

July 15, 2016

Captain Ken Brown  
Acting Director and Deputy Director Administration  
Mississippi Department of Public Safety  
Post Office Box 958  
Jackson, MS 39205

Re: Refusal to Provide Driver's License with Accurate Information to Qualified Applicant.

Captain Brown:

This letter seeks your cooperation to immediately remedy the unlawful denial of a renewal driver's license to a qualified applicant due to what appears to be blatant discrimination based on gender identity and/or immigration status. Dianne Ellis, of the Ellis Law Firm, PLLC, represents Mississippi resident Lauren Miller, who seeks: 1) assurance that she can enter a Mississippi Department of Public Safety (DPS) office without fear of reprisal, and 2) a renewed driver's license that accurately reflects her legal name and her gender. As the oldest and largest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender (LGBT) people, as well as people living with HIV, Lambda Legal has extensive experience with issues related to discrimination against transgender people and is consulting with the Ellis Law Firm in contemplation of co-counseling should litigation be required.

As set forth below, and without limitation, DPS's refusal to issue a renewed driver's license to Ms. Miller with her legal name and her accurate gender violates state and federal law.

**I. FACTUAL BACKGROUND**

Lauren Miller is a British citizen living in Mississippi with lawful permanent residency status. She has been seeking a Mississippi driver's license that accurately reflects her legal name and correct gender since 2013.

Ms. Miller is a transgender woman, meaning that her gender identity is female although she was assigned a male sex designation at birth by a doctor. In December 2013, Ms. Miller legally changed her name in the United Kingdom (UK) and received a Deed of Change of Name and Title (UK Legal Document). Based on a physician's letter providing sufficient proof of irreversible surgical gender procedures (Physician's Letter), she updated her UK passport to reflect her legal name and female gender. She thereafter sought updated U.S. identification documents. Although she successfully

updated her Social Security Administration (SSA) documentation with her correct name and gender, her Green Card was re-issued without the requested amendments.<sup>1</sup>

At the DPS office in Gautier, Mississippi, Ms. Miller personally requested an amended driver's license in 2013, and provided the DPS representative with her UK passport, SSA card, UK Legal Document and Physician's Letter. She was told that DPS would update her information only with a U.S. court order. In March 2016, after receiving a final judgment from Jackson County Mississippi Chancery Court ordering the name change (from Lee Christopher Miller to Lauren Christina Miller), Ms. Miller returned to the DPS office in Gautier to again request a renewed driver's license that accurately reflects her legal name and gender. She provided the Mississippi court order changing her name, her UK passport, her SSA card, her UK Legal Document and the Physician's Letter. Again, she was denied the requested changes. She also requested a renewed license with accurate information at the D'Iberville office. Her request was denied, although with a different justification.

Because Ms. Miller was given conflicting and confusing information regarding her ability to receive a license with accurate information, she telephoned DPS in Jackson to seek clarification of the requirements for a corrected license. Someone identifying himself as "Captain Kelly" told her that she needed to amend her UK birth certificate in order to have her driver's license amended—even though foreign birth certificates are not acceptable forms of ID to prove identity, including gender, under the REAL ID Act.<sup>2</sup>

Ms. Miller recently returned to the Gautier DPS office on or about May 16, 2016, and, again sought to renew her license. Despite the indignity and risks inherent in having a gender marker that does not match one's gender identity and expression, she requested a renewed license with, at a minimum, her legal name. She was recognized by the clerk who had twice previously refused to amend her license and was told that unless she had an updated Green Card, DPS would not provide any amendments to the license. In this encounter, as in all others, Ms. Miller was calm and respectful despite being treated disrespectfully by the clerk, who repeatedly used male pronouns to refer to her. The following day, Ms. Miller was contacted by Sergeant Pugh<sup>3</sup> by telephone who, without providing any legal basis, threatened her with arrest if she entered a DPS facility seeking an amended license.

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<sup>1</sup> Ms. Miller was unable to successfully "appeal" the failure of the issuing agency to provide an updated Green Card because she did not have a copy of the application and therefore could not prove that she had sought an updated card with her legal name. Because she intends to apply for citizenship, she does not intend to seek an updated Green Card.

<sup>2</sup> States that are compliant with REAL ID Act are required to set minimum standards to issue drivers licenses to verify citizenship, identity, residence, date of birth and social security account number. 2005, PL 109-13, May 11, 2005, 119 Stat 231. Sect. 202(1)(2). States may not accept a "foreign document, other than an official passport, to satisfy" these minimum requirements.

<sup>3</sup> Whereas no DPS directory is publicly available, the spelling of this name is phonetic.

## II. REFUSAL TO AMEND MS. MILLER'S DRIVER'S LICENSE IS UNLAWFUL

DPS is governed by, among other laws, the Highway Safety Patrol and Driver's License Law of 1938 (Driver's License Law) of Mississippi, which prohibits the denial of a license where the denial is: 1) unsupported by substantial evidence, 2) arbitrary and capricious, 3) beyond the agency's power, or 4) in violation of some statutory or constitutional right of the complainant. *See* Miss. Code. Ann. § 63-1-31 (2016); *Mississippi Comm'n on Env'tl. Quality v. Chickasaw Cty. Bd. of Sup'rs*, 621 So. 2d 1211, 1215 (Miss. 1993) (citations omitted). Because there is no evidence upon which to base its refusal to provide Ms. Miller with a license that reflects her legal name and accurate gender, and because doing so violates her constitutional rights, *see* Sec. III, *infra*, DPS is in violation of the Driver's License Law.

The only reference in Mississippi driver's license law and regulations to a "sex change" indicates that an amendment of one's gender marker is indeed possible. *See* Miss. Admin. Code 31-1:4.2. We have found no further publicly available information concerning amending a gender designation on a Mississippi driver's license. This office is currently in violation of the Mississippi Public Records Act, § 25-61-1 *et seq.*, in failing to respond to multiple requests for public documents on this subject sent by electronic mail from this office to M/Sgt. Wendell on May 20, 2016, and with a follow-up request sent by electronic mail to M/Sgt. Wendell, with copies sent by U.S. mail to you and Capt. Kelly, on June 6, 2016.<sup>4</sup>

With respect to changing the name of a licensee or applicant, the law is clear that a name is to be changed where the licensee or applicant provides "a birth certificate or other legal document."<sup>5</sup> Miss. Admin. Code 31-1:4.2; *see also* Miss. Code. Ann. § 63-1-19(3). Ms. Miller has repeatedly attempted to comply with these requirements by providing DPS, in person, a multitude of legal documents, including a final court order issued by a Mississippi court, reflecting her legal name. Yet DPS inexplicably refuses to comply with their obligation.

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<sup>4</sup> On June 14, 2016, a DPS representative responded by telephone assuring us that we would soon receive the requested records. No records have yet arrived. The undersigned are considering separate litigation regarding DPS's failure to comply with the Mississippi Public Records Act, but are hopeful that no litigation will be required. The Act sets out a procedure for compelling production through the Mississippi Ethics Commission, Miss. Code Ann. § 25-61-13, and makes individuals civilly liable for violating the Act by imposition of a financial penalty and liability for reasonable expenses incurred in bringing a procedure for compelling records. Miss. Code Ann. § 25-61-15.

<sup>5</sup> Indeed, "so long as a fraudulent purpose is not intended, adults are entitled to change their name without recourse to the courts or any statutory provision" under "the common law rule." Miss. A.G. Op'n, 2014 WL 1513529, at \*1-2 (Mar. 28, 2014) (opining that, in the case of marriages between same-sex couples prior to *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), "if a person otherwise complies with Section 63-1-9 and any other legal requirements and presents a 'certified copy' of another state's marriage license as required by statute, DPS should issue the license or reissue the license with the name change as requested").

An agency decision that is not based on substantial evidence is arbitrary and capricious, and thus unlawful. *Mississippi Transp. Comm'n v. Anson*, 879 So. 2d 958, 963 (Miss. 2004). There is no evidence to support refusal to issue Ms. Miller an accurate license.

### III. REFUSAL TO AMEND MS. MILLER'S DRIVER'S LICENSE IS UNCONSTITUTIONAL

The statutory and regulatory law is clear that a court order is acceptable proof of name change. Failure to provide Ms. Miller with a corrected driver's license that reflects her legal name violates her rights to equal protection by discriminating based on sex, gender identity or immigration status, and by violating her rights to freedom of expression and due process. See *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender"); *Graham v. Richardson*, 403 U.S. 365 (1971) (state legislation that treats resident "aliens" unequally must be subjected to "heightened" or "close judicial scrutiny"); *Ingraham v. Wright*, 525 F.2d 909, 916 (5th Cir. 1976), *aff'd*, 430 U.S. 651 (1977) ("Plaintiffs' right to substantive due process is. . . 'a guaranty against arbitrary legislation, demanding that the law not be unreasonable and that the means selected shall have a real and substantial relation to the object sought to be attained'") (citations omitted).

In addition, as a branch of the executive department, DPS may not refuse to honor a validly entered decree from the Mississippi courts without violating the separation of powers doctrine. See, e.g., *Thomas v. N. Carolina Dep't of Human Res.*, 478 S.E.2d 816, 823 (N.C. App. 1996), *aff'd*, 485 S.E.2d 295 (N.C. 1997) ("we hold that the separation of powers doctrine requires that the NCDHR and all other administrative agencies of the state give full effect to orders of this Court and acquiesce in the statutory and constitutional interpretations determined by this Court and by our Supreme Court"); *Mitchell v. Orr*, 268 Cal. App. 2d 813, 74 Cal. Rptr. 407 (Ct. App. 1969) (Department of Motor Vehicles is bound by court's writ of mandamus barring the Department from suspending a particular driver's license).

With respect to the refusal to permit a transgender person to correct the sex designation on his or her driver's license, or placing onerous burdens on doing so, such actions have been found to violate constitutionally protected rights. See *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL 2685183, at \*3 (Alaska Super. Ct. Mar. 12, 2012) (the absence of any procedure for changing the sex designation on an individual's license impermissibly infringes on the privacy rights of license holders under their state constitution's expansive right to privacy); *Love v. Johnson*, No. 15-11834, 2015 WL 7180471, at \*5 (E.D. Mich. Nov. 16, 2015)(holding that state's refusal to change sex marker on drivers' licenses without proof of surgery implicated the fundamental right to privacy and finding no compelling interest justified the policy).



#### IV. THREATENING ARREST FOR CONDUCTING LAWFUL BUSINESS ON GOVERNMENT PROPERTY IS UNCONSTITUTIONAL

Threatening Ms. Miller with arrest if she enters a DPS office to seek a renewed license is an abuse of governmental power and an unlawful exercise of authority implicating both the First and Fourth amendments. In *Florida v. Bostick*, the Supreme Court noted that law enforcement threats of arrest can violate the Fourth Amendment when, “taking into account all of the circumstances surrounding the encounter, the police conduct would ‘have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.’” 501 U.S. 429 (1991) (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)); see also *Vickroy v. City of Springfield*, 706 F.2d 853, 854 (7th Cir.1983) (threat of arrest if person does not identify himself to police officers constitutes a seizure under the Fourth Amendment). Moreover, the threat of arrest itself acts to chill and suppress Ms. Miller’s expression and speech and therefore acts as an unlawful prior restraint. The Supreme Court has often noted that a realistic threat of arrest is enough to chill First Amendment rights. *City of Houston, Texas v. Hill*, 482 U.S. 451, 459, n. 7 (1987); *Steffel v. Thompson*, 415 U.S. 452, 462 (1974); *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (“When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.”).

#### CONCLUSION

As set forth above, without limitation, the refusal to issue a renewal license to Ms. Miller and threatening her with arrest for seeking the same violates state and federal law. Accordingly, in order to avoid litigation, please advise us within 10 days and no later than July 28, 2016 as to whether you will ensure that Ms. Miller may:

- 1) Enter a DPS office to seek a renewal license without fear of arrest or other retaliation for her lawful activities;
- 2) Be provided a renewal driver’s license that accurately reflects her legal name, upon provision of the Mississippi court order; and
- 3) Be provided a renewal driver’s license that accurately reflects her female gender, upon provision of a valid passport, SSA card and Physician’s Letter affirming irreversible gender surgery.

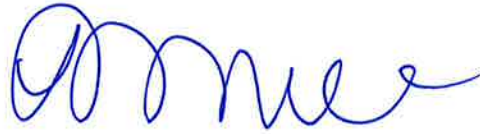
If the answer to any of the above questions is in the negative, please provide us with the statutory, regulatory or other bases upon which you rely in denying the requested relief. As you may be aware, the costs of litigation, including attorneys’ fees, may be borne by the losing party, pursuant to 42 U.S.C. § 1988(a), (b) & (c) and Miss. R.C.P. 54(d).

Please do not hesitate to contact us with any questions.

Respectfully yours,



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