

IN THE CIRCUIT COURT OF
PULASKI COUNTY, ARKANSAS

BRANDYN GALLAGHER, JAVON HANSEN, KADEN MCINTOSH,
LYDIA NELSON, and HALEY NICOLE PRENTICE

Plaintiffs

v. Case No. _____

ARKANSAS DEPARTMENT OF FINANCE AND ADMINISTRATION

Defendant

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

1. Plaintiffs in this case are transgender, nonbinary, and intersex Arkansans who want their state-issued driver’s licenses to reflect the gender with which they identify.

2. Beginning in 2010, if not earlier, the Department of Finance and Administration (“DFA,” the “Department,” or “State”) allowed transgender, nonbinary, and intersex applicants to self-identify their gender when obtaining a driver’s license. DFA has also allowed transgender, nonbinary, and intersex Arkansans to indicate their gender as “X” rather than “M” or “F.”

3. On March 15, 2024, the Department suddenly changed course by issuing an emergency rule, effective immediately, to make it more difficult, if not impossible, to change the gender marker on a driver’s license. Now, transgender Arkansans may not change the gender on their driver’s licenses without providing a difficult-to-obtain amended birth certificate. The emergency rule also prohibits the gender marker “X” in lieu of “M” or “F.”

4. In this action, Plaintiffs seek a declaratory judgment that the emergency rule violates the Arkansas Administrative Procedure Act, Ark. Code Ann. § 25-15-201 *et seq.*, because the Department did not certify an emergency permitting it to avoid notice-and-comment rulemaking. Given that the Department has, without incident, long permitted gender self-identification and X markers, there is no “imminent peril to the public health, safety, or welfare” that “requires adoption of a rule upon less than thirty (30) days’ notice.” Ark. Code Ann. § 25-15-204(c)(1). Plaintiffs ask the Court to enjoin the emergency rule and to order DFA to revert to its pre-rule practice of permitting transgender, nonbinary, and intersex applicants to list their gender as M, F, or X upon request.

JURISDICTION AND VENUE

5. This Court is a court of general jurisdiction that has authority to hear this suit under Ark. Const. amend. 80 § 6(A). The Court has subject-matter jurisdiction under Ark. Code Ann. § 25-15-207(a), which provides that the “validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that the rule, or its threatened application, injures or threatens to injure the plaintiff in his or her person, business, or property.”

6. Venue is proper in this Court under Ark. Code Ann. § 25-15-207(b), which allows challenges to agency rules to be brought “in the circuit court of any county in which the plaintiff resides or does business or in Pulaski County Circuit Court.”

PARTIES

7. Plaintiff Brandyn Gallagher is an intersex and nonbinary person. Currently their driver's license lists their gender as X. Application of the emergency rule will require them to adopt a gender marker of M or F against their will.

8. Plaintiff JaVon Hansen is a transgender male. Though Hansen's driver's license lists his gender as female, his gender identity is male. He desires to have a driver's license consistent with his gender identity. But for the emergency rule, he would be able to obtain this corrected driver's license by self-identifying his gender.

9. Plaintiff Kaden McIntosh is a nonbinary person. Currently their driver's license lists their gender as female. They wish to change the gender marker on their driver's license to X and would be permitted to do so but for the emergency rule.

10. Plaintiff Lydia Nelson is a nonbinary person. They have an expired state-issued identification card that lists their gender as X. Application of the emergency rule will require them to adopt a gender marker of M or F against their will.

11. Plaintiff Haley Nicole Prentice is a transgender female. Though Prentice's driver's license lists her gender as male, her gender identity is female. She desires to have a driver's license consistent with her gender identity. But for the emergency rule, she would be able to obtain this corrected driver's license by self-identifying her gender.

12. Defendant Arkansas Department of Finance and Administration, through its Office of Driver Services, is responsible for administration and enforcement of state laws and regulations concerning driver's licenses and identification cards. It

issued the emergency rule Plaintiffs challenge here. It is the proper defendant in this suit under Ark. Code Ann. § 25-15-207(c).

FACTS

A. Transgender, nonbinary, and intersex Arkansans need identification documents that match their gender identity.

13. Gender identity refers to a person's fundamental, internal sense of belonging to a particular gender. There is a medical consensus that gender identity is innate and that efforts to change a person's gender identity are unethical and harmful to a person's health and well-being. The gender marker designated on a birth certificate at the time of birth ("sex assigned at birth") is almost always based solely on the appearance of an infant's external genitalia.

14. Transgender people are people who have a gender identity different from their sex assigned at birth.

15. Nonbinary people are people who do not identify as either male or female.

16. The term "intersex" captures a number of differences in sexual development, including people who are born with both male and female genitalia and people with chromosomal combinations different than XY (male) or XX (female). Roughly one percent of Americans are intersex. For intersex people born with ambiguous genitalia, medical professionals list on the birth certificate the gender with which they believe the child will most likely come to identify. Intersex people may or may not ultimately identify with that gender.

17. Many transgender, nonbinary, and intersex people experience gender dysphoria. Gender dysphoria is a medically recognized condition defined by a

marked incongruence between a person's gender identity and the sex they were assigned at birth, when accompanied by clinically significant distress or impairment in social, occupational, or other important areas of functioning. If left untreated, gender dysphoria can lead to debilitating depression, anxiety, and suicidal thoughts and acts.

18. Treatment for gender dysphoria typically includes (often among other things) socially transitioning. This means living consistently with one's gender identity by taking steps such as: (a) change in clothing, hair, or appearance; (b) change of name; (c) change in pronouns (*i.e.*, "she," "he," or "they"); (d) change in the gender marker on identifying documents, including driver's license and passport; and (e) change in participation in gender-specific activities and use of gender-specific spaces.

19. Being able to live in accordance with one's gender identity in all aspects of one's life is important to addressing and alleviating gender dysphoria.

20. Forcing transgender, nonbinary, or intersex people to use identity documents that do not match their gender identity is inconsistent with medical protocols for the treatment of gender dysphoria because it prevents them from fully living consistently with their gender identity. And having identification documents labeling one with the wrong gender can cause anxiety and distress to individuals with gender dysphoria.

21. In addition to the psychological harm, having to present identity documents that do not match one's gender identity can result in discrimination and violence.

22. A driver's license is a critically important form of identification. It is necessary to be able to drive, which is important in Arkansas, where most people need to drive every day to go to work, school, stores, doctors' offices, or visits with friends and family. Even when a person does not drive, a state-issued identification is essential for many purposes, such as to vote, to secure a job, or to secure housing.

23. People are often asked to show a driver's license or state-issued identification to verify their identity. A driver's license that fails to match one's gender leads to the disclosure of private, intimate information about one's transgender status, and it often leads to physical harm, harassment, discrimination, or groundless accusations of fraud.

24. Twenty-two percent of transgender people reported being verbally harassed, assaulted, asked to leave a location, or denied services when they have shown someone an ID with a name or gender that did not match their presentation. James, S.E., et al., *Early Insights: A Report of the 2022 U.S. Transgender Survey* (Feb. 2024), at 22, *available at* <https://tinyurl.com/4x4c92z9>.

25. This data is consistent with broader findings that transgender people often risk harassment, harm, and social stigma when others learn that they are transgender. According to the 2022 U.S. Transgender Survey:

- a. Eighty percent of adult respondents and 60% of 16- and 17-year-old respondents who were out in K-12 schools experienced one or more form of mistreatment because of their transgender status. *Id.*

- b. Nearly one in ten respondents reported that they were denied equal treatment or service in the 12 months preceding the survey because of their gender identity or expression. *Id.* at 21.
- c. Thirty percent of respondents reported experiencing verbal harassment during that same time period because of their gender identity or expression. *Id.*
- d. Sixty-two percent of respondents reported that they would feel uncomfortable asking the police for help if they needed it because of their gender identity or expression. *Id.* at 22.

B. The Department passes an emergency rule to change at least thirteen years of contrary practice.

26. The Department is responsible for issuing driver's licenses and state identification cards (referred to collectively here as "driver's licenses" unless otherwise noted) through its Office of Driver Services.

27. By statute, most driver's licenses are valid for eight years from the date of initial issuance. *See Ark. Code Ann. § 27-16-901.*

28. For at least thirteen years, the Department's policy has been to allow Arkansans to change the gender marker on their driver's license upon request.

29. On December 3, 2010, Mike Munns, then-assistant Commissioner for Revenue, Operations and Administration at the Department, wrote in a memo that "Our official policy is to allow a licensee to change their gender as requested, no questions asked, no documentation required."

30. Upon information and belief, this practice was in place for years prior to that memo. Even before the memo, the Department did not require documents to establish gender.

31. The Department's longstanding policy also allowed Arkansans to use the "X" gender marker, indicating that they do not identify as either male or female.

32. At times in the past, the Department has also denoted a licensee's unspecified gender with a "U" rather than an M or F.

33. The Department's longstanding policy is consistent with the current policy of the United States Department of State, which permits applicants to denote their gender on passports and other documents as M, F, or X without documentation.

34. As of March 15, 2024, 516 Arkansans have driver's licenses with gender marker X.

35. On March 7, 2024, the Department announced its intent to adopt an emergency rule concerning gender markers on driver's licenses. The Arkansas Legislative Council approved the rule on March 15, 2024, and it went into effect that day.

36. The new rule requires that gender on driver's licenses match the gender listed on the person's "identity document," defined as the applicant's birth certificate or passport. The rule is prospective and does not require revocation of or changes to driver's licenses in circulation at the time the Department adopted the rule. Rather, it governs how the Department will regulate gender markers on licenses it issues in the future.

37. The new rule prohibits use of the “X” gender marker. If an applicant for a new or renewed driver’s license presents an identity document that contains an X or no gender, the applicant must use a specified form to select M or F.

38. The rule also authorizes the Department to alter the gender markers on existing X licenses based upon documents in its possession. In a public notice of the rule issued on March 12, 2024, the Department disclaimed intent to avail itself of this discretionary power, asserting that “[a]ll previously issued licenses and IDs with the ‘X’ designation will remain valid through the existing expiration date.” At a hearing of the Executive Committee of the Arkansas Legislative Subcommittee on March 14, 2024, Assistant Commissioner of Revenue Paul Gehring specified that, though the Department intends to review identity documents on file for those with X markers and to change their gender markers internally, licenses with X markers will remain valid until expiration.

39. If a transgender person wants to change their gender marker from M to F or vice versa, the rule requires them to present an amended birth certificate with a gender marker matching the gender marker they want on their driver’s license. The person may not switch genders on a driver’s license by presenting a passport that indicates the new gender (notwithstanding the general rule that driver’s licenses and identity documents, which include passports, must match).

40. Obtaining an amended birth certificate can be a difficult process in many states. In Arkansas, a person wishing to amend the gender marker on their birth

certificate must obtain a court order finding that the person's sex has been changed by surgical procedure. Ark. Code Ann. § 20-18-307(d).

41. Many transgender, nonbinary, and intersex individuals do not undergo gender-affirming surgeries, either because it is not medically indicated for them or because they do not have the resources to access such treatment. Thus, obtaining an amended birth certificate is not possible for many transgender, nonbinary, and intersex individuals who were born in Arkansas.

C. The Department fails to identify an imminent peril justifying the emergency rule.

42. Arkansas state agencies must follow certain procedures in adopting new rules, including a 30-day public notice and comment period. Ark. Code Ann. §25-15-204.

43. The law allows for emergency adoption of a rule without notice to the public in only two specific instances: (1) the agency finds imminent peril to the public health, safety, or welfare; or (2) compliance with a federal law or regulation requires adoption of a rule with less than 30 days' notice. In either instance, the agency is required to state in writing its reasons for finding an emergency. Ark. Code Ann. §25-15-204(c)(1).

44. State agencies seeking approval of an emergency rule must file the proposed emergency rule with the Executive Subcommittee of the Arkansas Legislative Council. Ark. Code Ann. § 10-3-309(d)(1).

45. On March 7, 2024, Jim Hudson, Secretary of the Department, sent the proposed rule to the Bureau of Legislative Research. In a letter accompanying the rule, Hudson identified three reasons the rule is “necessary.”

- a. “[I]n order to administer the Office’s responsibilities under Ark. Code Ann. § 27-16-1104(3), which requires that a driver’s license or identification card issued by the Office contain the person’s gender.”
- b. “[T]o ensure that individuals and organizations that rely upon identifying information contained within a driver’s license or identification card are provided with the most accurate and complete gender information that reflects the person’s gender information stated within the holder’s birth certificate, passport, or DHS document.”
- c. “[T]o provide the Office with the procedures to modify gender information contained in a driver’s license or identification card.”

46. Hudson’s letter did not explain whether or why the rule was necessary because of an imminent peril to public health, safety, or welfare. Nor did it assert that compliance with federal law or regulation required immediate adoption of the rule.

47. Nor did the Department indicate its reasons for finding an emergency in the other documents it submitted to Arkansas Legislative Council and its Executive Subcommittee. The Department’s filing expressly disclaimed that the rule is required to comply with federal statute, rule, or regulation. It provided no

indication that the rule was necessary because of imminent peril to the public health, safety, or welfare.

48. DFA adopted the rule after meetings of the Arkansas Legislative Council Executive Subcommittee on March 14, 2024, and the entire Arkansas Legislative Council on March 15, 2024. At neither meeting did representatives of the Department articulate any concrete incident that led it to seek an emergency change to DFA's existing practice or to determine that an imminent peril had arisen after over thirteen years of existing practice.

D. The emergency rule and its threatened application injures or threatens to injure Plaintiffs.

Brandyn Gallagher

49. Brandyn Gallagher is an intersex and nonbinary person. They were born with both a clitoral organ, which grew into a penis, and a vagina. Beginning in 2013, they started a regimen of hormone treatment that resolved chronic health problems they had experienced since puberty. The treatment includes both testosterone and estrogen. Without both hormones, their bones will weaken to the point of fracture.

50. Gallagher is a truck driver. They obtained an Arkansas commercial driver's license ("CDL") in 2019. Later in 2019 or early in 2020, they changed the gender marker on that license to X. That license is due for renewal in 2026.

51. Gallagher obtained a United States passport with gender marker X in January 2024.

52. In March 2024, Gallagher got a new job that pays more than any other job they have had as a trucker. As a requirement of employment, Gallagher is required to obtain an endorsement on their CDL permitting them to transport hazardous materials (“hazmat endorsement”).

53. To get a hazmat endorsement, Gallagher must undergo a background check and fingerprinting by the Transport Security Administration, as well as a written test. Several days before Gallagher was scheduled to take the test, the Department imposed the emergency rule.

54. Getting the hazmat endorsement will require Gallagher to get a new license. Rather than continuing a process that would require them to select their gender as M or F, Gallagher refrained from taking the test and raised the issue with their employer.

55. Gallagher’s work status is currently in limbo. The employer has provided a temporary exemption to allow them to continue driving without a hazmat endorsement as the company figures out what to do, but it is unclear how long this exemption will last.

56. Gallagher is currently on a probationary period and can be released from employment at any time. They have experienced increased anxiety knowing that it would be easy for the company to dismiss them rather than dealing with the difficulties of their situation. Gallagher is now hyperaware of all their conduct to ensure that the company has no grounds to dismiss them.

57. If the Department had not adopted the emergency rule, Gallagher would have taken the test for the hazmat endorsement and would have had a more secure work situation, without need for the temporary exemption. Moreover, Gallagher would have been spared many unwanted and stressful conversations at work about their gender necessitated by the new rule.

58. If the company declines to maintain the exemption from the requirement for a hazmat endorsement, Gallagher does not know what they will do. They will have to choose between keeping their current job or obtaining a driver's license that does not acknowledge their intersex status.

59. The emergency rule causes Gallagher harm in their business by hindering them from getting a hazmat endorsement that is a necessary element of their job.

60. The emergency rule causes Gallagher injury to their person in the form of increased stress from having to discuss their gender at work and from the prospect of losing their job.

61. The emergency rule forces Gallagher into a Hobson's choice. They can either obtain a driver's license that will injure them in their person as described above, or they can forego a driver's license and lose their current job, thus suffering injury to their business and property.

JaVon Hansen

62. JaVon Hansen is a transgender man. He has identified as male for approximately eight years.

63. Hansen obtained a court order changing his legal name in 2022.

64. Before he got his name changed, Hansen had an Arkansas driver's license that stated his gender as female. In April 2024, just before his old license was set to expire, Hansen got a new license with his new legal name. However, the Department's emergency rule prevented him from changing the gender marker on his license from female to male.

65. Hansen has not had a surgical sex change and thus cannot get the amended birth certificate needed under the emergency rule to change the gender marker on his driver's license.

66. If the Department had not adopted the emergency rule, Hansen would have changed his gender marker from F to M.

67. Forcing Hansen to maintain a driver's license that lists his gender as F when he identifies as male injures him in his person by subjecting him to increased anxiety and psychological distress.

68. Forcing Hansen to maintain a driver's license with a gender marker that does not conform to his social presentation threatens to injure him in his person by subjecting him to an increased risk of harassment, discrimination, and physical injury.

Kaden McIntosh

69. Kaden McIntosh is a nonbinary person. They have identified as nonbinary since 2020. They have been considering whether to change the gender markers on their identification documents for the past two years.

70. McIntosh has a current driver's license that states their gender as F. The Department issued this license in May 2020; it expires in May 2028.

71. In late February or early March of 2024, before the emergency rule passed, McIntosh determined that they were ready to change the gender marker on their identification documents to X.

72. Having made this determination, McIntosh, who was born in Colorado, began the process of changing the gender marker on their birth certificate to X. Colorado permits people to make this change by filling out a form and presenting that form with identification and a processing fee. McIntosh expects this process to be complete in the near future.

73. Because of the emergency rule, McIntosh is no longer able to get an Arkansas driver's license with a gender marker that matches their nonbinary gender identity or the X that will soon appear on their Colorado birth certificate.

74. Were McIntosh to try to update their license using their amended Colorado birth certificate, the emergency rule would require them to either select M or F as a gender marker or else forego a license altogether.

75. Forcing McIntosh to maintain a driver's license that lists their gender as F when they do not identify as female injures them in their person by subjecting them to increased anxiety and psychological distress.

Lydia Nelson

76. Lydia Nelson is a nonbinary person. They have identified as nonbinary for over twelve years.

77. Nelson does not drive and has always had a state-issued ID rather than a driver's license. They obtained a state-issued ID listing their gender as X in February 2020.

78. Nelson's ID expired on February 19, 2024. Were the emergency rule not in place, they would renew their state-issued ID and indicate their gender as X.

79. Nelson is now forced to choose between foregoing a state-issued ID or accepting an ID that does not reflect their gender identity.

80. Should Nelson forego a state-issued ID, they will not be able to prove identity in the many situations in which such proof is required. Absence of an ID threatens to injure Nelson in the many daily transactions in which a valid ID is required.

81. On the other hand, forcing Nelson to select either M or F as the gender marker on their license will injure them in their person by subjecting them to increased anxiety and psychological distress.

Haley Nicole Prentice

82. Haley Nicole Prentice is a transgender woman. She has identified as female for decades. She has consistently presented as a woman for a couple of years. As part of her transition, she began gender-affirming hormone therapy in September 2023.

83. Prentice obtained a court order changing her legal name on March 25, 2024.

84. Before she got her name changed, Prentice had an Arkansas driver's license that stated her gender as male.

85. On March 27, 2024, Prentice went to the DMV and asked to update the name and gender marker on her license. The DMV office issued a new license with her new name. However, it refused to change the gender marker from M to F.

86. Prentice has not had a surgical sex change and thus cannot get the amended birth certificate needed under the emergency rule to change the gender marker on her driver's license.

87. If the Department had not adopted the emergency rule, Prentice would have changed her gender marker from M to F.

88. Forcing Prentice to maintain a driver's license that lists her gender as M when she identifies as female injures her in her person by subjecting her to increased anxiety and psychological distress.

89. Forcing Prentice to maintain a driver's license with a gender marker that does not conform to her social presentation threatens to injure her in her person by subjecting her to an increased risk of harassment, discrimination, and physical injury.

CAUSE OF ACTION

COUNT ONE: DECLARATORY JUDGMENT UNDER ARK. CODE ANN. § 25-15-207

90. The previous paragraphs of this complaint are incorporated by reference as if fully stated herein.

91. Ark. Code Ann. § 25-15-207(a) provides: "The validity or applicability of a rule may be determined in an action for declaratory judgment if it is alleged that

the rule, or its threatened application, injures or threatens to injure the plaintiff in his or her person, business, or property.”

92. Had the Department not passed the emergency rule, Plaintiffs would have been able to obtain a current driver’s license with the gender marker that matches their gender identity. The inability to obtain and maintain such a license injures or threatens to injure Plaintiffs in their persons or business in the ways identified above.

93. The emergency rule is invalid because the Department did not “state[] in writing its reasons” for finding “that imminent peril to the public health, safety, or welfare or compliance with a federal law or regulation requires adoption of [the] rule upon less than thirty (30) days’ notice.” Ark. Code Ann. § 25-15-204(c)(1). The rule is invalid on this basis alone.

94. Moreover, insofar as the Department attempted or now attempts to articulate such reasons, the rule is invalid under Ark. Code Ann. § 25-15-204(c)(1) because there is neither an “imminent peril to the public health, safety or welfare” nor a need for “compliance with a federal law.”

RELIEF REQUESTED

95. The Court should provide the following relief:
- a. Issue a preliminary and permanent injunction that precludes the Department from enforcing the emergency rule and that requires it to revert to its pre-rule practice of permitting transgender, nonbinary, and intersex applicants to list their gender as M, F, or X upon request.

- b. Issue a declaratory judgment finding that the emergency rule violates Ark. Code Ann. § 25-15-204 and is invalid; and
- c. Provide any other necessary and proper relief.

Dated: April 30, 2024

Respectfully submitted,



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