IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAKISHA LAVETTE SHORT, Petitioner Below, Appellant Below, Appellant, v. STATE OF DELAWARE, Respondent Below, Appellee Below, Appellee.	)	No. 481, 2014 Case Below: Superior Court of the State of Delaware in and for New Castle County, C.A. No. N13A-08-006 MJB

OPENING BRIEF OF APPELLANT

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NATURE OF THE PROCEEDINGS

Plaintiff-Appellant Lakisha Lavette Short[1] appeals from the Superior Court's April 17, 2014 order affirming the Court of Common Pleas denial of his petition seeking to change his name to Kai Short (attached as Exhibit A, herein "Order") and the Superior Court's subsequent denial of his Motion for Reargument on August 5, 2014 (attached as Exhibit B, herein "Op."). Mr. Short challenges the validity of the statutory restriction on name changes for incarcerated persons as applied to him and seeks reversal of the Superior Court's affirmance and a remand to the Court of Common Pleas for a grant of his name change petition.

[1] Consistent with the Appellant's identity and preference, counsel refer to Petitioner as "Mr. Short" and with masculine pronouns (he/him) throughout. This is consistent with common practice and the advice of medical and mental health professionals who work with individuals with gender dysphoria. *See* Gianna E. Israel and Donald E. Tarver II, M.D., Transgender Care 7 (1997). *Accord Glenn v. Brumby*, 724 F. Supp. 2d 1284, 1289 n.2 (N.D. Ga. 2010)("The Court refers to Plaintiff in this Order as she or her out of respect for Plaintiff's self-identification"), *aff'd*, 663 F.3d 1312 (11th Cir. 2011); *Doe v. Reg'l Sch. Unit 26*, 86 A.3d 600 (Me. 2014)(referring to female transgender student with female pronouns throughout); *Ava v. NYP Holdings, Inc.*, 64 A.D.3d 407, 408 n.1 (N.Y. App. Div. 2009)("In accordance with plaintiff's preference, we refer to her using feminine pronouns.").

SUMMARY OF THE ARGUMENT

1. The statutory name change prohibition imposes a blanket ban on treatment for gender dysphoria, thereby denying Mr. Short treatment for a serious medical need in violation of the Eighth Amendment.

2. The ban violates the Equal Protection Clause of the Fourteenth Amendment by providing an exemption for prisoners with religious motivations for changing their names but not for other constitutionally protected motivations.

3. The statutory ban permits religiously motivated speech but not secular speech communicating other constitutionally protected messages. That distinction is impermissible viewpoint discrimination under the First Amendment.

4. The denial of Mr. Short's petition for a name change forces him to retain a name that does not comport with his gender. That constitutes coerced speech in violation of the First Amendment.

5. The statutory ban on name change petitions as applied to transgender inmates was abrogated by later enacted legislation prohibiting discrimination on the basis of gender identity.

STATEMENT OF FACTS

a) Mr. Short Petitioned For A Legal Name Change To Affirm His Male Gender As Part of His Gender Transition And In Accordance With Medical Protocols.

Mr. Short is transgender and has gender dysphoria, a condition in which a person's gender identity – a person's innate sense of being male or female – differs from the sex the person was assigned at birth, causing clinically significant distress.[2] Mr. Short is currently incarcerated at Baylor Women's Correctional Institution serving a sentence for robbery and weapons charge convictions with a scheduled release date of 2053. Order at 1. Gender dysphoria is a serious medical and mental health condition included in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, Fifth ed. (2013) (DSM-5), and recognized by the other major medical and mental health professional groups, including the American Medical Association and the American Psychological Association. *See, e.g., Fields v. Smith*, 712 F. Supp. 2d 830 (E.D.Wis. 2010), *aff'd*, 653 F.3d 550 (7th Cir. 2011).

The World Professional Association for Transgender Health (WPATH) is the leading medical authority on gender dysphoria and has developed Standards of Care for the treatment of the condition. *See, e.g.*, *Battista v. Clarke*, 645 F.3d 449, 450 (1st Cir. 2011); *Fields*, 653 F.3d at 553; *De'lonta v. Johnson* (*De'lonta II*), 708

[2] International Classification of Diseases (10th revision; World Health Organization).

F.3d 520, 522-23 (4th Cir. 2013). These standards, which have been recognized as authoritative by every major medical and mental health association[3] and by courts that have considered them, provide for the following treatments, some or all of which will be required depending on the specific needs of the patient:

- Changes in gender expression and role (which may involve living part time or full time in another gender role, consistent with one's gender identity);
- Hormone therapy to feminize or masculinize the body;
- Surgery to change primary and/or secondary sex characteristics (e.g., breasts/chest, external and/or internal genitalia, facial features, body contouring)
- Psychotherapy (individual, couple, family, or group) for purposes such as exploring gender identity, role, and expression; addressing the negative impact of gender dysphoria and stigma on mental health; alleviating internalized transphobia; enhancing social and peer support; improving body image; or promoting resilience.

World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People* ("*WPATH Standards of Care*") 9-10 (7th ver. 2012); *De'lonta II*, 708 F.3d at 523 (identifying the WPATH *Standards of Care* treatment protocols as authoritative).

One critical component of changing one's gender expression and role is changing the name and gender marker on one's identification documents and in social and societal interactions. *WPATH Standards of Care* at 10. During the part of treatment for gender dysphoria where a patient lives in accordance with his/her

[3] *See* American Medical Association (2008), Resolution 122 (A-08); American Psychiatric Association-DSM-5; American Psychological Association Policy Statement on Transgender, Gender Identity, and Gender Expression Non-discrimination (2009).

gender identity, often called the "Real Life Experience," a legal name change facilitates social adaptation. *Id*.; *see also De'lonta II*, 708 F.3d at 523 (identifying the Real Life Experience as part of the established protocols for treating gender dysphoria); *cf. Glenn*, 724 F. Supp. 2d at 1305 (noting that the Real Life Experience is part of the treatment for gender dysphoria in the context of an employment discrimination claim). When documents that correspond to one's gender identity are procured, psychosocial adjustment improves, and dysphoria is attenuated. WPATH *Standards of Care* at 10, 28. The State of Delaware has recognized this need in the context of gender marker changes on drivers' licenses. 2 *Del. C. Admin.* § 2217-5.0.

Without necessary treatment, gender dysphoria leads to serious medical problems, including clinically significant psychological distress, dysfunction, debilitating depression, and suicidality. WPATH *Standards of Care* at 67; *Fields*, 653 F.3d at 556 (discussing harms that flow from failing to treat gender dysphoria). For this reason, the National Commission on Correctional Healthcare (NCCHC) recommends that the medical management of prisoners with gender dysphoria "should follow accepted standards developed by professionals with expertise in transgender health," citing the WPATH *Standards of Care*. National Commission on Correctional Healthcare, Position Statement: Transgender Health Care in Correctional Settings (2009), http://www.ncchc.org/transgender-health-care-in-

correctional-settings. The NCCHC specifically instructs that "[b]ecause inmate-patients may be under different stages of care prior to incarceration, there should be no blanket administrative or other policies that restrict specific medical treatments for transgender people." *Id*.

As Mr. Short explained at his hearing before the Court of Common Pleas, the reason for his name change petition was his transition from female to male. (A07 (stating that the factual basis for the petition was petitioner's transgender status).) His birth name, "Lakisha" is traditionally associated with the female gender and Mr. Short wants to ensure that his name properly reflects his male identity. *Id*. The ability to be known by a name more typically associated with one's gender is basic and essential treatment for gender dysphoria. *WPATH Standards of Care* at 10.

For a person in prison suffering from gender dysphoria, like Mr. Short, the failure to treat the condition can lead to disastrous consequences. Mr. Short has nearly 40 years left on his sentence and without a legal name change, it will be impossible for him to ever have documentation, like a birth certificate or prison identification, or affirmation, the ability to be called "Kai" or have "Kai" listed as an "AKA" on his paperwork, of his gender-affirmed name. Unlike prisoners who are able to change their names because of sincerely held religious beliefs or a

marriage,[4] Mr. Short will not be permitted to bring his name in line with his identity. Without this treatment, he will be known always and for all purposes by his birth name, which incorrectly communicates to the world that he is female.

b) Proceedings Below.

On April 22, 2013, Mr. Short filed a Name Change Petition with the Court of Common Pleas seeking to change his name to Kai Short. Order at 1-2. At the time of filing, Mr. Short was unrepresented by counsel. At the hearing on June 10, 2013, the court inquired as to the factual basis for the name change. (A06-07.) Mr. Short testified that the factual basis for his petition was that he is "transgender." (A07.) When the court inquired further, Mr. Short confirmed that he "wanted to, as a first step, change [his] name to Kai, to reflect [his] male identity." *Id*. The State opposed Mr. Short's petition on the grounds that 10 *Del. C.* § 5901(c)(2) ("the Name Change Ban") precludes name changes by inmates unless the name change "is motivated by a sincerely held religious belief." (A09-10.) The State did not express any concern that the name change would interfere with prison administration. (A09-12.) The Court of Common Pleas denied Mr. Short's petition because it was not motivated by a sincerely held religious belief.

[4] The Name Change Ban applies only to court-ordered name changes. Because incarcerated individuals can marry, *see Turner v. Safley*, 482 U.S. 78 (1987), they can effectuate a name change through marriage despite the bar to court-ordered name changes. *See, e.g.*, Delaware Department of Motor Vehicles, Driver's Services, Changing Your Name/Address http://www.dmv.de.gov/services/driver_services/other/dr_oth_change.shtml (permits name change with marriage certificate).

(A12.) The court did not address Mr. Short's medical condition or medical need for the name change. (A06-12.)

On July 27, 2013, Mr. Short appealed the denial of his name change petition to the Superior Court. (A14.) The Superior Court affirmed the Court of Common Pleas, holding that 10 *Del. C.* § 5901(c)(2) "unambiguously provides that a name change petition brought by an inmate of the Department of Correction (the "DOC") can only be granted if the Court determines the petition is motivated by 'a sincerely held religious belief.'" Order at 3.

On April 24, 2014, Mr. Short, through counsel, filed a Motion for Reargument of the denial of his Name Change Petition. (A15-20.) Without objection from the State (A24-35.), Mr. Short's motion raised constitutional arguments that had not been raised in earlier proceedings. (A15-20.) Mr. Short argued that the Name Change Ban, as applied to him, violated his rights under the Eighth and Fourteenth Amendments. He also challenged the ban on the ground that it conflicts with a later passed Delaware statute, 6 Del. C. § 4501, *et seq.* as amended by the 2013 amendments thereto, contained in the Gender Identity Nondiscrimination Act of 2013, Del. S.B. 97, 147th Gen. Assem, 2013 Del. Laws Ch. 47 (2013), Delaware's public accommodations nondiscrimination law (the "Nondiscrimination Law"). (A16-17.) In its response to Mr. Short's motion, the State raised constitutional arguments under the First Amendment. (A32.)

On August 5, 2014, the Superior Court denied Mr. Short's Motion for Reargument. Op. at 13. In ruling on the motion, the court reached the questions raised in the Motion for Reargument and the Response thereto. *Id*. at 9-12. The court held that enforcement of the Name Change Ban did not violate the Eighth Amendment because "there is no evidence how or where the name change falls into medical planning," and "the court has no basis to determine that gender dysphoria is a serious medical condition." *Id*. at 12. The court further held that the Name Change Ban did not violate Mr. Short's right to equal protection and did not conflict with the gender identity protections in the Nondiscrimination Law. Op. at 11-12. On September 2, 2014, Mr. Short timely filed his notice of appeal. (A36-38.)

ARGUMENT

I. THE DENIAL OF MR. SHORT'S NAME CHANGE PETITION AND THE APPLICATION OF THE NAME CHANGE BAN TO MR. SHORT VIOLATES THE UNITED STATES CONSTITUTION

A. Question Presented: Did denying Mr. Short's petition to change his name violate his rights under the United States Constitution because the denial violated the Eighth Amendment prohibition against cruel and unusual punishment, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and/or the First Amendment to the United States Constitution? The Eighth Amendment was raised at A19 and addressed by the Superior Court at Op. at 12. The equal protection argument was raised at A19 and addressed by the Superior Court at Op. at 11. The First Amendment was raised by the State at A32 and addressed by the Superior Court at Op. at 11. To the extent the Court finds that the issues relating to the First Amendment were not fairly presented below, Mr. Short requests that they be considered by the Court under the interests of justice exception in Delaware Supreme Court Rule 8, as the question involves the violation of a core, constitutional right and as Mr. Short proceeded without the assistance of counsel during much of these proceedings.

B. Scope of Review: This Court reviews legal issues arising under the United States Constitution *de novo*. *Jackson v. State*, 21 A.3d 27, 34 (Del. 2011).

C. Merits of the Argument

1. The Name Change Ban Imposes A Blanket Ban On Medical Treatment For Gender Dysphoria, A Serious Medical Need, In Violation Of The Eighth Amendment.

The Superior Court erroneously held that gender dysphoria is not a serious medical need for purposes of the Eighth Amendment. Op. at 12. It is well-established that gender dysphoria is a serious medical need for purposes of the Eighth Amendment and that laws imposing blanket bans on treatment for that condition violate the Eighth Amendment's proscription against cruel and unusual punishment. Banning name changes for transgender petitioners, like Mr. Short, with a serious medical need for such treatment, is thus unconstitutional.

a. Gender Dysphoria is a Serious Medical Need.

The Superior Court's finding that "there is no basis to determine that gender dysphoria is a serious medical condition" was incorrect, and goes against the great weight of authority on this question. Op. at 12. In fact, for over two decades, courts have routinely held that gender dysphoria (historically also referred to as "gender identity disorder" or "transsexualism") is a serious medical need for purposes of the Eighth Amendment. *See, e.g., Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987) (recognizing that transsexualism as a serious medical need that should not be treated differently than any other psychiatric disorder); *Brown v. Zavaras*, 63 F.3d 967 (10th Cir. 1995) (prison officials must address the medical

needs of prisoner with gender identity disorder); *Fields*, 712 F. Supp. 2d at 855-56 (gender identity disorder is a serious medical need for purposes of the Eighth Amendment); *Battista*, 645 F.3d at 449 (upholding district court decision recognizing that gender identity disorder as a serious medical need for purposes of the Eighth Amendment); *Phillips v. Michigan Dep't of Corrections*, 731 F. Supp. 792, 799 (W.D. Mich. 1990) (complete refusal by prison officials to provide a person with gender identity disorder with any treatment at all would state an Eighth Amendment claim); *cf. Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) ("We assume for purposes of this appeal that transsexualism constitutes a serious medical need.").

The Superior Court erred in deciding that gender dysphoria is not a serious medical condition and does not constitute a serious medical need for purposes of the Eighth Amendment.

b. Enforcing a Blanket Ban on a Particular Treatment for Gender Dysphoria Violates the Eighth Amendment.

The Name Change Ban prevents any incarcerated person from obtaining a legal name change regardless of the medical need for such change. The ban, 10 *Del. C.* § 5901(c)(2), provides in relevant part that

> The common law right of any person to change his or her name is hereby abrogated as to individuals subject to the supervision of the State of Delaware Department of Correction. Such individuals may only effect a name change by petitioning the Court of Common Pleas as follows: . . . (2) When, based upon testimony or sworn affidavits,

> the court finds that a petition for a name change of an individual subject to the supervision of the Department of Correction is motivated by a sincerely held religious belief, the court may grant such petition.

By enforcing a blanket ban on one form of treatment (*i.e.*, the ability to be affirmed in one's gender through the real life experience, including using a name that reflects one's gender), the State is acting with deliberate indifference to Mr. Short's serious medical needs in violation of the Eighth Amendment's prohibition on cruel and unusual punishment. *De'lonta II*, 708 F.3d at 526; *Fields*, 653 F.3d at 550.

The Eighth Amendment requires that prisoners be provided with adequate medical care "based on an individualized assessment of an inmate's medical needs in light of relevant medical considerations." *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 242 (D. Mass. 2012). Given this need for individualized assessment, laws that categorically bar medical treatment, regardless of medical need for the treatment, violate the Eighth Amendment. *See Johnson v. Wright*, 412 F.3d 398, 406 (2d Cir. 2005) (denial of hepatitis C treatment to a prisoner based on a policy that a particular drug could not be administered to inmates with recent history of substance abuse could constitute deliberate indifference since policy did not allow exceptions based on medical need); *Mahan v. Plymouth Cnty. House of Corr.*, 64 F.3d 14, 18 n.6 (1st Cir. 1995) ("inflexible" application of prescription policy may violate Eighth Amendment); *Jorden v. Farrier*, 788 F.2d 1347, 1349 (8th Cir.

1986) (application of prison pain medication policies must be instituted in a manner that allows individualized assessments of need).

Consistent with this established law, courts have routinely held that prison policies that automatically exclude certain forms of treatment for gender dysphoria violate the Eighth Amendment. In *Fields v. Smith*, the Court of Appeals for the Seventh Circuit held that a state law that barred hormone therapy and sex reassignment surgery as possible treatments for prisoners with gender dysphoria facially violated the Eighth Amendment. *Fields*, 653 F.3d at 559. Similarly, in *De'lonta v. Angelone* (*"De'lonta I"*), 330 F.3d 630 (4th Cir. 2003), the Court of Appeals for the Fourth Circuit held that a prisoner with gender dysphoria stated a claim for deliberate indifference where the Department of Corrections withheld hormone therapy pursuant to a categorical policy against providing such treatment, rather based on the medical judgment of qualified providers. *See also Allard v. Gomez*, 9 F. App'x 793, 795 (9th Cir. 2001) ("[T]here are at least triable issues as to whether hormone therapy was denied Allard on the basis of an individualized medical evaluation or as a result of a blanket rule, the application of which constituted deliberate indifference to Allard's medical needs."); *Soneeya*, 851 F. Supp. 2d at 249 (holding that a prison policy that "removes the decision of whether sex reassignment surgery is medically indicated for any individual inmate from the considered judgment of that inmate's medical providers" violated Eighth

Amendment); *Houston v. Trella*, 2006 WL 2772748, at *8 (D.N.J. Sept. 22, 2006) (claim that prison doctor's decision not to provide hormone therapy to prisoner with gender identity disorder based not on medical reason but policy restricting provision of hormones stated viable Eighth Amendment claim); *Barrett v. Coplan*, 292 F. Supp. 2d 281, 286 (D.N.H. 2003) ("A blanket policy that prohibits a prison's medical staff from making a medical determination of an individual inmate's medical needs [for treatment related to gender identity disorder] and prescribing and providing adequate care to treat those needs violates the Eighth Amendment."); *Brooks v. Berg*, 270 F. Supp. 2d 302, 312 (N.D.N.Y. 2003) (prison officials cannot deny inmates medical treatment for gender dysphoria based on a policy of limiting such treatments to inmates who were diagnosed prior to incarceration), *vacated in part on other grounds*, 289 F. Supp. 2d 286.

By summarily denying his name change petition on the ground that it was not filed for sincerely held religious beliefs, neither the Superior Court nor the Court of Common Pleas evaluated Mr. Short's need for the name change to treat his gender dysphoria. This type of blanket ban on a type of treatment for gender dysphoria violates the Eighth Amendment.

c. The State Has Offered No Justification for Categorically Denying Name Changes When They Are Necessary Medical Care for Gender Dysphoria.

The DOC has not presented any security or penological purpose for the ban. During the proceedings below, counsel for the DOC explained that the only reason for the DOC's enforcement of the ban was the existence of the statute and not any independent security-related concerns. (A09-12.) Moreover, because state law does allow name change petitions by incarcerated individuals for religious reasons, 10 *Del. C.* § 5901(c)(2), permitting name changes for medical reasons would not create any unique administrative, security or penological concerns.

Even if the DOC were to come forward with a *post-hoc* security justification, the Eighth Amendment does not permit wholesale deference to prison officials in the administration of prisoner medical care. While courts acknowledge that "'the realities of prison administration' are relevant to the issue of deliberate indifference," *Kosilek v. Maloney*, 221 F. Supp. 2d 156, 191 (D. Mass. 2002) (quoting *Helling v. McKinney*, 509 U.S. 25, 37 (1993)), they repeatedly emphasize that "judgments concerning the care to be provided to inmates for their serious medical needs generally must be based on medical considerations." *Id*. (citing, *inter alia*, *Estelle v. Gamble*, 429 U.S. 97, 104 n.10 (1976); *Durmer v. O'Carroll*, 991 F.2d 64, 67-69 (3d Cir. 1993)); *cf. Battista*, 645 F.3d at 452 (affirming district court holding that hormone therapy could be safely administered to prisoner

despite security concerns raised by prison staff, which were undercut by "pretexts, delays, and misrepresentations"); *Fields*, 653 F.3d at 557 (rejecting prison security argument raised by correction officials as justification for denying medical care to transgender prisoners). In this case, since religious name changes are permitted and the DOC failed to identify a single penological or security justification for enforcing the ban against Mr. Short, deference to prison officials could not justify withholding this necessary medical care.

The Name Change Ban, as applied to Mr. Short, is unconstitutional because it amounts to a blanket ban on a form of treatment for gender dysphoria, a well-recognized serious medical need for purposes of the Eighth Amendment.

2. The Name Change Ban Distinguishes Between Religious and Non-Religious Bases For Petitioning For a Legal Name Change Violating the Equal Protection Clause of the Fourteen Amendment.

The Fourteenth Amendment of the United States Constitution prohibits states from "'deny[ing] to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (internal citations omitted). If legislation discriminates against some and favors others, it violates the Equal Protection Clause and is prohibited. *Shapiro v. Thompson*. 394 U.S. 618, 637 (1969); *see also Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985). The Name Change Ban impermissibly favors religious over

other non-religious, but also constitutionally protected, reasons for changing one's name in violation of the Equal Protection Clause. There is no legitimate interest that is rationally related to this restriction.

Where a classification is not "suspect" and does not implicate a fundamental right, the differential treatment of two classes must be rationally related to a legitimate state purpose. *City of Cleburne*, 473 U.S. at 439. Even though rational basis review has been described as the Court's most deferential standard, it is not "toothless." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Though certain rights of prisoners are abrogated by virtue of their incarceration, "prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at 84.

The Name Change Ban facially classifies between religious and non-religious grounds for petitioning for a legal name change. No prisoner can obtain a legal name change unless a court determines that the name change "is motivated by a sincerely held religious belief." 10 *Del. C.* § 5901(c)(2). Even where the basis for the requested name change is sincere, and constitutionally protected speech, see section I(C)(3), *infra*, a similarly situated incarcerated petitioner, like Mr. Short, is barred from legally changing his name, while a petitioner who seeks a name change for religious reasons could have it granted. As applied to Mr. Short, a transgender person with gender dysphoria, such differential treatment lacks any

rational justification. In fact, cases holding that states cannot bar name changes to incarcerated persons where such changes are based on a person's sincerely held religious belief are grounded in both the free exercise and free speech guarantees of the First Amendment and not, as the DOC suggested in the Superior Court proceeding below, only in free exercise. *See, e.g.*, *Salaam v. Lockhart*, 905 F.2d 1168, 1170 n.4 (8th Cir. 1990) (*citing Felix v. Rolan*, 833 F.2d 517, 518 (5th Cir. 1987) (per curiam)) ("'The adoption of Muslim names by inmates practicing that religion is generally recognized to be an exercise of both first amendment *speech* and religious freedom'" (emphasis added)).

The legislative history of the 1996 amendment to the name change law establishing the ban offers no rational basis for the distinction between sincerely held religious and non-religious bases for name changes by incarcerated petitioners. When the General Assembly amended the name change law in 1996, the purpose for the change was set forth in the synopsis to the bill:

> This Act abrogates the absolute common law right of individuals to adopt a name of their choice to the extent that the individual is under the supervision of the Department of Correction. The purpose is to prevent inmates and other people under the supervision of the Department of Correction from changing their name to avoid supervision or for other inappropriate reasons. This Act will also facilitate record keeping by the Department.
>
> Finally, the Act recognizes that some religions have followers who change their names for purely religious purposes and permits name changes under such circumstances.

Del. H.B. 585, 138th Gen. Assem. 1996 Del. Laws Ch. 479 (1996). There is no explanation offered as to why individuals seeking name changes as treatment for a serious medical need are categorically ineligible, while inmates with religious reasons for a name change can have the name change granted. By contrast, in the context of vaccine regulation in school, the General Assembly recognized the importance of both medical and religious grounds for exempting students from vaccination requirements. 14 *Del. C.* § 131(a)(5),(6). There is no rational basis for the distinction between religious and non-religious needs for legal name changes, particularly in light of the fact that other legislative acts have included both religious and medical exemptions where warranted.

While the justifications for the Name Change Ban – preventing inmates from avoiding supervision and orderly record-keeping – are legitimate state interests, the distinction drawn between religious and non-religious grounds for petitioning the court for a legal name change bears no rational relationship to these interests. Instead, the Name Change Ban forecloses virtually all legal name changes by prisoners even where the grounds for such changes are sincerely held and in no way pursued for "inappropriate" reasons.

To the extent there are concerns related to legal name changes at all, the DOC can use the system it now uses to maintain security, records, and identification of inmates who change their legal name for "sincerely held religious

beliefs." There is no rational basis to believe that such systems for classification, tracking and administration could not be maintained if name changes are also permitted on the basis of a medical need for treatment of gender dysphoria or on constitutionally protected communication of one's expression of gender, I(C)(3), *infra*.

Because the DOC has no penological interest in preventing Mr. Short's name change and has offered no security justifications to overcome the infringement on his constitutional rights, the ban, as applied to him, must be struck down. *Cf. In re Cruchelow*, 926 P.2d 833, 834 (Utah 1996) (generalized operational concerns could not form the basis of a policy denying name changes to incarcerated persons "the court must show some substantial reason before it is justified in denying a petition for a name change.").

3. The Name Change Ban Violates the Guarantees of the First Amendment.

The First Amendment protects the rights of individuals to speak and express themselves without undue interference from the government. Amend. I, U.S. Const. This includes the freedom to speak regardless of viewpoint and without coercion. The Name Change Ban violates the guarantees of the First Amendments by discriminating on the basis of viewpoint and coercing transgender petitioners to speak in a manner that is inconsistent with their core identity.

a. By Permitting Only Those Name Changes By Incarcerated Persons That Are Motivated By A Sincerely Held Religious Belief, the State Impermissibly Discriminates On the Basis of Viewpoint in Violation of the First Amendment.

A legal name provides the ability to accurately identify oneself, and express who one is to the world, particularly when communicating with the government. Denying that ability to inmates, unless they have a religious (or marital) reason for wanting to change their name, restricts that expression. Where the government discriminates on the basis of the viewpoint of the speaker, such discrimination violates the First Amendment. *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 828 (1995). By favoring religious over non-religious speech, the Name Change Ban violates the free speech guarantee of the First Amendment.

A person's communication of his name is clearly speech protected by the First Amendment. The government could not, for example, prohibit some classes of people (*i.e.*, people with names beginning with "A") from speaking their names ("My name is Annie"). A legal name change governs where and how a name is used and implicates the ability to control the message communicated by one's name. The speech communicated through a legal name change is protected such that the legal name change regime is subject to constitutional scrutiny under the First Amendment. This is particularly true for incarcerated petitioners for whom a legal name change creates the only opportunity to speak one's chosen or preferred

name – they cannot choose to use or be addressed by a non-legal name. As discussed at the hearing below, Mr. Short seeks a legal name change to express that his gender is male despite the fact that he was assigned to the female sex at birth. This change would permit him to speak his name "Kai", particularly when communicating with the government (i.e. prison officials, prison identification, birth certificate, GED certificate, parole). The speaking of his name and the communication about his gender are expression protected by the First Amendment.[5]

Allowing name changes that express a religious viewpoint, but denying name changes that express, for example, one's gender, is viewpoint discrimination. "It is axiomatic that the government may not regulate speech based on ... the message it conveys." *Rosenberger*, 515 U.S. at 828. Regardless of the forum, it is always unconstitutional for speech to be restricted on the basis of viewpoint. *Kincaid v. Gibson*, 236 F.3d 342, 355 (6th Cir. 2001); *see also Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998).

Where the government opens a forum to non-religious speech by secular speakers or groups, it is unconstitutional viewpoint discrimination to exclude

[5] Courts have held that when a person's dress communicates a message, the dress is protected speech under the First Amendment. *See, e.g McMillen v. Itawamba Cnty. School Dist.*, 702 F. Supp. 2d 699, 704-05 (N.D. Miss. 2010) (holding that a female student's desire to wear a tuxedo to the prom to convey her "social and political views that women should not be constrained to wear clothing that has traditionally been deemed 'female' attire . . . is the type of speech that falls squarely within the purview of the First Amendment").

speech from a religious perspective by religious speakers or groups. In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94, 389 (1993), the U.S. Supreme Court held that when a public school district opens its property to after-school use by private groups for the presentation of views about "family issues and child rearing," it cannot exclude a church group's presentations on those subjects on grounds that they are expressed "from a Christian perspective." Then, in *Rosenberger v. Rector & Visitors of the University of Virginia*, the U.S. Supreme Court held that when a public university pays for the printing of student publications, it cannot refuse to pay for the printing of some publications on the basis that they have "Christian editorial viewpoints." *Rosenberger*, 515 U.S. at 821-22. Again in *Good News Club v. Milford Central School*, 533 U.S. 98, 108-112 (2001), the U.S. Supreme Court held that when a public school allows outside groups to use its facilities after hours for events "pertaining to the welfare of the community" or to promote the "development of character and morals," it cannot prohibit a Christian group from using the facilities for that purpose merely because its activities are "decidedly religious in nature." In all three cases, the Court held "that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." *Good News Club*, 533 U.S. at 112.

Here, the State has conversely permitted "religious viewpoints" but banned non-religious viewpoints (*i.e.*, Mr. Short's expression of his gender). The very definition of viewpoint neutrality means that the forum created by the name change scheme cannot solely protect religious speech; non-religious speech must also be permitted where such speech is itself protected under the First Amendment. By permitting religious name changes by incarcerated petitioners, viewpoint neutrality requires that the State also permit Mr. Short to access a legal name change to express his constitutionally protected expression of his gender.

As discussed above, even under the most deferential *Turner* standard, the Name Change Ban cannot survive constitutional review as applied to transgender petitioners. The State has expressed no penological purpose for the ban. Any potential interest in administrative efficiency or security is undermined by the fact that the DOC already processes name changes for petitioners with sincerely held religious beliefs. There is simply no rational basis to suggest that name changes for people with sincerely held gender-related bases for a name change cannot be similarly processed. *See supra*, I(C)(2) (discussing no rational basis for the ban).

b. The Name Change Ban As Applied To Mr. Short Constitutes Coerced Speech in Violation of the First Amendment

The Name Change Ban forces Mr. Short, a transgender man, to retain and use a name that undermines his identity in violation of the First Amendment. The U.S. Supreme Court has held that "one important manifestation of the principle of

free speech is that one who chooses to speak may also decide 'what not to say.'" *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (*quoting Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion)). This principle has been extended to protect speech that is necessary to dissent from presumptions of inclusion within a majority point of view or identity. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (holding that the First Amendment protects the "right of individuals to hold a point of view different from the majority"). In the context of the now-repealed Don't Ask Don't Tell policy of the United States military, five judges on the Court of Appeals for the Ninth Circuit recognized that "silence . . . can lead others to presume that [gay people] assent to a view about their own sexuality that they do not espouse." *Holmes v. California Army Nat'l Guard*, 155 F.3d 1049, 1050 (9th Cir. 1998) (Pregerson, J., dissenting from denial of rehearing *en banc*); *cf. Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 609-11 (Cal. 1979) (holding that being openly gay was "political activity" in light of political struggle for acceptance for gay and lesbian persons), *overruled by statute per In re Marriage Cases*, 183 P.3d 384, 428 (Cal. 2008).

The Name Change Ban forces Mr. Short to identify publicly as female and non-transgender where his political and personal message is that he does not identify with either group. Expressing one's identification with a gender different

than the sex assigned to a person at birth is a deeply political message in light of the hostility and marginalization that transgender people experience in society. *See generally*, Jaime Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey (2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf (documenting discrimination faced by transgender individuals in the United States). Further, adopting and being publicly recognized by a name consistent with one's gender when such gender differs from the person's assigned sex at birth is not only a deeply political message but also is constitutive of the person's very identity. *See, e.g.*, Kenji Yoshino, Covering, 111 *Yale L.J.* 769, 836 (2002). ("Sometimes self-identifying speech can constitute one's identity."). By compelling petitioner to speak about himself as non-transgender and as female, the Name Change Ban infringes upon his First Amendment rights.

II. THE APPLICATION OF THE NAME CHANGE BAN TO NAME CHANGES BY TRANSGENDER PRISONERS BASED ON THEIR GENDER IDENTITY WAS ABROGATED BY THE LATER PASSED GENDER IDENTITY NON-DISCRIMINATION ACT

A. Question Presented: Did the later-passed Gender Identity Non-Discrimination Act abrogate the Name Change Ban as applied to name change petitions by transgender prisoners based on their gender identity? This issue was raised at A16-17 and addressed by the Superior Court at Op. at 10.

B. Scope of Review: "A trial court's interpretation of a statute is reviewed *de novo*." *Knott v. LVNV Funding, LLC*, 95 A.3d 13, 15 (Del. 2014).

C. Merits of the Argument

Under Delaware law, a later-passed statute prevails over an earlier-passed statute where the two are in conflict. *State ex rel. State Highway Dept. v. George F. Lang Co.*, 191 A.2d 322 (Del. 1963). This doctrine of "implied repealer" can be used to limit the prior enacted law to harmonize it with the later one. *Bd. of Assessment Review of New Castle Cnty v. Silverbrook Cemetery Co.*, 378 A.2d 619, 621 (Del. 1977). Though not favored, the implied repeal of an earlier-enacted law is sometimes necessary to "give meaning and effect to the latest enactment." *Id*. (internal citations omitted).

As applied to name change petitions by transgender prisoners, the Name Change Ban directly conflicts with the Gender Identity Nondiscrimination Act, which prohibits, *inter alia*, discrimination in places of public accommodation on

the basis of gender identity. Del. S.B. 97, 147th Gen. Assem, 2013 Del. Laws Ch. 47 (2013). As applied to Mr. Short, an inmate in a DOC facility subject to the Nondiscrimination Law, by preventing him from expressing his gender identity through the name change process, a critical component of treatment for gender dysphoria, the Name Change Ban discriminates against him on the basis of gender identity and must be re-interpreted so as to be harmonized with the later-passed Gender Identity Non-Discrimination Act.

a. Delaware DOC facilities are places of public accommodation within the meaning of 6 *Del. C* § 4502(14).

Prisons are public accommodations within the meaning of the Delaware Nondiscrimination Law. Under the Delaware Nondiscrimination Law, a "place of public accommodation" is defined as:

> any establishment which caters to or offers goods or services or facilities to, or solicits patronage from, the general public. *This definition includes state agencies, local governement [sic] agencies, and state-funded agencies performing public functions.* This definition shall apply to hotels and motels catering to the transient public, but it shall not apply to the sale or rental of houses, housing units, apartments, rooming houses or other dwellings, nor to tourist homes with less than 10 rental units catering to the transient public.

6 *Del. C.* § 4502(14) (emphasis added). Though this Court has not considered whether prisons are places of public accommodation under this definition, the statute itself, 6 *Del. C.* § 4501, provides that it is to be liberally construed, and both the legislative history of the definition of "place of public accommodation" and the

decisions of other courts interpreting similar – or narrower – laws to apply to prisons are instructive.

In 2000, the Delaware Attorney General's office issued an opinion responding to a question posed by the State Human Relations Commission as to whether state agencies were subject to the Delaware Nondiscrimination Law. *Re: State of Delaware as a Party to an Equal Accommodation Complaint*, Del. Op. Atty. Gen. 00-IB09, 2000 WL 1092966 (2000) (the "AG Opinion"). In that opinion, the Attorney General's office determined that, as the statute was then written, state agencies were not places of public accommodation within the meaning of the Delaware Nondiscrimination Law. *Id*. at *1. However, it noted that other states had written their public accommodations statutes to include specifically state agencies. *Id.* In so noting, the Attorney General's office specifically recognized that including state agencies in the definition of public accommodations could result in the application of the law to prisoners and prisons. *Id*. at *3. In fact, in comparing the then-existing Delaware statute to Michigan's statute, which applied to government agencies and places of public service, the Attorney General's office specifically cited to and discussed a Michigan case, *Doe v. Department of Corrections*, 2000 WL 253625 (Mich. Ct. App. Mar. 3, 2000), in which a Michigan court found the Michigan public accommodations statute to apply to prisoners and prisons. *Id*. The Attorney General's office noted that it was

forwarding a copy of the AG Opinion to the Office of the Governor to pursue legislative changes necessary to include the State and its agencies within the Delaware Nondiscrimination Law. *Id*. at *4.

Following the AG Opinion, the Delaware Nondiscrimination Law was amended in 2005 to, *inter alia*, add the second sentence of the definition of "place of public accommodation," which specifically makes state agencies subject to the law. Del. S.B. 41, 143rd Gen. Assem., 2006 Del. Laws ch. 356 (2006). The DOC is a state agency. *See generally* 11 *Del. C.* ch. 65; 29 *Del. C.* ch. 89. It also performs the public functions of the "treatment, rehabilitation and restoration of offenders as useful, law-abiding citizens within the community." 11 *Del. C.* § 6502(a). As a result of the 2005 amendments to the Delaware Nondiscrimination Law by the Gender Identity Nondiscrimination Act, the DOC is prohibited from withholding from transgender prisoners, including Mr. Short, accommodations, advantages and privileges, such as access to a name change, based on their gender identity. In its opinion, the Superior Court did not address or discuss the applicability of the second sentence of the statutory definition of a "place of public accommodation" to the DOC. Op. at 10.

Further, decisions of other courts interpreting similar – or narrower – public accommodations laws of other states to apply to prisons and prisoners are instructive in interpreting Delaware's statute. For example, in *Chisolm v.*

McManimon, a New Jersey federal court held that New Jersey's public accommodation nondiscrimination law applied to correctional facilities. 97 F. Supp. 2d 615, 621-22 (D.N.J. 2000) *overruled on other grounds*, 275 F.3d 315 (3d Cir. 2001). The law interpreted by the court in *Chisolm* was narrower than Delaware's and did not even specifically include within its definition state agencies. N.J. Stat. Ann. § 10:5-4 (West). Similarly, the Supreme Court of Vermont held that all governmental entities, including prisons, are subject to Vermont's public accommodation statute. *Dep't of Corr. v. Human Rights Comm'n*, 917 A.2d 451, 459 (Vt. 2006) (holding that nondiscrimination law applied to prisons).

b. Prisoners in Delaware DOC facilities are protected by 6 Del. C. 4504, which prohibits discrimination on the basis of gender identity.

The Name Change Ban prevents Mr. Short and other transgender prisoners from legally changing their names as part of a gender transition or the expression of their gender identity. Medical treatment is provided to non-transgender prisoners but a whole class medical of treatment is withheld from transgender prisoners by virtue of the Name Change Ban. By not permitting changes that are pursued for sincerely needed and medically justified grounds related to gender transition, as an expression of one's gender identity, the ban discriminates on the basis of gender identity.

Delaware law protects against both direct and indirect discrimination on the basis of gender identity in public accommodations. The law prohibits those persons operating any place of public accommodation from directly or indirectly withholding or denying any accommodation, advantage or privilege based on a person's gender identity. 6 *Del. C.* § 4504. The Name Change Ban prohibits name changes by petitioners in prison at the time of their petition except where the purpose of the change is a sincerely held religious belief. 10 *Del. C.* § 5901(c)(2). The central justification for the ban is to prevent name changes for "inappropriate" purposes. *See* Del. H.B. 585, 138th Gen. Assem. 1996 Del. Laws Ch. 479 (1996) ("The purpose is to prevent inmates and other people under the supervision of the Department of Correction from changing their name to avoid supervision or for other inappropriate reasons.").

By prohibiting name changes that are pursued for serious medical reasons related to a petitioner's gender identity and as part of the expression of a petitioner's gender identity, the ban discriminates on the basis of gender identity by suggesting such changes may presumptively be for inappropriate purposes. The law plainly cannot support this presumption. *See, e.g.*, *In re McIntyre*, 715 A.2d 400 (Pa. 1998) (reversing denial of name change to transgender petitioner on the ground that it is not inappropriate for a transgender petitioner to change names to one that comports with his/her gender); *In re Winn-Ritzenberg*, 891 N.Y.S.2d 220

(N.Y. Sup. App. Term 2009) (improper to request additional evidence from transgender name change petitioner because being transgender alone is not suggestive of fraudulent purpose).

To reconcile the conflict between the Name Change Ban and the later-passed Gender Identity Non-Discrimination Act, the accommodations, advantages and privileges provided to petitions for sincerely held religious beliefs must be similarly provided to petitions for legal name changes on the basis of a person's gender identity. To construe the later-adopted Gender Identity Nondiscrimination Act as not overriding the earlier-adopted Name Change Ban as applied to Mr. Short would be repugnant to the purposes of the Gender Identity Nondiscrimination Act. To achieve equality and prevent discrimination against transgender individuals, the Gender Identity Nondiscrimination Act must be held to override application of the Name Change Ban to Mr. Short. *Cf. Campbell v. Comm'r. of Town of Bethany Beach*, 139 A.2d 493 (Del. 1958) (recognizing earlier-enacted town charter provisions repugnant to later-enacted State Highway Department Act, and therefore overridden).

CONCLUSION

For the foregoing reasons, Mr. Short respectfully requests that the Superior Court's judgment be reversed and that his name change petition be remanded to the Court of Common Pleas for an order granting his name change petition.

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Dated: October 20, 2014

CERTIFICATE OF SERVICE

I, Anthony Flynn, Jr., hereby certify that on October 20, 2014, I caused a copy of the foregoing document to be served in the manner indicated:

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