

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of

JONES DAVID HOLLISTER,

Petitioner-Appellant.

Lane County Circuit
Court No. 19CV20980

CA A171609

AMICUS BRIEF OF THE STATE OF OREGON

Appeal from the Judgment of the Circuit Court for Lane County
Honorable CHARLES CARLSON, Judge

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American Psychological Association (APA), Gender and Sexual Orientation Diversity in Children and Adolescents in Schools, Definitions and Limitations Language, https://www.apa.org/pi/lgbt/resources/diversity-schools?item=3	7
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Sandy E. James *et al.*, Nat’l Center for Transgender Equality,
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BRIEF OF THE STATE OF OREGON AS *AMICUS CURIAE*

INTRODUCTION

Circuit courts in Oregon “may order a legal change of sex and enter a judgment indicating the change of sex” if an individual submits a petition and “attests that the individual has undergone surgical, hormonal or other treatment appropriate for the individual for the purpose of affirming gender identity.” ORS 33.460(1). Petitioner, who identifies using the gender-neutral pronoun “they,” submitted a petition for change of sex from female to nonbinary. In doing so, petitioner attested that they had undergone appropriate treatment to affirm their gender identity, which is nonbinary.¹

Although the trial court recognized that petitioner identifies as nonbinary, the court ruled that it could not recognize a nonbinary sex designation that would accurately reflect petitioner’s gender identity. Instead, the court concluded, it could only recognize a sex designation of male or female. On appeal, petitioner argues that ORS 33.460(1), properly construed, authorizes a nonbinary sex designation. And petitioner contends that this court should read the statute that way because any other reading would present constitutional concerns.

¹ Consistent with petitioner’s practice, this brief uses “they” (and its derivative forms) as a singular, gender-neutral pronoun.

The State of Oregon submits this *amicus curiae* brief to aid this court in construing ORS 33.460.² Analysis of the statute’s text, context, and legislative history shows that the legislature intended to authorize a change of sex to affirm a person’s gender identity, whether male, female, or nonbinary. The trial court was mistaken that ORS 33.460(1) conditions a change of sex on a person’s affirmation of gender identity yet does not permit a change of sex to accurately reflect it. Accordingly, this court should reverse and remand the trial court’s judgment.

BACKGROUND

There was no dispute in the trial court that petitioner met the statutory requirements for a “legal change of sex” under ORS 33.460(1). Petitioner, who is nonbinary, attested to engaging in “treatment appropriate for me for the purpose of affirming my gender identity.” (TCF at 3). The trial court acknowledged that the attestation was sufficient under ORS 33.460(1) and that petitioner’s gender identity was “nonbinary,” meaning that petitioner did not “identify as either a male or female.” (ER 30).

The trial court also recognized that the process for a “legal change of sex” in ORS 33.460(1) is closely related to the process for amendment of an

² ORAP 8.15(9) authorizes the State of Oregon to “appear as *amicus curiae* in any case in the Supreme Court and Court of Appeals without permission of the court.”

Oregon birth certificate under ORS 432.235. (ER 30). The legislature substantially revised both statutes in the same bill, House Bill 2673 (2017), to authorize changes to sex designations based on an applicant's affirmation of gender identity:

- An applicant can obtain a court order for “a legal change of sex” by “attest[ing] that the individual has undergone surgical, hormonal or other treatment appropriate for the individual *for the purpose of affirming gender identity.*” ORS 33.460(1) (emphasis added).
- An applicant can “change the sex” listed on an Oregon birth certificate by presenting a court ordered change of sex, or by submitting an administrative request directly to the state registrar in which “the applicant attests * * * *to making the request for the purpose of affirming the applicant's gender identity.*” ORS 432.235(3)(b)(B)(ii) (emphasis added).

As the trial court further recognized (ER 30), applicants using the administrative process can change the sex listed on an Oregon birth certificate to nonbinary. *See* OAR 333-011-0272 (providing requirements for applications for change of sex); <https://www.oregon.gov/oha/PH/BIRTHDEATH/CERTIFICATES/CHANGEVITALRECORDS/Documents/OHA-2673.pdf> (accessed Nov 5, 2019) (providing application for change of sex to “X (Non-

binary)”).³ In that respect, the “sex” designations on Oregon birth records are the same as those available on Oregon driver licenses. As a result of rulemaking occurring while the legislature was considering House Bill 2673 (2017), any person who holds an Oregon driver license or state identification card is eligible to have their “sex” listed as “X.” *See* OAR 735-062-0013(3)(c) (allowing “[s]ex” to be displayed as M, F, or X).

Petitioner, who does not hold an Oregon birth certificate, sought a legal change of sex under ORS 33.460 so that they did not have to “go through life with this sort of dual presentation,” where they would be left to guess how “to mark their [sex] designation for such things as insurance applications” or other government documents. (ER 17). Petitioner noted that they could obtain a nonbinary sex designation on their Oregon driver license, but explained that the license alone did not amount to a “legal designation” reflecting petitioner’s nonbinary identity for all purposes. (ER 20).

Ultimately, the trial court concluded that it could not order a change of sex to anything other than male or female. The court reasoned that ORS 33.460 “says ‘sex change’”; that “traditionally,” sex “has been two choices”; and that there is a “distinction between sex and gender.” (ER 16, 19). The court concluded that, regardless of petitioner’s gender identity, the legislature

³ All websites cited in this brief were accessed November 5, 2019.

intended that “sex” must mean either “male” or “female,” and did not intend for ORS 33.460 to permit a change of sex to recognize petitioner’s nonbinary gender identity. (ER 31–32). Based on that understanding, the court denied petitioner’s request.

ARGUMENT

When a person petitions for a “legal change of sex” under ORS 33.460, a trial court has authority to affirm the nonbinary gender identity of that person by ordering a change of sex to nonbinary. The trial court’s contrary conclusion cannot be squared with the statutory text, context, or legislative history. *See State v. Gaines*, 346 Or 160, 170–73, 206 P3d 1042 (2009) (directing that “text and context” are “primary” in determining legislative intent, while legislative history is considered “for whatever it is worth”).

As a matter of text, ORS 33.460(1) makes plain that a person’s “gender identity”—a term universally understood to reflect male, female, or nonbinary designations—is determinative of their “sex.” Context confirms that understanding: With its most recent amendment to ORS 33.460, the legislature rejected the view, reflected in versions of the statute enacted decades before, that sex is a binary conception determined by anatomy or physical characteristics. The legislature has now made clear that a court-ordered change of sex should reflect an applicant’s gender identity—male, female, or nonbinary—just as Oregon birth certificates and driver licenses now do.

Finally, legislative history shows that the legislature sought to ensure that *all* transgender, gender-diverse, and gender non-conforming Oregonians—including those who identify as nonbinary—can obtain documentation that accurately reflects their gender identity.

A. As a matter of text and context, ORS 33.460 permits a trial court to order a legal change of sex to “nonbinary.”

The text of ORS 33.460, in context, is the best evidence of what the legislature intended. *State v. Walker*, 356 Or 4, 13, 333 P3d 322 (2014). As explained below, a review of text and context shows that the legislature intended to allow a court to order a change of sex to reflect an applicant’s gender identity, whether male, female, or nonbinary.

1. By allowing a change in “sex” to affirm a person’s “gender identity,” the legislature authorized courts to recognize a nonbinary sex designation.

ORS 33.460(1) authorizes a court to order a legal change of sex “if the individual attests that the individual has undergone surgical, hormonal or other treatment appropriate for the individual *for the purpose of affirming gender identity.*” (Emphasis added). With that text, the legislature explicitly recognized that the individual’s legal sex should accurately reflect the individual’s “gender identity.” Accordingly, the legislature made clear that it intended to recognize a nonbinary sex designation.

That is because the term “gender identity” describes a person’s “internal sense of being male, female, some combination of male and female, or neither

male nor female.” *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/gender%20identity>. As a matter of common usage, the term “gender identity” includes those who identify as male or female and those who do not.⁴ And as used in Oregon statutes and administrative rules, the term “gender identity” has the same meaning.⁵

⁴ See American Psychological Association (APA), *Gender and Sexual Orientation Diversity in Children and Adolescents in Schools, Definitions and Limitations Language*, <https://www.apa.org/pi/lgbt/resources/diversity-schools?item=3> (citing 2011 APA source defining “gender identity” as “one’s sense of oneself as male, female, or something else”); see also *Definitions Related to Sexual Orientation and Gender Diversity in APA Documents*, <https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf> (providing similar definitions of “gender identity” in APA documents); Robin Marantz Henig, *How Science is Helping Us Understand Gender*, *Nat’l Geographic* (Jan 2017), <http://www.nationalgeographic.com/magazine/2017/01/how-science-helps-us-understand-gender-identity/> (defining “gender identity” as a “deeply felt sense of being a man, woman, or a gender that is both, fluid, or neither”; explaining that “[c]isgender people identify with the sex assigned at birth; transgender people don’t”); GLAAD Media Reference Guide 11 (10th ed. 2016), <https://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf> (defining “gender identity” as a person’s “internal, deeply held sense of their gender” and explaining that “gender identity” includes “man or woman” and “non-binary and/or genderqueer,” meaning a person who “does not fit neatly into one of those two choices”); <https://www.dictionary.com/browse/gender-identity#> (defining “gender identity” as “a person’s inner sense of being male or female,” while explaining that a person’s “general identity may continue to evolve over time and may diverge from the male/female gender division”).

⁵ See, e.g., OAR 839-005-0003(9) (As used in ORS Chapter 659A, which prohibits discrimination on the basis of gender identity, “gender identity” means “an individual’s gender-related identity, whether or not that identity is different from that traditionally associated with the individual’s assigned sex at birth, including, but not limited to, a gender identity that is transgender or

For many, the label of “male” or “female” provides an accurate reflection of gender identity. That is true for those who identify as the same gender as that assigned at birth (cisgender), just as it is for those whose identity differs from the gender assigned at birth (transgender).⁶ But many individuals have a “gender identity that is neither entirely male nor entirely female,” meaning that their gender identity is nonbinary. See *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/nonbinary> (defining “nonbinary”). Indeed, hundreds of thousands of people throughout the United States, and thousands within Oregon, identify as nonbinary.⁷

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androgynous.”); OAR 416-435-0020(5) (defining gender identity under Oregon Youth Authority rules as “a person’s internal, deeply felt sense of being male, female, or non-binary”); OAR 581-022-2050(1)(h) (defining “gender identity” under Oregon Department of Education rules as “a person’s internal sense of being male, female or some other gender, regardless of whether the individual’s appearance, expression or behavior differs from that traditionally associated with the individual’s sex assigned at birth”); OAR 291-210-0020(3) (defining “gender identity” under Department of Corrections rules as “a person’s internal, deeply felt sense of being male, female or something else”).

⁶ See *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/transgender> (defining “transgender” as “of, relating to, or being a person whose gender identity differs from the sex the person had or was identified as having at birth”); *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/cisgender> (defining “cisgender” as “of, relating to, or being a person whose gender identity corresponds with the sex the person had or was identified as having at birth”).

⁷ The national numbers are drawn from surveys published in 2016. See Andrew R. Flores *et al.*, Williams Institute (UCLA), *How Many Adults Identify as Transgender in the United States* (2016),

Footnote continued...

ORS 33.460(1) recognizes that basic fact by authorizing a legal change of sex to reflect a person’s gender identity, regardless of how that person might be categorized in terms of physical, hormonal, or biological traits. To be sure, those traits—and how they correspond to ideas of who is “male” and “female”—may determine the sex or gender a person is *assigned* at birth. See Amanda Montañez, *Beyond XX and XY: The Extraordinary Complexity of Sex Determination*, *Scientific American* 50–51 (Sept 2017), available at <https://www.scientificamerican.com/article/beyond-xx-and-xy-the-extraordinary-complexity-of-sex-determination/> (“Humans are socially conditioned to view sex and gender as binary attributes. From the moment we are born—or even before—we are definitively labeled ‘boy’ or ‘girl.’”).

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<https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>, at 3 (1.4 million, or 0.6%, of U.S. adults identify as transgender); Sandy E. James *et al.*, Nat’l Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>, at 45 & Fig. 4.2 (35% of adult transgender population identifies as nonbinary). Because not all nonbinary individuals identify as transgender, the number of nonbinary individuals within the United States is almost certainly higher than the number drawn from these surveys.

As for Oregon, over 4,000 individuals with Oregon driver licenses or state identification cards now have a nonbinary sex designation of “X.” Again, the number of nonbinary individuals in Oregon is likely higher than the number of those who have already obtained licenses or state identification cards with nonbinary designations.

But ORS 33.460(1) recognizes that an individual may come to understand that their *assigned* sex or gender does not accurately reflect the individual's gender identity. *See* American Psychological Association (APA) Guidelines for Psychological Practice with Transgender and Gender Nonconforming People (Dec 2015), <https://www.apa.org/practice/guidelines/transgender.pdf> (“Psychologists understand that gender is a nonbinary construct that allows for a range of gender identities and that a person’s gender identity may not align with sex assigned at birth”). And for purposes of ORS 33.460(1), “gender identity” is determinative.

Put simply, under ORS 33.460(1), a person’s legal sex should match their gender identity. And for those whose gender identity is nonbinary, all that ORS 33.460(1) requires is a simple statement to the court: “I am nonbinary, and I have undergone treatment to affirm that fact.” Once that requirement is satisfied, ORS 33.460(1) authorizes the trial court, in turn, to order a change of sex to nonbinary.

2. A comparison of the current version of ORS 33.460 to its prior versions shows that the legislature discarded the notion that sex is a binary concept determined only by physical or biological traits.

By conditioning a change of sex under ORS 33.460 on a petitioner’s affirmation of their “gender identity,” the legislature has abandoned the view that “sex” is a binary concept that depends on biological or physical

characteristics. A comparison of the current version of ORS 33.460 to earlier versions of the statute confirms as much. *See In re Marriage of Harris*, 349 Or 393, 402, 244 P3d 801 (2010) (“[T]he context of a statutory provision, including its prior versions, is helpful in determining [the statute’s] reach.”). Indeed, since the legislature first enacted ORS 33.460 in 1981, it has moved away from a binary conception of sex as determined by anatomy or physical characteristics to endorse the view that a person’s sex should reflect a person’s innate sense of gender—whether male, female, or nonbinary.

The legislature first enacted a provision for a “legal change of sex” in 1981. The legislature provided that a court could order a change of sex only for “a person whose sex has been changed by surgical procedure.” Or Laws 1981, ch 221, § 1. The statutory text thus reflected an understanding of sex as related to physical characteristics associated with being male or female, and it authorized a change of sex only when an individual took steps to alter those characteristics surgically. *See Lisa Mottet, Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 Mich. J. Gender & L. 373, 405 (2013) (“In the middle of the twentieth century, the medical community’s viewpoint, developed by a small set of early practitioners, was that genital surgery was the successful culmination of a person’s treatment and gender transition.”).

In 2013, the legislature took a significant first step in moving away from a conception of “sex” as determined solely by whether a person had “male” or “female” physical characteristics. The legislature amended ORS 33.460 to permit a change of sex when a trial court found “that the individual has undergone surgical, hormonal or other treatment appropriate for that individual for the purpose of gender transition and that sexual reassignment has been completed.” Or Laws 2013, ch 366, § 52. The legislature thus recognized that an individual “may not undergo hormonal or surgical treatment” to obtain a change of sex and that, instead, any treatment for the purpose of “gender transition” was sufficient. Mottet, 19 Mich. J. Gender & L. at 403 (analyzing nearly identical statutory text). Yet, at the same time, the legislature imposed a requirement that the trial court find that a person’s “sexual reassignment” was “complete” before ordering a legal change of sex. Or Laws 2013, ch 366, § 52. The legislature thus did not definitively resolve whether an individual who identified as nonbinary could obtain a change of sex based on that gender identity.

In 2017, the legislature did resolve that question, requiring only that a person confirm treatment “for the purpose of affirming gender identity.” Or Laws 2017, ch 100, § 3. The legislature eliminated any requirement concerning “sexual reassignment.” And the legislature abandoned a requirement that the trial court find that the “reassignment” was “complete.” In

fact, the legislature eliminated any requirement for specific findings; a change of sex is now authorized once a person attests that they have taken steps to affirm their gender identity.

The history of ORS 33.460 thus confirms what the current text provides: A change of sex is intended to affirm a person’s gender identity, without regard to whether the person possesses certain “male” or “female” physical or biological characteristics. To be sure, “sex” can be understood as a binary concept determined by a person’s genitalia and other physical characteristics. *See Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/sex> (defining “sex” as “either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures”). But the history of ORS 33.460 shows that the legislature abandoned that narrow conception of “sex” and what is required to change one’s sex. Now, under ORS 33.460, a person’s gender identity—whether male, female, or nonbinary—controls.

3. Related provisions governing how a person’s “sex” is described on state documents recognize a nonbinary sex designation.

Like the earlier versions of ORS 33.460 reviewed above, related statutory and administrative provisions confirm that the legislature intended to recognize a change of sex to affirm an individual’s nonbinary gender identity. *See, e.g.,*

State v. Klein, 352 Or 302, 309, 283 P3d 350 (2012) (a statute’s context includes “related statutes”). In particular, two provisions governing “sex” designations on government documents confirm that “sex” includes a nonbinary designation.

The first of those, ORS 432.235, provides a process by which a person born in Oregon can amend a birth certificate. An applicant can either obtain a court order “changing the sex of the applicant” under ORS 33.460, or an applicant can submit an administrative request directly to the state registrar, in which “the applicant attests, as prescribed by the state registrar by rule, *to making the request for the purpose of affirming the applicant’s gender identity.*” ORS 432.235(3)(b) (emphasis added). Under the latter process, an applicant must “affirm before a notary that the change is requested because the sex currently appearing on the record of live birth *is different than the registrant’s gender identity* and the sex designation requested *supports the registrant’s gender identity.*” OAR 333-011-0272(3)(d) (emphasis added). The “form prescribed by the state registrar” for a change of sex request, ORS 432.235(3)(b)(B), permits a change of sex to reflect the applicant’s gender identify of male, female, or nonbinary.⁸

⁸ See <https://www.oregon.gov/oha/PH/BIRTHDEATH/CERTIFICATES/CHANGEVITALRECORDS/Documents/OHA-2673.pdf>.

As noted above, the text of ORS 432.235 mirrors the text of ORS 33.460(1) and finds its source in the same legislation. *See* HB 2673 (2017). Both provisions directly link a change of sex, whether on a birth certificate or on a court order, to an applicant’s gender identity. Although the trial court recognized that individuals with Oregon birth certificates could obtain a change of sex to nonbinary, it appeared to suggest that ORS 33.460 was different because it used the “generic” phrase “change of sex” and did not use the term “gender.” (ER 30–31). But both ORS 432.235 and ORS 33.460 permit a “change” of “sex” to accurately reflect an applicant’s “gender identity.” The trial court’s construction of ORS 33.460 puts the statute at odds with the administrative process available under ORS 432.235. The correct understanding of ORS 33.460, consistent with text and context, is that an individual’s legal sex should match their gender identity.⁹

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The form developed by the Oregon Judicial Department for a court-ordered change of sex likewise allows for a change of sex to “nonbinary.” *See* [https://www.courts.oregon.gov/forms/Documents/Name%20and%20Sex%20Change%20Packet%20\(Adult\).pdf](https://www.courts.oregon.gov/forms/Documents/Name%20and%20Sex%20Change%20Packet%20(Adult).pdf).

⁹ The trial court’s construction of ORS 33.460 would lead to an anomalous result that an individual can change their sex to nonbinary on an Oregon birth certificate through an administrative application to the state registrar but cannot do so by presenting a court ordered change of sex to the registrar. *See* ORS 432.235(3)(b) (allowing for change of sex on birth certificate through either procedure).

That understanding of 33.460 is also consistent with administrative rules governing state driver licenses and identification cards. At the same time the legislature was amending ORS 33.460 and related statutes, the Oregon Department of Transportation—in consultation with the Oregon State Police, Oregon Judicial Department, Oregon Secretary of State, and other state agencies—engaged in rulemaking to add a nonbinary sex designation to Oregon licenses. *See* OAR 735-062-0013 (2017) (effective July 1, 2017), *see, e.g.*, Oregon Department of Transportation, Rule Advisory Committee on Non-Binary Licensing and Identification Meeting Minutes (Oct. 17, 2016). An application for a driver license or identification card may now list their “[s]ex” as “X,” the same nonbinary designation allowed on Oregon birth certificates. OAR 735-062-0013(3)(c). That provision, too, shows that the trial court was mistaken in concluding that a “sex” designation cannot accurately reflect a person’s gender identity and can only identify the individual as “male” or “female.” (ER 31).

Indeed, the provisions above show that in Oregon, processing identifications and government documents with nonbinary sex designations is now the regular business of public and private institutions. Even if “sex” has in the past been “traditionally” understood as reflecting “two choices”—“male” or “female” (ER 16)—that is not true of the current statutory and administrative provisions governing legal sex designations. In accord with those provisions,

ORS 33.460 recognizes a nonbinary sex designation to accurately reflect an individual's nonbinary gender identity.

B. The legislative history of ORS 33.460 confirms that the legislature intended to permit courts to recognize a nonbinary sex designation.

As the final step in its interpretive methodology, this court may consider the legislative history of ORS 33.460 to the extent that history “appears useful to the court’s analysis.” *Gaines*, 346 Or at 172. As noted, the version of ORS 33.460 currently in effect originated in House Bill 2673 (2017). In three ways, the legislative history of that bill confirms that the legislature intended to permit a change of sex to nonbinary.

First, the legislative history reflects that, consistent with the statutory text, the legislature intended to enact a bill that would affirm the gender identity of those who apply for a change of sex. For example, the measure summary for HB 2673 describes that “the purpose of the request” for a change of sex “is to affirm the applicant’s gender identity.” Staff Measure Summary, Senate Committee on Judiciary, HB 2673, May 4, 2017

. Throughout the legislative process, legislators and commenters made clear that they viewed the bill as enabling applicants to obtain documentation to accurately reflect their gender identity.¹⁰

¹⁰ See, e.g., Exhibit 29, Senate Committee on Judiciary, HB 2673, May 3, 2017 (statement of Senator Hayward) (explaining that the bill “creates the option of an administrative process for updating one’s name and gender

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Second, and contrary to the trial court’s understanding (ER 31), the legislature did not distinguish between “sex” (as a binary male-female construct) and “gender” or “gender identity” (as a construct that recognizes nonbinary individuals). In fact, legislators and witnesses most often used the term “gender” without any mention of “sex.” *See, e.g.*, Exhibit 15, House Committee on Health Care, HB 2673, Feb 27, 2017 (statement of Amy Penkin, Program Supervisor, OHSU Transgender Health Program) (referring to “gender marker amendment” and “gender identifications that are affirming to one’s gender identity”); Audio Recording, House Committee on Health Care, HB 2673, Feb 27, 2017 at 40:00 (statement of Rep Williamson) (referencing gender identity).

(...continued)

identity”); Exhibit 27, Senate Committee on Judiciary, HB 2673, May 3, 2017 (statement of Lotus Rising Project) (“The economic and social hardships involved in obtaining name and gender identity confirming documents compromise the immediate and long-term health, safety, and economic security of trans and gender nonconforming community members.”); Audio Recording, House Committee on Health Care, HB 2673, Feb 27, 2017 at 56:10 (comments of Erica Wegener, Transgender Services Coordinator for Outside In) (“I am here to voice support for HB 2673 which would remove several barriers to identity change for thousands of transgender and gender non-conforming Oregonians.”); Floor Letter, House Chamber, March 14, 2017 (statement of American Civil Liberties Union of Oregon submitted by Rep Williamson) (explaining that HB 2673 would improve processes for people to obtain records to “accurately reflect their gender identity” and would help “individuals with identity documents that do not match their gender identity”); Floor Letter, House Chamber, March 16, 2017 (statement of Call to Safety submitted by Rep Lininger) (supporting HB 2673 to improve “the process of updating personal information to reflect gender identity”).

Third, the statements of witnesses and others make plain that the bill was intended to serve, without exclusion, transgender individuals, gender-nonconforming individuals, and gender-diverse individuals. *See* Audio Recording, House Committee on Health Care, HB 2673, Feb 27, 2017 at 56:10 (comments of Oblio Stroyman) (supporting the bill as a way to improve the “process for trans/*gender diverse* people” (emphasis added)); Audio Recording, Senate Committee on Judiciary, HB 2673, May 3, 2017 at 1:04:30 (comments of Margot Presley) (“The OHSU transgender health program, launched in January 2015, provides safe, comprehensive, affirming health care for the transgender and *gender-expansive* communities.” (Emphasis added).); Audio Recording, House Committee on Health Care, HB 2673, Feb 27, 2017 at 54:20 (“I urge you to approve HB 2673A, knowing that you will make transgender and *gender nonconforming* Oregonians safer and improve our quality of life, which benefits all of Oregon.”). Nothing in the legislative history shows that the legislature intended to affirm the gender identity of only those who identify as strictly “male” or “female.”

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In sum, the legislative history shows that the legislature intended to enable individuals to obtain a court-ordered change of sex, or use an administrative process, to reflect their gender identity. And the legislature did not intend to exclude those, like petitioner, who identify as nonbinary.¹¹

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¹¹ In this court, petitioner repeats an argument presented to the trial court—that ORS 33.460 should be read as petitioner advocates because a contrary reading would present constitutional problems. (App Br 33, arguing that this court should “interpret [ORS 33.460] to avoid those constitutional questions”; ER 10–13, same). That is, petitioner invokes the canon of constitutional avoidance. *See, e.g., Westwood Homeowners Ass’n v. Lane County*, 318 Or 146, 160, 864 P2d 350 (1993) (rejecting proposed interpretation that “arguably would infringe on the constitutional rights” of parties), *adhered to as modified on reconsideration*, 318 Or 327, 866 P2d 463 (1994). In addition, in parts of the opening brief, petitioner describes their argument as an as-applied constitutional challenge to ORS 33.460. (App Br 2, 28).

This court need not consider either argument. This court need not apply the constitutional avoidance canon because the legislature’s intent to recognize a nonbinary sex designation is clear from the text, context, and legislative history of ORS 33.460. *See Westwood Homeowners Ass’n*, 318 Or at 160 (considering constitutional avoidance canon when meaning of statute is unclear after considering text, context, and legislative history). Assuming that petitioner is raising a direct constitutional challenge to ORS 33.460—and assuming that a constitutional challenge is properly before this court—this court need not consider it for the same reason: ORS 33.460 provides for a nonbinary designation.

CONCLUSION

For all the reasons set out above, ORS 33.460(1) authorized the trial court to order a legal change of sex to nonbinary to reflect petitioner's nonbinary gender identity. The court erred in concluding that it could not do so. Accordingly, this court should reverse the trial court's judgment.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on November 8, 2019, I directed the original Brief of the State of Oregon as *Amicus Curiae* to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Lorena M. Reynolds, attorney for appellant, and Sarah Kobak, attorney for *Amici Curiae* American Civil Liberties Union of Oregon Inc. and Basic Rights Oregon, Incorporated, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(1)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(a)) is 4,723 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(3)(b).

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