

No. 20170046-SC

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IN THE  
SUPREME COURT OF THE STATE OF UTAH

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IN THE MATTERS OF THE NAME AND SEX/GENDER CHANGE OF:

SEAN W. CHILDERS-GRAY, F.K.A. JENNY PACE,  
Appellant,

*and*

ANGIE RICE, F.K.A. ARTHUR EDWARD RICE,  
Appellant.

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BRIEF OF APPELLANTS

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On appeal from the Second Judicial District Court,  
Honorable Noel S. Hyde, District Court Nos. 163900359 and 163500015

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## Jurisdictional Statement

This court has jurisdiction under section 78A-3-102(3)(j) of the Utah Code.

### Introduction

Utah courts have common law authority to change one's legal status – the designations on a birth certificate – to reflect the reality of the person's identity. If a person has assumed a name different from the one on the person's birth certificate, a court can change the legal name to the name the person is known by, as long as the change is not for a wrongful or fraudulent purpose. *In re Porter*, 2001 UT 70, ¶ 8, 31 P.3d 519. The Utah Code codifies the courts' common law authority and the test for changes to a legal name. Utah Code §§ 26-2-11, 42-1-1.

The Utah Code also recognizes that courts can change a person's sex designation to reflect the reality of the person's gender identity, but the statute does not expressly set forth a test for when such a change is appropriate. *Id.* § 26-2-11(1). This court should clarify that the test for changing one's sex designation is the same as the test for changing one's legal name, with the obvious difference that, at the hearing, the court would receive evidence that the person's gender identity is different from the one listed on the birth certificate.

Fortunately, the Utah Legislature in the Fair Housing Act has described what type of evidence would prove a person's gender identity at that hearing: "A person's gender identity can be shown by providing evidence, including, but not limited to, medical history, care or treatment of the gender identity, consistent and uniform assertion of the gender identity, or other evidence that

the gender identity is sincerely held, part of a person's core identity, and not being asserted for an improper purpose." *Id.* § 57-21-2(16). As long as the sex designation on a petitioner's birth certificate does not reflect the petitioner's gender identity, the court should order that the legal sex designation be changed.

Here, Jenny Sean Pace, a transgender man<sup>1</sup> who was born a biological woman, filed a petition to change his legal name to a man's name, Sean Childers-Gray, and to change his sex designation from female to male. Arthur Edward Rice, a transgender woman who was born a biological man, filed a petition to change her legal name to a woman's name, Angie Rice, and to change her sex designation from male to female. Both petitions stated that the petitioners were not listed on the sex offender registry, involved in any legal proceedings, on probation or parole, seeking to avoid creditors, or seeking the name and sex designation changes for any fraudulent purpose. The district court granted the petitioners' requests to change their legal names, but denied their requests to change their sex designations. The court erred.

Both petitions set forth how the petitioners underwent hormone therapy to change their appearances irreversibly and how both petitioners have – and were viewed by others as having – a gender identity different from what was listed on their birth certificates. Because both petitioners showed that their legal sex designations do not reflect their gender identities, this court should reverse.

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<sup>1</sup> This brief refers to the petitioners with the pronouns matching their gender identity, not the pronouns matching the sex designations on their birth certificates.

## Statement of the Issues

**Issue 1:** Whether the district court erred in declining to apply, to a petition for change of sex designation, general common law principles governing petitions for name changes, where the statute suggests that the court should treat name changes and sex changes similarly.

**Standard of Review:** This court reviews questions of statutory interpretation for correctness. *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 12, 267 P.3d 863.

**Preservation:** This issue is preserved. (C.R.69-70,R.R.57,83.)

**Issue 2:** Whether the district court erred in determining that a petition for change of sex designation presents a nonjusticiable political question until the Utah Legislature expressly articulates standards and procedures for a sex change.

**Standard of Review:** This court reviews questions of jurisdiction for correctness. *Canfield v. Layton City*, 2005 UT 60, ¶ 10, 122 P.3d 622.

**Preservation:** This issue is preserved. (C.R.71,R.R.57,84.)

## **Determinative Provisions**

The following statutes are of central importance to the appeal and are set forth at Addenda E and F:

### **Utah Code § 26-2-11. Name or sex change – Registration of court order and amendment of birth certificate**

(1) When a person born in this state has a name change or sex change approved by an order of a Utah district court or a court of competent jurisdiction of another state or a province of Canada, a certified copy of the order may be filed with the state registrar with an application form provided by the registrar.

(2)(a) Upon receipt of the application, a certified copy of the order, and payment of the required fee, the state registrar shall review the application, and if complete, register it and note the fact of the amendment on the otherwise unaltered original certificate.

(b) The amendment shall be registered with and become a part of the original certificate and a certified copy shall be issued to the applicant without additional cost.

### **Utah Code § 42-1-1. By petition to district court – Contents**

Any natural person, desiring to change his name, may file a petition therefor in the district court of the county where he resides, setting forth:

- (1) The cause for which the change of name is sought.
- (2) The name proposed.
- (3) That he has been a bona fide resident of the county for the year immediately prior to the filing of the petition.

## Statement of the Case

### 1. Nature of the Case and Course of Proceedings

This appeal concerns two petitions, filed by two transgender individuals, to change their names and sex designations with the state registrar. (C.R.9-13,R.R.1-4.)<sup>2</sup> In both cases, the court agreed to order the state registrar to change the name but not the sex designation. (C.R.19,68-73,R.R.55-58.)

### 2. Statement of Facts

Mr. Childers-Gray is a transgender man who was born a biological woman. (C.R.10-11,41.) His birth name was Jenny Sean Pace. (C.R.10.) Although his birth certificate identifies his sex as female, he holds himself out as male to his family, friends, and the public. (C.R.10.) He “lives 100% as a male.” (C.R.2.)

After being diagnosed with Gender Identity Disorder, he underwent hormone therapy to change his physical appearance. (C.R.2,41.) The hormones changed his voice, caused his female sex organs to no longer function, changed his body hair growth, and changed his breast tissue. (C.R.41.) By the time he filed his petition, he had been treated with hormone therapy for more than three years. (C.R.2,41.) These changes are irreversible. (C.R.41.)

Angie Rice is a transgender woman who was born a biological man. (R.R.1-2,27,66-70.) Her birth name was Arthur Edward Rice. (R.R.1.) Although her birth certificate identifies her as male, she holds herself out as female to her

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<sup>2</sup> Mr. Childers-Gray and Ms. Rice cite to their respective records using “C.R.” and “R.R.”

family, friends, and the public “in every aspect of [her] life.” (R.R.5,71.) She “lives 100% as a female.” (R.R.6.)

Like Mr. Childers-Gray, after being diagnosed with Gender Dysphoria, she underwent hormone therapy to change her physical appearance. (R.R.5,6,68.) By the time she filed her petition, she had been treated with hormone therapy for five years. (R.R.6.)

Mr. Childers-Gray and Ms. Rice each filed a petition in the district court, seeking an order changing the sex designations on their birth certificates.<sup>3</sup> (C.R.9-15,R.R.1-41.) Only one statute governs sex designation changes, and it treats name changes and sex designation changes similarly. Utah Code § 26-2-11. It provides that when a person “has a name change or sex change approved by an order of a Utah district court,” the person may file the order with the state registrar, who must amend the person’s birth certificate. *Id.*

A different statute, section 42-1-1, codifies the common law test for what must be included in a petition for name change, but it does not mention petitions for sex designation changes. It provides that a petition for name change must include: (i) the proposed name, (ii) the reason for the change, and (iii) that the petitioner has been a resident of the county for at least one year. Utah Code § 42-1-1. No similar statute describes what must be included in a petition for a sex designation change.

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<sup>3</sup> Mr. Childers-Gray filed his petition pro se but was later assisted by counsel. (C.R.3,21.)

Both Mr. Childers-Gray's and Ms. Rice's petitions included the reasons for the requested name and sex designation changes. Specifically, the petitions included letters from a doctor, stating that each of them had been treated for Gender Identity Disorder and had undergone "the appropriate clinical treatment" for the gender transition. (C.R.2;R.R.6.)

Ms. Rice's petition also stated that changing the sex indicated on her legal documents "will prevent confusion, embarrassment, loss of employment opportunities, conflict with law enforcement," problems boarding aircraft, and potential violence. (R.R.2.) She testified that, since the age of eight, she felt like a woman trapped in a man's body. (R.R.66.) Because of this, she suffered significant emotional distress when she presented as a man, hiding her true self. (R.R.69-70.) And now that she presents as a woman, she suffers when she must present her identification card, which identifies her as a man. She is subjected to invasive and embarrassing scrutiny, including pat-downs, because her "documentation doesn't match who [she is]." (R.R. 76-77.)

The petitions included the proposed new names, and both petitioners stated that they had been residents of the counties where they lived for at least one year. (C.R.4,92;R.R.1.) The petitions also stated that the petitioners were not listed on the sex offender registry, involved in any legal proceedings, on probation or parole, seeking to avoid creditors, or seeking the name and sex designation changes for any fraudulent purpose. (C.R.4,R.R.3,8.)

The court entered orders that granted the name changes, ruling that all of the statutory requirements had been satisfied. (C.R.19,R.R.57-58.) But the court refused to order a sex designation change in either case because the legislature has not provided guidance on when a petition for sex designation change should be granted. (C.R.69-73,R.R.57-58,83-85.)

In Ms. Rice's case, the court ruled that "[t]he procedure for obtaining a sex/gender marker change must be set forth by the legislature" before they may be considered by the court. (R.R.57,83.) The court ruled that it was "prohibited from invading the legislature's prerogative on this issue." (R.R.57,83-84.)

In Mr. Childers-Gray's case, the court reached the same conclusion, stating that the petition for sex designation change must be denied "because there is no statute in the State of Utah which sets forth either standards or procedures under which the court may consider such a request." (C.R.69.) The court ruled that the lack of legislative guidance rendered the question of whether to change a sex designation to be a nonjusticiable political question under *Baker v. Carr*, 369 U.S. 186, 209 (1962). (C.R.71.)

But the court further ruled that the petition for sex designation change must be denied under the law governing petitions for name and sex changes. The court noted that a petition for name change must be denied if it will "affect the legal rights or duties of either the petitioner or anyone else." (C.R.72.) Applying those principles to a petition for sex designation change, the court suggested that



petitions for sex designation changes must *always* be denied because “any change in the rights or duties of [the] Petitioner will *necessarily* change rights and duties of others that interact with [the] Petitioner.” (C.R.72 (emphasis added).) The court noted, for example, that changing one’s sex could change applicable insurance rates, require a person to register for the draft, change the likelihood of success in an athletic competition, hinder creditors, or frustrate criminal prosecution. (C.R.72.)

The court therefore entered orders in Mr. Childers-Gray case, changing his name to Sean but requiring that his birth certificate continue to identify him as female. (C.R.17,19.) The court entered a similar order in Ms. Rice’s case, changing her name to Angie but requiring that her birth certificate continue to identify her as male. (R.R.57.)

Mr. Childers-Gray and Ms. Rice both appealed the denials of their petitions for sex designation changes, and this court consolidated their appeals. (C.R.75,R.R.59; Feb. 22, 2017 Order.)

## Summary of the Argument

The district court had common law and statutory authority to approve a sex designation change, just as it had authority to approve a name change. Indeed, Utah law recognizes that a person's legal status – the designations on a birth certificate – can be changed to reflect the reality of the person's identity, and in particular a person's legal name and sex designation.

This court should clarify that district courts should order a change in sex designation if the change will reflect the petitioner's gender identity. The test for changing a sex designation applies the general principles that govern the test for name changes. The fact that the legislature codified "sex changes" together with name changes confirms that the general test is the same. Under the test for name change, a petitioner shows that the proposed name accurately reflects the person's identity. For a change in sex designation, the petition must show that the new sex designation accurately reflects the person's gender identity.

Fortunately, the Utah Code explains how one proves gender identity – i.e., with evidence of "medical history, care or treatment of the gender identity, consistent and uniform assertion of the gender identity, or other evidence that the gender identity is sincerely held, part of a person's core identity, and not being asserted for an improper purpose." Utah Code § 57-21-2(16). Here, Ms. Rice and Mr. Childers-Gray demonstrated that their sex designations did not match their gender identities. The district court erred in denying their petitions.

## Argument

The district court erred when it ruled that it lacked authority to adjudicate the petitions. District courts have common law and statutory authority to approve a sex designation change. And courts should approve a change where, like in both cases here, the person presents evidence that the change will reflect the person's gender identity.

### **1. The District Court Erred in Ruling that It Lacks Authority to Adjudicate a Petition for a Sex Designation Change**

The district court ruled that it lacked authority to consider a petition for sex designation change because the statute did not provide the "standards or procedures under which the court may consider such a request." (C.R.69, *see also* R.R.57,83.) The court also ruled that the absence of legislative guidance rendered the issue a nonjusticiable political question. (C.R.71.)

But the court has both common law and statutory authority to approve a sex designation change, just as it has authority to approve a name change. And because the legislature enacted a statute that contemplates sex changes, the adjudication of a sex designation change petition presents a question of statutory interpretation, not a political question. The district court had authority to adjudicate the petitions here.

## **1.1 Utah District Courts Have Authority to Approve Changes to a Person's Legal Status, Including a Sex Designation**

Under the common law, district courts have authority to change a person's legal status to reflect the reality of the person's life. Indeed, as courts of general jurisdiction, district courts may adjudicate any matters that affect the legal rights of citizens. Utah Const. art. VIII, §§ 1, 5; Utah Code § 78A-5-102. And Utah law recognizes that a person's legal status – or the designations on his or her birth certificate – should be changed to reflect the reality of his or her identity.

Using this authority, courts have changed a person's marital status to reflect the fact that the person is living as a married person, and courts have changed a person's legal name to reflect the name the person uses in daily life. Courts have the same authority to change a person's sex designation to reflect the fact that the person is living as a member of the opposite sex.

The common law recognizes that a person's marital status should be changed to reflect the person's life as a married person, even though the marriage was not solemnized. Indeed, this court has long recognized a court's authority to change a person's marital status to reflect a common law marriage that was informally entered into in the past. *E.g., Whyte v. Blair*, 885 P.2d 791, 794 (Utah 1994). The marriage is established by the couple's behavior – cohabitation, sharing marital rights and duties, and holding themselves out as husband and wife. *Id.* at 792. Thus, the rule recognizes that society should consider a couple to

be married if they behave as if they are married, regardless of whether the marriage was ever solemnized.

The common law also recognizes a person's right to change his name. This court has recognized that a district court's authority to approve a name change derives from the common law, which permitted a person to "adopt another name at will," as long as it is not done for a wrongful or fraudulent purpose. *In re Porter*, 2001 UT 70, ¶ 8, 31 P.3d 519; *In re Cruchelow*, 926 P.2d 833, 834 (Utah 1996). The common law rule recognizes that society will identify a person by the name under which he holds himself out, even if it is not his legal, given name. *Porter*, 2001 UT 70, ¶ 11; *Cruchelow*, 926 P.2d at 834.

The rule reflects a centuries-long tradition of men who abandoned their given names and assumed a name of their choice. *Smith v. United States Cas. Co.*, 90 N.E. 947, 948-49 (N.Y. 1910) (listing Voltaire, Napoleon Bonaparte, Mark Twain, Ulysses S. Grant and Grover Cleveland). "While some of these names were merely professional pseudonyms, others were adopted as the real name, and in time became the only name of the person who assumed it." *Id.*

The purpose of the rule is to provide protection and prevent confusion. Allowing legal recognition of a person's assumed name protects both the person and the general public "by producing a public record to document the change." *Cruchelow*, 926 P.2d at 834. Thus, legal recognition of the assumed name avoids

confusion and makes the person legally responsible for actions taken in the assumed name. *Porter*, 2001 UT 70, ¶ 11.

The Utah Legislature recognized the common law right to change one's name when it enacted the statute governing name changes. Utah Code § 42-1-1. Although the statute enumerates what must be listed in a petition for name change, it does not change the common law governing the circumstances under which a petition may be granted. Indeed, as this court put it, the statute does not create the right to change a name, but instead "merely provide[s] a codified process to aid [the] common law right." *Porter*, 2001 UT ¶ 8; *Cruchelow*, 926 P.2d at 834. Specifically, the codification "provides protection for both the applicant and the general public by producing a public record to document the change." *Cruchelow*, 926 P.2d at 834.

District courts retain the same authority to approve a change to a person's sex designation. *E.g.*, *In re Petition for Change of Birth Cert.*, 22 N.E.3d 707, 709 (Ind. Ct. App. 2014). Like a legal name, the sex listed on a birth certificate is assigned at birth. And like a legal name, the sex assigned at birth is not necessarily the sex with which the person will later wish to be identified. Because the common allows a person to choose how society will identify him, regardless of what is assigned at birth, district courts have common law authority to change those assignments consistent with the person's wishes. Indeed, sex designation changes, like name changes, "relate principally to the legal status or

identification of an individual,” and “[t]here is nothing extraordinary about equity jurisdiction in these kinds of matters.” *In re Heilig*, 816 A.2d 68, 82 (Md. Ct. App. 2003).

And even if district courts lacked common law authority to approve changes to sex designations, the statute gives courts express statutory authority to do so. The statute requires the state registrar to amend a birth certificate when a person has a “sex change approved by an order of a Utah district court.” Utah Code § 26-2-11.<sup>4</sup> The plain language of the statute unambiguously contemplates that Utah district courts have jurisdiction to adjudicate and approve changes to a person’s sex designation.

The court’s jurisdiction is not undermined by the absence of “standards or procedures under which the court may consider such a request” as the district court worried here. (C.R.69, *see also* R.R.57,83.) When interpreting a statute, the court’s “overall goal is to give effect to the legislative intent, as evidenced by the statute’s plain language, in light of the purpose the statute was meant to achieve.” *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 15, 266 P.3d 702 (alteration and internal quotation marks omitted). And courts give effect to a statute even when the statute “gives no guidance” as to how it should be given effect. *Duke v. Graham*, 2007 UT 31, ¶ 31, 158 P.3d 540. Under those circumstances, the court “look[s] to the policies behind” the statute to determine how to give it effect. *Id.*

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<sup>4</sup> The statute does not define “sex change” but elsewhere, in the Utah Fair Housing Act, the Utah Code defines sex to mean gender. Utah Code § 57-21-2(22).

Here, the plain language of the statute reveals that the purpose of the statute was to give people the ability to amend their birth certificates after having a “sex change approved by an order of a Utah district court.” Utah Code § 26-2-11(1). The statute therefore necessarily contemplates that district courts have authority to enter orders approving changes to sex designations.

Indeed, district courts across the state have exercised that jurisdiction and approved changes to sex designations. *E.g.*, *In re Davis*, Case No. 173900047 (Mar. 27, 2017) (Second District Court); *In re Cohen*, Case No. 163902596 (Jan. 3, 2017) (Third District Court); *In re Manzanares*, Case No. 163901747 (Sept. 14, 2016) (Third District Court); *In re Fairbourn*, Case No. 163901213 (Aug. 18, 2016) (Third District Court); *In re Hardy*, Case No. 153400814 (Aug. 10, 2016) (Fourth District Court); *In re South*, Case No. 163400140 (July 8, 2016) (Fourth District Court); *In re Walton*, Case No. 163700026 (June 6, 2016) (Seventh District Court); *In re Ivory*, Case No. 153300116 (Feb. 2, 2016) (Third District Court); *In re Carmichael*, Case No. 153902067 (Jan. 4, 2016 ) (Third District Court); *In re Collins*, Case No. 153902244 (Dec. 3, 2015) (Third District Court); *In re Leavitt*, Case No. 153900411 (June 8, 2015 ) (Third District Court); *In re Caldwell*, Case No. 143800043 (Oct. 31, 2014) (Eighth District Court) (attached at Addendum H).

Courts in other jurisdictions with similar statutes have reached the same result, concluding that statutes permitting birth certificates to be amended are



merely a codification of the courts' common law powers.<sup>5</sup> For example, in *Heilig*, a Maryland appellate court reviewed a district court's decision that it lacked jurisdiction to grant a petition to change a sex designation. 816 A.2d at 69. Like Utah's statute, the Maryland statute established the procedure for amending a birth certificate after a sex designation change had been approved, but the statute did not indicate when a change should be approved. *Id.* at 82.

The court held that the district court had "general equity jurisdiction" to grant the petition. *Id.* at 85. The court explained that "it is clear that, in enacting [the statute], the [l]egislature necessarily recognized the jurisdiction of the Circuit Courts to consider and grant petitions to declare a change in gender; indeed, that section could have no other rational meaning." *Id.* at 84. Because the statute "does not purport to grant any new jurisdiction," it "therefore must be taken as a recognition that such jurisdiction already existed." *Id.*

An Indiana appellate court reached the same conclusion even though the Indiana statute does not mention sex designation changes. *In re Petition for*

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<sup>5</sup> Although some courts have concluded that they lacked authority to change a person's sex designation, their opinions were based upon circumstances, not present here, that fall into four categories: (i) statutes that permit sex designation changes only to correct a clerical error, *e.g.*, *In re Ladrach*, 513 N.E.2d 828, 831 (Ohio Prob. Ct. 1987); (ii) the conclusion that administrative law governs the field rather than the common law, *e.g.*, *Anonymous v. Mellon*, 398 N.Y.S.2d 99 (N.Y. Sup. Ct. 1977); *Anonymous v. Weiner*, 270 N.Y.S.2d 319,323 (N.Y. Sup. Ct. 1966); (iii) statutes that give effect orders approving sex designation changes from other jurisdictions but that do not authorize courts in the state to enter such orders, *e.g.*, *In re McReynolds*, 502 S.W.3d 884, 886 (Tex. App. 2016); or (iv) the absence of a statute permitting sex changes at all,; *K. v. Health Div., Dep't of Human Res.*, 560 P.2d 1070, 1071 (Or. 1977) (en banc).

*Change of Birth Certificate*, 22 N.E.3d 707, 708 (Ind. Ct. App. 2014). Indeed, the Indiana statute provides only that “[t]he state department may make additions to or corrections in a certificate of birth on receipt of adequate documentary evidence.” *Id.* (internal quotation marks omitted). Like the district court here, the Indiana district court “concluded that it did not have authority” to approve a sex designation change because the legislature “had not yet spoken on the issue.” *Id.* at 708. But the appellate court disagreed. *Id.* at 710.

The appellate court ruled that, “[i]n light of this statute, as well as the inherent equity power of a court of general jurisdiction, . . . the trial court had authority to grant the petition.” *Id.* at 709. The court explained that the lack of legislative guidance did not undermine that jurisdiction: “The legislature is free to craft specific requirements. Without such guidance, however, it is our view that the ultimate focus should be on whether the petition is made in good faith and not for a fraudulent or unlawful purpose.” *Id.* at 710; *see also In re Taylor*, No. 03CA1753, 2003 WL 22382512, at \*1, 5 (D.C. Super. Ct.) (statute granted jurisdiction to grant sex designation change order where statute stated that “upon receipt of a certified copy of an order of the [c]ourt indicated that the sex of an individual has been changed by surgical procedure . . . the certificate of birth shall be amended” (internal quotation marks omitted)).

Here, by enacting section 26-2-11, the legislature recognized that courts have authority to order changes to birth certificates. The district court erred.

## 1.2 Because the Utah Code Contemplates Changes to Sex Designations, the Adjudication of a Petition Raises a Question of Statutory Interpretation, Not a Political Question

In Mr. Childers-Gray's case, the district court ruled that the lack of legislative guidance in the statute rendered the question of whether to order the change of a sex designation on a birth certificate a nonjusticiable political question under *Baker v. Carr*, 369 U.S. 186, 209 (1962). (C.R.71.) Specifically, the court held that "the principles of judicial restraint and constraint recognized in *Baker v. Carr*, and expressly set forth in Utah's Constitution, preclude any effort of the court to determine the procedural and substantive criteria for the granting of a sex-change order, or to approve a sex-change request in the absence of such criteria." (C.R.71.) But the political question doctrine prevents courts from considering issues beyond their jurisdiction, not questions that the legislature squarely places within their authority.

The political question doctrine is based upon the separation of powers in the Utah and the U.S. Constitutions. *Skokos v. Corradini*, 900 P.2d 539, 541 (Utah Ct. App. 1995). Both constitutions establish "three distinct departments" of government – legislative, executive, and judicial – and declare that no branch may exercise the powers belonging to another branch. Utah Const. art. V, § 1; U.S. Const. art. I, § 1, art. II, § 1, art. III, § 1. The political question doctrine "prevents judicial interference in matters wholly within the control and discretion of other branches of government." *Skokos*, 900 P.2d at 541.

A case involves a political question if “there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.”

*Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 195 (2012) (internal quotation marks omitted). It applies, for example, to prevent a court from interfering with the legislature’s constitutional right to make decisions concerning the qualifications of its members and to resolve contests for seats in the legislature. *State v. Evans*, 735 P.2d 29, 32 (Utah 1987); *Ellison v. Barnes*, 63 P. 899, 900 (Utah 1901).

But where the legislature has enacted a statute, the court’s interpretation of the statute does not present a political question. *Zivotofsky*, 566 U.S. at 191-201; *Corradini*, 900 P.2d at 541. In those circumstances, the courts “are not being asked to supplant a [policy] decision of the political branches with the courts’ own unmoored determination of what [the policy] should be.” *Zivotofsky*, 566 U.S. at 196. Instead, the issue involves the enforcement of “a specific statutory right,” a question of statutory interpretation that “is a familiar judicial exercise.” *Id.* Indeed, “one of the Judiciary’s characteristic roles is to interpret statutes,” and courts “cannot shirk this responsibility merely because [the] decision may have significant political overtones.” *Japan Whaling Ass’n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986).

The interpretation of Utah’s statute does not present a political question. Although changing a sex designation on a birth certificate is related to issues of sexuality that might have political overtones, there is not a “textually demonstrable constitutional commitment of the issue to a coordinate political department” nor “a lack of judicially discoverable and manageable standards for resolving” the consideration of sex designation change petitions. *Zivotofsky*, 566 U.S. at 195 (internal quotation marks omitted). Instead, the legislature expressly recognized the court’s authority to consider petitions to change sex designations when it enacted section 26-2-11. The issue presents only a question of statutory interpretation, an exercise well within the powers of a court.

**2. The District Court Should Have Exercised Its Authority to Allow Ms. Rice and Mr. Childers-Gray to Change Their Legal Sex Designations to Conform to Their Gender Identities**

The district court should have granted both petitions to allow Ms. Rice’s and Mr. Childers-Gray’s sex designations to reflect their gender identities. Although in section 26-2-11 the legislature recognized that district courts have authority to enter orders approving changes to sex designations, the legislature did not expressly provide guidance on when courts should exercise that authority. District courts must therefore rely on their common law authority to identify the test for when to approve a change to a sex designation, just as district courts developed a common law test for when to grant a name change.

But in light of the well-established law governing name changes, the fact that the legislature codified “sex changes” together with name changes suggests that the legislature intended district courts to apply to sex designation changes the good cause test developed by courts to evaluate name changes. Under that test, a name change petition should be granted if the petitioner shows that the proposed name accurately reflects the person’s identity. Applying this test to petitions for sex designation changes, a change should be granted if the proposed sex accurately reflects the person’s gender identity.

Notably, in Utah, surgery is not a prerequisite for changing a person’s sex designation. Although the statutes in many states – and the Model State Vital Statistics Act – include surgery as a prerequisite, the Utah Legislature omitted any surgical requirement. Thus, although the legislature left to courts the task of determining when to approve a sex designation change, the legislature was clear that surgery is not part of that test.

## **2.1 Under Utah Law, a Person May Obtain a Name Change When the Proposed Name Reflects the Person’s Identity**

With respect to name changes, Utah law recognizes that a person may, at will, “select the name by which he is known, within very broad limits.” *In re Porter*, 2001 UT 70, ¶ 11, 31 P.3d 519; *In re Cruchelow*, 926 P.2d 833, 834 (Utah 1996). Thus, name change petitions “should generally be granted.” *Cruchelow*, 926 P.2d at 834. The rule promotes clarity and avoids confusion by ensuring that the identity that a person actually uses is consistent with the identity listed on

the person's government identification. *Id.* at 834; *Porter*, 2001 UT 70, ¶ 11. Giving legal status to the name a person uses in public eliminates the confrontations that can ensue when members of the public perceive as fraudulent the difference between the name used by the person and the name listed on the person's government identification. *In re Harris*, 707 A.2d 225, 228 (Pa. 1997).

Section 42-1-1 of the Utah Code reflects this common law rule by requiring a petition for a name change to include only (i) the proposed name, "[t]he cause for which the change of name is sought," and (iii) that the person has been a resident of the county for at least one year. Utah Code § 42-1-1. The court must grant the petition if, at the hearing,<sup>6</sup> there is "proof in open court of the allegations of the petition and that there exists proper cause for granting the same." *Id.* § 42-1-2. And proper cause exists when changing the person's name will allow his legal name to conform to his identity. *Porter*, 2001 UT 70, ¶ 11; *Cruchelow*, 926 P.2d at 834.

A court may deny a petition only if it identifies a "substantial reason," with "factual support" that justifies denial. *Cruchelow*, 926 P.2d at 834. Those reasons include "factual proof of an unworthy motive, the possibility of fraud on the public, or the choice of a name that is bizarre, unduly lengthy, ridiculous, or offensive to common decency and good taste." *Porter*, 2001 UT 70, ¶ 7 (internal quotation marks omitted). A court may not deny a petition based upon

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<sup>6</sup> The court may give notice of the hearing to any entity it believes might be affected by the change. Utah Code § 42-1-2; *Cruchelow*, 926 P.2d at 835.

unsupported generalizations or concerns, including worries that the change could create confusion or misunderstanding, complicate government recordkeeping and notice requirements, cause substantial mischief, or create a chilling effect on potential future litigants. *Cruchelow*, 926 P.2d at 834-35; *Porter*, 2001 UT 70, ¶¶ 9-11.

This court has had two opportunities to review a district court's denial of a name change petition, and in both cases, this court reversed the denial. In the first case, this court considered whether a prison inmate should be able to change his name while in custody. *Cruchelow*, 926 P.2d at 833-34. The inmate wanted to change his name to "reflect[] his religious beliefs." *Id.* at 834. Specifically, he had become a devout Muslim, and the scriptures of the Islamic faith direct Muslims to adopt names associated with Allah. *Id.* at 834 & n.2.

The district court denied the petition, explaining that the name change would complicate the prison's recordkeeping and create problems with providing notice of parole hearings: "[T]he prisoner's records become confused at the prison. It is difficult to reestablish new records for an inmate who has a name change. It also presents problems with the Board of Pardons, when hearings are held, and notice is given of those hearings to the general public." *Id.* at 834.

But this court reversed, citing the rule that name change petitions "should generally be granted unless sought for a wrongful or fraudulent purpose." *Id.* at



834 (internal quotation marks omitted). The court held that the reasons that the district court articulated were “unsupported generalizations and speculations,” which resulted in an “arbitrary denial.” *Id.* at 835 (internal quotation marks omitted). The court remanded with directions either to grant the petition or to hold an evidentiary hearing to consider whatever evidence might mitigate against the petition. *Id.*

In the second case, this court held that the petitioner was entitled to change his name to Santa Claus. *Porter*, 2001 UT 70, ¶ 12. The petition explained that “he resembles the fictional character Santa Claus and does numerous charitable and business activities in the Santa Claus persona, and that the name change is for these functions and public relations purposes.” *Id.* ¶ 6 (alterations and internal quotation marks omitted).

The district court denied the petition, even though it ruled that the petitioner did not seek the name change for an improper purpose. *Id.* ¶ 10. The district court reasoned that the name change “would likely create confusion [and] misunderstanding,” could “allow for substantial mischief,” and “could cause a substantial chilling effect for persons otherwise entitled to exercise access to the courts but who would be hesitant to sue Santa Claus.” *Id.* ¶ 9 (internal quotation marks omitted).

This court again reversed, noting that “[t]he record does not contain any evidence to support these concerns,” and regardless, that the concerns were not

sufficient to deny the petition. *Id.* ¶¶ 11, 13. The court agreed that the petitioner’s choice to change his name to Santa Claus “may be thought by some to be unwise, and it may very well be more difficult for him to conduct his business and his normal everyday affairs as a result.” *Id.* ¶ 11. But the court explained that the petitioner “has the right to select the name by which he is known, within very broad limits.” *Id.* The court held that it was significant that he “already tells others that he is Santa Claus,” and thus, “[a]llowing him to legally change his name to reflect his practice of doing so is more likely to avoid greater confusion than to create it.” *Id.* The court remanded with instructions to enter the name change order. *Id.* ¶ 13. Unlike in *Cruchelow*, this court did not permit the district court to conduct an evidentiary hearing to consider any evidence that might support the court’s concerns. *Id.*; *Cruchelow*, 926 P.2d at 835.

## **2.2 Under Utah Law, a Person May Obtain a Sex Designation Change When the Proposed Sex Reflects the Person’s Gender Identity**

Like the approval of name changes, a court should approve a change of a person’s sex designation when the change will reflect the person’s identity. The legislature has provided little guidance concerning when a court should approve a change in a person’s sex designation. As discussed above, the lack of guidance indicates that the legislature intended for courts to use their common law authority to develop the test for when sex designations should be changed.

But the plain language of Section 26-2-11 provides two starting points for developing that test. First, the fact that name changes and sex designation

changes are mentioned together – “name change or sex change” – suggests that the legislature intended sex designation change petitions to be considered under the well-developed law governing name changes. Second, the fact that the legislature omitted any surgical requirement – even though many states require surgery – suggests that the legislature did not intend surgery to be a prerequisite for changing a person’s sex designation in Utah.

The policies underlying name changes and sex designation changes are similar. Like a person’s name, a person’s sex is designated at birth. Like a name, a person may decide to adopt and identify with a sex different from the one designated at birth, and to present to the public as a member of the adopted sex. *In re Heilig*, 816 A.2d 68, 79 (Md. 2003) (gender “may be, or possibly may become, other than what is recorded on the person’s birth certificate”). Like the legal recognition of a name change, legal recognition of a change to a person’s sex designation promotes clarity and avoids confusion by ensuring that the identity that a person actually uses does not conflict with the identity listed on the person’s government identification.

The test governing name changes and sex designation changes should also be similar. Just as a person may change his name to the one that reflects his identity, a person should be able to change his sex designation to the one that reflects his gender identity.

The Utah Legislature has expressly recognized that a person's birth certificate might not necessarily reflect the person's actual identity. Specifically, in the Utah Fair Housing Act, the legislature stated that a person's "gender identity" – i.e., the "innate sense of being male or female" – is based upon the person's subjective beliefs about his or her "core identity" and the sex the person holds himself or herself out as:

"Gender identity" has the meaning provided in the Diagnostic and Statistical Manual (DSM-5). A person's gender identity can be shown by providing evidence, including, but not limited to, medical history, care or treatment of the gender identity, consistent and uniform assertion of the gender identity, or other evidence that the gender identity is sincerely held, part of a person's core identity, and not being asserted for an improper purpose.

Utah Code § 57-21-2(16); *Dawson v. H&H Elec., Inc.*, No. 4:14CV00583 SWW, 2015 WL 5437101, at \*1 (E.D. Ark. Sept. 15, 2015) (defining "gender identity" as the "innate sense of being male or female"). And the DSM-5 defines gender as the "public[ly] (and usually legally recognized) lived role as boy or girl, man or woman." Diagnostic & Statistical Manual of Mental Disorders 451 (5th ed. 2013).

The legislature has also expressly stated that "sex" and "gender" are synonymous. Utah Code § 57-21-2(22) (defining "sex" to mean gender). Thus, the legislature has recognized that a person's sex, like a name, can change, based upon his subjective beliefs about himself and how he presents himself to others.

In defining "gender identity," the legislature provided a useful basis for courts to develop the test for the showing required to change a person's sex

designation. The definition is consistent with the good cause test in the name change context – both gender identity and the name change test reflect the fact that a person’s identity is formed by a person’s subjective beliefs about himself or herself. And like a name, a person’s gender identity can differ from his or her designated sex only if it is “not being asserted for an improper purpose.” Utah Code § 57-21-2(16).

Indeed, Utah district courts considering petitions for sex designation changes have considered factors identical to the gender identity factors. Specifically, courts in the Third, Fourth, Seventh, and Eighth Districts have granted petitions after considering whether the petitioners held themselves out to family and friends as a member of the opposite sex, whether the petitioner had been diagnosed with Gender Identity Disorder or Gender Dysphoria, and whether the petitioner had undergone any hormone or medical treatment.<sup>7</sup> These factors, which establish a person’s gender identity, were sufficient to

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<sup>7</sup> Specifically, counsel is aware of – and has attached at Addendum H – the following cases in which courts granted petitions for sex designation changes: *In re Davis*, Case No. 173900047 (Mar. 27, 2017) (Second District Court); *In re Cohen*, Case No. 163902596 (Jan. 3, 2017) (Third District Court); *In re Manzanares*, Case No. 163901747 (Sept. 14, 2016) (Third District Court); *In re Fairbourn*, Case No. 163901213 (Aug. 18, 2016) (Third District Court); *In re Hardy*, Case No. 153400814 (Aug. 10, 2016) (Fourth District Court); *In re South*, Case No. 163400140 (July 8, 2016) (Fourth District Court); *In re Walton*, Case No. 163700026 (June 6, 2016) (Seventh District Court); *In re Ivory*, Case No. 153300116 (Feb. 2, 2016) (Third District Court); *In re Carmichael*, Case No. 153902067 (Jan. 4, 2016 ) (Third District Court); *In re Collins*, Case No. 153902244 (Dec. 3, 2015) (Third District Court); *In re Leavitt*, Case No. 153900411 (June 8, 2015 ) (Third District Court); *In re Caldwell*, Case No. 143800043 (Oct. 31, 2014) (Eighth District Court).

establish the good cause required to grant the petition. *E.g., In re Davis*, Case No. 173900047 (Mar. 27, 2017) (Second District Court); *In re Caldwell*, Case No. 143800043 (Oct. 31, 2014) (Eighth District Court) (attached at Addendum H).

These courts also required the petitioners to satisfy the other requirements of a name change. Thus, the petitioners were required to satisfy the conditions of section 42-1-1 by establishing that they were residents of their county for at least a year, and by establishing that they were not seeking the change for an improper purpose. To show a lack of improper purpose, the petitioners established that they were not seeking the change for a fraudulent purpose or to defraud creditors, that they had given notice to any interested third parties, and that they were not listed on the sex offender registry (a factor uniquely important in the sex designation context). (Add. H.)

Courts in other jurisdictions agree. These courts have held that good cause for changing a sex designation was shown with medical evidence regarding the gender transition, and the petitioner's "genuine desire" to have his identification documents match his gender identity. *In re Petition for Change of Birth Certificate*, 22 N.E.3d, 707, 710 (Ind. Ct. App. 2014); *see also Heilig*, 816 A.2d at 87 ("Almost all courts have recognized that the question of whether and how gender can be changed is one where the law depends upon and, to a large extent, must follow medical facts (medical facts, in this context, to include relevant psychological facts).").

Notably, the legislature has indicated that it did not intend surgery to be a prerequisite for changing a person’s sex designation in Utah. Many statutes that permit changes to sex designations require a finding “that gender has been changed by surgical procedure.” *Heilig*, 816 A.2d at 86 (alteration and internal quotation marks omitted).<sup>8</sup> The Model Vital Statistics Act also contemplates a sex designation change only after a person’s sex “has been changed by surgical procedure.” *Id.* at 82.

Utah is among several states whose statutes contemplate sex designation changes but do not mandate a surgical prerequisite.<sup>9</sup> The omission is dispositive, as this court “seek[s] to give effect to omissions in statutory language by presuming all omissions to be purposeful.” *2 Ton Plumbing, L.L.C. v. Thorgaard*, 2015 UT 29, ¶ 32, 345 P.3d 675.

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<sup>8</sup> *E.g.*, Ala. Code § 22-9A-19(d); Ariz. Rev. Stat. Ann. § 36-337(A)(3); Ark. Code Ann. § 20-18-307(d); Colo. Rev. Stat. § 25-2-115(4); Ga. Code Ann. § 31-10-23(e); Iowa Code § 144.23(3); Ky. Rev. Stat. Ann. § 213.121(5); La. Rev. Stat. Ann. § 40:62; Mass. Gen. Laws ch. 46, § 13(e); Mich. Comp. Laws § 333.2831(c); Mo. Rev. Stat. § 193.215(9); Neb. Rev. Stat. § 71-604.01; N.J. Stat. Ann. § 26:8-40.12; N.M. Stat. Ann. § 24-14-25(D); N.C. Gen. Stat. § 130A-118(b)(4); Va. Code Ann. § 32.1-269(E). In addition, some states grant regulatory authority to agencies that have promulgated regulations that include a surgical requirement. *E.g.*, Conn. Agencies Regs. § 19a-41-9(e); N.D. Admin. Code § 33-04-12-02(1).

<sup>9</sup> *E.g.*, Cal. Health & Safety Code § 103426; Haw. Rev. Stat. § 338-17.7(a); Md. Code Ann., Health-Gen. § 4-211(b); Or. Rev. Stat. § 33.460; Utah Code Ann. § 26-2-11; Vt. Stat. Ann. tit. 18, § 5112; Wis. Stat. § 69.15(1)(a). Some states have granted authority to agencies, which have in turn promulgated regulations that do not include a surgical mandate. *E.g.*, Nev. Admin. Code § 440.130; N.H. Code R. tit. I, ch. 5-C:87(V); N.Y. Comp. Codes R. & Regs. tit 10, § 35.2 (2014); R.I. R. & Regs. Governing Vital Records part IX, § 35.5(2); Wyo. Code. R. HLTH VR, ch. 10, § 4(e)(iii) (2004).

Equally important, if this court interprets the common law test to require surgery, then the court's interpretation would be unconstitutional as a violation of equal protection principles, since sex-reassignment surgery is disproportionately more difficult and expensive for transgender men than for transgender women. *Heilig*, 816 A.2d at 78.

As a preliminary matter, it is unclear what surgeries would be sufficient to satisfy the test. Indeed, depending upon a person's financial means, there are a variety of surgeries available to people seeking to change their physical appearance to conform to their gender identities. Some of those surgeries include facial reconstruction, orchiectomy (removal of gonads), vaginoplasty (construction of vagina), mammoplasty (construction of breasts), mastectomy, hysterectomy, vaginectomy, and phalloplasty. *E.g.*, *Heilig*, 816 A.2d at 78; *Harris*, 707 A.2d at 226.

Although each of these is a "surgical procedure," it is unclear which are sufficient to satisfy the statutes. In fact, at least one court has suggested that a person must undergo *all* of the surgical procedures before being entitled to a sex designation change. *In re Marriage of Simmons*, 825 N.E.2d 303, 309-10 (Ill. App. Ct. 2005). Thus, requiring a surgical procedure as a prerequisite for a sex designation change could serve to complicate, rather than clarify, the test for when a person is entitled to a sex designation change.



Regardless, even if the surgical requirement were defined, the requirement would violate the Equal Protection Clause of the United States Constitution and the uniform operation of laws provision of the Utah Constitution. U.S. Const. amend XIV, § 1 (prohibiting states from “deny[ing] to any person within its jurisdiction the equal protection of the laws”); Utah Const. art. I, § 24 (“All laws of a general nature shall have uniform operation.”). Those provisions require that laws must treat men and women similarly.

Specifically, the Equal Protection Clause of the U.S. Constitution permits a law to disproportionately impact a particular sex only if the impact is “substantially related” to an “important governmental objective[.]” *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). The uniform operation of laws provision in the Utah Constitution provides even greater protection by requiring that persons similarly situated must be treated similarly. *State v. Drej*, 2010 UT 35, ¶ 33, 233 P.3d 476.

Requiring sex reassignment surgery disproportionately affects transgender men. Because of the increased technical difficulty in performing surgeries that alter male genitalia, the cost of sex reassignment surgery is “much higher” for transgender men – twice as much as the cost for transgender women. *Heilig*, 816 A.2d at 78. Thus, this court should not adopt a test that includes a surgical requirement.

### **2.3 Because the Sex Designations on Ms. Rice's and Mr. Childers-Gray's Birth Certificates Do Not Reflect their Gender Identities, the District Court Erred When It Denied Their Petitions**

Ms. Rice and Mr. Childers-Gray demonstrated that their sex designations did not match their gender identities, and there was no evidence that they sought the changes for an improper purpose. The district court erred in denying their petitions.

Mr. Childers-Gray's birth certificate designates his sex as female, but his gender identity is male. (C.R.10-11,41.) His medical history shows that he has been diagnosed with Gender Identity Disorder, and has been treated with hormone therapy to change his physical appearance. (C.R.2,41.) The hormones changed his voice, caused his female sex organs to no longer function, changed his body hair growth, and changed his breast tissue. (C.R.41.) These changes are irreversible. (C.R.41.) This is "the appropriate clinical treatment" for his gender transition. (C.R.2.) By the time he filed his petition, he had been treated with hormone therapy for more than three years. (C.R.2,41.) He consistently and uniformly holds himself out as male to his family, friends, and the public. (C.R.10.) He "lives 100% as a male." (C.R.2.)

Similarly, Ms. Rice's birth certificate designates her sex as male, but her gender identity is female. (R.R.1-2,27,66-70.) Her medical history shows that she has been diagnosed with Gender Dysphoria, and has been treated with hormone therapy to change her physical appearance. (R.R.5,6,68.) This is "the appropriate clinical treatment" for the gender transition. (R.R.6.) By the time she filed her

petition, she had been treated with hormone therapy for five years. (R.R.6.) She consistently and uniformly holds herself out as female to her family, friends, and the public “in every aspect of [her] life.” (R.R.5,71.) She “lives 100% as a female.” (R.R.6.)

Ms. Rice’s petition also stated that changing the sex indicated on her legal documents “will prevent confusion, embarrassment, loss of employment opportunities, conflict with law enforcement,” problems boarding aircraft, and possible violence. (R.R.2.) She testified that, since the age of eight, she felt like a woman trapped in a man’s body. (R.R.66.) Because of this, she suffered significant emotional distress when she presented as a man, hiding her true self, (R.R.69-70.) And now that she presents as a woman, she suffers when she must present her identification card, which identifies her as a man. She is subjected to invasive and embarrassing scrutiny, including pat-downs, because her “documentation doesn’t match who [she is].” (R.R. 76-77.)

Their petitions also complied with the remaining requirements of the name change statute. Both petitioners stated that they had been residents of the counties where they lived for at least one year. (C.R.4,92;R.R.1.) The petitions also stated that the petitioners were not listed on the sex offender registry, involved in any legal proceedings, on probation or parole, seeking to avoid creditors, or seeking the name and sex designation changes for any fraudulent purpose. (C.R.4,R.R.3,8.)

The district court denied the petitions because it believed it lacked authority to adjudicate them, but in Mr. Childers-Gray's case, the court also ruled that the petition failed under the common law test for a name change. (C.R.69-73,R.R.57-58,83-85.) Specifically, the court ruled that under the name change test, the change must be denied if it will "affect the legal rights or duties of either the petitioner or anyone else." (C.R.72.) Applying those principles to a petition to change a sex designation, the court suggested that a petition to change a sex designation must *always* be denied because "any change in the rights or duties of [the] Petitioner will *necessarily* change rights and duties of others that interact with [the] Petitioner." (C.R.72 (emphasis added).) The court noted, for example, that changing one's sex could change applicable insurance rates, require a person to register for the draft, change the likelihood of success in an athletic competition, hinder creditors, or frustrate criminal prosecution. (C.R.72.)

But under the court's reasoning, a person could never change the sex designation on a birth certificate because such a change would always, "*necessarily*," change the rights and duties of people who interact with the person. This would be true even for people who underwent full sex reassignment surgery. But because section 26-2-11 contemplates precisely this change, the district court's conclusion cannot be – and is not – the law in Utah.

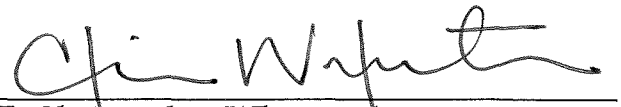
Instead, the court should have entered an order approving the changes to Ms. Rice's and Mr. Childers-Gray's sex designations to reflect their gender identities.

### Conclusion

This court should reverse the orders of the district court and remand with instructions to enter orders approving the sex designation changes.

DATED this 23<sup>rd</sup> day of May, 2017.

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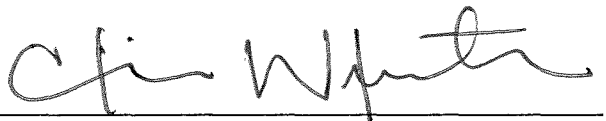
## Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type-volume limitation of Utah R. App. P. 24(f)(1) because this brief contains 9,082 words, excluding the parts of the brief exempted by Utah R. App. P. 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Book Antiqua.

DATED this 23<sup>rd</sup> day of May, 2017.



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