IN THE COURT OF APPEALS OF GEORGIA
NO. A16A1770

IN RE: REBECCA ELIZABETH FELDHAUS,

Appellant

BRIEF OF *AMICI* ACLU FOUNDATION OF GEORGIA AND ACLU IN SUPPORT OF APPELLANT

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PART ONE
Statement of Interest

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Georgia is one of the ACLU's statewide affiliates with approximately 5,000 members. As organizations that advocate for First Amendment liberties as well as equal rights for lesbian, gay, bisexual, and transgender people, the ACLU and the ACLU of Georgia have a strong interest in protecting the freedom of speech and fundamental rights for all Americans, including transgender people.

Amici agree that the trial court erred in denying Sgt. Feldhaus' Petition for the reasons stated by the Appellant and write to explain more fully why denying the Petition violated Sgt. Feldhaus' freedom of speech and liberty to choose his own name guaranteed by the U.S. Constitution.

PART TWO
Argument and Citation to Authorities

The denial of the Petition violates Sgt. Feldhaus' right to free speech and fundamental right to choose his name. When the government restricts speech

based on content or infringes on a fundamental right, the government must satisfy strict scrutiny. *See Burson v. Freeman,* 504 U.S. 191, 198 (1992); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978). The government cannot meet its burden because it has neither a legitimate government interest nor a compelling one in limiting Sgt. Feldhaus' choice to a traditionally male name.

I. DENIAL OF THE PETITION VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The denial of the Petition violates the First Amendment to the U.S. Constitution in two ways. First, denying the Petition because Sgt. Feldhaus' chosen name does not conform to societal norms is viewpoint discrimination that impermissibly curbs his speech. Second, denying the Petition constitutes compelled speech because it forces Sgt. Feldhaus to use a name of the government's choosing rather than his own. It is well settled that both viewpoint discrimination and compelled speech violate an individual's right to freedom of speech and are impermissible unless the government can establish that such infringements are necessary to serve compelling state interests and are narrowly tailored to achieve those interests. As shown below, the government has no

compelling interest, or even any legitimate interest, in restricting Sgt. Feldhaus' freedom to choose his name.

A. DENIAL OF THE PETITION IS VIEWPOINT DISCRIMINATION IN VIOLATION OF THE FIRST AMENDMENT.

Viewpoint discrimination is "an egregious form of content discrimination" prohibited by the First Amendment. *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 828 (1995). The government engages in viewpoint discrimination when it targets "particular views taken by speakers on a subject." *Id.* The trial court engaged in viewpoint discrimination when it denied the Petition based upon the fact that Sgt. Feldhaus' chosen name is one traditionally associated with men and not women. (R. 19) (T. 14)

Names serve both private and public functions. Names have the ability to communicate multiple details about a person including gender, ethnic background, social status, religion, and familial ties. *See* Jana Kasperkevic, *Judge Approves Caitlyn Jenner's Formal Request for Name Change,* theguardian (Sept. 26, 2015, 12:20 PM), https://www.theguardian.com/tv-and-radio/2015/sep/26/caitlyn-jenner-official-name-change-approved (Jenner changed name "to better match my identity"); Richard Wolffe, *When Barry Became Barack*, Newsweek (Mar.22,

2008, 10:26 AM), http://www.newsweek.com/when-barry-became-barack-84255 (reverting to Barack was "part of his lifelong quest for identity"); Muhammad Ali, https://en.wikipedia.org/wiki/Muhammad_Ali#cite_note-HauserThomas-12 (last visited on June 29, 2016) ("Clay . . . changed his name from Cassius Clay, which he called his 'slave name', to Muhammad Ali, and gave a message of racial pride for African Americans and resistance to white domination during the 1960s Civil Rights Movement."). Sigmund Freud once wrote: "A man's name is a principal component of his personality, perhaps even a portion of his soul." Julia S. Kushner, *The Right to Control One's Name*, 57 UCLA L. Rev. 313, 323-34 (2009). Names also serve as public identifiers for the rest of the population and for the government.

Names are particularly important for transgender people. When an individual transitions to living in accordance with his or her gender identity, using a name associated with the gender identity conveys a public message about who that person is. Moreover, expressing one's identification with a gender different than the sex assigned at birth is a deeply political message in light of the hostility and marginalization that transgender people experience in society. *See Adkins v. City of N.Y.*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) ("[T]ransgender people

report high rates of discrimination in education, employment, housing, and access to healthcare."); *see also* Jamie Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey; cf. Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592, 609-611 (Cal. 1979) (holding that being openly gay was "political activity" in light of the political struggle for acceptance for gay and lesbian persons).

Here, the trial court denied the Petition because Sgt. Feldhaus could not prove by statistical evidence that the name he sought to use is traditionally associated with the sex he was assigned at birth or, alternatively, traditionally associated with either sex. (T. 14-16) In other words, the trial court refused to grant the name change because of its own view that one should not "chang[e] names from male to female – male names to obvious female names, and vice versa." (R. 19) (T.12) By allowing Sgt. Feldhaus to change his name to one that would communicate the message that he is female, but not the message that he is male, the trial court engaged in classic viewpoint discrimination in violation of the First Amendment.

Viewpoint discrimination is presumptively unconstitutional and subject to strict scrutiny. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-

based regulations are presumptively invalid"; viewpoint restrictions are a subset of content-based regulations); *Burson*, 504 U.S. at 198 ("The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'").

B. DENIAL OF THE PETITION CONSTITUTES COMPELLED SPEECH IN VIOLATION OF THE FIRST AMENDMENT.

The right to be free from compelled speech prohibits government from forcing an individual to express the government's own specific message. *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (forcing drivers to display license plate with State slogan "Live Free or Die" is unconstitutional compelled speech); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (forcing students to recite the Pledge of Allegiance unconstitutional compelled speech). Indeed, "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 *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 11 (1986) (plurality opinion)). The right to be free from compelled speech is necessary to protect dissenting voices from presumptions of inclusion within a majority point of view. *See, e.g.*,

Wooley, 430 U.S. at 715 (First Amendment protects the "right of individuals to hold a point of view different from the majority"). The freedom from compelled speech protects all Americans, including transgender people. *Cf. Holmes v. Cal. Army Nat'l Guard*, 155 F.3d 1049, 1050 (9th Cir. 1998) (Pregerson, J., dissenting from denial of rehearing *en banc*) (military's 'Don't Ask, Don't Tell policy lead others to presume that [gay people] assent to a view about their own sexuality that they do not espouse" while allowing heterosexual service members to talk about their sexual orientation).

The denial of the Petition forces Sgt. Feldhaus, a transgender man, to use a traditionally female name, which communicates a message that he is a female. Not only does Sgt. Feldhaus disagree with that specific message, but it squarely conflicts with the message he chooses to convey – that he is male. Sgt. Feldhaus chose his name because he felt it was the best way to express himself to the rest of society. *See Riley v. Nat'l Fed'n of the Blind N.C.*, 487 U.S. 781, 796-97 (1988) (individual knows best what to say and how to say it). Since the Petition was denied, Sgt. Feldhaus has been forced to speak and write the name that the government has chosen and to convey the government's message that he is female, not the name Sgt. Feldhaus chose for himself or his own message that he is male.

Just as the government may not require students to recite the Pledge of Allegiance or require drivers to display license plates with the motto "Live Free or Die," the government may not require Sgt. Feldhaus to use a name to express beliefs he does not hold.

II. CHOOSING ONE'S NAME IS A FUNDAMENTAL RIGHT PROTECTED BY THE DUE PROCESS CLAUSE

The denial of the Petition violated the fundamental right to choose one's name protected by the Fourteenth Amendment to the United States Constitution because the denial of the Petition was not narrowly tailored to serve a compelling government interest.

A right is fundamental, and therefore protected by the Due Process Clause, when it is "'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'" *Washington v. Glucksberg*, 521 U.S. 792, 720-21 (1997). First, the right to change one's name is deeply rooted in this Nation's history and tradition. *See* Kushner, *supra* at 346 (the right to change one's name is "well-established in the common law of England and the United States"). Modern day courts continue to recognize the liberty interest, long accepted under the common

law, in one's right to choose a name. Second, the right to choose one's name is implicit in the concept of ordered liberty. A person's name carries great significance for individuals and has social, cultural, religious, personal and other meaning. *Id.* at 351. Restricting a person's right to choose their name restricts their ability to live freely as they choose in society and is, thus, a central part of ordered liberty. For these reasons, courts have recognized a protected liberty interest in the right to choose one's name. *See Henne v. Wright*, 904 F.2d 1208, 1218 (8th Cir. 1990) (Arnold, J., concurring in part and dissenting in part) (recognized fundamental right to choose one's own name); *Sydney v. Pingree*, 564 F. Supp. 412, 413 (S.D. Fla. 1982) ("constitutional right of liberty and privacy is broad enough to include the right of parents to choose a name for their child"); *Roe v. Conn*, 417 F. Supp. 769, 782-83 (M.D. Ala. 1976) ("[i]t seems clear that Plaintiff Roe has a 'liberty' interest at stake when his name is altered").

III. DENIAL OF THE PETITION CANNOT SATISFY STRICT SCRUTINY

The government may not burden a fundamental right, either the right to free speech or the right to choose one's name, unless the infringement is narrowly tailored to further a compelling government interest. *See Burson,* 504 U.S. at 198; *Zablocki*, 434 U.S. at 388. Government burdens a fundamental right when it

prohibits a person from exercising that fundamental right. *See Zablocki*, 434 U.S. at 387. There is no dispute that, by denying the Petition, the trial court prevented Sgt. Feldhaus from exercising his fundamental rights to free speech and to choose his name.

The reasons provided by the trial court for denying the Petition are not legitimate government interests, let alone compelling ones. The trial court concluded that a transgender man does not have a right to change his name to a "traditionally and obviously male name" because this could cause confusion, embarrassment, and offend the "sensibilities and mores" of the citizens of Georgia. (R. 19) (T. 14.) The government does not have a compelling government interest in censoring the message that an individual wishes to disseminate in these circumstances. It is not uncommon for people, transgender or not, to use names that are traditionally associated with a different sex – actress Evan Rachel Wood, Princess Michael of Kent, and supermodel James King, to name a few examples. And, whether they know it or not, it is not uncommon for the citizens of Georgia to encounter transgender people who have adopted names consistent with the gender they live every day. None of these circumstances causes confusion or embarrassment for anyone.

Further, there is not even a legitimate government interest in a rule that treats transgender name change applicants differently from other name change applicants or otherwise restricts name changes to those names traditionally associated with one sex:

> The law does not distinguish between masculine and feminine names, which are a matter of social tradition. Some names are traditionally associated with one gender; some with the other; some with either. And… the gender association of some names has changed over time. Apart from the prevention of fraud or interference with the rights of others, there is no reason – and no legal basis - for the court to appoint themselves guardians of orthodoxy in such matters.

In re Guido, 1 Misc. 3d 825, 828 (N.Y. Civ. Ct. 2003) (granting name change petition from traditionally male name to traditionally female name where no evidence of fraud); s*ee also Matter of Anonymous*, 194 N.Y.S. 852 (App. Div. 4th Dep't 2013) (same); *In re McIntyre*, 715 A.2d 400 (Pa. 1998) (same, noting that fact that petitioner is transsexual irrelevant to question of whether petition should be granted); *Matter of Eck*, 584 A.2d 859 (N.J. Super. App. Div. 1991) (same); *In re Miller*, 824 A.2d 1207 (Pa. Super. Ct. 2003) (where statutory requirements met, misapplication of judicial discretion to deny name change to surname of same-sex partner).

While on rare occasions, there is tension between the individual's right to self-expression and the government's need to identify individuals, such as when the intent of the individual seeking the name change is to defraud creditors, *see* O.C.G.A. §19-12-4, or when the best interests of a minor child are at stake, *see* O.C.G.A. §19-12-1, no such circumstances are present here. Moreover, this court has held that when a petitioner meets all of the requirements of O.C.G.A §19-12-1 *et seq.* and does not intend to defraud anyone, the petition for name change should be granted. *In re Mullinix*, 262 S.E.2d 540 (Ga. Ct. App. 1979) (abuse of discretion when the statutory criteria for a change of name were met, no objections were raised at the hearing, and trial judge denied name change on belief that a wife and mother bearing a different name than her family violated social norms). Just as in *Mullinix*, Sgt. Feldhaus' Petition should have been granted. There is no justification for treating transgender people differently from others who seek a legal name change or restricting name-change options based on a person's sex.

WHEREFORE, for the reasons stated above, *Amici* request that this Court hold that the denial of Sgt. Feldhaus' Petition violated the First and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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*Motions for Admission for *Pro Hac Vice* to be Filed

CERTIFICATE OF SERVICE

I hereby certify that on this date I sent via First Class U.S. Mail and electronically filed, using the COA EFast System, the foregoing **BRIEF OF *AMICI* ACLU FOUNDATION OF GEORGIA AND ACLU IN SUPPORT OF APPELLANT** on the following attorneys of record:

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This 30th day of June, 2016.

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