No Oral Argument Requested

Cal. No. 09-227
Civil Court, New York County Clerk's Index No. NC-000381-09/NY

New York Supreme Court
Appellate Term—First Department

In the Matter of the Application of LEAH URI WINN-RITZENBERG
for Leave to Change His/Her Name To OLIN YURI WINN-RITZENBERG,

Petitioner-Appellant.

BRIEF FOR *AMICI CURIAE* ELIZABETH COOPER, SUZANNE B. GOLDBERG, ZACHARY A. KRAMER, SYLVIA A. LAW, & DEAN SPADE

MAEVE O'CONNOR
ANDREW GILDEN
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000

- and –

HAYLEY GORENBERG
COLE THALER
LAMBDA LEGAL DEFENSE &
EDUCATION FUND, INC.
120 Wall Street
Suite 1500
New York, NY 10005
(212) 809-8585

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND CONSTITUTIONS

OTHER AUTHORITIES

Statement of Interest of Amici

Elizabeth Cooper is an Associate Professor at Fordham University School of Law, where she also is the Faculty Director of the Feerick Center for Social Justice. She was the Reporter of the REPORT OF THE NEW YORK STATE BAR ASSOCIATION'S COMMITTEE ON THE LEGAL RIGHTS OF SAME SEX COUPLES (2009) and the Co-reporter of the N.Y. State Bar Association's REPORT AND RECOMMENDATION ON MARRIAGE RIGHTS FOR SAME-SEX COUPLES (2009). She has long been an advocate for gay, lesbian, bisexual and transgender (GLBT) rights.

Suzanne B. Goldberg is the founder and director of the Sexuality & Gender Law Clinic and a Clinical Professor at Columbia Law School. Through the Clinic and in her own work, she has written extensively about sexuality and gender law and has worked on many cases and other matters involving the rights of transgender individuals.

Zachary A. Kramer is an Assistant Professor of Law at Penn State University whose scholarly work focuses on the legal regulation of intimate life. In addition to earlier works on same-sex marriage, work/family balance, and heterosexuality discrimination, his current scholarly project explores the changing nature of transgender legal identity under American antidiscrimination law. He is particularly interested in the ways in which the law responds to legal assertions of transgender identity.

Sylvia A. Law is the Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry at New York University Law School. For 35 years she has taught health law, constitutional law, and family law and published many books and articles in these areas. In 1984 she became the first law professor to win a McArthur Prize Fellowship. She has written extensively on civil

rights in the health care context, and on constitutional issues related to sexual orientation and GLBT people.

Dean Spade is an Assistant Professor of Law at Seattle University whose research focuses on issues of gender and identity verification in law. His recent research has examined the varying ability of transgender people to change their names and gender markers on legal documents as well as consequences in terms of access to employment, social services, and various other necessities. After representing a client who had been denied a name change by the New York County Civil Court in 2003, Judge Debra Samuels invited him to train Civil Court judges on issues related to transgender people because she believed that many might be operating under misunderstandings when addressing transgender name change petitions.

Preliminary Statement

The Civil Court imposed a medical certification requirement on Appellant's name change, simply because Appellant is transgender[1] and seeks a name more consistent with his male identity. This additional evidentiary burden is wholly unsupported by New York's name change statutes and raises a host of constitutional concerns. Even though this Court can easily avoid constitutional entanglement based on the plain language of the name change statutes, *amici* encourage the court also to keep in mind the significant constitutional ramifications involved in imposing unique burdens only on those who are transgender.

[1] The New York City Commission on Human Rights provides that "transgender" refers to individuals "whose gender self-image and presentation do not fully accord with the legal sex assigned to them at birth." N.Y. CITY COMM'N ON HUMAN RIGHTS, GUIDELINES REGARDING GENDER IDENTITY DISCRIMINATION: A FORM OF GENDER DISCRIMINATION PROHIBITED BY THE NEW YORK CITY HUMAN RIGHTS LAW (2006). Pursuant to this definition, a transgender man is someone who was assigned the female sex at birth, but identifies and lives as a man. A transgender woman was assigned the male sex at birth, but identifies and lives as a woman.

New York law provides that courts *shall* grant a name change to any petitioner who—like Appellant – has affirmed that he does not seek to avoid law enforcement, creditors, or dependents, and meets all other statutory requirements. People change their names for a multitude of reasons without having to provide certification from doctors, clergy, or any other source, and there is no exception in the law triggering a separate, more demanding standard for transgender people. The Civil Court's decision should be reversed on that basis. Although the process of gender transition sometimes includes medical interventions like hormone therapy and surgeries, such treatment modalities are not a necessary component of each person's transition, and many transgender people make the profoundly personal choice of taking on a new name without consulting a health care professional.[2]

The medical certification requirement was apparently based upon the Civil Court's view that Appellant's preferred name was inappropriately masculine in light of his birth-assigned sex. This sex stereotyping runs afoul of federal and state constitutional equal protection guarantees. Moreover, singling out name change petitioners who are transitioning from one sex to another with an additional evidentiary burden is sex discrimination in the same way that singling out religious converts would be religious discrimination. New York courts have disavowed antiquated cases imposing an "American standard" on religious name changes, and they should

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[2] Gender transition (which often includes name change) is an individualized process that involves bringing one's external and social self into alignment with one's fundamental male or female gender identity. Internationally accepted medical standards of care for individuals undergoing gender transition emphasize that transition is an individualized process and that counseling is not necessary before living consistently with one's gender identity. *See* WORLD PROF'L ASS'N FOR TRANSGENDER HEALTH, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 11 (6th version 2001), *available at* http://www.wpath.org/publications_standards.cfm ("Not every adult gender patient requires psychotherapy in order to proceed with" gender transition, including living full-time as the other sex).

similarly refuse to enforce traditional gender norms through disparate application of the name change statutes. Although the medical certification requirement is vulnerable under any level of constitutional scrutiny, classifications based on gender identity are well-suited for heightened scrutiny.

Additionally, federal and state due process provisions protect individuals' autonomy regarding deeply personal matters including intimacy, beliefs, and self-expression. Central to this constitutionally-protected autonomy of self is the ability to live with integrity and dignity, which includes making the profoundly personal choice of a name that is consistent with one's gender identity. The Civil Court interfered with this liberty interest by requiring medical intervention where it was unwarranted, unnecessary and unauthorized.

In light of these considerations, the Civil Court's denial of Appellant's name change should be reversed and Appellant's petition should be granted.

Statement of Facts

On February 18, 2009, Appellant, a 26-year-old transgender man, filed a petition with the New York County Civil Court to change his legal name from Leah Uri Winn-Ritzenberg to Olin Yuri Winn-Ritzenberg. According to the petition, Appellant wished to change his name "because [he] understand[s] [him]self as a man and live[s] [his] life as a man and this name is more concordant with [his] male gender identity." (Petition ¶ 10). Appellant's Louisiana birth certificate, appended to his petition, lists his sex as female. Pursuant to the New York name change statute, he specified that he has never been married, has no minor children, has never been convicted of a crime, has never been adjudicated bankrupt, has no outstanding judicial liens against him, and is not the party to any actions of proceedings. (Petition ¶¶ 6-8). On February

27, 2009, the Civil Court (Mendez, J.) denied the name change petition with leave to renew. The following notation accompanied the denial: "Need Letter from Dr., Psych [sic] or Social Worker Re: Need for Change Name."

Judge Mendez previously has imposed an identical medical certification requirement on other transgender name change petitioners seeking to change their names from a masculine one to a feminine one or vice versa. *See, e.g.*, *In re Pritchett*, Index No. 000791 NC 2009 (N.Y. Civ. Ct. Apr. 16, 2009) (requiring transgender petitioner to produce letter from doctor, psychologist or social worker addressing gender identity); *In re Snowden*, Index No. 000774 NC 2009 (N.Y. Civ. Ct. Apr. 15, 2009) (same); *In re Pretchenik*, Index No. NC-000667-09/NY (N.Y. Civ. Ct. Apr. 16, 2009) (same).

Argument

I. Appellant Is Entitled to Change His Name Pursuant to the Name Change Statutes.

There are ample statutory grounds on which the Court should resolve this matter in Appellant's favor and avoid any constitutional question. It is well settled that "statutes are to be construed so as to avoid constitutional issues if such a construction is fairly possible." *FGL & L Prop. Corp. v. City of Rye*, 485 N.E.2d 986, 992 (N.Y. 1985) (citations omitted). Appellant's name change petition should be granted because he has satisfied the requirements of New York's name change statutes, N.Y. CIV. RIGHTS LAW §§ 60–65 (McKinney Supp. 2009), which mandate that the court "*shall* make an order" granting the name change if the petition is true and there is no reasonable objection to the name change. *Id.* § 63 (emphasis added). There is no evidence of fraudulent or otherwise improper motive on the part of Appellant, and the name change statutes do not contemplate an extra-statutory medical certification requirement. *See In re Linda Ann A.*,

480 N.Y.S.2d 996, 997 (N.Y. Sup. Ct. 1984) ("The court's power of review [of name change petitions] is thus quite limited and the court should be chary of substituting its subjective judgment on the propriety or advisability of the name change for an objective consideration of its lawfulness."); N.Y. CIV. RIGHTS LAW § 65(4) (every person has the right to a new name provided that it "is used consistently and without intent to defraud").

Generalized confusion or public policy concerns are not an adequate basis for imposing a heightened evidentiary standard on a person, perceived by the court as female, seeking to adopt a masculine name. *See In re Golden*, 867 N.Y.S.2d 767, 767 (3d Dept. 2008) ("[T]he potential for confusion" stemming from transgender name change "is not, standing alone, a basis to deny a petition inasmuch as confusion is a normal concomitant of any name change."); *Application of Halligan*, 361 N.Y.S.2d 458, 460 (4th Dept. 1974) (statute allows only "a limited power of review" of name change petitions, and requiring a *compelling reason* for husband and wife to have different last names "improperly imposed a burden of persuasion upon [the appellant] beyond that required by the statute"); *see also In re Daniels*, 773 N.Y.S.2d 220, 223–24 (N.Y. Civ. Ct. 2003) ("[A]n application to change a name is not to be decided based on public policy grounds, but on a much narrower basis."). Obtaining a medical certification involves time and expense, and may pose an insurmountable hurdle for transgender petitioners who have never consulted with a health care provider about their gender identity and lack the means to do so. The Civil Court's medical certification requirement creates, as in *Halligan*, an improper burden of persuasion that is not justified by the controlling statutes.[3]

[3] Appellant also has a common law right to change his name at will, provided there is no fraud, misrepresentation, or interference with the rights of others. *Halligan*, 361 N.Y.S.2d at 460 (4th Dept. 1974) ("[A]n individual possesses a broad right to assume a new name at common law and in most instances denial

"[T]here is no reason – and no legal basis – for the courts to appoint themselves the guardians of orthodoxy" regarding the gender association of names. *In re Guido*, 771 N.Y.S.2d 789, 791 (N.Y. Civ. Ct. 2003). Choosing a name to reflect a personal conviction is hardly unique to transgender people, yet Appellant and *amici* know of no other petitioners from whom the Civil Court demands medical evidence in support of their petition. Courts do not ask for external corroboration of a petitioner's personal convictions or religious beliefs and they should not ask for similar corroboration of a petitioner's gender identity. *In re Eck*, 584 A.2d 859, 860–61 (N.J. Super. App. Div. 1991) ("[A] person has a right to a name change whether he or she has undergone or intends to undergo a sex change through surgery, has received hormonal injections to induce physical change, is a transvestite, or simply wants to change from a traditional 'male' first name to one traditionally 'female,' or vice versa.").

II. The Medical Certification Requirement Implicates Equal Protection Concerns.

Although the Court can and should reverse the denial of Appellant's name change petition on statutory and common law grounds, the Civil Court's ruling creates problems of constitutional magnitude that may further inform this Court's consideration. *See Matter of Jacob*, 660 N.E.2d 397, 405 (N.Y. 1995) ("Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results."). For three reasons, the medical certification requirement

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of the application will accomplish little except delay the change and add to the confusion of records until a new name is established by usage."). Appellant has already been using the name "Olin" among friends, family, and business associates for approximately a year.

undermines the fundamental equal protection principles set forth in both the United States and New York Constitutions. U.S. CONST. amend. XIV; N.Y. CONST. art. I, § 11.

A. Imposing an Extra-Statutory Evidentiary Burden Only on Transgender Name Change Applicants Constitutes Prohibited Sex Discrimination.

The Civil Court's disparate treatment of Appellant because he is transgender is unconstitutional sex discrimination. *Cf. Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) (discrimination because of an employee's transgender identity is literally discrimination because of sex"); *accord Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995) (discrimination based upon change of "sexual status creates discrimination based on 'sex'").

The defendants in *Schroer* withdrew a job offer from a transgender applicant when she disclosed that she identified as a woman and intended to come to work as Diane instead of David. After trial, the court held that discrimination on the basis of a change of sex is literally sex discrimination, and thus is prohibited by Title VII (42 U.S.C. § 2000e-2 (2007)). The court analogized to discrimination against religious converts:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion.

Schroer, 577 F. Supp. 2d at 306.[4] Analysis of sex discrimination under Title VII is equally applicable to constitutional sex discrimination claims. *See Smith v. City of Salem,* 378 F.3d 566, 577 (6th Cir. 2004) ("The facts Smith has alleged to support his claims of gender discrimination pursuant to Title VII easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution, pursuant to § 1983."); *Williams v. Seniff,* 342 F.3d 774, 788 n.13 (7th Cir. 2003) ("Our cases make clear that the same standards for proving intentional discrimination apply to Title VII and § 1983 equal protection.").

The Schroer court's religious conversion analogy is particularly instructive in the context of New York name changes. For several decades, New York courts have routinely granted name changes to religious converts seeking to conform their legal name to their new religion. *See*, *e.g.*, *Matter of Austin*, 743 N.Y.S.2d 333 (3d Dept. 2002); *Matter of Waters*, 695 N.Y.S.D. 428 (3d Dept. 1999); *Matter of Madison*, 689 N.Y.S.2d 732 (3d Dept. 1999); *see also Application of Whyte*, 338 N.Y.S.2d 331, 333, 335 (N.Y. Civ. Ct. 1972) (although "regretfully" unable to waive procedural requirement for Muslim convert, noting that granting name change on the merits would be "singularly appropriate").

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[4] The *Schroer* court expressly rejected earlier decisions distinguishing discrimination on the basis of a change of sex from other forms of sex discrimination. *Schroer*, 577 F. Supp. 2d at 307 (rejecting as "judge-supposed legislative intent over clear statutory text" *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1981), *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977), and *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2005)). New York courts have similarly rejected this line of cases to hold that transgender people are protected under New York state sex discrimination laws. *See Maffei.*, 626 N.Y.S.2d at 395–96 (rejecting the reasoning of *Ulane* and *Holloway*), *accord Rentos v. OCE-Office Sys.*, 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996) (following *Maffei*); *Buffong v. Castle on Hudson*, 2005 WL 4658320, at *1 (N.Y. Sup. Ct. Aug. 9, 2005) (same).

This was not always the case. Prior to the 1970s, courts repeatedly denied name changes prompted by a conversion to a minority religion, because the desired names were viewed as "un-American":

> The Constitution permits complete freedom of religion and worship, and whatever charm the new religiosity may have for [Petitioner] is not for this court to inquire; but to adopt such a strange and unfamiliar name gives one pause . . . Petitioner should realize that he bears an honored name and should not hide his original identity by the assumption of another name totally and strangely different from the one he has borne since birth . . . [T]he petitioner should measure himself by the American standard and be proud not only of being an American citizen but manifest esteem for the honorable name by which he has been known for nigh a generation.

Matter of Green, 283 N.Y.S.2d 242, 244–45, (N.Y. Civ. Ct. 1967) (denying name change from 'Earl Green' to 'Merwon Abdul Salaam'); *see also Matter of Johns*, 212 N.Y.S.2d 146, 148 (N.Y. Sup. Ct. 1961) (denying name change from 'Warren McDonald Johns' to 'Mikael Habte Wold-Wossen'); *Matter of Wing*, 157 N.Y.S.2d 333, 336 (N.Y. Ct. 1956) (denying mother's petition to change her child's name from 'Cheryl Ann Wing' to 'Hafsah Ashraf').

This reasoning is so strikingly archaic and discriminatory that it has been abandoned and sharply criticized by courts in New York and beyond. *See In re Jackson*, 427 A.2d 139, 140 (N.J. Super. Ct. Law Div. 1981) (granting religious name change without corroboration of religious conversion or beliefs, and observing that "for this court to deny such person his right [to a name change] because of its strangeness would be to prefer the Judeo-Christian ethnic over the Islamic . . . [T]he reasonings of [*Green* and *Wing*] are simply out of the mainstream of enlightened thought. It is inconceivable that a court in this state would reach the same

conclusion today . . . ."); *Halligan*, 361 N.Y.S.2d at 460 n.1 (characterizing cases denying "un-American" name changes as "judicial caprice").[5]

The medical certification burden placed on Appellant is a troubling throwback to these religious name change denials. The Civil Court's demonstrated hostility toward Appellant's name change echoes the view expressed over forty years ago that a Muslim petitioner's preferred name was "strange and unfamiliar." The accrued cultural wisdom of the last forty years counsels against placing legal disabilities on name change petitioners solely because their beliefs and experiences may seem strange or unfamiliar. Just as the state should not be allowed to burden religious conversion by promoting a Judeo-Christian "American standard" of religious and cultural identity, it cannot burden gender transition by promoting a particular gender norm over all others. By granting masculine names only to individuals who were designated male at birth or whose male identity is medically "authenticated," the Civil Court does precisely that.

Distinctions made between individuals on the basis of sex are unconstitutional unless supported by an "exceedingly persuasive justification." *United States v. Virginia*, 518 U.S. 515, 524 (1996). There is no persuasive justification for placing a medical certification requirement solely on transgender petitioners. Appellant's petition bears none of the potential for fraud contemplated by the name change statute; there is no evidence whatsoever that he seeks to avoid spousal or parental obligations, criminal convictions, bankruptcy, pending civil actions, or

[5] New York courts have similarly disclaimed other name changes denials where courts imposed their own views of petitioner's "true" identity, for example, by refusing to allow an American-born individual to adopt a traditionally African name, or refusing to allow an individual to change an "ethnic" name. *Halligan*, 361 N.Y.S.2d at 460 n.1 (citing with disapproval *Matter of Middleton*, 304 N.Y.S.2d 145 (N.Y. Civ. Ct. 1969), *Application of Jama*, 272 N.Y.S.2d 677 (N.Y. Civ. Ct. 1966), *Matter of Filoramo*, 243 N.Y.S.2d 339 (N.Y. Civ. Ct. 1963), and *Petition of Cohen*,297 N.Y.S. 905 (N.Y. City Ct. 1936). The Appellate Division's disapproval of these decisions confirms that the name change law permits people to decide for themselves who they are and what their names should be.

judicial liens. Any theoretical confusion that might result from gender transition is an impermissible basis for denying a name change. *See Golden*, 867 N.Y.S.2d at 767 ("[T]he potential for confusion . . . is not, standing alone, a basis to deny a petition inasmuch as 'confusion is a normal concomitant of any name change.'") (quoting *Halligan*, 361 N.Y.S.2d at 460); *see also* Jillian Todd Weiss, *The Gender Caste System*: *Identity, Privacy and Heteronormativity*, 10 LAW & SEXUALITY 123, 174 (2001) ("Administrative convenience is an insufficiently important objective to justify gender-based classifications.") (citing, *inter alia*, *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

The medical certification requirement solely serves to enforce stereotypes about appropriate male and female names—a constitutionally impermissible goal. *Virginia*, 518 U.S. at 541 ("State actors controlling gates to opportunity, we have instructed, may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females.'") (quoting *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)); *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 140 n.11 (1994) ("We have made abundantly clear in past cases that gender classifications that rest on impermissible stereotypes violate the Equal Protection Clause . . . ."). Thus, the medical certification requirement cannot withstand the heightened scrutiny applied to sex classifications.[6]

[6] In fact, the medical certification requirement would fail even rational basis review. Courts have held other medical certification requirements for transgender people illegitimate without explicitly applying heightened scrutiny. *See Kastl v. Maricopa County Cmty. Coll. Dist.*, 2004 WL 2008954, at *8 (D. Ariz. June 3, 2004) (requiring only transgender individuals to provide proof of sex prior to using restrooms not rationally related to interest in privacy and safety), *summary judgment granted on other grounds by* 2006 WL 2460636 (D. Ariz. Aug. 22, 2006); *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267, 272 (N.Y. Sup. Ct. 1977) (defendant instituted chromosomal test "for the sole purpose of preventing plaintiff from participating in the tournament"). Heightened scrutiny, however, would be appropriate in this case. *See infra* Section IV(C).

B. Requiring Medical Certification Is Unconstitutional Sex Stereotyping Because It Enforces the Propriety of Certain Names for Men and Others for Women

The Civil Court subjected Appellant to a medical certification requirement because Appellant's desired name—Olin Yuri—is not stereotypically associated with his female sex designation. Although other name change applications routinely are granted without third-party corroboration, Judge Mendez has repeatedly required a medical "stamp of approval" only for transgender applicants, whose requested names do not comport with traditional sex stereotypes. It is unconstitutional sex discrimination to impose legal burdens on an individual solely for his failure to meet sex stereotypes. *See Smith*, 378 F.3d at 577-78 (transgender firefighter stated Equal Protection sex discrimination claim based on unlawful sex stereotyping); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 117–21 (2d Cir. 2004) (claims premised on sex stereotyping theory state claim of unconstitutional sex discrimination).

Numerous courts have concluded that adverse treatment of transgender people for failure to conform to sex stereotypes is unlawful sex discrimination under the federal constitution and various civil rights laws. *See, e.g.*, *Barnes v. City of Cincinnati*, 401 F.3d 729, 737–38 (6th Cir. 2005) (Title VII); *Smith*, 378 F. 3d at 574–75, 577–78 (Title VII and Section 1983); *Schwenk v. Hartford*, 204 F.3d 1187, 1202–03 (9th Cir. 2000) (Gender Motivated Violence Act); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000) (Equal Credit Opportunity Act); *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173, at *1–2 (W.D. Pa. Feb. 17, 2006) (Title VII); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, 2003 WL 22757935, at *4 (W.D.N.Y. May 9, 2003) (Title VII); *Doe v. United Consumer Fin. Servs.*, 2001 WL 34350174, at *3–4 (N.D. Ohio Nov. 9, 2001) (Title VII).

The Supreme Court acknowledged that sex stereotyping is a prohibited form of sex discrimination in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). Hopkins brought suit under Title VII after she was denied a promotion. Her employer advised her that her chances for promotion would increase if she learned to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. The Court held that requiring Hopkins to conform to sex stereotypes was impermissible sex discrimination. *See id.* at 258.

In so holding, the Supreme Court made clear that sex discrimination is not limited to discrimination based on anatomical or birth-assigned sex, but rather reaches the "entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id*. at 251 (quoting *L.A. Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707 n. 13 (1978)). For this reason, *Price Waterhouse* effectively overruled older cases denying protection to transgender plaintiffs on the grounds that sex discrimination only reached traditional understandings of men and women. *See Smith*, 378 F.3d at 73 (*Price Waterhouse* "eviscerated" *Ulane v. Eastern Airlines, Inc*., 742 F.2d 1081, 1085 (7th Cir. 1984), *Holloway v. Arthur Andersen & Co*., 566 F.2d 659, 663 (9th Cir. 1977) and similar cases). Just as Hopkins was denied partnership for failing to conform to feminine norms of dress, speech and comportment, transgender persons are often targeted for not conforming to stereotypes associated with their birth-assigned sex. *See Smith*, 378 F.3d at 574 ("It follows [from *Price Waterhouse*] that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); *Barnes*, 401 F.3d at 735, 737 (transgender sergeant told to stop wearing makeup and act more

masculine stated claim under Title VII); Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 590 (2007).

Appellant's petition was denied due to his stated desire to change his name from a traditionally feminine name to one more concordant with his male gender identity. If a non-transgender petitioner with a male sex designation on his birth certificate sought to change his name from a traditionally masculine one to "Olin Yuri," it is highly unlikely that the Civil Court would have required a medical certification. The court below apparently imposes a medical certification requirement only when it believes a petitioner seeks a name that, *in its own view*, is inappropriately masculine or feminine given the petitioner's birth-assigned sex. The Equal Protection Clause forbids the government from denying a benefit solely based on stereotypical views of masculinity and femininity. *See Virginia*, 518 U.S. at 541; *Hogan*, 458 U.S. at 725.

The Civil Court did not state that it imposed the medical certification requirement on Appellant due to a belief that a person it perceived as female would be engaging in a form of misrepresentation or fraud by presenting herself as masculine. Yet even this rationale, without more, would be premised on sex stereotypes about names, appearance, and identity, and is therefore inadequate.[7] In departing from settled statutory standards for granting a name change, the Civil Court unconstitutionally burdened Appellant's right to change his name due to his failure to meet particular sex stereotypes.

[7] Similarly, if the Civil Court suspected that Appellant was a woman seeking to perpetrate fraud on creditors or law enforcement by adopting a male name or persona, such a scheme is so implausible that it cannot constitute a reasonable basis for the medical certification requirement. Someone who adopts a male name or persona to escape obligations but who continues to live as female would hardly be covert. *See* N.Y. CIV. RIGHTS LAW §§ 63–64 (requiring name changes to be published). Moreover, any such risk is not particular to transgender name change petitioners.

C. Gender Identity Classifications May Appropriately Be Considered Suspect Classifications that Receive Heightened Judicial Scrutiny.

As explained above, this matter should resolve on statutory grounds, but this Court's analysis may be informed by consideration of the particularly searching scrutiny that should apply when transgender individuals are subjected to governmental discrimination. Although the medical certification requirement would fail any level of judicial review—including rational review or the intermediate level of scrutiny for sex-based classification—its gender-identity based distinction should be subjected to especially heightened review. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985) (race, national origin and alienage classifications are subject to strict scrutiny because they are "so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy"). The medical certification requirement is not supported by a compelling government interest required to survive such heightened review.

1. Gender Identity Classifications Bear the Hallmarks of Suspect Classifications

Courts typically consider four factors in assessing whether a classification is suspect: (1) historical invidious discrimination; (2) whether the defining trait is unrelated to the ability to perform and participate in society; (3) whether the adversely affected group is a discrete and insular minority or politically powerless; and (4) whether the defining trait is immutable or deeply important. *See, e.g.*, *Varnum v. Brien*, 763 N.W.2d 862, 896 (Iowa 2009) (sexual orientation is at least a quasi-suspect classification); *In re Marriage Cases*, 183 P.3d 384, 442

(Cal. 2008) (sexual orientation classifications should receive strict scrutiny).[8] For the reasons that follow, gender identity classifications, which typically burden transgender people, bear the hallmarks of a classification deserving strict scrutiny.

a. There Is a Long History of Transgender Discrimination.

Central to the suspect classification inquiry is whether a particular group has been subjected to a history of discrimination. *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 922 (1995) (history of purposeful discrimination requires strict scrutiny of any statute motivated by discriminatory classification); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 427 (Conn. 2008) ("Dispositive weight [is placed on] whether the group has been the subject of long-standing and invidious discrimination. . . ."). It is beyond dispute that transgender persons as a group have faced—and continue to face—pervasive invidious discrimination. Discrimination against transgender people "permeates every aspect of daily life" in both the public and private spheres. *See, e.g.*, Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 393 (2001).

This pervasive discrimination includes:

- Frequent subjection to extreme, bias-motivated violence, including murder. *See* AVY A. SKOLNIK, ET AL., THE NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY,

[8] The level of constitutional scrutiny applied to sexual orientation classifications does not dictate the level of scrutiny to be applied to gender identity classifications. Sexual orientation refers to an individual's attraction towards one or both sexes, while gender identity refers to one's male and/or female self-awareness and presentation. Cases addressing sexual orientation are cited here only for their insightful analysis of the factors supporting application of strict scrutiny generally.

BISEXUAL, AND TRANSGENDER PEOPLE IN THE UNITED STATES (2009), (reporting 208 instances of anti-transgender hate crimes in 13 U.S. regions in 2008, and numerous such crimes in additional regions); EMILY A. GREYTAK, ET AL., THE GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, HARSH REALITIES: THE EXPERIENCE OF TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS xi (2009) (reporting that more than half of surveyed transgender students were physically harassed and approximately one quarter were physically assaulted).

- Historic criminalization of wearing cross-gender attire. *People v. Archibald*, 296 N.Y.S.2d 834 (N.Y. App. Term 1968) (holding that male defendant in female clothing violated New York vagrancy statute prohibiting being disguised in a manner calculated to prevent being identified); *People v. Gillespi and Johnson*, 202 N.E.2d 565 (N.Y. 1964) (same); WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET (1999), Appendix A2 (listing 58 cities that criminalized wearing the attire of a different sex, starting in the mid-nineteenth century).

- Rampant employment discrimination. *See* M.V. LEE BADGETT, ET AL., THE WILLIAMS INSTITUTE, BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2007) (reviewing studies showing that 20% to 57% of transgender people have been fired, harassed, or otherwise discriminated against at work due to gender identity).

- Historic exclusion from established legal remedies. *See* 42 U.S.C. § 12211(b)(1) (excluding transsexualism from the Americans with Disabilities Act); *Ulane*, 742 F.2d at 1084-87 (holding that Title VII does not apply to transgender plaintiffs).

- Considerable difficulties accessing medical care, both related and unrelated to gender transition. *See* Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 94-99 (2002).

In amending New York City's anti-discrimination laws explicitly to protect gender identity, the City Council acknowledged this endemic discrimination:

> [T]he impact of gender-based discrimination is especially debilitating for those whose gender self-image and presentation do not fully accord with the legal sex assigned to them at birth. For

> those individuals, gender-based discrimination often leads to pariah status including the loss of a job, the loss of an apartment, and the refusal of service in public accommodations such as restaurants or stores.

Local Laws of City of New York No. 3 § 1 (2002) (legislative finding and intent).

b. Gender Identity Bears No Relation to the Ability to Contribute to Society.

In the same way that one's race, alienage, national origin, or religion should not affect the ability to make a living or raise a family, gender identity has no adverse effect on the "ability to perform certain functions or to discharge certain responsibilities in society." *Cf. Kerrigan*, 957 A.2d at 435 (distinguishing sexual orientation from mental retardation or old age). For example, social science literature indicates that a parent's gender identity has no impact on his or her ability to raise happy and healthy families. Richard Green, *Transsexuals' Children*, INT'L J. TRANSGENDERISM, Oct. - Dec. 1998; Richard Green, *Sexual Identity of Thirty-seven Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 692-697 (1978). Transgender people can be found in every occupation and in graduate and undergraduate institutions throughout the country, and are able to lead successful lives across all social and economic strata, often despite significant burdens imposed by stigma and bias. Disparate treatment of transgender persons is therefore "likely ... to reflect deep-seated prejudice rather than ... rationality." *Rowland v. Mad River Local School Dist*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 n. 14 (1982)).

c. Transgender Persons Are a Politically Powerless Minority.

Transgender persons are a discrete and insular minority lacking in significant political power. Transgender individuals have been estimated to comprise only approximately one to three percent of the population at most. *See* Hong, *supra*, at 91. Moreover, transgender persons expressly disavow and/or are unable to conform to majoritarian gender beliefs—namely, that the sex assigned at birth solely and permanently determines gender identity and role. *See* Paisley Currah, *Gender Pluralisms under the Transgender Umbrella*, *in* TRANSGENDER RIGHTS 3, 16 (Paisley Currah et al. eds., 2006). Because transgender persons are largely characterized by minority beliefs and experiences, they are almost by definition a discrete and insular minority. *Cf. Kerrigan*, 957 A.2d at 444 (anti-gay prejudice largely stems from sincere belief of many people that homosexuality is "morally reprehensible").

Transgender persons undeniably lack significant political power. There are no openly transgender individuals elected to nationwide or New York statewide office, nor are there federal or New York state anti-discrimination laws explicitly protecting transgender people. Such protections repeatedly have been omitted from state and federal legislation protecting gay men and lesbians. Richard Goldstein, *Life After SONDA*, Village Voice, Dec. 31, 2002, at 45 (transgender protections omitted from New York's Sexual Orientation Non-Discrimination Act because the lobbyists "feared it would kill the bill"); Kerry Eleveld, *ENDA to Be Separated Into Two Bills: Sexual Orientation and Gender Identity*, The Advocate, Sept. 29, 2007, *available at* http://www.advocate.com/news_detail_ektid49439.asp ("[T]he original bill didn't have enough votes to pass due to the trans-inclusive language."). The gender identity nondiscrimination laws that exist do not erase the burdens imposed on transgender people, but in fact underscore the

appropriateness of strict scrutiny. *See Hernandez v. Robles*, 855 N.E.2d 1, 28 (N.Y. 2006) (Kaye, C.J., dissenting) ("[Nondiscrimination] measures acknowledge—rather than mark the end of—a history of purposeful discrimination.").

d. Gender Identity is Akin to an Immutable Trait.

Strict scrutiny is particularly appropriate where a group's defining trait is immutable (*e.g.*, race or national origin) or is a fundamental aspect of one's identity and beliefs (*e.g.*, religion).[9] *See Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (Kennedy, J. concurring) ("Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion."); *In re Marriage Cases*, 183 P.3d at 442 (classification based on an "integral . . . aspect of one's identity" may warrant the most searching judicial scrutiny). Courts apply strict scrutiny in such circumstances either because it would be impossible to reform one's behavior to avoid legal disability, or because it would be "abhorrent" to force someone to do so. *Watkins v. U.S. Army*, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring) (treating sexual orientation as akin to immutable trait because it is "so central to a person's identity"); *see also Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000) ("Sexual orientation and sexual identity . . . are so fundamental to one's identity that a person should not be required to abandon them.").

Gender identity is such a central component of one's sense of self that it would be abhorrent to force people to change it. Several recent studies suggest that transgender identity

[9] Immutability is relevant to determining whether a class should be suspect, but it is not a necessary showing. *See, e.g., Nyquist v. Mauclet*, 432 U.S. 1, 9 n. 11 (1977) (alienage treated as suspect classification regardless of mutability).

may stem from neurobiological sources. *See* Jiang-Ning Zhou, et al., *A Sex Difference in the Human Brain and Its Relation to Transsexuality*, 378 NATURE 68, 68-70 (1995); Kruijver FP et al., *Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus*, 85(5) J. CLIN. ENDOCRIN. METAB. 2034, 2034-41 (2000). Regardless of gender identity's etiology, expert medical consensus recognizes the deep harm that can result from a forcing a person to alter it. Gerald P. Mallon, *Practice with Transgendered Children, in* SOCIAL SERVICES WITH TRANSGENDERED YOUTH 49, 55-58 (Gerald Mallon ed., 2000) (aversion therapy is unsuccessful and causes severe psychological and sometimes physical harm). Gender identity is a deeply felt and fundamental aspect of identity that should be shielded from adverse, majoritarian treatment.

2. The Medical Certification Requirement Lacks a Compelling Government Interest.

Just as there is no exceedingly persuasive justification for the medical certification requirement under intermediate scrutiny, *see supra* Section II(A), the government has no compelling interest in requiring transgender people to provide certification from a doctor, psychologist or social worker simply to obtain a name change.

For these reasons, strict scrutiny appears well-suited for gender identity classifications like the one made by the Civil Court below. This Court should be mindful of the gravity of these considerations and rule in Appellant's favor.

III. The Medical Certification Requirement Violates the Substantive Due Process Guarantees Set Forth in the Federal and New York Constitutions.

In *Lawrence v. Texas*, the United States Supreme Court struck down state criminal laws prohibiting sodomy, and noted "the respect the Constitution demands for the autonomy of the

person in making [intimate and personal] choices . . . ." 539 U.S. 558, 574 (2003). The Supreme Court reaffirmed a broad constitutional liberty interest in autonomous decision-making:

> [O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment . . . Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

Lawrence, 539 U.S. at 573-74 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)). State intervention into an individual's most personal decisions about his or her identity and selfhood "may cause deep and lasting injuries to the individual's innermost sense of self." Laura K. Langley, *Self-Determination in a Gender Fundamentalist State: Toward Legal Liberation of Transgender Identities*, 12 TEX. J. C.L. & C.R. 101, 124 (2006).

The liberty interests described in *Lawrence* guarantee transgender persons the autonomy to lead lives concordant with their deeply-held gender identity. *See* Chai Feldblum, *The Right to Define One's Own Concept of Existence: What Lawrence Can Mean for Intersex and Transgender People*, 7 GEO. J. GENDER & L. 115, 116 (2006) ("The liberty interest recognized by the court in *Lawrence* . . . speaks directly . . . to the efforts of transgender people to define their gender identity and expression."). Just as familial and sexual decisions "fundamentally affect[] a person," *Casey*, 505 U.S. at 851, gender in our society is "fundamental to personhood." Langley, *supra*, at 125. Most people do not experience discordance between their birth-assigned sex and their gender identity, and so are able to lead lives as their self-understood gender without

impediment or deliberation. Feldblum, *supra*, at 124. For transgender people, however, this discordance is real and persistent, and the steps they take to manifest manhood or womanhood are as intimate and personal as the choices to marry, to bear children, and to engage in sexual relationships. *Id*. at 126 ("[If choosing a sexual partner] goes to the core of defining one's self, then certainly the central act of . . . changing one's gender assigned at birth must go to such a core as well.").[10]

Transgender people's ability to make autonomous decisions about their gender expression is deeply bound up with dignity considerations. Just as *Lawrence* protected the sexually intimate conduct of profound relevance to gay and lesbian identity, *id*. at 124, the equality and dignity of transgender persons warrant constitutional protection for the acts that manifest and constitute their gender identities, including the choice of a name. *See* Appellant's Brief at 16-21. Without legal affirmation of identity, transgender individuals face challenges securing employment, healthcare and governmental services. A name is a particularly resonant signifier: it is the first fact about ourselves that we offer the world, a shorthand for our very personhood. Imposing undue burdens on such a personally meaningful choice is repugnant to constitutional protections. Appellant must have the autonomy to make deeply personal decisions regarding his gender—including his choice of name— with both dignity and respect, free of state efforts to "demean [his] existence or control [his] destiny . . . ." *Lawrence*, 539 U.S. at 574.

[10] Appellant's right to define and express his gender might alternatively be analyzed as a First Amendment speech interest. Appellant's name is a "necessary symbol of [his] very identity," used to express his gender. *Doe v. Yunits*, 2000 WL 33162199, at *3 (Mass. Super. Oct. 11, 2000) (wearing traditionally female clothing expresses female gender identity). Because the Civil Court imposed a heightened evidentiary burden for a name change that was intended to express concordance with Appellant's gender identity, the name change denial could constitute unconstitutional viewpoint discrimination. *See id.* at *4 (preventing transgender student from wearing traditionally female clothing suppressed speech because other females were allowed to wear similar clothing).

Denying certain groups the liberty to make core, intimate decisions about their own lives invites social stigmatization of that group. *See Lawrence*, 539 U.S. at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination . . . ."). Requiring transgender petitioners to produce medical certification in support of their preferred name stigmatizes them by indicating that their name choices – and theirs alone – are suspicious and need authoritative corroboration.

Here, the Civil Court failed to respect Appellant's constitutionally protected autonomy, which includes the choice of a name that more closely comports with his gender identity than does the name on his birth certificate. The Civil Court impeded this profoundly personal choice and supplanted Appellant's autonomy with its own determination that he must overcome some medical, psychological or sociological threshold to justify legal recognition. Such an approach undermines the legitimacy of Appellant's identity and stigmatizes him solely for being transgender. Preventing Appellant from adopting a name he feels is concordant with his male identity, without compulsory medical, psychological, or sociological intervention, undermines his due process rights to autonomy, dignity and liberty.[11]

[11] The medical certification requirement also implicates statutory and constitutional protections for Appellant's medical decision-making and privacy. Every New Yorker is free "to determine what shall be done with his own body . . . and to control the course of his medical treatment." *Rivers v. Katz*, 495 N.E.2d 337, 341 (N.Y. 1986). The medical certification requirement is inconsistent with the standards set forth under New York's Civil Rights Law, and with this basic principle. The privacy of such personal medical information also enjoys strong protection under both state law and the federal constitution. *See, e.g.*, N.Y. C.P.L.R. § 4504 (2009) (codifying physician-patient privilege); N.Y. Pub. Off. Law § 89(2)(b) (2009) (exempting medical records from freedom of information law); *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing constitutional privacy interest in maintaining confidentiality of medical information).

Conclusion

Although this case should be resolved on the basis of the statutory arguments above and in Appellant's brief, the Civil Court's denial of Appellant's name change raises a host of constitutional concerns that should inform the Court's consideration. Amici respectfully request that the court reverse the decision below and grant Appellant a legal change of name without the need for medical certification.

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Respectfully submitted,

DEBEVOISE & PLIMPTON LLP

By: _____
Maeve O'Connor
Andrew Gilden

919 Third Avenue
New York, New York 10022
(212) 909-6000

LAMBDA LEGAL DEFENSE &
EDUCATION FUND, INC.

By: Hayley Gorenberg
Cole Thaler*

120 Wall Street
Suite 1500
New York, NY 10005
(212) 809-8585
*not admitted in New York

Attorneys for Amici Curiae