰¹ Doran Shemin, a transgender legal advocate, noted several legal arguments may be successful in identification documentation cases: autonomy, bodily integrity, and dignity arguments, including relying sexual orientation and abortion jurisprudence.¹⁰²

Comparing *Corbitt* to other decisions and examining identification document policies reveals a larger fundamental issue—transgender people and their identities are inconsistently understood by the state. This leads to varied standards that unfairly burden transgender Americans. As one of the plaintiffs, Destiny Clark shared: “I know who I am. Transgender people know who we are, that’s not the issue. The issue is getting the state to recognize our existence and just let us live without intruding into our private, medical records.”¹⁰³ It is past time for legislators and the legal system to catch up.

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100. *Id.*

101. See *Love v. Johnson*, 146 F. Supp. 3d 848, 857 (E.D. Mich. 2015); *KL v. State*, 2012 WL 2685183 at *1, *2, (Alaska Super. Ct. Mar. 12, 2012).

102. Doran Shemi, *My Body Is My Temple: Utilizing the Concept of Dignity in Supreme Court Jurisprudence to Fight Sex Reassignment Surgery Requirements for Recognition of Legal Sex*, 24 AM. U.J. SOC. POL’Y & L. 491, 498 (2016).

103. *ACLU Press Release supra* note 83.

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