IN THE COURT OF APPEALS
STATE OF GEORGIA

IN RE: FELDHAUS

PETITION TO CHANGE NAME **CASE NO. A16A1770**

INITIAL BRIEF OF APPELLANT

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PART ONE
Statement of the Proceedings Below

This appeal follows the denial of an unopposed Petition to Change Name ("Petition") filed by Appellant in the Superior Court of Columbia County. The Verified Petition was filed July 9, 2015. (R. 4-6.) The Superior Court held a hearing on the Petition on February 17, 2016. (T. 1; R. 18.) Appellant filed a Brief and an Affidavit in Support of the Petition on March 14, 2016. (R. 11-17.) The lower court issued a Final Judgment denying the Petition on March 30, 2016. (R. 18-22.) A Notice of Appeal was timely filed on April 19, 2016. (R. 1-3.)

Material Facts Relevant to the Appeal

Appellant is a 24 year old transgender man.[1] (R. 4; T. 17-18.) He is a Sergeant in the US Army Reserve and works with the Singh Investment Group. (T. 6.) Although Rowan was given the name "Rebeccah Elizabeth" at birth, he has

[1] Although Rowan was assigned the sex of female by doctors at birth, his gender identity, and therefore his sex, is male. Gender identity refers to one's self-perception as male or female, *see, e.g.*, Atlanta, Ga., Ord. No. 94-10 (2000); Am. Psychological Assoc., *Guidelines for Psychological Practice with Lesbian, Gay, and Bisexual Clients* (2006), *available at* www.apa.org/pi/lgbt/resources/guidelines.aspx, and is the primary factor in determining one's sex, s*ee* William Reiner, *To be Male or Female —That Is the Question*, 151 ARCHIVES PEDIATRIC & ADOLESCENT MED. 224, 225 (1997) ("[T]he organ that appears to be critical to psychosexual development and adaptation is not the external genitalia, but the brain.").

been generally aware that his gender identity was incongruent with the sex assigned to him at birth since he was a young child. He is diagnosed with and being treated for Gender Dysphoria, a condition used by psychologists and physicians to describe people who experience significant distress when the sex assigned to them at birth is inconsistent with their gender identity.[2] (T. 8, 9, 17-18.) He lives his life in conformity with his male gender identity and uses his preferred name, Rowan Elijah Feldhaus. (R. 11.) His employee name tag identifies him as Rowan Elijah. *Id.* His family, friends, colleagues, acquaintances and peers refer to him as Rowan Elijah Feldhaus. *Id.*

Appellant filed a verified Petition to Change Name in July 2015, seeking a court order to change his legal name to Rowan Elijah Feldhaus. (R. 4-6.) Appellant averred that he was not seeking a name change to defraud anyone. (R. 4.)

[2] The Department of Justice recently acknowledged that Gender Dysphoria has a "physical basis." *See* Second Statement of Interest of the United States of America, at 4, *Blatt v. Cabela's Retail, Inc*., No. 5:14-cv-04822-JFL (E.D. Pa., filed Aug. 15, 2014) ("the current research increasingly indicates that gender dysphoria has physiological or biological roots.") (citing Aruna Saraswat, MD, Jamie D. Weinand, BA, BS & Joshua D. Safer, MD, *Evidence Supporting the Biologic Nature of Gender Identity*, 21 Endocrine Practice 199, 199-202 (Feb.2, 2015) and E.S. Smith, J. Junger, B. Derntil & U. Habel, *The Transexual Brain – a Review of Findings on the Neural Basis of Transsexualism*, NEUROSCIENCE AND BIOBEHAVORIAL REVIEWS (2015)).

Appellant concurrently filed an Affidavit showing that a notice was published once a week for four weeks in The Columbia County News-Times, and otherwise was compliant with Georgia Code Ann. § 19-12-1. (R. 10.)

The court held a hearing on the Petition on February 17, 2016. (T. 1, R. 18.) Appellant submitted as an Expert Affidavit the testimony of his treating psychotherapist, Cheryl Carswell, who averred that: a) Rowan is transgender, explaining that the term meant "that [Rowan's] self-identity does not conform to the sex assigned to him by doctors at birth;" b) confirmed that Appellant was diagnosed with Gender Dysphoria; c) described Gender Dysphoria as "a condition recognized in the *Diagnostic and Statistical Manual of Mental Health Disorders* as a diagnosis used by psychologists and physicians to describe people who experience significant distress between the sex and gender they were assigned at birth and their gender identity"; and d) stated that the name change "is critical among recommended treatment criteria in order to alleviate symptoms of Gender Dysphoria and securing a legal name is necessary in making the legal identity and lived experience of the Petitioner match." (T. 18.)

Appellant testified at the hearing that he had a 732 credit score, was not delinquent on any bills, had no criminal history and had no allegations of fraud in

his past. (T. 6.) Appellant explained that he was seeing a therapist for Gender Dysphoria and that she recommended that he legally change his name because, in her professional opinion, it is "crucial" to do so. (T. 9.) He also testified about the danger inherent with his having a "female-sounding" name. *Id.* Appellant stated that he had been prescribed and was taking testosterone. *Id.* Finally, Rowan stated that he sought the name change to live in accordance with his gender identity and he testified about the name he had chosen. (T. 10-11.)

Following Appellant's testimony, Superior Court Judge J. David Roper set out "on the record for purposes of an appeal" that he does "not approve of changing names from male to female…and vice versa." (T. 12.) However, Judge Roper stated that he was inclined to permit Appellant to change his legal first name from Rebeccah to Rowan based on the evidence that many females are named Rowan, but "not for your benefit," instead for the protection of other people, who will "look at your ID, the people who have to look at your name, the people that have look (sic) at you and say, what's going on here, the 17 year-old kid who's ringing you up at the grocery store and when you want to cash a check, or whatever it is, and you produce credit card or ID that is obviously inconsistent with your appearance and he or she doesn't know what to do." (T. 13.)

Yet, Judge Roper stated "I am not going to change your name to Rowan Elijah. You've got to come up with something else," suggesting "maybe Shawn or some other name that is commonly given male or female," but that "when you go to a name of Rowan Elijah, I mean, nobody is going to ever say that that is not a male name." (T. 14.) Finally, Judge Roper suggested that had Appellant claimed that Elijah was Appellant's "mother's name or something like that" he may have approved the petition, "[b]ut that's not what we've got here today …." *Id*. (T. 16.)

Following the hearing, on March 14, 2016, Appellant filed a Brief that raised constitutional claims and provided legal authority and further factual support. (R. 11-17.) A Final Order denying the Petition was issued on March 22, 2016. (R. 18-23.) The court reiterated that the denial was based on its "policy" of refusing to "change the name of a person who is anatomically male to an obviously female name, and vice versa." (R. 19.) The court further reasoned that it had unlimited discretion under the statute "in granting or refusing" a proper application for a name change, (R. 20), and concluded as a matter of law that "name changes which allow a person to assume the role of a person of the opposite sex[3] [sic] are, in

[3] As set forth above, Appellant reiterates that gender identity determines sex and that his sex is male.

effect, a type of fraud upon the general public" and "offend the sensibilities and mores of a substantial portion of the citizens of this state," (R. 21). The court summarily rejected that "Feldhaus' assertions under the First and Fourteenth Amendments are present in this case." *Id*.

PART TWO
Enumeration of Errors

1. The trial court erred in denying Appellant's Petition as exceeding sound legal discretion because the denial was not based on evidence of fraudulent or improper motive.
2. The trial court erred in summarily rejecting Appellant's Equal Protection argument because the denial of the Petition constitutes sex discrimination because it was based on one or both of the following: a) the fact that Appellant was assigned the sex of female, instead of male, at birth; and b) the fact that Appellant is transgender and, therefore unaligned with socially-constructed gender expectations, which discrimination lacks any legitimate justification.
3. The trial court erred in summarily rejecting Appellant's First Amendment argument because the denial interferes with his right to free expression and compels Appellant to convey a message incongruent with the message he chooses to convey regarding his name and his gender identity in violation of Appellant's constitutional right to freedom of expression.

Jurisdictional Statement

The Court of Appeals, and not the Supreme Court, has jurisdiction of this appeal because the issue concerns a legal name change and appeals of such cases are not reserved to the Supreme Court of Georgia. Ga. Const. art. VI, § 6, para. II.

Although constitutional arguments are presented, Petitioner does not challenge the constitutionality of a statute, which would be a matter reserved to the Supreme Court of Georgia. *See Gaines v. State*, 205 Ga. 210, 210 (1949).

PART THREE
Standard of Review

"[W]hether a judge of the superior court shall grant or refuse a proper application for a change in name, upon objection and after a hearing, involves the exercise of a sound legal discretion." *Johnson v. Coggins*, 124 Ga. App. 603, 603 (1971). Thus, the standard of review is abuse of discretion. *Id.*

Argument and Citation of Authorities

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S PETITION TO CHANGE HIS NAME BECAUSE THE DENIAL WAS NOT BASED ON EVIDENCE OF FRAUD OR IMPROPER MOTIVE BUT WAS, INSTEAD, ARBITRARY AND BASED ON INSUFFICIENT AND IMPROPER REASONS.

Any person seeking a name change "may present a petition, setting forth fully and particularly the reasons why the change is asked," publish the petition for four weeks, and after 30 days and proof of publication, "if no objection is filed, the court…[shall] determine all matters raised by the petition and [] render final judgment or decree thereon." Ga. Code Ann. § 19-12-1. "The action of the superior court in granting or refusing a proper application to change the name of a person is

based solely on a sound legal discretion[.]" *Binford v. Reid*, 83 Ga. App. 280, 280 (1951).

Sound legal discretion, a standard applied to dozens of Georgia statutes, is not unbounded discretion. Instead, its application is guided by the reasoning underlying a Georgia Supreme Court decision announced 130 years ago. In *Miller v. Wallace*, 76 Ga. 479 (1886), the court announced the rule routinely cited as the rule governing the application of "sound legal discretion" throughout Georgia law. The *Miller* court set out that "the discretion to be exercised is not an arbitrary and unlimited discretion," instead, "[it] means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague and fanciful, but legal and regular." *Id.* at 484; *see also Johnson v. Durrence*, 136 Ga. App. 439, 440 (1975) (quoting *Miller* in defining discretion in relation to default judgments); *Keller Indus., Inc. v. Summers Roofing Co.*, 179 Ga. App. 288, 290 (1986) (quoting *Miller* in defining discretion for awarding additional peremptory challenges).

Further, the exercise of sound legal discretion is not an invitation for judges to issue rulings in accordance "to their wills and private affections" but to apply the law. *Miller*, 76 Ga. at 484; *see also Griffin v. State*, 12 Ga. App. 615, 620 (1913) (explaining that legal discretion "must be exercised…in accordance with,

established rules of law. It is not an arbitrary power, but one which must be exercised wisely and impartially"); *Davison-Paxon Co. v. Burkart*, 92 Ga. App. 80, 83 (1955) (discretion to reopen default judgment "does not mean that [the judge] may act arbitrarily but that he must exercise a *sound and legal* discretion. He may not open a default capriciously or for fanciful or insufficient reasons").

a. Failure to Grant Appellant's Name Change Was Not Grounded in Established Rules of Law Because Petitions for Name Change Should Be Granted Where, as Here, the Petitioner Satisfies the Statutory Criteria, No Improper Motive Is Alleged and There Are No Objections Raised.

This Court has upheld the denial of an adult's petition to change his or her name as an exercise of sound legal discretion only where there was evidence suggesting an improper motive. *See*, *In re Redding*, 218 Ga. App. 376 (1995) (evidence of prior fraud and criminal activity), *and In re Serpentfoot*, 285 Ga. App. 325 (2007) (evidence that granting the petition would infringe upon the reputational rights of another). In *Redding*, this Court affirmed the denial of an inmate's petition for name change based on facts showing "previous convictions include giving a false name to a law enforcement officer, in addition to crimes of violence" and evidence that granting the name change might allow him "to conceal his true identity and to disassociate himself with his criminal past." 218 Ga. App.

at 376; *see also In re Parrott*, 194 Ga. App. 856, 856 (1990) (same based on evidence that inmate petitioner was convicted of first degree forgery).

This Court has also upheld denial of an adult's petition for a name change where there was evidence that granting the request would defraud or usurp another of a legal right. In *In re Serpentfoot*, the petitioner sought to change her name to "Anne Serpent-Mooney," a change objected to by Mr. Mooney who alleged that petitioner sought to defraud him, and that the name change would cause him embarrassment and ridicule. 285 Ga. App. at 326. This Court affirmed, reasoning that "[g]iven the probable harm to [Mr.] Mooney and appellant's improper motives, the trial court exercised sound legal discretion in denying the petition. Also, a person is not authorized to change his name 'with a view to deprive another fraudulently of any right under the law.' Every 'individual has a common law right to the protection of his own good name.'" *Id.* at 327 (citations omitted).

Here, Appellant presented evidence that his motives for changing his legal name are not improper. Specifically, Appellant testified that he wants to change his legal name in order to: 1) have his legal name align with the name he is known by in his community; 2) have his legal name align with his gender identity; 3) as part of his course of treatment for Gender Dysphoria; and 4) reduce the risk of violence

and protect his physical safety. None of these motives can fairly be described as improper or fraudulent. Nevertheless, without any evidentiary support, the presiding judge rejected the petition on the grounds that it would be "a type of fraud on the general public." (R. 21.)

Such a decision finds no support under Georgia law and is contrary to the vast majority of published decisions that reject the court's misguided justification. *See, e.g.*, *In re Harvey*, 293 P.3d 224, 225 (Okla. Civ. App. Div. 1 2012) ("The law does not require males be given traditionally male names, or females traditionally female names, by their parents at birth. … The relevant issue in a name change proceeding is not whether the applicant's DNA corresponds with the traditionally male or female name preferred by the applicant. The statute does not change the sex of the applicant, only the applicant's name."); *In re McIntyre*, 715 A.2d 400, 402-03 (Pa. 1998) ("it was undisputed that Appellant was judgment free and was not seeking a name change to avoid any financial obligations or commit fraud. The fact that he is a transsexual seeking a feminine name should not affect the disposition of his request") (citations omitted).

Last year, the Supreme Court of Virginia twice reversed the denial of a name change to a transgender petitioner where, as here, a judge routinely denied such

requests.[4] *In re Brown*, 770 S.E.2d 494, 497-98 (Va. 2015). The *Brown* court reasoned that, as in Georgia,[5] the existence of a statute allowing birth certificate amendments with court orders as to name and gender "makes clear that once good cause has been established, the only thing left for the trial court to consider is whether the evidence shows that the name change is sought for a fraudulent purpose or would otherwise infringe upon the rights of others." *Id.* at 497-98.

Here, there is simply no evidence that Appellant – who has no criminal history and is serving his country as a Sergeant in the US Army Reserves – seeks to change his name for any fraudulent, improper or criminal purpose. But, there is ample evidence that denying the name change imposes a significant burden on Appellant (R. 11), exposes him to increased risks of violence and distress (T. 9), and is contrary to his therapist's professional course of treatment to alleviate

[4] The *Brown* court granted the applications of two transgender petitioners denied a name change by the same judge; however, the day before the court rendered its decision, one of the petitioners committed suicide. 770 S.E. 2d at 495.

[5] *See* Georgia Code Ann. § 31-10-23(e) ("[u]pon receipt of a certified copy of a court order indicating the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed, the certificate of birth of such individual shall be amended ….").

symptoms associated with Gender Dysphoria[6] (T. 17-18). *See also In re E.P.L.*, 26 Misc. 3d 336, 339 (N.Y. Sup. Ct. 2009) (granting transgender petitioner's request to be exempted from the name change publication requirement because "while petitioner did not, and hopefully could not, cite a personal experience of violence or crime against him based on his gender identity, he has made a compelling argument as to why, at the age of twenty, he has a right to feel threatened for his personal safety in the event his transgender status is made public."). Where, as here, a decision lacks a legal basis, the decision is arbitrary and capricious. *See Pryor Org., Inc. v. Stewart*, 274 Ga. 487, 488 (2001).

b. Sound Legal Discretion Is Not Unlimited and Cannot, As Here, Be Based on a Judge's Personal Biases and Speculations.

Judicial discretion is not an invitation for judges to issue rulings in accordance with their personal beliefs about "sensibilities" or "social mores," but to apply the law "and not to do according to their wills and private affections." *Miller*, 76 Ga. at 484. The limits of a court's exercise of sound legal discretion when considering a name change petition are set forth in *In re Mullinix*, 152 Ga.

[6] Notwithstanding that benefit to general public is legally irrelevant in name change cases, *see infra* at Sec. II (c), ironically, the lower court noted that a name change to align Appellant's gender expression and his legal name would *benefit* the general public. (T. 13-14.)

App. 215 (1979), a case that involved a married mother who sought to change her name to her maiden name because she was an only child and wanted to preserve her family name. As here, the name change was sought to benefit the petitioner, no objections were raised, and there was no allegation that the name change was sought for a fraudulent purpose. *Id*. The trial court denied the petition based on the belief "that such a change of name for this wife and mother would set the stage for serious confusion, misunderstanding, complications, and above all embarrassment, particularly for the minor child who would be put in a very strange situation." *Id.* at 215. This Court reversed, noting that:

> This reason alone is not a valid basis for denying a change of name. We conclude that the trial judge abused his discretion in denying appellant's petition inasmuch as appellant met the statutory criteria for a change of name and no objections whatsoever were raised at the hearing. The case is remanded to the lower court with direction to enter an order granting appellant's petition for change of name.

Id.; *see also McIntyre*, 715 A.2d at 403 (finding there "is no public interest being protected by the denial…. The details surrounding Appellant's quest for sex-reassignment surgery are not a matter of governmental concern").

Because the lower court's ruling is not based in law or facts, but is instead based on the judge's belief that "[s]uch name changes offend the sensibilities and

mores" of others, it is inconsistent with *Mullinix*¸ and beyond the bounds of judicial discretion established in *Miller*. Therefore, the decision constitutes an abuse of discretion. As in *Mullinix*, the petitioner here has satisfied the statutory criteria for a change of name and no objections were raised or evidence presented of improper motive. The trial court's decision should be reversed.

II. THE TRIAL COURT ERRED IN SUMMARILY REJECTING APPELLANT'S EQUAL PROTECTION ARGUMENT BECAUSE THE COURT'S DENIAL WAS UNLAWFUL DISCRIMINATION BASED ON SEX.

Contrary to the lower court's ruling that "Fourteenth Amendment issues are [not] present in this case" (R. 21), the denial of Appellant's name change petition based on Appellant's sex and/or failure to conform to gender stereotypes not only implicates, it violates, Appellant's right to Equal Protection of the law. *See Glenn v. Brumby*, 632 F. Supp. 2d 1308, 1317 (N.D. Ga. 2009) ("[D]iscrimination against a transgender individual… is sex discrimination.").

It is well established that "individuals have a right, protected by the Equal Protection clause of the Fourteenth Amendment, to be free from discrimination on the basis of sex." *Glenn v. Brumby*, 663 F.3d 1312, 1315 (11th Cir. 2011). "[T]he Equal Protection Clause forbids sex discrimination no matter how it is labeled."

Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 118-19 (2d Cir. 2004); *see also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007) (courts should not "allow employers to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals").

To make out a sex discrimination claim, "a plaintiff must prove that he or she suffered purposeful or intentional discrimination on the basis of gender." *Glenn*, 632 F. Supp. 2d at 1315 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp*., 429 U.S. 252, 264–65 (1977)). "[A]ll gender-based classifications today warrant heightened scrutiny." *United States v. Virginia*, 518 U.S. 515, 555 (1996) (internal quotation marks omitted). Once sex discrimination is shown, courts must determine whether the justifications for the unequal treatment are "exceedingly persuasive." *Id.*

As set out below, the court's denial constitutes unlawful sex discrimination for three reasons: 1) denying a name change based only on the sex designation on petitioner's birth certificate is, literally, discrimination "based on sex"; 2) denying transgender individuals the ability to change their name to one that conforms with their gender identity necessarily relies upon sex stereotypes, and gender identity,

and is, therefore, discrimination based on sex; and 3) the justifications offered by the trial court for the discriminatory treatment are constitutionally insufficient.

a. The Trial Court's Decision Is Sex Discrimination Because a Similarly Situated Petitioner Whose Sex Assigned at Birth Was "Male" Instead of "Female" Would Have Been Granted the Name Change.

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr*., 473 U.S. 432, 439 (1985) (quotation and citation omitted). The decision below violates that constitutional direction because it creates two classes of similarly situated petitioners seeking name changes and treats them differently. Petitioners with a male sex designation on their birth certificates who meet the statutory requirements for a name change and seek to change their name to "an obviously and traditionally male name" are granted their requests while similarly situated petitioners with a female sex designation on their birth certificates who seek to change their name to "an obviously and traditionally male name" are denied their requests.

The lower court's "policy" of denying name change petitions whenever a person with a "male" designation on their birth certificate seeks "an obviously

female name and vice versa," is quintessential sex-based discrimination. *See, e.g.*, *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (sex discrimination found where the contributions to a pension fund was higher or lower depending upon the sex of the employee); *Stevens v. Califano*, 448 F. Supp. 1313 (N.D. Ohio 1978), *aff'd*, 443 U.S. 901, 99 (1979) (sex discrimination found where statute permitted needy families to qualify for benefits based upon the unemployment of the male parent but not upon the unemployment of the female parent). Because Appellant's petition would have been granted but for the sex designated on his birth certificate, the order below undeniably constitutes discrimination based on sex.

b. The Trial Court's Decision Is Sex Discrimination Because the Decision Was Based on Appellant's Transgender Status and Non-Conformity With Socially-Constructed Gender Expectations.

The lower court's refusal to grant Appellant's name change also appears to have been based upon the fact that he is transgender, which necessarily relies upon sex stereotypes and the lower court's application of socially-constructed gender expectations *vis a vis* 'appropriate' names for each gender. (R. 18-19.)[7] Adverse

[7] The court further justified it's ruling based on not knowing "anybody named Elijah who's female. I'm not going to do that. I've never heard of that." (T. 16)

action based upon a person's failure to conform to sex stereotypes and expectations is forbidden by Title VII and the Equal Protection clause.[8] *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (holding that sex stereotyping can be the basis for sex discrimination claims under Title VII and recognizing that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (holding that transgender applicant presented ample evidence of sex discrimination and recognizing that "[t]here is nothing in existing case law setting a point at which a man becomes too effeminate, or a woman becomes too masculine, to warrant protection under Title VII and *Price Waterhouse*").

Protections from sex stereotyping apply equally to transgender individuals. *See Glenn*, 663 F.3d at 1317 ("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"); *E.E.O.C. v. R.G. & G.R. Harris Funeral*

[8] Courts rely upon a common body of law in analyzing discrimination claims, regardless of whether the claim at issue arises under the Equal Protection Clause or a particular antidiscrimination statute. *See G.G. ex rel. v. Gloucester Cnty. Sch. Bd.*, No. 15-2056, 2016 WL 1567467 at *4 (4th Cir. Apr. 19, 2016).

Homes, Inc., 100 F. Supp. 3d 594, 603 (E.D. Mich. 2015) ("a transgender person – just like anyone else – can bring a sex-stereotyping gender-discrimination claim under Title VII under a *Price Waterhouse* theory"); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 574 (6th Cir. 2004) (district court erred in holding that transsexuals, as a class, are not entitled to Title VII protections).

Illustrative cases reveal how sex discrimination is implicated in the circumstances before this Court. In *Smith*, where a transgender woman was terminated from her position as a firefighter based upon "transsexualism and its manifestations," the Sixth Circuit explained why sex discrimination based on transgender status is sex discrimination:

> After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows 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.

378 F.3d at 574.

As the Eleventh Circuit observed in *Glenn*, where a state employee was terminated after announcing her intention to begin appearing at work in conformity with her gender identity, "[a] person is defined as transgender precisely because of

the perception that his or her behavior transgresses gender stereotypes.... There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." 663 F.3d at 1316.[9] In *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000), the Ninth Circuit likewise concluded that a transgender plaintiff who was singled out for harassment had stated an actionable claim for sex discrimination under the Gender Motivated Violence Act because "the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like one.'" *See also Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008) (holding that revocation of an employment offer "when it learned that a man named David intended to become, legally, culturally, and physically, a woman named Diane," is "discrimination 'because of ... sex'"); *Chavez v. Credit Nation Auto Sales, LLC*, No. 14-14596, 2016 WL 158820 at *1 (11th Cir. Jan. 14, 2016) ("Sex discrimination includes discrimination against a transgender person for gender nonconformity") (citations omitted); *Rosa v. Park W. Bank & Trust Co*., 214 F.3d

[9] *And see Smith v. City of Salem, Ohio*, 369 F.3d 912, 922 (6th Cir. 2004) ("Discrimination based on transsexualism is rooted in the insistence that sex (organs) and gender [identity] (social classification of a person as belonging to one sex or the other) coincide. This is the very essence of sex stereotyping."), *opinion amended and superseded*, 378 F.3d 566 (6th Cir. 2004).

213 (1st Cir. 2000) (bank that refused to provide a loan application to a man in feminine clothing found guilty of sex discrimination based on sex stereotyping under Equal Credit Opportunity Act); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005) (transgender police officer demoted because she wore makeup and did not appear "masculine" met burden of proof that she was victim of sex discrimination).

The lower court's denial of Appellant's Petition because he is transgender and the name requested was "traditionally and obviously a male name" and thus not in conformity with its view of an appropriate name for a person designated female at birth is paradigmatic sex stereotyping. *See Smith*, 378 F.3d at 574 (sex stereotyping based on employee's "appearance and mannerisms, which Defendants felt were inappropriate for his perceived sex"); *Glenn*, 663 F.3d at 1320 (proof that supervisor fired transgender employee because he considered it "inappropriate," "unsettling" and "unnatural" for her to appear at work as a woman provided ample support for district court's conclusion that adverse action was based on employee's gender non-conformity); *Doe by Doe v. City of Belleville, Ill*., 119 F.3d 563, 580 (7th Cir. 1997) (evidence that employee's personality "did not conform to his

coworkers' view of appropriate masculine behavior supplies that proof" necessary for Title VII liability), *vacated on other grounds*, 523 U.S. 1001 (1998).

Here, the lower court's denial of Appellant's Petition based on its "policy" of limiting name choices to "traditionally and obviously" male or female names, depending on the petitioner's sex designation on their birth certificate, and to otherwise limit transgender people to gender-neutral names in order to impede their ability to "assume the role of the opposite sex," is based on sex stereotyping and gender non-conformity. As such, the decision below is sex discrimination.

c. There Is No Rational Basis, Let Alone a Governmental Interest that Satisfies Heightened Scrutiny, in Denying Appellant's Petition for Name Change.

In determining whether differential treatment based on sex is constitutional, "the reviewing court must determine whether the proffered justification is 'exceedingly persuasive.' The burden of justification is demanding and it rests entirely on the State." *Virginia*, 518 U.S. at 532. It is no defense to apply differential treatment equally to men and women. *Califano v. Westcott*, 443 U.S. 76, 83-85 (1979) (applying heightened scrutiny to sex-based classification even if the effects of its application are felt equally by men and women). Recent federal court decisions have recognized that discrimination against transgender people—

beyond its connection to discrimination based on sex stereotyping—must be evaluated under heightened scrutiny. *See, e.g., Adkins v. City of New York*, __ F. Supp. 3d __, No. 14 Civ. 7519, 2015 WL 7076956, at *3-4 (S.D.N.Y. Nov. 16, 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015).

Here, the lower court offers two reasons for the discriminatory treatment: 1) "Names which allow a person to assume the role of the opposite sex are, in effect, a type of fraud on the general public,"; and 2) "Such name changes offend the sensibilities and mores of a substantial portion of the citizens of this state." (R. 21) Neither is sufficient to satisfy the state's burden.

i. Regulating citizen's names for gender compliance is an inappropriate judicial function and insufficient governmental interest to justify sex discrimination.

The lower court's determination that it is an appropriate judicial function to regulate name changes to ensure they correspond with the sex designation on the petitioners' birth certificates, or do not cross the line of gender-neutral, is error. *See Matter of Eck*, 584 A.2d 859, 861 (N.J. App. Div. 1991) (gender appropriateness of name change sought by transgender petitioner of no legitimate concern to the judiciary); *In re McIntyre*, 715 A.2d 400 (same). *And see In re*

Mullinix, 152 Ga. App. at 215 (judge's opinion that divorced mother should have same last name as child was abuse of discretion).

Fifteen year ago, a New Jersey appellate court considered a similarly misguided position from a lower court. In *Matter of Eck*, the court held that:

> Absent fraud or other improper purpose 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. Many first names are gender interchangeable-e.g., Adrian, Evelyn, Erin, Leslie, Lynn, Marion, Robin-and judges should be chary about interfering with a person's choice of a first name. Finally, we perceive that the judge was concerned about a male assuming a female identity in mannerism and dress. That is an accomplished fact in this case, a matter which is of no concern to the judiciary, and which has no bearing upon the outcome of a simple name change application.

584 A.2d at 861.

The Pennsylvania Supreme Court agreed with this reasoning. The court in *In re McIntyre* reversed the denial of a transgender woman's request for a name change based, as here, on an unwillingness to approve "changing of petitioner's name from one unmistakably male to one conspicuously and well-accepted as

female,"[10] finding "that there is no public interest being protected by the denial of Appellant's name change petition." 715 A.2d at 403.

As set out *infra*, *see* Sec. I, the lower court's decision was untethered to law and, as such, was an effort to regulate the adjudication of names along gender lines, which is an inappropriate and unconstitutional judicial function and concern.

ii. Concern about hypothetical fraud upon the general public is an insufficient justification for sex discrimination.

The court's suggestion that the government must ensure that the general public is protected from people with legal names that are not "traditionally and obviously" associated with the gender reflected on their birth certificates presumes harm that is non-existent and, at most, purely speculative. *See Bernal v. Fainter*, 467 U.S. 216, 227-28 (1984) (statute prohibiting resident aliens from becoming notaries violated equal protection, in part, because "purported interest was not shown to be a "real, as opposed to a merely speculative, problem to the State"); *Arizona Dream Act Coal. v. Brewer*, 81 F. Supp. 3d 795 (D. Ariz. 2015), *aff'd*, 818 F.3d 901 (9th Cir. 2016) (holding that justifications for Arizona's policy of denying driver's licenses to undocumented persons, who qualified for deferred

[10] *In re McIntyre*, 1996 WL 942100, *4 (Com. Pl. 1996), *aff'd sub nom*. *Matter of McIntyre*, 687 A.2d 865 (Pa. Super. 1996), *rev'd.*, 715 A.2d 400.

removal, were unfounded or speculative, or that the policy did not further Arizona's asserted justifications, and thus policy violated equal protection clause).

The harm the lower court speculates will ensue should Appellant's legal name match the name he is known by in his community is as illogical as it is unsubstantiated. Indeed, the fact that the lower court suggested that it would approve the name 'Rowan Shawn Feldhaus' but not 'Rowan Elijah Feldhaus,' (T. 14), or that it would likely approve 'Rowan Elijah Feldhaus' if "Elijah" were a family name, (T. 16), illustrates the absurdity of the justification.

In fact, the lower court contradicts its own justification of avoiding speculative 'harm' to the general public where it explained that the public interest is *furthered* by reducing the incongruence between Appellant's male gender expression and the female name revealed on his identification. (T. 13-14.) The court explained that the imposition of a gender-neutral name requirement on Appellant is to allow the public to maintain their impression of Appellant as male. (R. 19) ("third parties should not have to contend with the quandary, predicament and dilemma of a person who presents as male, but who has an obviously female name, and vice versa."). *And see* (T. 13-14.) Yet, the court failed to explain how allowing a "traditionally and obviously male name" would impede that objective.

The justification below is not only unsupported in fact, it is unsupported in law. Vague and speculative concerns about harm to "the public" flowing from granting a transgender person a name change is not a valid justification to deny a request that implicates both First and Fourteenth Amendment rights. *See In re Brown*, 770 S.E.2d at 496 (reversing denial that was based on lower court's finding of "the potential negative impact on the community'"); *In re McIntyre*, 715 A.2d at 402 (no public interest furthered in denying name change to transgender petitioner); *Matter of Eck* 584 A.2d at 861(same).

iii. Protecting the public from being offended is an insufficient basis for discrimination.

The trial court's reasoning that the petition must be denied because it "offends the sensibilities and mores of a significant portion of the citizens of this state," (R. 21), is a similarly deficient justification for discrimination. The district court in *Glenn* recognized that such a justification does not pass constitutional muster: "[A]voiding the anticipated negative reactions of others cannot serve as a sufficient basis for discrimination and does not constitute an important government interest" to justify discrimination against a transgender woman." 724 F. Supp. 2d, 1284, 1305 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312. Such a justification fails

rational basis review, the lowest level of scrutiny. *See Lawrence v. Texas*, 539 U.S. 558, 582 (2003) ("Moral disapproval of [a] group…is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.") (citations omitted); *City of Cleburne*, 473 U.S. at 448 ("[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.").

The state interests identified here to justify discrimination against Appellant are insufficient under even the most deferential standard of review, let alone the demanding burden of showing that the interest is "exceedingly persuasive." *Virginia*, 518 U.S. at 532. Accordingly, the decision below is reversible error.

III. THE TRIAL COURT ERRED IN SUMMARILY REJECTING APPELLANT'S FIRST AMENDMENT ARGUMENT BECAUSE THE DENIAL VIOLATES APPELLANT'S RIGHT TO CHOOSE A NAME AND COMPELS HIM TO CONVEY A MESSAGE INCONGRUENT WITH THE MESSAGE HE CHOOSES TO CONVEY REGARDING HIS GENDER IDENTITY.

The trial court's decision infringes on Appellant's freedom of expression as guaranteed by the First Amendment of the United States Constitution. The First Amendment "guarantees 'freedom of speech,' a term necessarily comprising the

decision of both what to say and what not to say." *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781, 796-97 (1988). *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (a person could not be compelled to display the slogan "Live Free or Die"). Governmental justifications for impinging on First Amendment rights must be compelling. *Cohen v. California*, 403 U.S. 15, 26 (1971).

The First Amendment provides broad protection for parents to choose their children's names, and for adults to choose their own. Transgender people are no exception to this constitutional mandate. In addition, refusal to grant the requested name change compels Appellant to convey a message incongruent with the message he chooses to express regarding his name and his gender identity when required to show identity documents. In denying his Petition, the State forces Appellant to express a female gender identity that leads to confusion and confrontations that would be eliminated, or diminished, with the requested name change. Such government compulsion, without a correspondingly compelling justification, violates Appellant's right to freedom of expression.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the decision below and order the court to grant the Petition.

This, the 9th day of June, 2016.

Respectfully submitted,

/s Elizabeth Littrell
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CERTIFICATE OF SERVICE

I hereby certify that, given this case involves the denial of an unopposed petition to change the name of Petitioner, there is no opposing counsel to serve or otherwise notify of this INITIAL BRIEF OF APPELLANT.

This 9th day of June, 2016.

/s Elizabeth Littrell
Elizabeth Littrell
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