

# California Transgender Law 101

## A Reference Guide for California Lawyers and Advocates

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Transgender Law Center



***ADVOCATING FOR OUR COMMUNITIES***

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PUBLICATION OF THIS GUIDE MADE POSSIBLE BECAUSE OF GENEROUS SUPPORT FROM:  
THE ECHOING GREEN FOUNDATION, THE EVELYN AND WALTER HAAS JR. FUND, THE HORIZONS FOUNDATION, THE  
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# California Transgender Law 101

## I. Identity Documents

### A. State of the law

- Driver's License – name may be changed without a court order. Gender marker may be changed without applicant having undergone any form of hormone or surgical treatment. Medical service provider must sign DMV form 328. People under the age of 18 will need parental support to apply unless person is an emancipated minor. (**Attachment A – DL 328**)
- Social Security Number – name and gender marker may be changed with appropriate supporting documentation. In the past, this documentation did not require a court ordered name change. As of late 2005, it seems the policy has changed. Change must be done at social security office. (**Attachment B – info from SSA website about change of name and gender**)
- Common Law Name Change – while this method of changing a person's name is falling quickly into disfavor due to concerns about identity fraud, it theoretically remains a recognized method of a legal name change. (**Attachment C – Opinion of Attorney General on Common Law Name Changes, June 9, 2000**)
- Court Ordered Name Change -- allowed under California law (California Code of Civil Procedure sec. 1275 et seq.). No court can ask if the petitioner has undergone any medical procedure prior to requesting a change of name as no such requirement exists under California law. People under the age of 18 will need parental support to apply unless person is an emancipated minor. Links to California court forms NC-100, NC-110, NC-120, NC-130 (additional forms necessary if a minor) are available at [www.transgenderlawcenter.org](http://www.transgenderlawcenter.org). (**Attachment D – model P&As in response to request for proof of medical procedure**)
- “Legalizing” Gender – California allows anyone born in California to change the gender marker on a California birth certificate with an appropriate court order (California Health and Safety Code sec 103425 et seq). While the statute explicitly applies to people born in California, equitable jurisdiction has been found to give courts authority to grant change of gender for people born outside of California. Some restrictions apply. (**Attachment E – model P&As for equitable jurisdiction claims**)
- Birth Certificate – name and gender marker may be changed pursuant to a court order. Old birth certificate is sealed and new one is issued (California Health and Safety Code sec 103425 et seq). (**Attachment F – CA Dept of Vital Records Publication on Birth Certificate Change**)
- Passport – name may be changed either with a court order or proof that the person has been using the name for the past five years (this last route to a name change seems to be a consistent practice, but no written policy seems to confirm it). Passport office has policy

requiring “completed sex reassignment surgery” for issuance of a 10 year passport. No clear guidance on what this phrase means. (**Attachment G – Passport Bulletin 92-22** *only known written policy providing guidance to Passport Agents*)

- Selective Service – transgender men seeking government support for programs like educational loans will need to get a waiver of selective service filing requirement. This can be done through submitting a Request for Status Information Letter available at [www.sss.gov/PDFs/SILForm.pdf](http://www.sss.gov/PDFs/SILForm.pdf). (**Attachment H – Request for Status Information Letter**)
- Immigration Service Records and Documents -- green card, visa, employment authorization, and/or naturalization certificate. All of these records can be changed. However, some confusion exists around what supporting documentation a person would need to do so. (*See attachment N for more information.*)
- Non-government records (bank, credit cards, etc.) – each company will have its own policy. Many institutions are interpreting the Patriot Act to require them to only change the name on an account if the account holder produces a court ordered name change.

## II. Marriage and Custody Rights

### A. State of the law for marriage rights

- “Pre-Transition” Marriages – while the term “pre-transition” is an oversimplification for someone’s identity, it is used here to represent those marriages that are begun prior to a person transitioning. These marriages are strongly believed to remain valid. No case law or statute exists directly on point. However, California law is well settled that the only ways to dissolve a marriage are divorce or death. Transition does not, by itself, dissolve a marriage.
- “Post-Transition” Marriages -- No explicit prohibitions exist in California or federal law to prevent a transgender person from entering into a heterosexual marriage. Challenges – with mixed results -- have been made to the validity of marriages involving a transgender person in a number of cases across the U.S. The one case that has been fully litigated in California found that the underlying marriage was valid. (**Attachment I – Decision in redacted Southern California Case**)
- While we have every reason to believe that the validity of marriages involving transgender people will be upheld in California, it is important that couples preserve as many rights as possible in the event that their marriage is ruled invalid upon challenge. Key steps to doing so include: a memorandum of understanding between the spouses, financial power of attorney, health care directive, and a will. (*See TLC’s Transgender Family Law 101 for more information on these tools.*)

## B. State of the law for custody rights

- Biological children -- No explicit prohibition exists in California regarding the rights of a transgender person to retain custody or visitation rights to their biological child. However, a parent's transgender identity is often an issue used in a custody hearing to the detriment of the transgender parent regardless of the fact that no consideration should be given absent evidence of actual harm to the child. (**Attachment J – Redacted Amicus Brief in Southern California case involving a biological parent's rights to liberal visitation with her daughter**)
- Children of a Post-Transition Marriage – many times, the transgender spouse in a post-transition marriage will adopt children of the marriage via spousal rights. Occasionally, one partner will challenge the transgender parent's rights or responsibilities to that child by attacking the underlying marriage. In addition to the above conclusions found in *Attachment I*, additional arguments for finding parental rights and responsibilities exist in California law. (**Attachment K – Excerpts from redacted brief in support of parental rights of a transgender father**) (*Also, see Elisa B v. Superior Court 37 Cal.4th 108, 33 Cal.Rptr.3d 46 Cal.,2005 for the latest non-biological parent CA Supreme Court Case.*)

## III. Employment and Housing (TLC has a brochure for each area)

### A. State of the law

- California –FEHA explicitly protects transgender people due to the passage of Gender Nondiscrimination Bill of 2003. (**Attachment L – Evolutions in State and Federal Employment Law Regarding California Transgender Employees**)
- Federal – trend towards protection in Employment as sex under Title VII of the 1964 Civil Rights Act. (see *Attachment L*) Transsexualism and Gender Identity Disorder are *explicitly excluded* from protection under the American's with Disabilities Act.

## IV. Public Accommodation

### A. State of the law

- California – Explicit protection under the Unruh Act (California Civil Code sec 1801 et seq, as clarified by *AB 1400, the Civil Rights Act of 2004*). (**Attachment M – Decision of the CA Fair Employment and Housing Commission on public accommodation discrimination against woman in Central California.**)
- Federal – no apparent protection as *sex* is not a protected category in Title II of the 1964 Civil Rights Act.

## V. Immigration

### A. State of the Law

- General -- The Citizenship and Immigration Service (formerly the INS) does not bar transgender people from immigrating to the United States. As noted above, people can change the name and gender on their US immigration documents. While for years, “post-transition” marriages valid in the state in which they were performed were recognized for the purposes of fiancé and spousal visas. Over the last several years, the immigration service has attempted to reject post-transition applicants. (**Attachment N – April 2004 CIS Memo**) However, the Board of Immigration Appeals has rejected each such attempt and in 2005 issued a strong decision affirming the rights of some post-transition applicants. (**Attachment O – In re: Lovo-Lara**)
- Asylum -- The Ninth Circuit has recognized transgender people’s ability to apply for asylum based on gender identity persecution. (**Attachment P – Excerpts from Redacted Position Statement in Support of an Asylum Application**)

## VI. Police Conduct and Prison/Jail Conditions

### A. State of the law

- Street harassment – some police regulations and policies require officers to address transgender people by their proper name and pronoun. Searches of transgender people can not be done for the limited purpose of determining a person’s “biological gender.”
- Prison/Jail housing – as far as we know all California and federal prisons house inmates based on their “biological gender.” Often times, however transgender prisoners are housed in “soft cell” areas. (**Attachment Q – Model Jail Protocols**)
- Access to medicine and medical care - in California prisons, the stated policy of penal facilities is to maintain inmates on any medication they were taking when they were incarcerated. For jails, policies vary from county to county. (**Attachment R – Decision (unpublished disposition) in support of hormone access for MTF prisoner**)

## VII. Health Care (TLC has a Medi-Cal pamphlet)

### A. State of the law

- Private Health Insurance – private health insurance will often explicitly exclude coverage for transition related procedures. Insurance carriers that do not explicitly exclude coverage sometimes try to deny coverage based on claims that procedures are “cosmetic” or “experimental.” Such claims are unlikely to survive legal challenge. The *Insurance Gender Non-Discrimination Act* of 2005 made explicit in sections of the Insurance Code and Health and Safety Code that decisions by insurance companies motivated by anti-transgender bias are unlawful. (**Attachment S – text of AB 1586 as Chaptered on 9/29/05**)

- Public Health Insurance -- Medicare denies coverage. No current case law explicitly prohibits these denials. Medi-Cal, however, should not be denying any funding requests from otherwise eligible recipients. Case law supports the position that such blanket denial by Medi-Cal (and any other state Medicaid health program) is unlawful. (**Attachment T – Redacted Medi-Cal Position Statement for Top Surgery for an FTM Client.**)
- Discrimination in the Provision of Care – many transgender people find that they face discrimination from their health care providers or staff members at clinics or hospitals. Such discrimination is likely illegal under Unruh.

## **VIII. Youth Issues**

### A. State of the law

- A number of laws affect the ability of transgender people under the age of 18 to get treatment for and recognition of their gender identity. Many, but not all of these laws require that youth have permission of their parent or guardian unless they are emancipated. Youth are protected against gender identity based discrimination and harassment in a school setting (California Education Code 200). (**Attachment U – San Francisco Unified School District Regulations**, the first in the state to fully implement ED Code 200)

*This document is intended to convey basic information about laws and regulations affecting our ability to express our gender identity. It is not intended to serve as legal advice. While every effort has been made to provide readers with accurate information, the law is often changing, especially in this area. Anyone with a specific legal question is strongly encouraged to contact the Transgender Law Center or another source of legal information to discuss the facts surrounding your particular circumstances.*

# **Attachment**

**A**



**CONFIDENTIAL**  
**MEDICAL INFORMATION AUTHORIZATION**  
**(Name and Gender Change)**

TO (HOSPITAL OR MEDICAL FACILITY)	DATED (VALID FOR THREE YEARS FROM THIS DATE)
ADDRESS	DRIVER LICENSE NO.
	CASE NO. (MEDICAL)
	SOCIAL SECURITY NO.
TO (PHYSICIAN)	PHONE NUMBERS (IF AVAILABLE)
ADDRESS	PATIENT (PREFERRED NAME)
	PHYSICIAN
	HOSPITAL
PERSON'S PRESENT NAME AND DATE OF BIRTH (SHOWN ON DRIVER'S LICENSE OR ID CARD)	

TO BE COMPLETED BY MEDICAL DOCTOR OR HOSPITAL	<b>My professional opinion is that the person's:</b>
	Gender Identification is <input type="checkbox"/> Male <input type="checkbox"/> Female (On this date _____)
	Demeanor is <input type="checkbox"/> Male <input type="checkbox"/> Female (On this date _____)
	Gender Identification checked above is: _____ <input type="checkbox"/> Complete <input type="checkbox"/> Transitional (Please comment.)
	Comments: _____

**ADVISORY STATEMENT**

Medical information is required under the authority of Divisions 6 and 7 of the California Vehicle Code. Failure to provide the information is cause for refusal to issue a license, or to cancel or withdraw the driving privilege.

All records of the department relating to the physical or mental condition of any person are confidential and not open to public inspection (Section 1808.5, California Vehicle Code).

**AGREEMENT**

I hereby authorize my physician or hospital to answer the above questions and submit information to the Department of Motor Vehicles, or its employees, relating to my gender identification for the purpose of obtaining a driver license or identification card under my preferred gender.

I understand that information received by the department will be held in the strictest confidence per Vehicle Code 1808.5 unless I authorize an attorney to gain access to my file. Any expense involved is to be charged to me and not to the Department of Motor Vehicles.

**ATTN:** Physician or Hospital -- Please return this form to the subject for inclusion with the driver license or identification card application.

Signed: \_\_\_\_\_

\_\_\_\_\_  
WITNESS

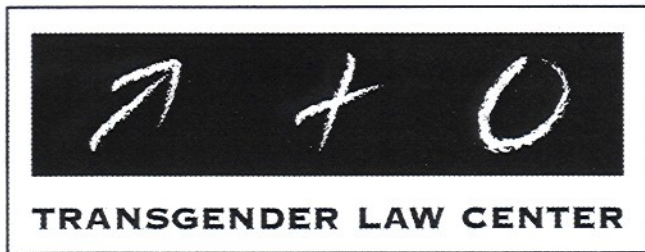
A completed examination form for this person is on file in my office at:

ADDRESS
DATE OF EXAMINATION
NAME OF EXAMINING PHYSICIAN/MEDICAL LIC. NO.
SIGNATURE OF PHYSICIAN

DMV Examiner's  
Signature \_\_\_\_\_

D.M.V.





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**Instructions for completing the California DL 328 form<sup>1</sup>**

Name and address of the facility where you receive services from your physician.	Date the form was completed.
	Patient's <sup>2</sup> driver license number
	Record number that physician uses to track patient (if applicable).
	Patient's social security number
Name of physician and business address (if different from above).	Physician's phone number
	Name to which driver license is being changed.
	Physician's name
	Name from top left box.
Patient's birth name (or whatever is the current name on driver license) and date of birth	
This section to be completed by physician. Form may be rejected if this section is not fully completed. Please make sure that a box is checked on each of three lines and date entered in first two lines. Comments need only be made if applicable.	
Witness: should be witnessed by someone at doctor's office, hospital, or clinic.	Patient should sign this form with current name (the one to which the license is being changed).
Address where file is kept.	DMV will fill out this section.
Date examination was completed (can be different than the date the form was completed).	
Physician's name	
Physician's signature	

<sup>1</sup> These instructions were created by the Transgender Law Center in consultation with the California Department of Motor Vehicles (DMV). If you experience any trouble in filing a form completed using the information in this document, you can request assistance from the DMV policy division at (916) 657-6550.

<sup>2</sup> "Patient" is the person changing their driver license.

**NATIONAL CENTER FOR LESBIAN RIGHTS**  
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# **Attachment**

**B**

## Social Security Administration Record Changes

### 1. Current Name Change Policy (Viewed in April of 2006)

[http://ssa-custhelp.ssa.gov/cgi-bin/ssa.cfg/php/enduser/std\\_adp.php?p\\_faqid=315](http://ssa-custhelp.ssa.gov/cgi-bin/ssa.cfg/php/enduser/std_adp.php?p_faqid=315)

To change your name on your Social Security card:

- Complete an [Application For A Social Security Card](#) (Form SS-5);
- Show us proof of your:
  - U.S. citizenship (if you have not previously established your citizenship with us);
  - Legal name change; and
  - Identity.
- Take your completed application and documents to [your local Social Security office](#).

### Name change

You must show us a recently issued document as proof of your legal name change. Documents Social Security may accept to prove a legal name change include:

- Marriage document;
- Divorce decree specifically stating you may change your name; or
- Court order for a name change.

### 2. Prior Name Change Policy (viewed in June 2004)

#### Question:

How do I change my name on my Social Security card?

#### Answer:

To change the name shown on your card, you need to complete Form SS-5 which is available for download at <http://www.socialsecurity.gov/online/ss-5.html> and submit evidence of your identity. Or you can obtain Form SS-5 by calling 1-800-772-1213 or visiting your local Social Security office. These services are free.

Your card will have your new name but the same number as your old card. To change your name on your card, we need one or more documents identifying you by both your OLD NAME that is on our records and your NEW NAME. Examples of documents which might show both your old name and new name include your marriage certificate, divorce decree, or a court order changing your name. Or we may accept two identity documents – one in your old name and one in your new name. The document

identifying you by your new name must be of recent issuance so that we can determine your continued existence. Generally, we prefer to see a document with a photograph. However, we may generally accept a non-photo identity document if it has enough information to identify you (e.g., your name as well as your age, date of birth, or parents' names). If you were born outside of the U.S, we also need proof of your U.S. citizenship or lawful alien status.

### **3. Current Change of Gender Marker Policy** (Viewed in April 2006)

<https://s044a90.ssa.gov/apps10/poms.nsf/lrx/0100203215!opendocument>

#### **C. Policy – Changing Numident Data — Other Than Name Change**

Each applicant requesting a change or correction of information on the prior Numident record must submit evidence of identity establishing that he or she is the person on the record in addition to evidence supporting the change, unless the correction is for an obvious keying error (that is the application completed and signed by the NH does not agree with the information on the Numident). If the application is a MES-generated application you cannot presume there was a keying error, a new application with proper evidence must be obtained.

#### **Sex**

The surgeon or attending physician must provide a letter verifying the sex change surgery has been **completed**. All documents must clearly identify the NH.

**IMPORTANT:** Numident sex data is used for identification purposes only. Do not use the sex data shown on the Numident to determine whether a valid marital relationship exists. Rather, consult appropriate State law to make a determination whether a valid marital relationship exists

**NOTE:** to correct a keying error, the prior application must be reviewed. If the application is a MES-generated application, do not presume there was a keying error. If the prior application is not reviewed, obtain a new application with proper evidence. The person must submit evidence showing the correct sex. The evidence must have been established before the CYD date of the Numident with the incorrect entry.

# **Attachment**

**C**

TO BE PUBLISHED IN THE OFFICIAL REPORTS  
OFFICE OF THE ATTORNEY GENERAL State of California

BILL LOCKYER Attorney General

OPINION	:	No. 00-205
	:	
of	:	June 9, 2000
	:	
BILL LOCKYER	:	
Attorney General	::	
	:	
ROBERT L. MUKAI	:	
Deputy Attorney General	::	

THE HONORABLE TED LEMPert, MEMBER OF THE STATE ASSEMBLY, has requested an opinion on the following question:

Is a common law change of name valid in California?

CONCLUSION:

A common law change of name is valid in California.

**ANALYSIS**

". . . An old Roman maxim runs, 'Sine nomine homo non est' (without a name a person is nothing). One's name is a signboard to the world. It is one of the most permanent of possessions; it remains when everything else is lost; it is owned by those who possess nothing else. A name is the only efficient means to describe someone to contemporaries and to posterity. When one dies it is the only part that lives on in the world. [Citation.]" (*In re Marriage of Gulsvig* (Iowa 1993) 498 N.W.2d 725, 730 (dis. opn. of Snell, J.).)

The question presented for analysis is whether a common law change of name is valid in California. Before answering the question in the affirmative, we undertake to explain what a common law change of name is.

The phrase "common law change of name" refers to the adoption and use of a name different from the one by which a person was formerly known, without resort to judicial process or other intervention by the state. The usage reflects the fact that at common law,

all persons had, and in most common law jurisdictions including California,<sup>1</sup> continue to have a right to change their given names and surnames at will. In modern times the phrase generally denotes the right of a person to use whatever name he or she chooses, as long as the purpose is not "to defraud or intentionally confuse." (*Weathers v. Superior Court* (1976) 54 Cal.App.3d 286, 288.)

In California, as in most American jurisdictions (see Note, *South Dakota Supreme Court: Keegan v. Gudahl: The Child's Surname as a New Bargaining Chip in the Game of Divorce* (1996) 41 S.D. L. Rev. 166, 176-177, fn. 91), a procedure has been established by statute (Code Civ. Proc., §§ 1275-1279.6) for the formal changing of one's name. The purpose of the statutory procedure is to have, wherever possible, an official record of the change. (*In re Ross* (1937) 8 Cal.2d 608, 609; *In re Ritchie* (1984) 159 Cal.App.3d 1070, 1072.) But resort to the statutory procedure is not necessary either prior to commencing use of a new name, or afterward, for the purpose of rendering a prior name change valid. The statutory method for changing names does not repeal or displace the common law ability to change one's name. (Code Civ. Proc., § 1279.5, subd. (a).) Accordingly, a person may change his or her name without legal proceedings simply by adopting another name and using it as his or her own. (*In re Ross, supra*, 8 Cal.2d at p. 609; *Lee v. Superior Court* (1992) 9 Cal.App.4th 510, 513-514; *In re Ritchie, supra*, 159 Cal.App.3d at pp. 1072-1074.)

The statutory procedure's very placement of the new name on the public record, however, unquestionably affords some advantages not bestowed on a common law name change standing alone. The statutory process provides an official document by which the change of name is definitely and specifically established and easily proved even after the death of all contemporaneous witnesses. Conversely, the inability to establish one's name for purposes of life's daily transactions, although perhaps only occasionally resulting when sole reliance is placed on the common law method, can be a substantial inconvenience when it occurs. Such are the circumstances in which one may be led to question the "validity" of a common law change of a name.

A common law name change is "valid" notwithstanding the failure or refusal of others to recognize and rely on the new name. The validity of the name change is unaffected by the refusal of others to accept it, simply because the validity of the change does not include a requirement that it be recognized or accepted by the world at large, or indeed, by anyone except the one who assumes it. In *Application of Dengler* (Minn. 1979) 287 N.W.2d 637, for example, the Minnesota Supreme Court observed:

“ . . . [C]ustom has universally decreed that a man shall be known by the name of his father. But in England and the United States, at least, this custom is not legally binding; there is no law preventing a man from taking whatever name he has a fancy for, nor are there any particular formalities

---

<sup>1</sup> Civil Code section 22.2 provides:

“The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State.”

required to be observed on adopting a fresh surname; but, on the other hand, if a man has been known for a considerable time by the name of his father, or by a name of repute, and he changes it for another, he cannot compel others to address him or designate him by the new one. [Citation.]’ ” (*Id.*, at p. 629, fn. 1.)

A common law name change, in other words, carries with it no mandate to those with whom one comes in contact to accept at face value the nexus between the new name and the individual who assumes it.

Thus “validity,” for purposes of a common law name change, means that one has the freedom to change one’s name and to use whatever name he or she chooses, qualified only by the proviso that the purpose not be dishonest. To change one’s name by the common law method is to exercise the freedom to unbind oneself from the given name or surname acquired through birth or prior assumption, and to identify oneself anew; it is not to unilaterally impose recognition or acceptance of the newly chosen name as an obligation incumbent upon others.

In answer to the question presented, we conclude that a common law change of name is valid in California.

\*\*\*\*\*



# **Attachment**

**D**

XXX, Petitioner  
2715 S Street, #8  
Sacramento, CA 95816

XXX

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF XXX

In re: XXX Petition for Change of Name

CASE NO. XXX

**PETITIONER'S POINTS AND  
AUTHORITIES IN RESPONSE TO  
TENTATIVE RULING**

Date: July 15, 2003

**I. Factual History**

Petitioner, born XXX, is transgender. Petitioner was born on Sept 9, 1949 in Milwaukee County, Wisconsin. While identified as a male at birth and given a traditionally male name, petitioner is actually female. From the early age Petitioner has worn female clothing and associated with the female gender. As she matured, Petitioner avoided romantic relationships because they did not feel right for her. In the early 1990s, Petitioner became aware that she likely had a condition called gender dysphoria. It would another decade before she began to seek treatment for this condition, though, due to personal feelings of guilt and shame. Finally, in 2002, Petitioner accepted the fact that she is female and sought a therapist to guide her through gender transition.

In May of 2003, Petitioner began to live full-time as a woman and adopted the name XXX. XXX has used this name for the continuously and exclusively since. She has changed her drivers license, social security account, two credit card accounts, her bank

account, her health insurance, her utility accounts, and has notified her last two employers of the name change. Petitioner is known as XXX by her friends, health care providers, people in her social groups, and her fellow volunteers at Habitat for Humanity.

## **II. Procedural History**

On May 12, 2003 Petitioner filed a petition for change of name from XXX to XXX using Judicial Council of California forms NC-100, NC-110, NC-120, and NC-130. On line 6(c) of form NC-110, XXX listed “in process of changing my gender” as the reason for her name change.

On June 23<sup>rd</sup>, XXX received a “tentative ruling” stating: "Since petitioner is undergoing a gender change, he [sic] must file a petition for change of name and gender, have a letter from the surgeon, and Form NC-200.”

Petitioner appeared in court on June 24<sup>th</sup>. In court, she explained that she was not requesting a change of gender court order, but only a change of name. The case was left open to allow Petitioner to file Form NC-200.

On June 27, 2003 Petitioner filed a new petition requesting that her name be changed to “XXX.”

## **III. California Law Does Not Support Denial of Petitioner’s Name Change**

California Code of Civil Procedure sec 1275 (et seq.) lays out the substantive and procedural requirements for filing a petition for a name change. Other than the limitations outlined in Section 1279.5 (b-d), the statute provides no explicit grounds for denying a name change petition. Petitioner clearly does not fall within any of the categories outlined in subsections b-d.

Section 1278(a) does grant the court limited discretion to deny an application if the request is not “right and proper.” However, Courts interpreting this language have held that a judge may not exercise their discretion in a way that is arbitrary, capricious, or whimsical. XX v. Superior Court, 11 Cal. Rptr. 2d 763, at 765. In fact, Courts have held that there “must be a substantial reason for the denial” of a name change petition. In re Ritchie, 206 Cal.Rptr. 239, at 240.

In XX, petitioner was attempting to change his last name to a racial epithet. The court found that the chosen epithet was “vulgar.” The court then held that “no person has

a statutory *right* to officially change his or her name to a name universally recognized as being offensive.” XX at 765.

In Ritchie, petitioner was attempting to change his name to the Roman numeral “III.” The court found that names can not consist solely of numbers or symbols and “III” therefore fails to qualify as a name. Ritchie at 241.

The only other recorded decision of a California court denying a name change petition was in Weingand v. Lorre, 41 Cal.Rptr. 778. In this case, petitioner wanted to change his name to one strikingly similar to a famous actor. The court found that the petitioner requested such a change in bad faith to enable him to profit from the similarity in the two names. Based on this evidence, the court denied the petition due to the high potential for fraud.

Petitioner’s request is distinguishable from the holdings in XX, Ritchie, and Weingand. Petitioner’s request to change her name to XXX is not, on its face or otherwise, generally believed to be offensive or vulgar in any way. Both XXX are common names used throughout the county. Petitioner has not adopted these names in order to commit fraud or to otherwise unjustly enrich herself.

Simply because XXX are both normally considered to be female names and Petitioner was identified as male at birth, the court would not act properly by dismissing XXX’s petition. As both XX and Ritchie make clear, any denial under section 1278(a) must have a firm public policy rational. Refusing to recognize XXX’s female gender does not meet this high standard. After all, the court is not the appointed arbiter of the gender that is correctly associated with names.

Such a conclusion was reached by the Ohio Supreme Court in a recent pair of cases. In In re Maloney (774 N.E.2d 239) and In re Bucknell (771 N.E.2d 846), the court held that a person’s gender identity or sexual orientation is insufficient reason to deny a name change petition. In Maloney, a transgender woman had petitioned the court to change her name from her male birth name to her female adopted name. Both the trial court and the court of appeals denied the petition on the grounds that person who wants to change her named due a change of gender does not have a “proper purpose” for doing so and that such a change goes against public policy. (*see generally* In re Maloney, 2001 WL 908535)

In Bucknell, a cohabitating lesbian couple petitioned to change their names to the same last name. The trial court and court of appeals came to similar conclusions as in Maloney holding that such a petition ran counter to Ohio public policy positions on

marriage and same-sex relationships. (*see generally* In re Bicknell, 2001 WL 121147). In overruling previous decisions in both cases, the Ohio Supreme Court held that all petitions were “reasonable and proper under” the Ohio name change statute. (In re Bicknell, 771 N.E.2d 846, at 849).

Five years prior, the New Jersey Superior Court, Appellate Division came to the same conclusion in Matter of Eck, 584 A.2d 859. Similar to the present case, the Petitioner in Eck had been given a male name at birth and petitioned the court for a change of name to a female name. In reversing the trial court denial of Petitioner’s request, the court held:

“At common law, any adult or emancipated person is free to adopt any name, except for a fraudulent, criminal or other illegitimate purpose. Egner v. Egner, 133 N.J.Super. 403, 406, 337 A.2d 46 (App.Div.1975). N.J.S.A. 2A:52-1 is remedial legislation establishing a method of judicial recordation of name changes. It is to be construed consistently with and not in derogation of the common law. In re Application of Lawrence, 133 N.J.Super. 408, 411, 337 A.2d 49 (App.Div.1975).

We perceive no fraudulent purpose in petitioner's application. Absent fraud or other improper purpose a person has a right to a name change whether he or she has undergone or intends to undergo a sex change through surgery, has received hormonal injections to induce physical change, is a transvestite, or simply wants to change from a traditional "male" first name to one traditionally "female," or vice versa. Many first names are gender interchangeable--*e.g.*, Adrian, Evelyn, Erin, Leslie, Lynn, Marion, Robin--and judges should be wary about interfering with a person's choice of a first name.

Finally, we perceive that the judge was concerned about a male assuming a female identity in mannerism and dress. That is an accomplished fact in this case, a matter which is of no concern to the judiciary, and which has no bearing upon the outcome of a simple name change application.” *at 860 and 861.*

Petitioner should be granted the same result as Maloney and Eck in the present case as her petition is obviously properly submitted under California's name change statute. The fact that she is changing her name to one that better suits her gender identity is right and proper. XXX is the name by which Petitioner is known in her social circles, among her friends, and in all other interaction with civil society. No evidence has been presented that she is adopting the names to perpetrate fraud. Her intent, as stated in her original petition, is to select a name that more accurately reflects her identity.

#### **IV. California Public Policy Argues in Favor of Granting Petitioner's Request**

California courts have clearly identified the underlying purpose of section 1275 as being one of recording an act allowable under common law. "The common law recognizes the right of a person to change his name without the necessity of legal proceedings; the purpose of the statutory procedure is simply to have, wherever possible, the change recorded." In re Richie at 240. Having a recorded name change is helpful in creating an identifiable paper trail from an old name to a new one.

Since petitioner is already legally using XXX continuously and exclusively, it is beneficial for the court to make a record of such usage. Petitioner uses this name or all activities in civil life. Denial of formal recognition serves no legitimate public policy goal and, in fact, circumvents the very purpose of section 1275.

#### **V. Conclusion**

Petitioner respectfully requests that the court accept her second amended petition to change her name fromXXX to XXX. She further requests that this be done immediately and without hearing as is possible under California Code of Civil Procedure section 1278.<sup>1</sup>

Respectfully submitted,

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Date

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<sup>1</sup> "If no objection is filed the court may, without hearing, enter the order that the change of name is granted." California Code of Civil Procedure section 1278

# **Attachment**

**E**

Petitioner:

Address:

Phone Number:

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF XX

In re: Change of Gender Petition of XX

CASE NO.

**PETITIONER'S POINTS AND  
AUTHORITIES**

Date: XX

**I. Factual and Procedural Background**

XXX

**II. Does the California Superior Court have the authority to hear a petition for a change of gender from a person born outside of California?**

Yes. California Health and Safety Code section 103425 et seq. grants the superior court with the authority to hear a petition for a change of gender from a person born in California. The California Superior Court's power to craft equitable remedies provides jurisdiction for hearing a similar petition from someone born outside of the state.

**A. Can the Superior Court exercise equitable jurisdiction?**

Yes. The California Constitution grants Superior courts "original jurisdiction in all other causes except those given by statute to other trial courts." California



Constitution, Article 6, section 10. This language has been clearly interpreted to grant superior courts the power of equitable jurisdiction.<sup>3</sup> Multiple cases bear this out. (*In general see: Pennie v. Roach*, 29 P. 956, at 956 (Cal. 1892) “If [the superior court] has jurisdiction of the person and subject-matter, and it is admitted ... then it can administer full and entire relief according to the principles of equity,”; *State Life Ins. Co. v. Williams* 81 P.2d 481, at 599: “The first inquiry, when a court order is involved, must necessarily have to do with the authority for making it. Superior courts, indeed, have both probate and equity jurisdiction...”)

Equity jurisdiction is defined in Witkin, Summary of California Law as “flexible and expanding. And the theory that ‘for every wrong there is a remedy’ may be invoked by equity courts to justify the invention of new methods of relief for new types of wrongs.”<sup>4</sup> One court defined their obligation under equity jurisdiction as one “to administer justice as nearly as may be in accordance with fixed rules of law and procedure, aided wherever and whenever proper and necessary by established and governing principles which relate to equity jurisprudence.” *In re Kline's Estate*, 32 P.2d 677 (Cal.App. 2 Dist. 1934).

### **B. Is hearing petitioner’s plea an appropriate exercise of equity jurisdiction?**

Yes. Under California Health and Safety Code section 103425 et seq, the court has the power to issue such an order to an otherwise qualified person born in California. Even though Petitioner was not born in California, X needs a court order for the same

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<sup>3</sup> A former version of the California Constitution spelled this power out more clearly by granting superior courts original jurisdiction in cases in equity and in law. “Subsequent amendments to the Constitution deleted the separate references to courts of law and equity but did not change the rule that superior courts were vested with original jurisdiction in all civil cases except as otherwise permitted by the Constitution.” *Lentz v. McMahon* 231 Cal.Rptr. 622 (Cal.App. 1 Dist.,1986), Fn 2.

<sup>4</sup> Witkin, Summary of California Law, Equity, volume 4, page 2788.

reason that a person born in California needs one – to gain official recognition of X change of gender. Failing to exercise jurisdiction over Petitioner’s plea would lead to an unjust outcome essentially identified as offering state recognition of one category of transgender people (those born in California) while denying it to another (those born outside of California).

Petitioner’s plea is the classic example of an appropriate use of equitable jurisdiction. “In the exercise of equitable jurisdiction the court undoubtedly has broad discretionary powers to take whatever action is necessary in the interests of justice in order that its decrees will not fail to accomplish their purpose.” *Del Riccio v. Superior Court of Cal., in and for Los Angeles County*, 251 P.2d 678, at 679 (Cal.App. 2 Dist. 1952).

It is not unusual that no California case law seems to exist on this type of plea for equitable relief. In facing a different legal situation, one court found that: “regardless of the paucity of case law on the subject, [Code of Civil Procedure, § 187](#), appears to be squarely in point. It provides:

‘When jurisdiction is, by the Constitution or this Code, or by any other statute, conferred on a Court of judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this Code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.’ *Holibaugh v. Stokes*, 13 Cal.Rptr. 528, at 530 (Cal.App. 1961). The Court went on to find that, “this flexible principle of equity is tailored to fit the situation before us.” *Id.* at 530.

The one state court which has heard this identical question held that equitable

jurisdiction applied. In *In re Heilig*, 816 A.2d 68 (Md., 2003), the Court of Appeals of Maryland overturned two lower courts who had refused to exercise jurisdiction over Appellant's change of gender petition. Similar to California, Maryland has a statute allowing people born in the state to change the gender on their birth certificate via court order.<sup>5</sup> Heilig, having been born Pennsylvania, did not fall under the jurisdiction created by this statute. However, Heilig argued that the County court had equitable jurisdiction to grant her petition.

Holding that the court did not have jurisdiction under the Maryland Health Code, the County court denied Heilig's petition. After this denial was affirmed by the Maryland Court of Special Appeals, Heilig appealed to the Court of Appeals of Maryland. Basing their decision on Maryland Constitutional principles<sup>6</sup> and the statute giving effect to those principles,<sup>7</sup> the Court of Appeals held:

“The jurisdiction of Maryland courts is not limited by the birthplace of the parties seeking relief, however, so by recognizing the authority of the Circuit Courts to enter gender-change declarations with respect to persons born in Maryland, it necessarily recognizes as well their jurisdiction to enter such orders on behalf of anyone properly before the court. Indeed, any other conclusion would raise serious Constitutional issues under the Equal Protection and Privileges and Immunities Clause of the 14th Amendment to the United States Constitution.” *At 84-85.*

The same conclusion is required under California law.

### **III. Conclusion**

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<sup>5</sup> MD Health Gen § 4-214

<sup>6</sup> MD CONST Art. 4, § 20 “(a) There shall be a Circuit Court for each County and for Baltimore City. The Circuit Courts shall have and exercise, in the respective counties, and Baltimore City, all the power, authority and jurisdiction, original and appellate, which the Circuit Courts of the counties exercised on the effective date of these amendments, and the greater or lesser jurisdiction hereafter prescribed by law.”

<sup>7</sup> MD Code, Courts and Judicial Proceedings section 1-501 “The circuit courts are the highest common-law and equity courts of record exercising original jurisdiction within the State.”

The California Superior Court has well recognized power to fashion equitable relief. Petitioner's plea is an entirely appropriate matter over which the court should exercise equitable jurisdiction. Therefore, so long as Petitioner meets the other requirements of California Health and Safety Code section 103425, Petitioner respectfully requests that the court issue the submitted order.

I certify (or declare) under penalty of perjury that the foregoing is true and correct:

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Signature of Petitioner

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Printed name of Petitioner

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Date

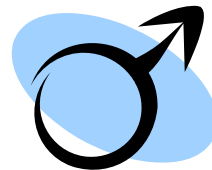
XX County, California

# **Attachment**

**F**



# Obtaining a New Birth Certificate After Gender Reassignment



Upon request, this document will be made available in Braille, large print, and audiocassette or computer disk. To obtain a copy in one of these alternate formats, please call or write:

California Office of Vital Records  
M.S. 5103  
P.O. Box 997410  
Sacramento, CA 95899-7410  
Telephone: (916) 445-2684  
California Relay: 711/1-800-735-2929  
[www.dhs.ca.gov](http://www.dhs.ca.gov) (then select "Services")

# Obtaining a New Birth Certificate After Gender Reassignment

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## What's a gender reassignment?

- “Gender **reassignment**” is when a person has his or her sexual characteristics surgically altered to those of the opposite sex.
  - This is not the same as “gender **error**,” which is when a person’s sex is **incorrectly stated** on the original birth certificate by the person preparing the certificate and registering the birth.
- 

## I've undergone gender reassignment.

### What's my next step toward amending my birth certificate?

A petition to have a new birth certificate issued that reflects the change of gender (and name if requested) must be filed with the Superior Court in the county where you reside (doesn't have to be in California, but must be in a U.S. territory) (Health and Safety Code 103425).

- If you've already obtained a legal name change prior to filing your petition for a new birth certificate, your petition to the court must include an affidavit of a physician documenting the gender reassignment, and a certified copy of the court order changing your name (Health and Safety Code 103430).
  - In lieu of separate proceedings, you can file a single petition with the court for a name change and the issuance of a new birth certificate that reflects a change of gender (Health and Safety Code 103435). In this case, your petition to the court must include an affidavit of a physician documenting the gender reassignment.
- 

## How do I file a petition with the court?

- We suggest you contact a family law attorney for legal advice in this matter. Our staff cannot provide legal advice, nor do we have information about the legal process.
  - There are also books available at bookstores or public libraries to help you with the court process.
  - You can also access the following website for additional information about the court process: [www.courtinfo.ca.gov](http://www.courtinfo.ca.gov).
-

**After I get the court order, what do I submit to amend my birth certificate?**

- 
- You'll need to complete an Affidavit to Amend a Record, VS 24(S).
  - You **must** include a **certified** copy of the court order gender reassignment and, if applicable, the court order name change. The certified copies must be photocopies of the original orders that were signed or stamped with the judge's signature and that have an **original seal** and a signature (or signature stamp) of the court clerk. We don't return the court orders after the new birth certificate is prepared.
  - Although this item isn't required, it would help our staff if you could include a photocopy of the current birth certificate if you have it (this helps us identify the exact record to be amended).
  - Mail the following items to our office using the address on the front of this pamphlet:
    - Completed VS 24(S)
    - \$ 20 fee
    - **Certified** copy of the court order
    - Photocopy of current birth certificate (if you have it)
  - If any of the required items aren't included, your request will be returned to you for correction.

**What's the fee for a new birth certificate after gender reassignment?**

- 
- \$20 – which includes one Certified Copy of the new birth certificate.
  - Additional copies are \$14 each.
  - Fees should be paid by check or money order payable to **Office of Vital Records**. International money orders for out-of-country requests should be payable in U.S. dollars.

**Where can I get the VS 24(S)?**

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The application must be an **original** form (our office uses a special bond paper). **Photocopies are not acceptable**. One application form is included if you receive this pamphlet by mail. If you need additional copies of the VS 24(S) form, or are accessing this pamphlet on our website:

- Order forms electronically at [www.dhs.ca.gov/hisp/chs/ovr/ovrformsreq.asp](http://www.dhs.ca.gov/hisp/chs/ovr/ovrformsreq.asp). Because of the volume of phone calls we receive, the internet is usually a faster process for our customers than calling our Customer Service Unit.



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(Continued)

**Where can I get the VS 24(S)?**

(Continued)

- Call our Customer Service Unit at (916) 445-2684.
- You can also get the form from the County Recorder or County Health Department in any California county.

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**How do I complete the VS 24(S)?**

A sample of what a completed form should look like is attached.

**PART I:**

- Complete the information **exactly** as it appears on the current birth certificate.

**Note:** If you need a copy of the current birth certificate to complete this section, you can get a copy by completing the Application for Certified Copy of Birth Certificate (attached) and submitting the application (and \$14 fee) to our office. Our average processing time for birth certificates is 4 weeks. But you can get a copy much faster from the County Recorder in the county where the birth took place.

**PART II:**

**Item 7:** Enter the item number from the current birth certificate that needs to be corrected. List only one item per line.

**Item 8A:** Enter the **incorrect** information **as it appears** on the current birth certificate.

**Item 8B:** Enter the **correct** information **as it should appear** on the birth certificate.

**Item 9:** Enter the Superior Court information (county, case number, etc.) for the court that ordered a new birth certificate reflecting a change of gender and, if applicable, a court order name change.

**Items 10A-E:** Enter your personal information and signature.

- Contrary to the instructions on the VS 24(S), two signatures **are not required** when using this form for gender reassignment.

What makes a VS 24(S) form “acceptable”?

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## Important Information

Birth certificates are legal documents that must be able to hold up in any court, unchallenged as to their accuracy and reliability. To help us prepare the new birth certificate accurately:

- Every item on the amendment must be completed.
- The amendment form must be an original, not a photocopy.
- We must be able to read the information on the form. It's extremely important that the form be legible. ***Using a typewriter to complete the form ensures that the information is interpreted clearly.***
- If you're not able to type the amendment, it's extremely important that you take the extra time to print ***very clearly and legibly***. Documents that aren't legible will be returned to you to complete again.
- ***Only black ink is acceptable.***
- ***There can't be any erasures, whiteout, or alterations.***

How will I know if my request has been accepted?

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Once your request has been received and evaluated, we'll send you either:

- A postcard letting you know your request has been accepted, and reminding you of our processing time.
- If your request is not accepted (e.g., due to insufficient fee, insufficient information, etc.), we'll return your request to you with a letter explaining what needs to be corrected.

Please allow about 6 weeks to receive the acknowledgement postcard. Rejected requests can take up to 10 weeks to be returned.

How long will it take to get my new birth certificate?

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Our processing time for birth amendments is approximately 7 months. (The processing time can change based on our workload.)

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**Once I file the amendment, what happens to my original birth certificate?**

- When we receive the acceptable documents (and fee), we'll seal the original birth certificate and replace the sealed record with a new birth certificate.
- The new birth certificate will in no way indicate that it's not the original birth certificate.
- The new birth certificate will be the only birth certificate available to the public. (The original sealed record will only be available through a court order – per Health and Safety Code 103440.)

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**What if I still have questions?**

If you've read this pamphlet thoroughly and still have questions that weren't answered in this pamphlet, please call (916) 557-6076 and leave your name, telephone number, and question. One of our Amended Records staff will return your call within 48 hours.

If you have questions on the **status** of your request, please call our Customer Service Unit at (916) 445-2684 – **but only after the processing time has passed.**

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## APPLICATION FOR CERTIFIED COPY OF BIRTH RECORD

**DO NOT Complete This Application Before Reading the Instructions on Page 2**

In an attempt to stop the illegal use of vital records, and as part of statewide efforts to reduce identity theft, a new law (effective July 1, 2003) changed the way certified copies of birth certificates are issued. **Certified Copies** to establish the identity of a registrant can be issued only to authorized individuals, as indicated below. All others will be issued **Certified Informational Copies** that **are not** valid to establish identity.

Fee: \$14 per copy (payable to the Office of Vital Records).

Please indicate the type of certified copy you are requesting:

<input type="checkbox"/> I would like a <b>Certified Copy</b> . This copy will establish the identity of the registrant. (To receive a Certified Copy you <b>MUST INDICATE YOUR RELATIONSHIP TO THE REGISTRANT</b> by selecting from the list below <b>AND COMPLETE THE ATTACHED SWORN STATEMENT</b> declaring that you are eligible to receive the Certified Copy. The Sworn Statement <b>MUST BE NOTARIZED</b> if the application is submitted by mail <b>unless you are a law enforcement or local or state governmental agency.</b> )	<input type="checkbox"/> I would like a <b>Certified Informational Copy</b> . This document will be printed with a legend on the face of the document that states, <b>"INFORMATIONAL, NOT A VALID DOCUMENT TO ESTABLISH IDENTITY."</b>  <b>(A Sworn Statement does not need to be provided.)</b>
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**NOTE: Both documents are certified copies of the original document on file with our office. With the exception of the legend, the documents contain the exact same information.**

To receive a **Certified Copy** I am:

- The registrant (person listed on the certificate) or a parent or legal guardian of the registrant.
- A party entitled to receive the record as a result of a court order, or an attorney or a licensed adoption agency seeking the birth record in order to comply with the requirements of Section 3140 or 7603 of the Family Code.
- A member of a law enforcement agency or a representative of another governmental agency, as provided by law, who is conducting official business. *(Companies representing a government agency must provide authorization from the government agency.)*
- A child, grandparent, grandchild, brother or sister, spouse, or domestic partner of the registrant.
- An attorney representing the registrant or the registrant's estate, or any person or agency empowered by statute or appointed by a court to act on behalf of the registrant or the registrant's estate. *(If you are requesting a Certified Copy under a power of attorney, please include a copy of the power of attorney with this application form.)*

**APPLICANT INFORMATION** (PLEASE PRINT OR TYPE)

**Today's Date:** \_\_\_\_\_

Printed Name <b>and Signature</b> of Person Completing Application	Purpose of Request	Area Code and Telephone (    )
Mailing Address – Number, Street	City	State                      ZIP Code
Name of Person Receiving Copies, if Different From Above	Number of Copies	Amount Enclosed
Mailing Address for Copies, If Different From Above	City	State                      ZIP Code

**BIRTH CERTIFICATE INFORMATION** (PLEASE PRINT OR TYPE)

**Adopted:**    No    Yes   **(If Yes, see #4 on Page 2 for more information)**

LAST Name on Certificate (Birth Name if Married)	FIRST Name on Certificate	MIDDLE Name on Certificate
City of Birth	County of Birth	
Date of Birth – MM/DD/CCYY (If unknown, enter approximate date of birth)	Sex <input type="checkbox"/> Female <input type="checkbox"/> Male	
LAST Name on Certificate – Father/Parent	FIRST Name on Certificate – Father/Parent	MIDDLE Name on Certificate – Father/Parent
MAIDEN Name on Certificate – Mother/Parent	FIRST Name on Certificate – Mother/Parent	MIDDLE Name on Certificate – Mother/Parent

**INFORMATION:** Birth records have been maintained in the Office of the State Registrar of Vital Records since July 1, 1905.

**INSTRUCTIONS:**

1. As of July 1, 2003, **ONLY** individuals who are authorized by Health and Safety Code Section 103526 can obtain a Certified Copy of a Birth Record to establish identity of the registrant (person listed on the certificate). (Page 1 identifies the individuals who are authorized to make the request.) All others may receive a Certified Informational Copy which will be marked, "Informational, Not a Valid Document to Establish Identity."

**Confidential Information on Birth Record:** Some individuals have special needs for a birth certificate that contains the confidential information provided at the time the birth record was prepared. This confidential information may be used to establish ethnicity, to provide health background, or for other personal reasons. For information on how to obtain a birth certificate containing the confidential information, please refer to the Birth Certificate section of our website: [www.dhs.ca.gov](http://www.dhs.ca.gov) (then select "Services"). Only specific individuals may obtain confidential copies.

2. Complete a separate application for each birth record requested.
3. Complete the **Applicant Information** section on Page 1 and provide your signature where indicated. In the **Birth Certificate Information** section, provide all the information you have available to identify the birth record. If the information you furnish is incomplete or inaccurate, we may not be able to locate the record.
4. **If the registrant has been adopted**, make the request in the **adopted** name. (If you're requesting a copy of the **original** birth certificate, you **must** provide a court order releasing the original sealed record.)

5. **SWORN STATEMENT:**

- The authorized individual requesting the certified copy must sign the attached Sworn Statement, declaring under penalty of perjury that they are eligible to receive the certified copy of the birth record, and identify their relationship to the registrant – the relationship must be one of those identified on Page 1.
- If the application is being submitted by mail, the Sworn Statement **must be** notarized by a Notary Public. (To find a Notary Public, see your local yellow pages or call your banking institution.) **Law enforcement and local and state governmental agencies are exempt from the notary requirement.**
- You do not have to provide a Sworn Statement if you are requesting a Certified Informational Copy of the birth record.

6. Submit \$14 for **each** copy requested. If no birth record is found, the \$14 fee will be retained for searching the record (as required by law) and a Certificate of No Public Record will be issued to the applicant. Indicate the number of copies you want and include the correct fee(s) in the form of a personal check or postal or bank money order (International Money Order for out-of-country requests) made payable to the **Office of Vital Records**. Mail this application with the fee(s) to the Office of Vital Records at the address below.

7. **Return Mail Option:** Completed certificates are returned using the U.S. Postal Service. If you prefer priority return mail service, the following option is available:

**Prepaid Courier Envelope:** You can include a self-addressed **prepaid** return envelope from a **priority mail courier** (e.g., Fed Ex, U.S. Postal Express Overnight, etc.). (Most couriers do not deliver to a post office box.) If you choose this option, include a separate return envelope for each application. Be sure to mail us the courier envelope as well as the airbill (mailing label). Fill in all information on the airbill (include **your** name and address as the receiver **and shipper**). Write down the airbill tracking number for your file – you'll need this tracking number if it's necessary to track the delivery through the mail courier. **Return envelopes provided by customers must be issued from a priority mail courier. Please do not provide "non-courier" return envelopes with any amount of postage (we can't use these, nor can we return the unused envelope).**

The priority mail service applies **only to the return mail service**. It does not expedite our internal processing time.

Office of Vital Records - MS 5103  
P.O. Box 997410  
Sacramento, CA 95899-7410  
(916) 445-2684

**SWORN STATEMENT**

I, \_\_\_\_\_, declare under penalty of perjury under the laws of the State of California,  
 (Applicant's Printed Name)

that I am an authorized person, as defined in California Health and Safety Code Section 103526 (c), and am eligible to receive a certified copy of the birth or death record of the following individual(s):

Name of Person Listed on Certificate	Applicant's Relationship to Person Listed on Certificate (Must Be a Relationship Listed on Page 1 of Application)

*(The remaining information must be completed in the presence of a Notary Public or Office of Vital Records staff.)*

Subscribed to this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_, \_\_\_\_\_.  
 (Day) (Month) (City) (State)

\_\_\_\_\_  
 (Applicant's Signature)

**Note: If submitting your order by mail, you must have your Sworn Statement notarized using the Certificate of Acknowledgment below. The Certificate of Acknowledgment must be completed by a Notary Public. (Law enforcement and local and state governmental agencies are exempt from the notary requirement.)**

**CERTIFICATE OF ACKNOWLEDGMENT**

State of \_\_\_\_\_ )  
 ) ss  
 County of \_\_\_\_\_ )

On \_\_\_\_\_ before me, \_\_\_\_\_, personally appeared \_\_\_\_\_,  
 (insert name and title of the officer here)

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.  
 (NOTARY SEAL)

\_\_\_\_\_  
 NOTARY SIGNATURE

# APPLICATION TO AMEND A RECORD

USE BLACK INK

NO ERASURES, WHITEOUTS, OR ALTERATIONS

INSTRUCTIONS ON BACK

If an acceptable application to amend the record is registered within one year of the date of the event, there is no processing fee, however, a fee is required for each certified copy.

If an acceptable application to amend the record is registered one year or more after the date of the event, there is a fee for filing the affidavit which includes one certified copy of the newly amended record.

There is a fee for each additional copy.

Enclosed is the fee of \$ 20.00 for filing the affidavit which includes one certified copy of the newly amended record.

Enclosed is the fee of \$ \_\_\_\_\_ for an additional certified copy(ies) of the newly amended record.

<p>► <b>Mary Jane Smith</b>  <small>Printed Name of Applicant</small></p> <p>Phone <u>(916) 444-5678</u></p>	<p><b>1234 Main Street</b>  <small>Mailing Address of Applicant</small></p> <p><b>Sacramento, CA 95820</b>  <small>City State ZIP Code</small></p>
--	--

## AFFIDAVIT TO AMEND A RECORD

" LEAVE BLANK "

" LEAVE BLANK "

BIRTH     DEATH     FETAL DEATH

STATE FILE NUMBER \_\_\_\_\_

NO ERASURES, WHITEOUTS, OR ALTERATIONS

LOCAL REGISTRATION DISTRICT AND CERTIFICATE NUMBER \_\_\_\_\_

### PART I INFORMATION TO LOCATE RECORD—TYPE OR PRINT IN BLACK INK ONLY

NAME AS IT APPEARS ON RECORD	1A. NAME—FIRST (GIVEN) <b>Martin</b>	1B. MIDDLE <b>James</b>	1C. LAST (FAMILY) <b>Smith</b>
ADDITIONAL INFORMATION TO LOCATE RECORD	2. SEX <b>Male</b>	3. DATE OF EVENT—MONTH, DAY, YEAR <b>06/03/1950</b>	4A. CITY OF OCCURRENCE <b>Sacramento</b>
	4B. COUNTY OF OCCURRENCE <b>Sacramento</b>		
	5. FATHER'S NAME AS STATED ON ORIGINAL <b>John James Smith</b>		6. MOTHER'S NAME AS STATED ON ORIGINAL <b>Ellen May Johnson</b>

### PART II STATEMENT OF CORRECTIONS—NO ERASURES, WHITEOUTS, OR ALTERATIONS

	7. CERTIFICATE ITEM NUMBER	8A. INFORMATION AS IT APPEARS ON ORIGINAL RECORD	8B. INFORMATION AS IT SHOULD APPEAR
LIST ONE ITEM PER LINE	1A.	<b>Martin</b>	<b>Mary</b>
	1B.	<b>James</b>	<b>Jane</b>
	2.	<b>Male</b>	<b>Female</b>

9. **Gender Reassignment per Superior Court of Los Angeles County, State of California Case # 003466, filed 03/06/1996.**

AFFIDAVITS AND SIGNATURES: We, the undersigned, hereby certify under penalty of perjury that we have personal knowledge of the above facts and that the information given above is true and correct.

TWO PERSONS MUST SIGN THIS FORM	10A. SIGNATURE OF FIRST PERSON 	10B. TITLE/RELATIONSHIP TO PERSON IN PART I <b>Self</b>	10C. DATE SIGNED <b>01/24/2005</b>
USE BLACK INK ONLY	10D. AGE <b>Legal</b>	10E. ADDRESS (STREET, CITY, STATE, ZIP) <b>1234 Main Street Sacramento, CA 95820</b>	
	11A. SIGNATURE OF SECOND PERSON -----	11B. TITLE/RELATIONSHIP TO PERSON IN PART I -----	11C. DATE SIGNED -----
	11D. AGE -----	11E. ADDRESS (STREET, CITY, STATE, ZIP) -----	

12. SIGNATURE OF STATE OR LOCAL REGISTRAR ►	13. DATE ACCEPTED FOR REGISTRATION
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# **Attachment**

**G**



REPRESENTING LESBIAN, GAY, BISEXUAL, AND TRANSGENDER CLIENTS

EXHIBIT I

PASSPORT BULLETIN 92-22

TO: CA/PPT - All Regional Directors  
All Office Directors  
All Passport Services Staff

FROM: CA/PPT - Carmen A. DiPlacido  
Acting Deputy Assistant Secretary  
Passport Services

SUBJECT: Procedures for Handling Requests for a Change of Gender in Passports

REFERENCE: Instruction 2510.9F  
Instruction 3120.2D  
Instruction 3120.3C

SUMMARY

This bulletin provides a more detailed explanation of Passport Services' policy, and the procedures adjudicators are to follow, in cases where an applicant requests a different gender on the passport application from that on the applicant's citizenship evidence. It expands upon the previous information given to adjudicators as contained in current Instruction 2510.9F entitled "Names to be Written in Passports." It emphasizes the need for complete and detailed documentation regarding the change in gender; as well as the need for accurate identification and photographs reflecting the applicant's *current* appearance.

Because of the need for further medical guidance concerning certain aspects of this subject, a new and separate Instruction cannot be issued at this time. However, with that forthcoming publication of new Instruction 2105 regarding names, which does not contain any mention of gender disorder issues, it was believed essential to provide adjudicators with a uniform set of procedures to be followed in these types of cases.

PROCEDURES

- I Documents to be submitted with an application
  - (1) Evidence of U.S. citizenship
  - (2) Evidence of Identity

- (3) Photographs Two recent and identical photographs reflecting a good likeness of, and satisfactorily identifying the applicant. The adjudicator should *not*, in any instance, require photographs to conform to a preconceived "male" or "female" appearance. However, the photographs should agree with the submitted identification evidence and reflect the applicant's *current* and true appearance.
- (4) Fee
- (5) Medical Documentation
- (a) "Preoperative" Applicant In case of a preoperative transsexual, submitted documentation should be, at the very least, in the form of a detailed statement from the attending *medical* physician or surgeon outlining the applicant's past medical history relating to the gender disorder, such as past psychological and hormonal treatment, the treatment stage the applicant currently is in, and the approximate date of the *sexual reassignment surgery*.
- (b) "Postoperative" Applicant In case of a postoperative transsexual, submitted documentation should be in the form of appropriate *medical* documentation from either the attending surgeon or hospital evidencing that the *sexual reassignment surgery* has taken place.
- (6) Name change While some applicants may not have a name different from that on the citizenship evidence, most do. Adjudication of the name change should be handled as a routine request, and conform to the requirements listed in Section 3A of Instruction 2105 for change of name by court order, or in Section 5 of the Attachment to Instruction 2105 for a change of name without the benefit of a court order.

# **Attachment**

**H**

## Request for Status Information Letter

I am requesting a Status Information Letter. I am a male who is not registered with Selective Service. I am now twenty six years old or older, and was born after December 31, 1959.

### Section 1:

Name \_\_\_\_\_  
First Middle Last

List any other names used \_\_\_\_\_  
Include any multiple last names

Current mailing address \_\_\_\_\_  
Street address  
\_\_\_\_\_  
City State Zip code

Social Security Account Number \_\_\_\_\_

Date of Birth \_\_\_\_\_  
Month/day/year

Daytime Telephone Number \_\_\_\_\_

E-mail Address \_\_\_\_\_

### Section 2:

#### MILITARY:

List dates of active duty service: \_\_\_\_\_ to \_\_\_\_\_

List dates of reserve duty service: \_\_\_\_\_ to \_\_\_\_\_

List dates of military school service: \_\_\_\_\_ to \_\_\_\_\_

Military school attended: \_\_\_\_\_

Attach **copy** of DD214 (or DD Form 4 if still on active duty)

Incarcerated, Institutionalized, Hospitalized, or Confined to Home:

List dates during which you were (circle appropriate situation)

incarcerated, institutionalized, hospitalized, or confined to home.

For multiple dates, list all.

\_\_\_\_\_ to \_\_\_\_\_,

\_\_\_\_\_ to \_\_\_\_\_,

\_\_\_\_\_ to \_\_\_\_\_

Attach proof of each instance

NON CITIZEN/ALIEN:

Date you entered the United States for the first time: \_\_\_\_\_

month/day/year

INS status at time of entry: \_\_\_\_\_

List all alien status(es) held since entering the country, and give dates:

(attach separate sheet if necessary)

\_\_\_\_\_ to \_\_\_\_\_ USCIS Status: \_\_\_\_\_

\_\_\_\_\_ to \_\_\_\_\_ USCIS Status: \_\_\_\_\_

\_\_\_\_\_ to \_\_\_\_\_ USCIS Status: \_\_\_\_\_

\_\_\_\_\_ to \_\_\_\_\_ USCIS Status: \_\_\_\_\_

Attach **copies** of supporting documentation (see information sheet for detailed instructions regarding this).

TRANSSEXUAL:

At birth my gender was: \_\_\_\_\_

Attach copy of birth certificate

REASON WHY YOU FAILED TO REGISTER WITH SELECTIVE SERVICE UPON REACHING AGE 18 AND BEFORE REACHING AGE 26:

\_\_\_\_\_

\_\_\_\_\_

**Section 3:**

Sign and date, then send this letter, together with **copies** of required documents and whatever other supporting information you may wish to include to:

Selective Service System  
ATTN: SIL PO Box 94638  
Palatine, IL 60094-4638

---

signature

---

date

**No action can be taken until we receive all of the information/ documentation needed. You should retain a copy of all documents and correspondence submitted to us. You should receive a response within 4 to 6 weeks.**

# **Attachment**

**I**

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[REDACTED]  
**Attorneys at Law**  
[REDACTED]  
**Attorney at Law**  
**California State Bar #:** [REDACTED]  
[REDACTED]  
**Laguna Hills, California 92653**  
[REDACTED]

**ATTORNEY FOR PETITIONER**  
[REDACTED]

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
**IN AND FOR THE COUNTY OF [REDACTED]**

In re Marriage of:  
[REDACTED] v [REDACTED],  
**Petitioner,**  
and  
J [REDACTED] v [REDACTED],  
**Respondent.**

Case No. [REDACTED]  
**JUDGMENT ON RESERVED  
ISSUES; FINDINGS AND  
ORDER AFTER TRIAL**  
**DATE:** [REDACTED]  
**TIME: 8:30 A.M.**  
**DEPT: 609**

Trial in this matter was completed on O [REDACTED] in Department 609 of the above-entitled court, the Honorable Gary P. Ryan, Judge presiding. On the days of May 18-21, 1998, July 6-9, 1998 and October 21-22, 1998, the Court was presented with witness testimony, expert testimony, documentary evidence and the arguments of counsel. The Court also read and considered the Evidence Code 730 evaluation prepared by Dr. M [REDACTED]. The court makes the following



1 orders (and in limited instances, only where so indicated, said orders were based on the stipulation  
2 of the parties):

3 NULLITY ISSUE

4 The Court denies Petitioner's request for a nullity of marriage based on the contention by  
5 Petitioner of same sex marriage. In that respect the Court finds that a post-operative transsexual  
6 male, one born a female, but having gone through the transgender surgery, is in fact, a male based  
7 on the court's reading of Health & Safety Code § 103425, et seq. As to Petitioner's contention that  
8 the above described code section does not apply because J [REDACTED] V [REDACTED] never had a California  
9 birth certificate, because J [REDACTED] V [REDACTED] was not born in the State of California, the Court finds  
10 that it is the public policy of the State of California, as enumerated in Heath & Safety Code § 103425  
11 et seq. to recognize the post-operative gender of transsexuals. Accordingly, J [REDACTED] V [REDACTED], who  
12 the court finds was born a female and has gone through the transgender surgery, is for all marital  
13 purposes a male and the nullity requested based on same sex marriage is denied.  
14

15  
16 With respect to the issue of the request for nullity based on the alleged fraud for certain  
17 misrepresentations by Respondent to Petitioner (to wit, that at birth he was born a hermaphrodite  
18 with the presence of both male and female genitalia which male genitalia he represented was capable  
19 of producing sperm to father a child), the Court finds as follows:  
20

21 1. That at the time of marriage and prior to the marriage said misrepresentations  
22 concerning his gender at birth, the existence of male and female genitalia and the ability of the male  
23 genitalia to produce sperm, were made to [REDACTED] by J [REDACTED];

24 2. That [REDACTED] did rely on the above described misrepresentations made by J [REDACTED] and  
25 in reliance on the misrepresentations entered into the marriage;

26 3. That the misrepresentations were material misrepresentations and were in fact false  
27 (i.e. J [REDACTED] V [REDACTED] was not born a hermaphrodite, but was born only a female, he never had  
28

1 natural testes and he could never produce sperm); and

2 4. That although the misrepresentations were made, relied upon and were material, that  
3 notwithstanding the above, the Petitioner should have known they were false; that Petitioner should  
4 have realized within approximately six (6) months of [REDACTED] V [REDACTED] birth, that what she had  
5 been told by Respondent (i.e. he was born with testes and said testes were capable of producing  
6 sperm) was a lie. Petitioner ratified the marriage by continuing to reside and continued to stay  
7 married to Respondent for more than one (1) year from the time she should have been aware of any  
8 misrepresentations.  
9

10 **THE ISSUE OF ARTIFICIAL INSEMINATION AND**  
11 **WRITTEN CONSENT**

12 With respect to Petitioner's contention that Respondent is not the father of the minor child,  
13 Briana, based on Petitioner's contention that Family Code § 7613 requires, in an artificial  
14 insemination setting:

15 (a) The existence of a marital relationship between husband and wife;

16 (b) Even if the above marital relationship exists, the Code requires the existence of a  
17 written consent signed by the Petitioner consenting to the artificial insemination, the Court finds that  
18 J [REDACTED] V [REDACTED] is the father of B [REDACTED] because the Court has now ruled on the validity of the  
19 marriage (see above) and finds that a child born as a result of artificial insemination in a marriage  
20 context is the child of that marriage and is the child of the husband and wife regardless of the absence  
21 of any written consent signed by Petitioner. No written consent is required if the child, born of  
22 artificial insemination, is the child of a valid marriage. Accordingly, J [REDACTED] V [REDACTED] is the father  
23 of B [REDACTED] regardless of the absence of written consent signed by the Petitioner. Moreover, the statute  
24 is designed in part for the purpose of protecting unconsenting fathers. The facts before the court  
25 show no need for such protection. Mr. V [REDACTED] willingly assisted Petitioner in conceiving, not  
26  
27  
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# **Attachment**

**J**



In 2000, at age 49, respondent came to the realization that she was intensely uncomfortable being male and wanted to live the rest of her life as a woman. The respondent thereafter sought out medical and psychological professionals who guided her through the medically approved process necessary to relieve the discomfort of not being able to express her gender identity. This process, set forth in the Harry Benjamin International Standards of Care, included years of hormone therapy; more than a year of psychological therapy; living and working as a female for more than a year; and obtaining a driver's license and Social Security card as "XX."

After completing all of those preliminary steps, in November of 2003, respondent underwent the sex reassignment surgery to complete the physical transition. She has also submitted to the Court a petition for change of name and gender. That petition is scheduled to be heard in March 2004.

Petitioner is upset by Respondent's expression of her gender identity. Petitioner has expressed a negative emotional and physical reaction to seeing Respondent living her life as XX. Petitioner feels hurt by Respondent's expression of her gender identity and believes that she has been robbed by XX. Finally, Petitioner claims that respondent's expression of her gender identity "has condemned [XX] to a childhood of ridicule."

**III. In the Absence of Any Clear Showing of Harm, the Court Should Issue a Parenting Plan that Provides Respondent with Frequent and Continuing Contact with Her Daughter Unencumbered by Restrictions Concerning Respondent's Manner of Dress or Appearance**

Based on clear statutory mandate, the Court must devise a parenting plan for Petitioner and Respondent that incorporates and forwards the best interest of their minor daughter, XX. The Court is granted broad, but not unlimited, discretion to fashion a plan that minimizes harm to XX. Respondent's transition from XX to XX poses no inherent threat

to XX's health, safety, or welfare. Since Petitioner has no evidence establishing the level of harm necessary to meet California's clear evidence standard, the Court should remove from the permanent parenting plan all restrictions on Respondent's expression of her gender identity when in contact with her daughter.

### **A. Statutory Scheme**

The California Family Code clearly details the considerations the Court must make in devising a parenting plan for the XX. First, the Court must follow the public policy mandates of Family Code Section 3020:

(a) The Legislature finds and declares that it is the public policy of this state to assure that the health, safety, and welfare of children shall be the Court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children.

(b) The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011.

(c) Where the policies set forth in subdivisions (a) and (b) of this section are in conflict, any Court's order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members.

As made clear in Section 3020(b), Section 3011 provides guidance to the Court in determining what kind of contact is in XX's best interest. In addition to requiring the Court to consider XX's "health, safety, and welfare"<sup>1</sup> and "the nature and amount of contact with both parents,"<sup>2</sup> the statute identifies two specific considerations that are presumptively detrimental to a child's best interest:

(b) Any history of abuse by one parent or any other person seeking custody...

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<sup>1</sup> Family Code Section 3011(a)

<sup>2</sup> Family Code Section 3011(c)

(d) The habitual or continual illegal use of controlled substances or habitual or continual abuse of alcohol by either parent.<sup>3</sup>

In making a grant of custody, the Court is also required to determine which of the two parents is most likely to insure frequent and continuing contact with the non-custodial parent. Finally, the Court is prohibited from making a distinction between the two parents based on the sex of the parents.<sup>4</sup> And when the parenting plan is determining visitation rights, “the court shall grant reasonable visitation rights to a parent unless it is shown that the visitation would be detrimental to the best interest of the child.”<sup>5</sup>

Nothing on the face of this statutory scheme supports imposing limitations on XX’s manner of dress or appearance when she is in contact with XX. Certainly, none of the facts asserted by Petitioner demonstrates that contact with XX while she is dressed as a woman would raise the specific presumptions of Section 3011(b) or (d).

In fact, the temporary order currently in place may well violate provisions of Section 3040(a)(1) as it makes restrictions about XX’s contact with XX based on stereotypes about her sex. By limiting XX’s contact with her daughter so that she may only see her when dressed as a man, the Court engages in sex stereotyping similar to that rejected by the California Supreme Court in *In re Marriage of Carney*.<sup>6</sup>

In *Carney*, a disabled man’s wife sought custody of her minor sons from based on a disabling accident suffered by the father. In overturning a lower court’s grant of a change of custody, a unanimous Supreme Court held that arguments based on the father’s “inability” to engage in sports with his son were premised on impermissible sex

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<sup>3</sup> Family Code Section 3011(b) and (d)

<sup>4</sup> Family Code Section 3040(a)(1)

<sup>5</sup> Family Code Section 3100(a)

<sup>6</sup> 157 Cal.Rptr. 383 (Cal. 1979)

stereotypes.<sup>7</sup> The Court went on to chide the lower court's unquestioning reliance on such stereotypes in transferring custody from the father to the mother.<sup>8</sup>

Of even more relevance to the case at hand, was the Supreme Court's condemnation of the reliance on stereotypes to determine what is in a child's best interest:

“The trial Court herein ... premised its ruling on outdated stereotypes of both the parental role and the ability of the handicapped to fill that role. Such stereotypes have no place in our law. Accordingly, the order changing custody on this ground must be set aside as an abuse of discretion.”<sup>9</sup>

The Court goes on to lay out what is relevant in determining a parent's value to their child:

“On a deeper level, finally, the [disability] stereotype is false because it fails to reach the heart of the parent-child relationship. ... its essence lies in the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond. The source of this guidance is the adult's own experience of life; its motive power is parental love and concern for the child's well-being; and its teachings deal with such fundamental matters as the child's feelings about himself, his relationships with others, his system of values, his standards of conduct, and his goals and priorities in life. ... Indeed, in such matters his handicap may well be an asset: few can pass through the crucible of a severe physical disability without learning enduring lessons in patience and tolerance.”<sup>10</sup>

This reasoning must hold in the current case as well since the issues addressed about disabled parents twenty-five years ago in *Carney* are substantially similar to those that plague transgender parents today. Any reliance by the Court on such stereotypes in determining that XX's gender identity is intrinsically harmful to XX is likewise illegitimate.

Furthermore, in determining an appropriate parenting plan, reliance on negative stereotypes about transgender people cannot be the basis for a “reasonable visitation”

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<sup>7</sup> *In re Carney*, at 389

<sup>8</sup> *Ibid.*

<sup>9</sup> *Id.*, at 384

<sup>10</sup> *Id.*, at 391.



schedule as mandated by Section 3100(a). XX has undergone well recognized medical treatment for her transition from male to female. She has participated in regular counseling with standard hormone therapy, lived and worked as a woman since 2002, changed her name and gender marker on her California drivers license, undergone sex reassignment surgery, and petitioned the Superior Court for recognition of her change of name and gender.

Requiring XX to choose between being herself full-time or maintaining physical contact with her daughter is an unbearable burden made all the worse by the fact that such a choice is unnecessary and unreasonable. Absent a clear finding of harm, therefore, the Court must abide by the reasonableness requirement of Section 3100(a) and allow XX to dress as a woman when she visits with XX.

## **B. Clear Showing of Harm**

It is not sufficient for Petitioner to simply assert that XX's gender identity is harmful to XX. Instead, "an affirmative showing of harm or likely harm to the child is necessary in order to restrict parental custody or visitation."<sup>11</sup> In *Birdsall v. Birdsall*, a gay father faced a restriction on his visitation similar to the one currently constraining XX's relationship with XX.

In that case, the father was prohibited by the trial court from allowing anyone known to be homosexual to stay overnight in his home when his son was visiting. The trial court imposed this restriction even though it was clear that the father shared a three bedroom apartment with two other gay male house mates. In overruling the trial court, the Court of Appeal found that "[n]o evidence was presented to show the circumstances of this case

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<sup>11</sup> *Birdsall v. Birdsall* 197 Cal.App.3d 1024, 243 Cal.Rptr. 287 (Cal 4<sup>th</sup>, 1988)

require a restraining order be placed on Greg's visitation. No current harm to the child can be attributed to Greg's sexual orientation.”<sup>12</sup>

A California court came to a similar conclusion in regards to a father’s religious practice in *Mentry v. Mentry*.<sup>13</sup> In *Mentry*, a father appealed from a visitation order that prohibited him from participating in his religion practice with his children when they were visiting. The restriction was ordered by the Court due to complaints from the children’s mother about the man’s religious practice. The Court of Appeals held, “[t]he record contains no competent evidence that the children will in the future be harmed by the parental religious conflict. Petitioner has thus failed to meet her burden of a clear affirmative showing that these religious activities will be harmful to the children.”<sup>14</sup>

Furthermore, the Court found that any restriction on the conduct of the father in *Mentry* would also infringe on the father’s privacy rights: “[p]ersuasive arguments have been advanced in support of this non-interventionist approach and of the need to consider family privacy and parental autonomy relevant factors in the assessment of the best interests of the child.”<sup>15</sup>

The principle of parental autonomy was also a big consideration in *Punsly v. Ho*.<sup>16</sup> *Punsly* involves the right of a mother to make decisions about a visitation schedule between her daughter and her daughter’s grandparents. In holding that the mother was the best person to make this determination, the Court held that “[a] presumption exists that fit

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<sup>12</sup> *Birdsall* at 1031, 290-291.

<sup>13</sup> *142 Cal. App. 3d 260, 190 Cal. Rptr. 843*

<sup>14</sup> *Id* at 266, 847 (internal quotation marks deleted)

<sup>15</sup> *Id* at 267, 848.

<sup>16</sup> *Punsly v. Ho*, 87 Cal. App. 4<sup>th</sup> 1099, 105 Cal. Rptr. 2d 139

parents act in the best interests of their children.”<sup>17</sup> And since the Court found no evidence that the mother was an unfit parent, the presumption held. For this reason, Courts are required to practice great care in restricting parents’ access to their children and the manner in which they must conduct themselves in their children’s presence.

In *Palmore v. Sidoti*, for instance, the Supreme Court rejected a father’s request to change an existing court order because the only motivation for the request was that his ex-wife had entered into an interracial romantic relationship. In overturning a lower court’s grant of the father’s motion, the Supreme Court held that: “the effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”<sup>18</sup> In coming to this conclusion, the Court did not ignore the possible fallout that a child might experience growing up in an interracial household:

“There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin. The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not.”<sup>19</sup>

Taken together, this body of case law argues strongly against the limitations the current custody order imposes on XX’s visitation with XX. While distinctions exist between sexual orientation and gender identity, the reasoning in *Birdsall* and *Mentry* applies to this case. XX’s expression of her gender identity, and the effect that this expression *alone* has on XX, is simply not a reasonable ground for limiting XX’s conduct. Such a limitation is only

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<sup>17</sup> *Punsly*, at 1110 or 147

<sup>18</sup> *Palmore v. Sidoti* 466 U.S. 429, 104 S.Ct. 1879

<sup>19</sup> *Id* at 433, 1882

permissible in light of “an affirmative showing of harm or likely harm to” XX. No such showing has been made.

Furthermore, XX, like the parent in *Punsly*, is entitled to a presumption that she is acting in the best interest of XX. XXX is a fit parent whose judgment should only be questioned in the presence of clear evidence of harm. Otherwise, the Court risks trampling on XX’s parental autonomy.

And, as *Palmore* so soundly concluded, “clear harm” can not simply be cultural discomfort with a parent’s status or conduct. Nor can it be the societal shame that goes hand in hand with prejudice and bias. The only allegations of harm in the present case come from Petitioner’s impermissible bias against XX for being transgender. Petitioner has made clear her distaste for XX’s gender identity. However, such distaste and the alienation that expression of it has caused between XX and XX can not be the basis for a restrictive parenting plan.

**C. California Public Policy Supports the Removal of All Restrictions on XX’s Expression of Her Gender Identity When in Contact with Her Daughter.**

In ruling against the use of stereotypes about disabled parents in *Carney*, the California Supreme Court points to state and federal law outlawing discrimination against disabled people in employment, housing, education, transportation, and public accommodation.<sup>20</sup> Similarly, California law explicitly prohibits discrimination against transgender people in employment,<sup>21</sup> housing,<sup>22</sup> education,<sup>23</sup> and foster care.<sup>24</sup> In addition,

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<sup>20</sup> *Carney*, at 391-392

<sup>21</sup> California Government Code sec 12940, et seq

<sup>22</sup> California Government Code sec 12955, et seq

<sup>23</sup> California Education Code sec 200 (et seq) (incorporating categories from Penal Code 422.6)

<sup>24</sup> California Welfare & Institutions Code sec 16001.9(a)(22) and 16013(a).

transgender people are explicitly protected from hate crimes.<sup>25</sup> Transgender people are also able to petition the Court for recognition of their change of gender and change their California birth certificates to reflect this recognition.<sup>26</sup> Finally, agency policies allow transgender people to change the name and gender marker on their drivers license and Medi-Cal cards.

Based on these statutes and policies, California public policy clearly supports the incorporation of transgender people into the state's workforce, housing market, and educational and foster care systems. In fact, California public policy calls for the incorporation of transgender people into almost every facet of civil society. This inclusion is made in support of, not despite, the person's gender identity. Each of these statutes and policies makes it easier for transgender people to live full lives in their post-transition gender.

None of them force transgender people to remain hidden from society. None of them reflect the distaste that is exhibited by Petitioner in this case. And none of them would tolerate the restrictions that the temporary custody order places on XX's dignity and autonomy.

#### **D. Conclusion**

Throughout California's history, certain groups of people have been stereotyped as being bad parents. Their very status was mistakenly believed to be harmful to their children. Thankfully, though, Courts have overcome these stereotypes and found that parents who are disabled, homosexual, religious, and/or a part of an interracial couple are just as likely to be good parents as anyone else. The same is true for transgender parents in

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<sup>25</sup> California Penal Code sec 422.6

<sup>26</sup> California Health and Safety Code sec 103425, et seq.

general and XX in particular. Contact between XX and XX should not be presumed to be harmful to XX under any existing statute. In fact, prohibiting XX from expressing her gender identity when in contact with XX is likely a violation of California Family Code sections 3040(a)(1) and 3100(a). Furthermore, no evidence demonstrates that XX's gender identity is clearly harmful to XX's "health, safety, and welfare." Instead, Petitioner asks the Court to rely on her personal distaste for transgender people as the only cognizable evidence that XX's gender identity is harmful to XX. The stereotypes that underlie this "evidence" are unsupported by California statutes, case law, and public policy.

For these reasons, *Amicus Curiae* respectfully request that the Court provide XX with frequent and continuing contact with XX unencumbered by any restrictions on XX's mode of dress or appearance.

Respectfully submitted on XX.

---

Christopher W. Daley, Esq.  
California State Bar Number 219054  
Transgender Law Center  
1800 Market Street, Suite 406  
San Francisco, CA 94102  
(415) 865-0176

# **Attachment**

**K**

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN XXX

In re the marriage of:	)	Case No: XXX
	)	
XXX,	)	
Petitioner	)	
	)	Points and Authorities
and	)	
	)	
XXX,	)	
Respondent	)	
	)	
_____	)	

*The Facts, Procedural History, Argument Summary Sections and Part I were redacted*

**II. The Court’s Prior Order Was Based on a Correct Application of the Law.**

Even assuming arguendo that the prior order was not res judicata, the Court’s prior order finding XX to be a legal parent was legally correct. Under black letter law, XX is a legal parent under numerous independent provisions of the Family Code as well as settled equitable principles.

**A. XX is a Legal Parent By Virtue of Having Consented to His Wife’s Insemination and By Virtue of His Conduct of Functioning and Holding XX Out as His Child from the Moment of Her Birth Until the Present, 13 Years Later.**

First, at the time XX was born, the parties were married. Under Family Code Section 7613, a man who consents to his wife’s artificial insemination is treated as the child’s legal father. In this case, there is no dispute that XX consented to the



insemination that resulted in XX's birth. Accordingly, he is a legal father under Family Code § 7613.

Second, even apart from any statute, California courts have long held that a husband who functions and holds himself out as the child's natural father will be held accountable as a parent under equitable principles, even if he is not the child's biological father. *See Clevenger v. Clevenger* (1961) 189 Cal. App.2d 658 (imposing child support obligations on former husband who was not a child's biological father, but who had raised the child as his own since the child's birth). In *Clevenger*, the Court explained that a court may hold a man legally accountable as a parent by estoppel if the facts show:

that the husband represented to the boy that he was his father, that the husband intended that his representation be accepted and acted upon by the child, that the child relied on the representation and treated the husband as his father and gave his love and affection to him, that the child was ignorant of the true facts. . . . .

*Id.* at 671. The Fourth Appellate District recently affirmed this longstanding rule in *Marriage of Pedregon*, 2003 Cal. App. LEXIS 585 (April 21, 2003) (imposing child support obligations where the husband treated his wife's biological child as his own).

These equitable considerations apply with even greater logic and force to cases involving children born through reproductive technology. In *People v. Sorensen* (1968) 68 Cal.2d 280, the California Supreme Court held that a husband was a "lawful father" of a child created by artificial insemination where the husband consented to the procedure and actively participated in the acts that created the child. The court stated:

the term 'father' cannot be limited to the biologic or natural father as those terms are generally understood...a reasonable man who...actively participates...in the hope that a child will be produced whom they will treat as their own, knows that such behavior carries with it the legal responsibilities of fatherhood...One who consents to the production of a

child cannot create a temporary relation to be assumed and disclaimed at will.

*Id.* at 283-85. In the present case, XX also consented to, paid for, and actively participated in the procedures that resulted in XX's birth. Accordingly, the Court properly found that he must be held legally accountable as a parent.

Therefore, the facts necessary to hold XX accountable as a parent by estoppel are present. Since XX's birth, XX has represented himself to XX as her father. XX intended for XX to accept and rely on that representation, and she has done so. XX has known and loved XX as her father since she was born. She believes that he is her biological father. Accordingly, XX is a parent by estoppel.

**B. California Law Makes Clear That Even If XX and XX's Marriage is Void Ab Initio, This Finding Does Not Negate His Parental Rights, Even If Those Rights Were Obtained By Virtue of the Marriage.**

Similarly, under longstanding case law, the nullification of a marriage does not negate either party's parental rights, even when those rights were gained solely by virtue of the marriage. In *Adoption of Jason R.* (1979) 88 Cal. App.3d 11, for example, a stepfather whose marriage was annulled argued that "since the annulment decree had the effect of rendering the marriage void ab initio, the adoption is likewise void because he was not the husband of the child's mother and could not qualify as a stepparent." *Id.* at 16. The court rejected this argument decisively, concluding:

Although an annulment has been said to 'relate back' and erase the marriage and all its implications from the outset, the doctrine of relation back is a mere legal fiction and is not without its exceptions. A judgment of nullity is conclusive only as to the parties to the proceeding and those claiming under them. Consequently, the doctrine of relation back will not be applied so as to deprive the children of a void or voidable marriage of their legitimate status nor is it applied to other transactions involving the rights of third parties. In view of these circumstances, it is clear that the

stepparent and stepson relationship was not invalidated by the annulment of the marriage.

*Id.* (internal citations omitted). For the same reason, XX's parental rights and responsibilities vis-à-vis XX were not invalidated by the annulment of his marriage to XX.

Moreover, Family Code 7611(c) specifically provides that the nullification of a marriage does not affect parental rights. Family Code Section 7611(c) provides that a man is presumed be a child's natural father if before the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid, and with his consent he is named on the child's birth certificate or he is obligated to support the child under a written voluntary promise or by court order. Based on this provision, XX is a legal father because even though his marriage to XX was declared to be invalid, he consented to put his name on XX's birth certificate.

**C. Finally, Even Assuming Arguendo, That XX and XX Had Never Married, XX Would Still Be a Legal Parent Under Family Code 7611(d).**

Finally, even if the parties had never married, XX would be a presumed father under Family Code 7611(d). Under this provision, a man who has neither legally married nor attempted to marry a child's mother is nonetheless a presumed father if he receives the child into his home and openly holds the child out as his natural child. XX clearly meets both of these requirements. XX has lived with XX since her birth. And XX has held XX out as his natural child since the day of her birth. XX considers XX to be her father, and XX considers XX to be his daughter. *See, e.g.*, August 22, 2002 Report of Court-Appointed Mediator, XX, p. 2 (noting that XX has a "strong attachment and

psychological bond with her father”); September 22, 2002 Letter from Court-Approved Psychologist, XX, p. 1 (observing that “XX expresses love and loyalty toward her father. What is displayed is a close relationship between them).

### **III. XX’s Status as XX’s Parent Does Not Depend Upon Biology or Gender.**

XX is a transsexual man. As such, he is in the same situation as any other man who suffers from a physical condition that prevents him from biologically fathering a child – namely, he must use reproductive technology to become a father. Neither XX’s gender nor his biological incapacity to father a child has any direct legal relevance to this case.

XX’s parental status does not depend upon or derive from biology. California case law makes clear that Family Code § 7613 applies even in situations where the intended parents have no biological connection to the resulting child. *See Buzzanca v. Buzzanca* (1998) 61 Cal. App. 4<sup>th</sup> 1410. In *Buzzanca*, an infertile couple used an anonymous egg donor, an anonymous sperm donor, and a surrogate mother to carry their child to term. The couple divorced before the surrogate mother gave birth. The former wife, who had custody of the child since birth but had not adopted her, sued her former husband for child support. On appeal, the California Court of Appeal held that both the former husband and the former wife were the child’s legal parents, based on their consent to the medical procedures that resulted in the birth of a child whom they intended to raise as their own, despite the fact that neither the former husband nor the former wife had any biological connection to the child.

Similarly, in the context of a presumed parent under § 7611, the California Supreme Court has recently made clear that a man may be a presumed parent without

having a biological connection to a child. *In re Nicholas H.* (2002) 28 Cal. App. 4<sup>th</sup> 56 (holding that a man who has no biological relationship to a child may be a presumed parent under Family Code § 7611(d)). *See also In re Raphael P.* (2002) 97 Cal.App.4<sup>th</sup> 716 (same); *In re Jerry P.* (2002) 95 Cal.App.4<sup>th</sup> 793 (same); *In re Kiana A.* (2001) 93 Cal.App.4<sup>th</sup> 1109 (same); *Steven W. v. Matthew S.* (1995) 33 Cal.App.4<sup>th</sup> 1108 (holding that an unmarried, non-biological father was a legal parent under former Civil Code § 7004(a)(4) [current Family Code § 7611(d)] because he had previously lived with the child and the child's mother and maintained an ongoing parental relationship with the child.)

Indeed, this principle – that biology is not necessarily determinative of legal parentage -- is one of the bedrock foundations of California family law. *See, e.g., In re Raphael P.* (2002) 97 Cal.App.4<sup>th</sup> 716 (“biology is not necessarily determinative of legal paternity”); *Steven W. v. Matthew S.* (1995) 33 Cal. App.4<sup>th</sup> 1108, 1116 (“the courts have repeatedly held...that the extant father-child relationship is to be preserved at the cost of the biological ties.”); *Estate of Cornelius* (1984) 35 Cal.3d 461, 465-466 (“In the case of an older child, the familial relationship between the child and the man purporting to be the child's father is considerably more palpable than the biological relationship of actual paternity. . . . This social relationship is much more important, to the child at least, than a biological relationship of actual paternity. . . .”); *Comino v. Kelley* (1994) 25 Cal.App.4<sup>th</sup> 678, 684-685 (“To the extent there is a recognizable societal concern for [the minor] to have a father, that concern is served by avoiding the presumption that would prevent [the minor] from enXXing a parental relationship with the only man he has ever known as a father.”).

Moreover, XX's legal parent status is not dependent upon his gender. The California Uniform Parentage Act must be applied in gender-neutral terms. Family Code § 7650 specifically provides: "Insofar as practicable, the provisions of this part applicable to the father and child relationship apply" to an "action to determine existence or nonexistence of mother and child relationship." The California Supreme Court has specifically held that the UPA must be construed to permit a woman to establish parentage through any provision available to a man. *Johnson v. Calvert* (1993) 5 Cal. 4<sup>th</sup> 84, 90. *See also In re Karen C.* (2002) 101 Cal. App. 4<sup>th</sup> 932 (holding that a woman with no biological relationship to a child can be a presumed parent under 7611(d)).

Accordingly, neither XX's status as a transsexual person, nor his lack of biological connection to XX affects his status as one of her legal parents.

*Parts IV and V and the Conclusion Section were redacted*

# **Attachment**

**L**

# ADVANCEMENTS IN STATE AND FEDERAL LAW REGARDING TRANSGENDER EMPLOYEES

## A Compliance Guide for Employers and Employment Law Attorneys

A joint publication of:



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**Updated April 2006**

### **I. Background**

According to all available data, transgender employees have historically faced nearly unchecked amounts of discrimination in the workplace. This discrimination has included negative employment actions including failure to hire or promote, demotions, terminations, restrictions on a person's gender expression, and hostile environments resulting from basic bias against people who transition from one gender to another on the job or are known, or discovered, to have done so in the past.

For a number of decades, whether legal protection existed for transgender employees was somewhat unclear. In the 1970s, for example, some federal courts held that Title VII of the 1964 Civil Rights Act did not protect transgender employees from discrimination.<sup>1</sup>

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<sup>1</sup> See *Ulane v. Eastern Airlines, Inc.*, 742 F. 2d 1081 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985) (holding that "the words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, *i.e.*, . . . a person born with a female body who believes herself to be a male"). See also *James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478 (D. Kan. 1995) (same); *Somers v. Budget Marketing*, 667 F.2d 748 (8th Cir. 1982) (same); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977) (same); *Powell v. Read's, Inc.*, 436 F. Supp. 369 (D. Md. 1977) (same); *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 (N.D. Calif. 1975) (same).



Over the past decade, however, the rationales in these decisions have been undercut by the Supreme Court's increasingly expansive interpretation of Title VII in other contexts.<sup>2</sup> As a result, the Ninth Circuit, the First Circuit, and as is discussed in more detail later in this publication, the Sixth Circuit have issued favorable decisions holding that transgender, or more broadly, gender non-conforming persons, are protected from discrimination under Title VII and other sex discrimination statutes.<sup>3</sup> In addition, federal district courts are increasingly refusing to dismiss Title VII claims brought by transsexual plaintiffs and permitting such claims to proceed to trial.<sup>4</sup> The Sixth Circuit also upheld a nearly \$1,000,000 judgment in the case of an Ohio police officer demoted due to transition.<sup>5</sup>

During this same time period, courts and administrative agencies in Connecticut,<sup>6</sup> Massachusetts,<sup>7</sup> New Jersey,<sup>8</sup> and New York<sup>9</sup> have all found that transgender plaintiffs,

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<sup>2</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (Title VII prohibits an employer from discriminating against a woman who was considered to be too masculine); see also *Oncale v. Sundowner Offshore Oil Services*, 523 U.S. 75 (1998) (Title VII prohibits men from sexually harassing other men, even though same-sex harassment was not the "principal evil" Congress intended to combat when it enacted Title VII).

<sup>3</sup> *Schwenk v. Hartford*, 204 F.3d 1187 (9<sup>th</sup> Cir. 2000) (holding that the "initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*"). See also *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1<sup>st</sup> Cir. 2000) (reinstating Equal Credit Opportunity Act claim on behalf of transgender plaintiff who alleged that he was denied an opportunity to apply for a loan because he was not dressed in "masculine attire"). Finally, see *Smith v. City of Salem*, 369 F.3d 912 (6<sup>th</sup> Cir. 2004) later amended and superceded by *Smith v. City of Salem, Ohio* 2004 WL 1745840 (6<sup>th</sup> Cir. Aug 5, 2004).

<sup>4</sup> See, e.g., *Doe v. United Consumer Financial Services*, Case No. 1:01CV1112 (N.D. Ohio 2001) (holding that a transsexual had stated a claim under Title VII where the allegations indicated that her termination may have been based, "at least in part, on the fact that her appearance and behavior did not meet United Consumer's gender expectations (particularly in light of United Consumer's alleged inability to categorize her as male or female 'just from looking')"). *Schroer v. Billington* F.Supp.2d ----, 2006 WL 845806 (D.C.,2006) (preliminary ruling finding right of action under Title VII). For an exception to this trend, see *Oiler v. Winn-Dixie*, 2002 U.S. Dist. LEXIS 17417 (E.D. LA, Sept. 16, 2002) (denying Title VII protection to a male Winn-Dixie employee who wore female clothing off the job) and *Etsitty v. Utah Transit Authority Not Reported in F.Supp.2d*, 2005 WL 1505610 (D.Utah, 2005) (District Court dismissed claim brought by terminated bus driver, case is on appeal to the 10<sup>th</sup> Circuit).

<sup>5</sup> *Barnes v. City of Cincinnati*, 401 F.3d 729, C.A.6 (Ohio 2005) (court affirmed jury award of \$150,000 in compensatory damages, \$140,000 in front pay and \$30,511 in back pay; and the district court's award of \$527,888 in attorneys fees and \$25,837 in costs)

<sup>6</sup> *Declaratory Ruling on Behalf of John/Jane Doe* (Conn. Human Rights Comm'n 2000) (relying on *Price Waterhouse*, *Schwenk*, *Rosa*, and other recent federal court decisions in holding that the Connecticut state statute prohibiting discrimination on the basis of sex encompasses discrimination against transgender individuals).

<sup>7</sup> *Lie v. Sky Publishing Corp.*, 15 Mass. L. Rptr. 412, 2002 WL 31492397 (Mass. Super. 2002) (holding that transsexual plaintiff had established a prima facie case of discrimination based on sex and disability under state law prohibiting employment discrimination).

who had been discriminated against because of their gender identity, had a right of action under existing state and/or local anti-discrimination laws.

This guide apprises California employers and employment law attorneys of federal and state developments and provides guidance on steps that can be taken to create a non-discriminatory environment. It also includes basic information about the transgender community and highlights one of the main issues that transgender employees face: restroom access. Both NCLR and TLC regularly offer on-site trainings to California based employers, firms, and attorney associations. On a case-by-case basis, we also provide technical assistance to employers and who are trying to create non-discriminatory workplaces and employment attorneys bringing a cause of action based on gender identity related discrimination.

## II. Title VII of the 1964 Civil Rights Act

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin."<sup>10</sup>

In *Smith v. City of Salem*, the 6<sup>th</sup> Circuit found that this language includes protection for transgender employees because discrimination based on sex-stereotyping is unlawful:

“Such analyses cannot be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual--and therefore fails to act and/or identify with his or her gender--is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.

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<sup>8</sup> *Enriquez v. West Jersey Health Systems*, 342 N.J. Super. 501, 777 A.2d 365 (N.J. Super.), cert. denied, 170 N.J. 211, 785 A.2d 439 (N.J. 2001) (concluding that transsexual people are protected by state law prohibitions against sex and disability discrimination).

<sup>9</sup> *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S. 2d 391 (N.Y. Sup. Ct. 1995) (holding that city ordinance prohibiting "gender" discrimination protects transsexuals); *Rentos v. OCE-Office Systems*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996) (refusing to dismiss transsexual woman's claim that she had been discriminated against on the basis of sex in violation of the New York State Human Rights Law and the New York City Human Rights Law).

<sup>10</sup> 42 U.S.C. § 2000e-2(a)

Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination."<sup>11</sup>

As you'll see from reading the full opinion in *Smith* (included in Appendix 1), the Court in that case favorably cited a 9<sup>th</sup> Circuit Opinion, *Schwenk v. Hartford* that analyzed Title VII in a post *Price Waterhouse* environment. Therefore, while *Smith* does not apply directly to California employees, employers would be wise to expect California based Federal District Courts and the 9<sup>th</sup> Circuit to follow the reasoning of this landmark decision.

### III. California's Fair Employment and Housing Act

Beginning in 2004 California's Fair Employment and Housing Act (FEHA) explicitly protects all applicable transgender employees. FEHA was amended through the Gender Nondiscrimination Bill of 2003 (AB 196). AB 196 changed the California Government Code in two places. First, it amended California Government Code 12926(p) which defines sex to read:

(p) "Sex" includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. *"Sex" also includes, but is not limited to, a person's gender, as defined in Section 422.56 of the Penal Code. California Government Code 12926* (Italicized portion is the amended language)<sup>12</sup>

For the sake of statutory consistency, AB 196 did not create a new definition of gender to add to the statute. Instead it incorporated the definition from California's Hate Crimes Statute. That statute defines gender as:

"Gender" means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. **California Penal Code 422.56(c)**<sup>13</sup>

Second, AB 196 added new language to FEHA pertaining to dress codes. Again, in order to bring California in line with trends seen in other states and in local jurisdictions within

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<sup>11</sup> *Smith*, 2004 WL 1745840 at 8

<sup>12</sup> This language was just adopted by the state legislature through AB 1234 and will become law on January 1, 2005. The original AB 196 language was: "Sex" also includes, but is not limited to, a person's gender, as defined in Section 422.76 of the Penal Code, except that, for purposes of this part, the reference in that definition to the "victim" shall mean the employee or applicant and the reference in that definition to the "defendant" shall mean the employer or other covered entity or person subject to applicable prohibitions under this part.

<sup>13</sup> This language was just adopted by the state legislature through AB 1234 and will become law on January 1, 2005. Until that time, the definition in Penal Code section 422.76 is: "gender" means the [individual's] actual sex or the defendant's perception of the [individual's] sex, and includes the defendant's perception of the [individual's] identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the [individual's] sex at birth.

the state, AB 196 clarified the effect of this new language on an employer's existing ability to set standards for workplace appearance:

Nothing in this part relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity. **California Government Code 12949**

Section 12949 simply makes clear that in order to comply with state law, any such appearance or grooming policy must judge a transgender person's compliance by the standards appropriate for that person's gender identity.

#### **IV. Changing Workplace Environments**

While many employers have already been proactively creating workplaces that are free of gender identity discrimination, others need to take strong steps in order to do so. Gender identity discrimination is premised on the idea that the sex a person was assigned at birth is always accurate and/or unchangeable. However, as many transgender people can attest, it is not.

Therefore, employer policies and practices must incorporate the needs and experiences of transgender people in order to comply with state law. Aside from meeting the legal duties under federal and state law, updating such policies make for a better working environment, demonstrate respect for diversity, alleviate wasteful and counter-productive stress, and set clear standards for workplace behavior.

Following are examples of areas in which employers should make clear, understandable policies. As workplaces can vary widely, this publication only seeks to identify the most common changes employers need to make. Individual employers are again encouraged to contact either NCLR or TLC at the numbers or emails above to get answers to specific questions.

##### **A. Anti-Discrimination Policies**

Employers who have not already done so, should bring their employment policies in line with state law by clearly defining "sex" or "gender" to include gender identity or by adding the phrase "gender identity and expression" to their existing policy. Such modifications are important in order to put all employees on notice that transgender employees are respected and protected in the workplace.

Such policies obviously apply to hiring, promoting, training, and retaining employees. Managers and other decision makers should be explicitly trained about the employer's duty to not allow gender identity bias to play a role in any of these areas.

## **B. Names and Pronouns**

An employee who transitions on the job has the right to be addressed by the name and pronoun that corresponds to the employee's gender identity. Employee records and identification documents should be changed accordingly. While state law does not likely prohibit other employees from making inadvertent slips or honest mistakes about a person's name or gender, it does outlaw intentional or persistent refusal to respect a co-worker's or employee's gender identity. Intentionally addressing a co-worker or employee by the incorrect name or pronoun after having been informed of that person's gender identity is an actionable form of discrimination.

While some employers believe that an employee must get a court order to legally change the employee's name, this is not correct. California explicitly recognizes "common law" name changes for a majority of people in the state.<sup>14</sup> Furthermore, an employee does not need to get court recognition of a change of gender prior to requesting that an employer change the employee's gender marker in records and on identity documents. An employer also should not require such an order prior to effectuating such a request. To do so, would run counter to the policies of the majority of government agencies that keep records on a person's gender. For instance, a transgender person can get the gender marker changed on their state identification or drivers license without having first gotten a court order. The same is true of a person's gender marker in their social security records and on their passport.

## **C. Restroom accessibility**

All employees have a right to safe and appropriate restroom facilities. This includes the right to use a restroom that corresponds to the employee's gender identity, regardless of the employee's sex assigned at birth. No other employee's privacy rights are compromised by such a policy. While no such case has been heard in California (likely because of the ridiculous nature of the arguments involved), the only known case anywhere in the nation of a non-transgender person seeking legal remedy to the presence of a transgender person in the same restroom was dismissed for lack of a cause of action.<sup>15</sup>

In addition, where possible, an employer should provide an easily accessible unisex single stall bathroom for use by any employee who desires increased privacy, regardless of the underlying reason. In fact, a private restroom of this type can be utilized by an employee who does not want to share a multi-restroom with a transgender co-worker or employee. Clearly, though, use of a unisex single stall restroom should always be a matter of choice for an employee. No employee should be compelled to use one either as a matter of policy or due to continuing harassment in a gender appropriate facility.

## **D. Dress Codes**

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<sup>14</sup> see California Code of Civil Procedure, section 1279.5 and affirmed in *In re Ritchie* 206 Cal.Rptr. 239 (Cal.App. 1 Dist.,1984) and *Lee v. Superior Court* 11 Cal.Rptr.2d 763 (Cal.App. 2 Dist.,1992).

<sup>15</sup> *Cruzan v. Special School Dist., #1*, 294 F.3d 981 (8<sup>th</sup> Cir. 2002).

As clarified above in section III, California state law explicitly prohibits an employer from denying an employee the right to dress in a manner suitable for that employee's gender identity. While the most efficient way to avoid liability on this issue is to do away with all dress codes based on gender, any employer who does enforce gender based dress codes must do so in a non-discriminatory manner. This means not only allowing a transgender woman (for instance) to dress the same as other women, but that her compliance with such a dress code cannot be judged more harshly than the compliance of non-transgender women.

#### **E. Sex segregated job assignments**

AB 196 does not prohibit an employer from making job assignments based on sex so long as those assignments are otherwise in compliance with state law. However, in most cases, transgender employees must be classified and assigned in a manner consistent with their gender identity.

#### **F. Training**

Training employees in transgender sensitivity is clearly one way to improve the work environment and reduce liability. While transgender people in the workplace are certainly not a new phenomenon, many non-transgender people have questions when they find out that a fellow employee is transgender. Creating a space for these employees to ask such questions in a controlled environment is an incredibly helpful way to prevent bias related incidents. More and more professionals and government agencies are acquiring the skills necessary to provide trainings of this sort and employers are strongly recommended to avail themselves of these services.

# **ADVANCEMENTS IN STATE AND FEDERAL LAW REGARDING TRANSGENDER EMPLOYEES**

## **Attachments**

1. *Smith v. City of Salem*
2. The Transgender Umbrella: One View
3. Definition List
4. A Bathroom Conversation

2004 WL 1745840  
 --- F.3d ----  
 6th Cir.(Ohio), 2004

United States Court of Appeals,  
 Sixth Circuit.

Jimmie L. SMITH, Plaintiff-Appellant,  
 v.

CITY OF SALEM, OHIO, Thomas Eastek, Walter  
 Greenamyre, Brooke Zellers, Larry D.  
 DeJane, James A. Armeni, Joseph Julian, and Harry  
 Dugan, Defendants-Appellees.

**No. 03-3399.**

Argued: March 19, 2004.  
 Decided and Filed: Aug. 5, 2004.

Before COLE and GILMAN, Circuit Judges;  
 SCHWARZER, Senior District Judge. [FN\*]

### AMENDED OPINION

COLE, Circuit Judge.

\*1 Plaintiff-Appellant Jimmie L. Smith appeals from a judgment of the United States District Court for the Northern District of Ohio dismissing his claims against his employer, Defendant-Appellant City of Salem, Ohio, and various City officials, and granting judgment on the pleadings to Defendants, pursuant to Federal Rule of Civil Procedure 12(c). Smith, who considers himself a transsexual and has been diagnosed with Gender Identity Disorder, alleged that Defendants discriminated against him in his employment on the basis of sex. He asserted claims pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1983. The district court dismissed those claims pursuant to Rule 12(c). Smith also asserted state law claims for invasion of privacy and civil conspiracy; the district court dismissed those claims as well, having declined to exercise pendent jurisdiction over them.

For the following reasons, we reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

### I. BACKGROUND

In reviewing a motion for judgment on the pleadings pursuant to Rule 12(c), we construe the complaint in the light most favorable to the plaintiff and accept the complaint's factual inferences as true. *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509, 511-12 (6th Cir.2001). The following facts are drawn from Smith's complaint.

Smith is--and has been, at all times relevant to this action--employed by the city of Salem, Ohio, as a lieutenant in the Salem Fire Department (the "Fire Department"). Prior to the events surrounding this action, Smith worked for the Fire Department for seven years without any negative incidents. Smith--biologically and by birth a male--is a transsexual and has been diagnosed with Gender Identity Disorder ("GID"), which the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 576-582 (4th ed.2000). After being diagnosed with GID, Smith began "expressing a more feminine appearance on a full-time basis"-- including at work--in accordance with international medical protocols for treating GID. Soon thereafter, Smith's co-workers began questioning him about his appearance and commenting that his appearance and mannerisms were not "masculine enough." As a result, Smith notified his immediate supervisor, Defendant Thomas Eastek, about his GID diagnosis and treatment. He also informed Eastek of the likelihood that his treatment would eventually include complete physical transformation from male to female. Smith had approached Eastek in order to answer any questions Eastek might have concerning his appearance and manner and so that Eastek could address Smith's co-workers' comments and inquiries. Smith specifically asked Eastek, and Eastek promised, not to divulge the substance of their conversation to any of his superiors, particularly to Defendant Walter Greenamyre, Chief of the Fire Department. In short order, however, Eastek told Greenamyre about Smith's behavior and his GID.

\*2 Greenamyre then met with Defendant C. Brooke Zellers, the Law Director for the City of Salem, with the intention of using Smith's transsexualism and its manifestations as a basis for terminating his



employment. On April 18, 2001, Greenamyer and Zellers arranged a meeting of the City's executive body to discuss Smith and devise a plan for terminating his employment. The executive body included Defendants Larry D. DeJane, Salem's mayor; James A. Armeni, Salem's auditor; and Joseph S. Julian, Salem's service director. Also present was Salem Safety Director Henry L. Willard, now deceased, who was never a named defendant in this action.

Although Ohio Revised Code § 121.22(G)--which sets forth the state procedures pursuant to which Ohio municipal officials may meet to take employment action against a municipal employee--provides that officials "may hold an executive session to consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of [considering such matters]," the City did not abide by these procedures at the April 18, 2001 meeting.

During the meeting, Greenamyer, DeJane, and Zellers agreed to arrange for the Salem Civil Service Commission to require Smith to undergo three separate psychological evaluations with physicians of the City's choosing. They hoped that Smith would either resign or refuse to comply. If he refused to comply, Defendants reasoned, they could terminate Smith's employment on the ground of insubordination. Willard, who remained silent during the meeting, telephoned Smith afterwards to inform him of the plan, calling Defendants' scheme a "witch hunt."

Two days after the meeting, on April 20, 2001, Smith's counsel telephoned DeJane to advise him of Smith's legal representation and the potential legal ramifications for the City if it followed through on the plan devised by Defendants during the April 18 meeting. On April 22, 2001, Smith received his "right to sue" letter from the U.S. Equal Employment Opportunity Commission ("EEOC"). Four days after that, on April 26, 2001, Greenamyer suspended Smith for one twenty-four hour shift, based on his alleged infraction of a City and/or Fire Department policy.

At a subsequent hearing before the Salem Civil Service Commission (the "Commission") regarding his suspension, Smith contended that the suspension

was a result of selective enforcement in retaliation for his having obtained legal representation in response to Defendants' plan to terminate his employment because of his transsexualism and its manifestations. At the hearing, Smith sought to elicit testimony from witnesses regarding the meeting of April 18, 2001, but the City objected and the Commission's chairman, Defendant Harry Dugan, refused to allow any testimony regarding the meeting, despite the fact that Ohio Administrative Code § 124-9-11 permitted Smith to introduce evidence of disparate treatment and selective enforcement in his hearing before the Commission.

\*3 The Commission ultimately upheld Smith's suspension. Smith appealed to the Columbiana County Court of Common Pleas, which reversed the suspension, finding that "[b]ecause the regulation [that Smith was alleged to have violated] was not effective[,] [Smith] could not be charged with violation of it."

Smith then filed suit in the federal district court. In his complaint, he asserted Title VII claims of sex discrimination and retaliation, along with claims pursuant to 42 U.S.C. § 1983 and state law claims of invasion of privacy and civil conspiracy. In a Memorandum Opinion and Order dated February 26, 2003, the district court dismissed the federal claims and granted judgment on the pleadings to Defendants pursuant to Federal Rule of Civil Procedure 12(c). The district judge also dismissed the state law claims without prejudice, having declined to exercise supplemental jurisdiction over them pursuant to 28 U.S.C. § 1367(c)(3).

## II. ANALYSIS

On appeal, Smith contends that the district court erred in holding that: (1) he failed to state a claim of sex stereotyping; (2) Title VII protection is unavailable to transsexuals; (3) even if he had stated a claim of sex stereotyping, he failed to demonstrate that he suffered an adverse employment action; and (4) he failed to state a claim based on the deprivation of a constitutional or federal statutory right, pursuant to 42 U.S.C. § 1983.

We review *de novo* the dismissal of a complaint pursuant to Rule 12(c). *Grindstaff v. Green*, 133 F.3d 416, 421 (6th Cir.1998). A motion for judgment on the pleadings shall be granted only where, construing the complaint in the light most favorable to the plaintiff, and accepting all of its factual allegations as

true, the plaintiff can prove no set of facts in support of the claims that would entitle him to relief. *Id.* (citation omitted).

### A. Title VII

The parties disagree over two issues pertaining to Smith's Title VII claims: (1) whether Smith properly alleged a claim of sex stereotyping, in violation of the Supreme Court's pronouncements in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); and (2) whether Smith alleged that he suffered an adverse employment action.

Defendants do not challenge Smith's complaint with respect to any of the other elements necessary to establish discrimination and retaliation claims pursuant to Title VII. In any event, we affirmatively find that Smith has made out a *prima facie* case for both claims. To establish a *prima facie* case of employment discrimination pursuant to Title VII, Smith must show that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position in question; and (4) he was treated differently from similarly situated individuals outside of his protected class. *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir.2000). Smith is a member of a protected class. His complaint asserts that he is a male with Gender Identity Disorder, and Title VII's prohibition of discrimination "because of ... sex" protects men as well as women. *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 682, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983). The complaint also alleges both that Smith was qualified for the position in question--he had been a lieutenant in the Fire Department for seven years without any negative incidents--and that he would not have been treated differently, on account of his non-masculine behavior and GID, had he been a woman instead of a man.

\*4 To establish a *prima facie* case of retaliation pursuant to Title VII, a plaintiff must show that: (1) he engaged in an activity protected by Title VII; (2) the defendant knew he engaged in this protected activity; (3) thereafter, the defendant took an employment action adverse to him; and (4) there was a causal connection between the protected activity and the adverse employment action. *DiCarlo v. Potter*, 358 F.3d 408, 420 (6th Cir.2004) (citation omitted). Smith's complaint satisfies the first two requirements by explaining how he sought legal

counsel after learning of the Salem executive body's April 18, 2001 meeting concerning his employment; how his attorney contacted Defendant DeJane to advise Defendants of Smith's representation; and how Smith filed a complaint with the EEOC concerning Defendants' meeting and intended actions. With respect to the fourth requirement, a causal connection between the protected activity and the adverse employment action, "[a]lthough no one factor is dispositive in establishing a causal connection, evidence ... that the adverse action was taken shortly after the plaintiff's exercise of protected rights is relevant to causation." *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir.2000); *see also Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 110 (1st Cir.1988) (employee's discharge "soon after" engaging in protected activity "is indirect proof of a causal connection between the firing and the activity because it is strongly suggestive of retaliation."); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 731 (9th Cir.1986) ("Causation sufficient to establish a *prima facie* case of unlawful retaliation may be inferred from the proximity in time between the protected action and the allegedly retaliatory discharge."). Here, Smith was suspended on April 26, 2001, just days after he engaged in protected activity by receiving his "right to sue" letter from the EEOC, which occurred four days before the suspension, and by his attorney contacting Mayor DeJane, which occurred six days before the suspension. The temporal proximity between the events is significant enough to constitute direct evidence of a causal connection for the purpose of satisfying Smith's burden of demonstrating a *prima facie* case.

We turn now to examining whether Smith properly alleged a claim of sex stereotyping, in violation of the Supreme Court's pronouncements in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), and whether Smith alleged that he suffered an adverse employment action.

#### 1. Sex Stereotyping

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a).

In his complaint, Smith asserts Title VII claims of retaliation and employment discrimination "because of ... sex." The district court dismissed Smith's Title VII claims on the ground that he failed to state a claim for sex stereotyping pursuant to *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). The district court implied that Smith's claim was disingenuous, stating that he merely "invokes the term-of-art created by *Price Waterhouse*, that is, 'sex-stereotyping,' " as an end run around his "real" claim, which, the district court stated, was "based upon his transsexuality." The district court then held that "Title VII does not prohibit discrimination based on an individual's transsexualism."

\*5 Relying on *Price Waterhouse*--which held that Title VII's prohibition of discrimination "because of ... sex" bars gender discrimination, including discrimination based on sex stereotypes--Smith contends on appeal that he was a victim of discrimination "because of ... sex" both because of his gender non-conforming conduct and, more generally, because of his identification as a transsexual.

We first address whether Smith has stated a claim for relief, pursuant to *Price Waterhouse*'s prohibition of sex stereotyping, based on his gender non-conforming behavior and appearance. In *Price Waterhouse*, the plaintiff, a female senior manager in an accounting firm, was denied partnership in the firm, in part, because she was considered "macho." 490 U.S. at 235, 109 S.Ct. 1775. She was advised that she could improve her chances for partnership if she were to take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* (internal quotation marks omitted). Six members of the Court agreed that such comments bespoke gender discrimination, holding that Title VII barred not just discrimination because Hopkins was a woman, but also sex stereotyping--that is, discrimination because she failed to *act* like a woman. *Id.* at 250-51, 109 S.Ct. 1775 (plurality opinion of four Justices); *id.* at 258-61, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272-73, 109 S.Ct. 1775 (O'Connor, J., concurring) (accepting plurality's sex stereotyping analysis and characterizing the "failure to conform to [gender] stereotypes" as a discriminatory criterion; concurring separately to clarify the separate issues of causation and allocation of the burden of proof). As Judge Posner has pointed out, the term "gender" is one "borrowed from

grammar to designate the sexes as viewed as social rather than biological classes." Richard A. Posner, *Sex and Reason*, 24-25 (1992). The Supreme Court made clear that in the context of Title VII, discrimination because of "sex" includes gender discrimination: "In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." *Price Waterhouse*, 490 U.S. at 250, 109 S.Ct. 1775. The Court emphasized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251, 109 S.Ct. 1775.

Smith contends that the same theory of sex stereotyping applies here. His complaint sets forth the conduct and mannerisms which, he alleges, did not conform with his employers' and co-workers' sex stereotypes of how a man should look and behave. Smith's complaint states that, after being diagnosed with GID, he began to express a more feminine appearance and manner on a regular basis, including at work. The complaint states that his co-workers began commenting on his appearance and mannerisms as not being masculine enough; and that his supervisors at the Fire Department and other municipal agents knew about this allegedly unmasculine conduct and appearance. The complaint then describes a high-level meeting among Smith's supervisors and other municipal officials regarding his employment. Defendants allegedly schemed to compel Smith's resignation by forcing him to undergo multiple psychological evaluations of his gender non-conforming behavior. The complaint makes clear that these meetings took place soon after Smith assumed a more feminine appearance and manner and after his conversation about this with Eastek. In addition, the complaint alleges that Smith was suspended for twenty-four hours for allegedly violating an unenacted municipal policy, and that the suspension was ordered in retaliation for his pursuing legal remedies after he had been informed about Defendants' plan to intimidate him into resigning. In short, Smith claims that the discrimination he experienced was based on his failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance.

\*6 Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.

In so holding, we find that the district court erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because "Congress had a narrow view of sex in mind" and "never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex." *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085, 1086 (7th Cir.1984); *see also Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661-63 (9th Cir.1977) (refusing to extend protection of Title VII to transsexuals because discrimination against transsexuals is based on "gender" rather than "sex"). It is true that, in the past, federal appellate courts regarded Title VII as barring discrimination based only on "sex" (referring to an individual's anatomical and biological characteristics), but not on "gender" (referring to socially-constructed norms associated with a person's sex). *See, e.g., Ulane*, 742 F.2d at 1084 (construing "sex" in Title VII narrowly to mean only anatomical sex rather than gender); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir.1982) (holding that transsexuals are not protected by Title VII because the "plain meaning" must be ascribed to the term "sex" in the absence of clear congressional intent to do otherwise); *Holloway*, 566 F.2d at 661-63 (refusing to extend protection of Title VII to transsexuals because discrimination against transsexualism is based on "gender" rather than "sex;" and "sex" should be given its traditional definition based on the anatomical characteristics dividing "organisms" and "living beings" into male and female). In this earlier jurisprudence, male-to-female transsexuals (who were the plaintiffs in *Ulane*, *Sommers*, and *Holloway*)--as biological males whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity--were denied Title VII protection by courts because they were considered victims of "gender" rather than "sex" discrimination.

However, the approach in *Holloway*, *Sommers*, and *Ulane*--and by the district court in this case--has been eviscerated by *Price Waterhouse*. *See Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir.2000) ("The initial judicial approach taken in cases such as *Holloway* [and *Ulane* ] has been overruled by the logic and language of *Price Waterhouse*."). By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to "sex"

encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms. *See Price Waterhouse*, 490 U.S. at 251, 109 S.Ct. 1775; *see also Schwenk*, 204 F.3d at 1202 (stating that Title VII encompasses instances in which "the perpetrator's actions stem from the fact that he believed that the victim was a man who 'failed to act like' one" and that "sex" under Title VII encompasses both the anatomical differences between men and women and gender); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir.2002) (en banc) (Pregerson, J., concurring) (noting that the Ninth Circuit had previously found that "same-sex gender stereotyping of the sort suffered by Rene--i.e. gender stereotyping of a male gay employee by his male co-workers" constituted actionable harassment under Title VII and concluding that "[t]he repeated testimony that his co-workers treated Rene, in a variety of ways, 'like a woman' constitutes ample evidence of gender stereotyping"); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 262-63 (3d Cir.2001) (stating that a plaintiff may be able to prove a claim of sex discrimination by showing that the "harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender"); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874- 75 (9th Cir.2001) (holding that harassment "based upon the perception that [the plaintiff] is effeminate" is discrimination because of sex, in violation of Title VII), *overruling DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir.1979); *Doe v. Belleville*, 119 F.3d 563, 580-81 (7th Cir.1997) (holding that "Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles" and explaining that "a man who is harassed because his voice is soft, his physique is slight, his hair long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of his sex' "), *vacated and remanded on other grounds*, 523 U.S. 1001, 118 S.Ct. 1183, 140 L.Ed.2d 313 (1998).

\*7 After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination,

because the discrimination would not occur but for the victim's sex. *See, e.g., Nichols*, 256 F.3d 864 (Title VII sex discrimination and hostile work environment claim upheld where plaintiff's male co-workers and supervisors repeatedly referred to him as "she" and "her" and where co-workers mocked him for walking and carrying his serving tray "like a woman"); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n. 4 (1st Cir.1999) ("[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity." (internal citation omitted)); *see also Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir.2000) (applying *Price Waterhouse* and Title VII jurisprudence to an Equal Credit Opportunity Act claim and reinstating claim on behalf of biologically male plaintiff who alleged that he was denied an opportunity to apply for a loan because was dressed in "traditionally feminine attire").

Yet some courts have held that this latter form of discrimination is of a different and somehow more permissible kind. For instance, the man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination "because of ... sex," but rather, discrimination against the plaintiff's unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as "transsexual" on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification. *See, e.g., Dillon v. Frank*, No. 90-2290, 1992 WL 5436 (6th Cir. Jan.15, 1992).

Such was the case here: despite the fact that Smith alleges that Defendants' discrimination was motivated by his appearance and mannerisms, which Defendants felt were inappropriate for his perceived sex, the district court expressly declined to discuss the applicability of *Price Waterhouse*. The district court therefore gave insufficient consideration to Smith's well-pleaded claims concerning his transgender behavior, but rather accounted for that

behavior only insofar as it confirmed for the court Smith's status as a transsexual, which the district court held precluded Smith from Title VII protection.

\*8 Such analyses cannot be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual--and therefore fails to act and/or identify with his or her gender--is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.

Finally, we note that, in its opinion, the district court repeatedly places the term "sex stereotyping" in quotation marks and refers to it as a "term of art" used by Smith to disingenuously plead discrimination because of transsexualism. Similarly, Defendants refer to sex stereotyping as "the *Price Waterhouse* loophole." (Appellees' Brief at 6.) These characterizations are almost identical to the treatment that *Price Waterhouse* itself gave sex stereotyping in its briefs to the U.S. Supreme Court. As we do now, the Supreme Court noted the practice with disfavor, stating:

In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. Although the parties do not overtly dispute this last proposition, the placement by *Price Waterhouse* of "sex stereotyping" in quotation marks throughout its brief seems to us an insinuation either that such stereotyping was not present in this case or that it lacks legal relevance. We reject both possibilities.

*Price Waterhouse*, 490 U.S. at 250, 109 S.Ct. 1775.

## **2. Adverse Employment Action**

Despite having dismissed Smith's Title VII claim for failure to state a claim of sex stereotyping--a finding we have just rejected--the district court nevertheless

addressed the merits of Smith's Title VII claims *arguendo*. Relying on *White v. Burlington Northern & Sante Fe Ry. Co.*, 310 F.3d 443 (6th Cir.2002), the district court held that Smith's suspension was not an adverse employment action because the Court of Common Pleas, rendering the "ultimate employment decision," reversed the suspension, and that accordingly, Smith's Title VII claim could not lie. Because this Circuit has since vacated and overruled *White*, 364 F.3d 789 (6th Cir.2004) (en banc), and joined the majority of other circuits in rejecting the "ultimate employment decision" standard, we hold that the district court erred in its analysis and that Smith has successfully pleaded an adverse employment action in support of his employment discrimination and retaliation claims pursuant to Title VII.

\*9 Common to both the employment discrimination and retaliation claims is a showing of an adverse employment action, which is defined as a "materially adverse change in the terms and conditions of [plaintiff's] employment." *Hollins v. Atlantic Co.*, 188 F.3d 652, 662 (6th Cir.1999). A "bruised ego," a "mere inconvenience or an alteration of job responsibilities" is not enough to constitute an adverse employment action. *White*, 364 F.3d at 797 (quoting *Kocsis v. Multi-Care Mgmt. Inc.*, 97 F.3d 876, 886 (6th Cir.1996)). Examples of adverse employment actions include firing, failing to promote, reassignment with significantly different responsibilities, a material loss of benefits, suspensions, and other indices unique to a particular situation. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998); *White*, 364 F.3d at 798. Here, the Fire Department suspended Smith for twenty-four hours. Because Smith works in twenty-four hour shifts, that twenty-four hour suspension was the equivalent of three eight-hour days for the average worker, or, approximately 60% of a forty-hour work week. Pursuant to the liberal notice pleading requirements set forth in Fed.R.Civ.P. 8, this allegation, at this phase of the litigation, is sufficient to satisfy the adverse employment requirement of both an employment discrimination and retaliation claim pursuant to Title VII. [FN1]

It is irrelevant that Smith's suspension was ultimately reversed by the Court of Common Pleas after he challenged the suspension's legality. In *White*, this Court recently joined the majority of other circuits in rejecting the "ultimate employment decision" standard whereby a negative employment action is

not considered an "adverse employment action" for Title VII purposes when the decision is subsequently reversed by the employer, putting the plaintiff in the position he would have been in absent the negative action. *White*, 364 F.3d 789 (holding that the suspension of a railroad employee without pay, followed thirty-seven days later by reinstatement with back pay, was an "adverse employment action" for Title VII purposes). Even if the "ultimate employment decision" standard were still viable, the district court erred in concluding that, because the Court of Common Pleas overturned the suspension, it was not an adverse employment action. There is no legal authority for the proposition that reversal by a *judicial* body--as opposed to the employer--declassifies a suspension as an adverse employment action.

Accordingly, Smith has stated an adverse employment action and, therefore, satisfied all of the elements necessary to allege a *prima facie* case of employment discrimination and retaliation pursuant to Title VII. We therefore reverse the district court's grant of judgment on the pleadings to Defendants with respect to those claims.

#### **B. 42 U.S.C. § 1983 Claims**

The district court also dismissed Smith's claims pursuant to 42 U.S.C. § 1983 on the ground that he failed to state a claim based on the deprivation of a constitutional or federal statutory right.

\*10 42 U.S.C. § 1983 provides a civil cause of action for individuals who are deprived of any rights, privileges, or immunities secured by the Constitution or federal laws by those acting under color of state law. Smith has stated a claim for relief pursuant to § 1983 in connection with his sex-based claim of employment discrimination. Individuals have a right, protected by the Equal Protection clause of the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment. *Davis v. Passman*, 442 U.S. 228, 234-35, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). To make out such a claim, a plaintiff must prove that he suffered purposeful or intentional discrimination on the basis of gender. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). As this Court has noted several times, "the showing a plaintiff must make to recover on a disparate treatment claim under Title VII mirrors that which must be made to recover on an equal protection claim under section § 1983."

*Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir.1988) (citing *Kitchen v. Chippewa Valley Schs.*, 825 F.2d 1004, 1011 (6th Cir.1987)); *Daniels v. Bd. of Educ.*, 805 F.2d 203, 207 (6th Cir.1986); *Grano v. Dep't of Dev.*, 637 F.2d 1073, 1081-82 (6th Cir.1980); *Lautermilch v. Findlay City Schs.*, 314 F.3d 271, 275 (6th Cir.2003) ("To prove a violation of the equal protection clause under § 1983, [a plaintiff] must prove the same elements as are required to establish a disparate treatment claim under Title VII.") (quotation and citation omitted). The facts Smith has alleged to support his claims of gender discrimination pursuant to Title VII easily constitute a claim of sex discrimination grounded in the Equal Protection Clause of the Constitution, pursuant to § 1983. See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 117-21 (2d Cir. 2004) (holding that claims premised on *Price Waterhouse* sex stereotyping theory sufficiently constitute claim of sex discrimination pursuant to § 1983).

Defendants urge us to hold otherwise, on the ground that Smith's complaint fails to refer specifically to the Equal Protection Clause of the U.S. Constitution. But the Federal Rules of Civil Procedure provide for a liberal system of notice pleading. Fed.R.Civ.P. 8(a). A plaintiff need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). "Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Claims made pursuant to 42 U.S.C. § 1983 are not subject to heightened pleading standards. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 165-66, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993) (rejecting heightened pleading standard for § 1983 claims); *Jones v. Duncan*, 840 F.2d 359 (6th Cir.1988) (holding that § 1983 claims need not set forth in detail all the particularities of a plaintiff's claim against a defendant). Moreover, legal theories of recovery need not be spelled out as long as the relevant issues are sufficiently implicated in the pleadings; in considering motions pursuant to Fed.R.Civ.P. 12(c), we ask not whether a complaint points to a specific statute, but whether relief is possible under any set of facts that could be established consistent with the allegation. Because Smith's sex discrimination claim so thoroughly and obviously sounds in a constitutional claim of equal

protection, Defendants had fair notice of his claim and the ground upon which it rests. As such, we hold that Smith has satisfied the liberal notice pleading requirements set forth in Fed.R.Civ.P. 8 with respect to his claim of sex discrimination, grounded in an alleged equal protection violation, and we therefore reverse the district court's grant of judgment on the pleadings dismissing Smith's § 1983 claim.

\*11 In his appellate brief, Smith also contends that his complaint alleges a violation of his constitutional right to due process, based on the City's failure to comply with the state statutory and administrative procedures that an Ohio municipality must follow when taking official employment action against a public employee. His complaint outlines the statutory procedures, governed by O.R.C. § 121.22(G), pursuant to which members of an Ohio municipality may meet for purposes of taking official employment action against a public employee, and it alleges that those procedures were not followed. The complaint also discusses O.A.C. § 124-9-11, which would have permitted Smith to call witnesses at his post-suspension hearing in front of the Salem Civil Service Commission; and the complaint alleges that he was barred from calling witnesses. Smith contends that these allegations implicate his right to due process pursuant to the Fourteenth Amendment of the U.S. Constitution.

However, it is well-settled that state law does not ordinarily define the parameters of due process for Fourteenth Amendment purposes, and that state law, by itself, cannot be the basis for a federal constitutional violation. See *Purisch v. Tennessee Technological Univ.*, 76 F.3d 1414, 1423 (6th Cir.1996) ("Violation of a state's formal [employment grievance] procedure ... does not in itself implicate constitutional due process concerns."). Neither Smith's complaint nor his brief specifies what deprivation of property or liberty allegedly stemmed from the City's failure to comply with state procedural and administrative rules concerning his employment. Accordingly, he has failed to state a federal due process violation pursuant to § 1983.

In sum, we hold that Smith has failed to state a § 1983 claim based on violations of his right to due process. However, he has stated a § 1983 claim of sex discrimination, grounded in an alleged equal protection violation, and, for that reason, we reverse the district court's grant of judgment on the pleadings dismissing Smith's § 1983 claim.

### III. CONCLUSION

Because Smith has successfully stated claims for relief pursuant to both Title VII and 42 U.S.C. § 1983, the judgment of the district court is REVERSED and this case is REMANDED to the district court for further proceedings consistent with this opinion.

FN\* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

FN1. Smith's complaint does not state whether he was suspended with or without pay. Because we must construe the complaint in the light most favorable to the plaintiff, *Ziegler*, 249 F.3d at 512, and given the liberal pleading standards of Federal Rule of Civil Procedure 8, we do not find this failure dispositive. A "materially adverse change" in employment conditions often involves a material loss of pay or benefits, but that is not always the case, and "other indices that might be unique to a particular situation" can constitute a "materially adverse change" as well. *Hollins*, 188 F.3d at 662. Because no discovery has been conducted yet, we do not know the full contours of the suspension. For now, however, for the reasons just stated, we find that Smith has sufficiently alleged an adverse employment action.



# The Transgender Umbrella: one view

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San Francisco, CA 94102  
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Transgender people have been around for a long time. However, the term transgender, as it is currently used, is a relatively new term. It has only been in general, popular use since the early 1990s. As currently used, “transgender” is an umbrella term that is analogous to other umbrella terms like people of color or people with disabilities.

Like those terms, the word transgender was deliberately designed to create and foster a sense of commonality and common purpose between otherwise different and specific groups. The same way that the term “people of color” includes a variety of specific racial groups, such as African-Americans, Asian-Americans, Native-Americans and so forth, the term “transgender” also includes a variety of more specific identities.

It includes transsexual people, cross-dressers, transvestites, drag queens, butch lesbians, feminine gay men, and even more generally any women who have so called masculine characteristics and any men who have so called feminine characteristics.

The underlying idea or concept is that “transgender” includes anyone whose behavior, appearance, or identity falls outside of gender stereotypes or outside of stereotypical assumptions about how men and women are supposed to be. It is a very broad term that includes a very wide range of people.

For the transgender community, gender identity might be thought of as the core concept that is equivalent to sexual orientation for lesbian, gay and bisexual people. Gender identity refers to a person’s internal, deeply felt sense of being male or female (or both or neither). It is a person’s psychological identification as masculine or feminine. For most people, your gender identity corresponds to your physical body, to your anatomical sex. The whole premise of transgender identity is that this is not necessarily true for everybody.

Transsexual people might be thought of as the most extreme example of people whose gender identity does not correspond to the body they were born with. In my case, I was born with a female body and raised as a girl, but my gender identity is male. Like a lot of other transsexual people, I underwent medical treatment to change my body to correspond with my gender identity.

It’s important to make it clear, however, that not all transgender people choose to undergo any medical treatment. Not even all transsexual people do. There are female bodied people who identify as male and as transsexual without any medical treatment, and then there are some of us who really need the medical treatment.

That diversity is really the key to the liberating aspect of transgender identity and politics. We have been taught that if you are born in a female body, you should dress and behave in a feminine way, and you should be attracted to men. Lesbian and gay people know that is not true when it comes to sexual orientation. The transgender community shows another different, but similar kind of truth. Gender characteristics can be combined in any number of different ways. Helping people to see and understand that is really the heart of the liberating aspect of transgender identity.

# Transgender Definitions<sup>16</sup>

Transgender Law Center  
160 14<sup>th</sup> Street  
San Francisco, CA 94103  
(415) 865-0176

## **Transgender**

An umbrella term that can be used to describe people whose gender expression is nonconforming and/or whose gender identity is different from their birth assigned gender.

## **Gender Identity**

A person's internal, deeply-felt sense of being either male, female, something other, or in between. Everyone has a gender identity.

## **Gender Expression**

An individual's characteristics and behaviors such as appearance, dress, mannerisms, speech patterns, and social interactions that are perceived as masculine or feminine.

## **Sexual Orientation**

A person's emotional and sexual attraction to other people based on the gender of the other person. A person may identify their sexual orientation as heterosexual, lesbian, gay, bisexual, or queer. It is important to understand that sexual orientation and gender identity are two different things. Not all transgender youth identify as gay, lesbian, bisexual, or queer. And not all gay, lesbian, bisexual, and queer youth display gender non-conforming characteristics.

## **LGBTQ**

An umbrella term that stands for "lesbian, gay, bisexual, transgender, and questioning." The category "questioning" is included to incorporate those that are not yet certain of their sexual orientation and/or gender identity.

## **Female or Male Cross Dressers**

Individuals who occasionally wear clothing that is perceived to be conflicting with their anatomical genital structure.

## **Drag Queens or Kings**

Female or male cross dressers who are lesbian, gay, or bisexual.

## **Masculine Females**

Biological females who have or are perceived to have masculine characteristics. They may

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<sup>16</sup> The following definitions were excerpted from two sources. The San Francisco Human Rights Commission's *Compliance Guidelines to Prohibit Gender Identity Discrimination* and *Beyond the Binary: A Tool-Kit for Gender Identity Activism in Schools*.

have either a feminine or masculine gender identity, and will usually identify with their body if asked to specify.

### **Feminine Males**

Biological males who have or are perceived to have feminine characteristics. They may have either a masculine or feminine gender identity, and will usually identify with their body if asked to specify.

### **Transsexual**

A term most commonly used to refer to someone who transitions from one gender to another. It includes people who were identified as male at birth but whose gender identity is female, people who were identified as female at birth but whose gender identity is male, and people whose gender identity is neither male nor female. Transition often consists of a change in style of dress, selection of a new name, and a request that people use the correct pronoun when describing them. Transition may, but does not always, include necessary medical care like hormone therapy, counseling, and/or surgery.

### **Gender Non-Conforming**

A person who is or is perceived to have gender characteristics and/or behaviors that do not conform to traditional or societal expectations. Gender non-conforming people may or may not identify as lesbian, gay, bisexual, transgender, or queer.

### **Genderqueer**

People who do not identify as, or who do not express themselves as, completely male or female. Genderqueer people may or may not identify as transgender.

## **Bathroom Conversation:** A discussion with a Human Resources Manager about bathrooms and transsexual employees.

By Jamison Green

The HR manager of a San Francisco subsidiary of a major New York-based corporation received advice from his New York legal department to instruct a local newly-transitioning FTM employee that he couldn't use the men's bathroom until he had had genital reconstruction (which many transmen never have) and until he was listed with the health insurance carrier as male.

The HR manager had called me at the request of the very agitated and frustrated FTM employee. I told him that it would soon be highly inappropriate for the young man to be using the women's room, and that he would be using a stall in the men's room, so there was no forced or required nudity (as in a shower situation), and no violation of privacy. The manager seemed to understand me, and he was relieved that I had a sense of humor about the matter while I explained to him about the puberty-like nature of hormonal transition and its biochemical processes, surgery issues, and the fact that social maleness is really more important on a day-to-day basis than the shape of one's genitals. But somehow I had to bring the point home, because I wasn't sure he was getting it in a way that would resolve the young man's problem and solidify the HR manager's position with respect to his corporate legal department.

"How many men do you meet every day, feel comfortable with, do business with, etc., etc.?" I asked him rhetorically. "And how many of those men do you know for a fact has a penis?" He was stunned.

"So how important would you say a man's penis is in your employer/employee relationship?" I inquired. He was contrite.

"You assume all the men you meet have penises and started their lives in male bodies. This may not be true. And if that is so, what difference does it make to you?"

"I see," he said, thoughtfully.

"So the difference in the case of this employee," I went on, "is that you actually know an intimate detail of his life that you are not privileged to know in other cases. Transsexualism is a medical condition, treated by doctors to improve the quality of life for their patient. It is difficult, at best, to go through this process at all, and virtually impossible without some social support, unless one does it in secret, obliterating their past and cutting all ties with people who had any knowledge of their previous embodiment. Many people have lived that way and made their transitions a secret. What your employee is doing now is a courageous act, worthy of your respect. He has thought long and hard about this transition he is making, and he is not hiding, masquerading, or playing games. He is required by established medical standards to live completely as a man before he can have surgery. Your corporate refusal to cooperate feels like a game to him and is highly frustrating and demoralizing. You acknowledge that he gets along with his co-workers and they accept him as a man, so your refusal to accept him becomes a productivity obstacle for your

entire staff. Your resistance unnecessarily calls attention to a personal situation that should be none of your business beyond your privileged awareness that it exists and is a condition of his life."

The outcome of this conversation was that the company permitted the young man to use the men's restroom. They also changed his employment records to reflect his sex as male in correspondence with his newly issued legal California driver's identification, which was supported by his medical records. No incidents of complaint arose from other employees. In addition, the company installed a single-occupant unisex restroom for any employee to use, and the young man was NOT REQUIRED to use that facility.

This outcome is fully in compliance with San Francisco Public Ordinances prohibiting adverse discrimination on the basis of gender identity, though other forms of mitigation may have been negotiated had a complaint been filed with the San Francisco Human Rights Commission.

# **Attachment**

**M**

**FAIR EMPLOYMENT & HOUSING COMMISSION**

455 GOLDEN GATE AVENUE, SUITE 10600  
SAN FRANCISCO, CA 94102-3660  
TEL: (415) 557-2325  
FAX: (415) 557-0855

**NOTICE OF COMMISSION FINAL DECISION**

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

v.

MARION'S PLACE, a California Business Entity form Unknown; MARY ANN LOPEZ DEWITT, dba MARION'S PLACE; MARION LOPEZ, dba MARION'S PLACE  
(Francis Arreola, Complainant)

Case No.: U-200203 C-0008-00-s, C 03-04-070

Decision No.: 06-01-P

Enclosed is a copy of the decision of the Fair Employment and Housing Commission in the above-entitled case. (See Cal. Code Regs., tit. 2, § 7434, subd. (a).) The decision becomes effective on **March 6, 2006**. (See Cal. Code Regs., tit. 2, § 7434, subd. (g).)

Should you wish to request the Commission to reconsider this decision, you must file a motion for reconsideration meeting the requirements of California Code of Regulations, title 2, section 7436. The Commission's power to order reconsideration expires on the effective date of the decision stated above, and any motion for reconsideration must be filed with the Commission on or before **February 24, 2006**.

If extraordinary circumstances exist and you need more time to file a motion for reconsideration, you may also file a motion to extend the time within which the Commission can order reconsideration for 30 days, pursuant to the statute and regulations cited above. A motion to extend time for reconsideration must be filed with the Commission on or before **February 24, 2006**.

Should you wish to seek judicial review, you may do so by filing a petition for writ of mandate in accordance with Code of Civil Procedure section 1094.5, Government Code section 11523 and Code of Regulations, title 2, section 7437.

Date: February 3, 2006

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION  
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation  
of the

DEPARTMENT OF FAIR EMPLOYMENT  
AND HOUSING

v.

MARION'S PLACE, a California Business Entity  
form Unknown; MARY ANN LOPEZ DEWITT,  
dba MARION'S PLACE; MARION LOPEZ, dba  
MARION'S PLACE,

Respondents.

FRANCIS ARREOLA,

Complainant.

Case No.

U-200203 C-0008-00-s  
C 03-04-070

06-01-P

DECISION

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter and designates it precedential, pursuant to Government Code section 12935, subdivision (h), and California Code of Regulations, Title 2, section 7435, subdivision (a).

The Commission, *nunc pro tunc*, corrects the following errors in the decision: page 8, paragraph 1, line 5, is amended to read "under the age of 18" in lieu of "under the age 18;" page 9, paragraph 4, line 3 is amended to read "Court held that" in lieu of "Court that;" and page 17, paragraph 4, line 4 is amended to delete the following text, as indicated in strike-through: "~~along with a notice of customers' rights and obligations regarding unlawful discrimination under the Act (Attachment B).~~"

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437. Any petition for judicial review and



related papers shall be served on the Department, the Commission, respondents, and complainant.

DATED: February 1, 2006

GEORGE WOOLVERTON

HERSCHEL ROSENTHAL

PATRICK ADAMS

LINDA NG

BRENDA ST. HILAIRE

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION  
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation  
of the

DEPARTMENT OF FAIR EMPLOYMENT  
AND HOUSING

v.

MARION'S PLACE, a California Business Entity  
Form Unknown; MARY ANN LOPEZ DEWITT,  
dba MARION'S PLACE; MARION LOPEZ, dba  
MARION'S PLACE, MARION'S PLACE, INC.,  
a California Corporation,

Respondents.

FRANCIS ARREOLA,

Complainant.

Case No.

U-200203-C-0008-00-s

C 03-04-070

PROPOSED DECISION

Administrative Law Judge Caroline L. Hunt heard this matter on behalf of the Fair Employment and Housing Commission on February 22 and 23, 2005, in Salinas, California. Jennifer Woodford-Gittisriboongul, Senior Staff Counsel, represented the Department of Fair Employment and Housing. John Viljoen, Esq., represented respondents Marion's Place, Inc., Marion Lopez and Mary Ann Lopez Dewitt. Christopher Daley, Esq., of the Transgender Law Center, participated in after-hearing briefing as amicus curiae. Complainant Francis Arreola and respondents Marion Lopez and Mary Ann Lopez Dewitt attended the hearing. Maria D. Cruz served as the Spanish-speaking interpreter at hearing.

After receipt of the hearing transcripts, and timely filing of the parties' and amicus curiae's post-hearing and supplemental briefs, the last of which was received on November 7, 2005, the case was deemed submitted on that date.

After consideration of the entire record, the administrative law judge makes the following findings of fact, determination of issues, and order.

## FINDINGS OF FACT

### Procedural Setting

1. On May 5, 2003, Francis Arreola (Arreola or complainant) filed written, verified complaints with the Department of Fair Employment and Housing (Department) against Muriano's [sic] Club, Marion's Place, a California business entity – form unknown, Mary Ann Lopez Dewitt dba Marion's Place, and Marion Lopez dba Marion's Place. The complaints alleged that, within the preceding year, Marion Lopez (Lopez), owner of Muriano's [sic] Club and Marion's Place, located at 494 and 487 E. Market Street, Salinas, California, denied complainant full and equal privileges because of complainant's sex (male) and gender identity (transgender). The complaints alleged that Marion's Place denied entry to Arreola, who was wearing a dress, based on a "trousers only" dress code, and told Arreola to use only the men's restroom, and that this conduct constituted unlawful practices in violation of the Fair Employment and Housing Act (FEHA or Act), incorporating Civil Code section 51. (Gov. Code, § 12900 et seq., Civ. Code § 51.)

2. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On May 4, 2004, Jill Peterson, in her then official capacity as Interim Director of the Department, issued an accusation against Marion's Place, a California business entity form unknown, Mary Ann Lopez Dewitt, dba Marion's Place, and Marion Lopez, dba Marion's Place (respondents). The accusation alleged that respondents denied complainant full and equal accommodations, advantages, facilities, privileges and services based on complainant's actual or perceived sex, gender identity, and sexual orientation,<sup>1</sup> in violation of Civil Code section 51, as incorporated into the FEHA by Government Code section 12948. The accusation alleged that respondents denied complainant entry into their business establishment, Marion's Place, unless complainant adhered to the men's dress code by wearing pants, rather than a dress. The accusation further alleged that in March 2003, respondents permitted complainant into the nightclub but told Arreola that "she must use the 'bathroom at the gas station across the street.'"

3. In October 2004, respondents incorporated their nightclub business, forming Marion's Place, Inc., which received all of the assets and equipment of Marion's Place. Marion's Place, Inc., maintained the same employees, the same principals and managerial staff, and operated continuously under the same business name for the nightclub, in the same line of business, and at the same location, at 487 E. Market Street, Salinas, California.

4. On January 6, 2005, Suzanne Ambrose, in her official capacity as Director of the Department, filed a first amended accusation, adding Marion's Place, Inc., as a respondent in this proceeding.

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<sup>1</sup> In its post-hearing brief, the Department dropped its claim of arbitrary discrimination based on sexual orientation.

5. On January 21, 2005, the Department filed a second amended accusation, deleting the allegation that respondents told complainant she had to use the gas station bathroom. In the second amended accusation, the Department also amended the prayer for relief, moving its prayer for treble damages and attorney's fees, under Civil Code section 52, into the prayer seeking compensatory damages for emotional distress.

6. On August 12, 2005, on written application by the Transgender Law Center, a California non-profit law firm providing legal services to transgender people, for leave to file an amicus curiae brief after hearing, the undersigned administrative law judge issued an Order Re: Amicus Brief, granting such leave and in addition, granting respondents' right of reply. (Cal. Code Regs., tit. 2, § 7426.)

7. On October 5, 2005, the undersigned administrative law judge requested that the parties file supplemental briefs on the effect of Assembly Bill 1400 (Stats. 2005, ch. 420, § 3) on the issues presented in this case. Such briefs were timely filed by the parties and amicus curiae.

#### Factual Setting

8. Complainant Arreola identifies herself as a male-to-female transgender. She was born Francisco Arreola, a biological and anatomical male, on February 11, 1973, in Michoacan, Mexico. From an early age, Arreola considered herself female. In Mexico, she faced harassment and ostracism as a result of her sexual identity. On her arrival in the United States in about 1998, Arreola began publicly identifying herself as female in her daily life, by wearing women's clothes, jewelry, make-up and hair styles.

9. Arreola underwent hormone therapy, taking female hormones prescribed by her doctor. Arreola considered but, primarily for financial reasons, had not undergone sex reassignment surgery.

10. At the time of the acts alleged in this case, Marion's Place was a nightclub owned and run, for about 38 years, by respondent Marion J. Lopez (respondent Lopez). Marion's Place catered to a predominantly Hispanic, seasonal farm worker clientele. It offered a venue for drinking and dancing, with live music and cover charge on Friday, Saturday and Sunday nights. As a nightclub serving alcohol, Marion's Place was restricted to customers over 21 years of age. The nightclub had two bars, a dance floor, and a seating area. It held about 250 customers and was popular and crowded, especially on weekends.

11. Both prior to and after incorporation of the business, respondent Lopez managed the nightclub, supervising all employees. He and his daughter, Mary Ann Lopez Dewitt, also bartended each Saturday night. The club employed a host, wait staff, bartenders, musicians and security staff, a total of about 20 employees. After incorporation, Dewitt also served as the chief financial officer of Marion's Place, Inc.

## Transgender Customers at Marion's Place

12. Starting in about 2000, Marion's Place began to attract a transgender clientele, in addition to its existing customers and clients. By mid-to late 2002, the number of transgender customers at Marion's Place averaged around 25 on a Saturday night. Some of the male-to-female transgender customers wore dresses or skirts, clothing associated as traditionally "feminine" clothing, at the nightclub. Some women and transgender customers wore skirts or dresses that were very closely tailored and revealing, referred to as "mini skirts."

13. On occasion, fights or arguments took place at Marion's Place, at times involving verbal threats or physical altercations. The nightclub's security staff was headed by Alejandro (Alex) Gomez. Members of the security staff, including Gomez, were responsible for checking customers' identification documents (IDs) at the front entrance, checking for concealed weapons or alcohol, and intervening in the event of arguments and fights among clientele.

14. In both 2001 and 2002, several altercations at Marion's Place involving heterosexual and transgender patrons required intervention by Alex Gomez. In one such incident, a male customer became angry and physically violent on realizing that his dance partner was transgender. Gomez intervened to prevent a fistfight. In other incidents, transgender customers were assaulted or yelled at. From time to time, certain male customers became irate when they put their hands up the skirt of the person they were with, to discover that person was transgender. Each time, Gomez responded quickly to prevent an escalation to any further physical violence.

15. Marion's Place management and security personnel also dealt with a number of non-transgender females' soliciting sex acts both inside the club and outside in the parking lot.

16. Sometime in about 2002 at Marion's Place, a transgender, not identified in the record, came to the nightclub wearing a skirt without underwear. Several non-transgender customers complained and left, threatening never to return, when the transgender individual danced in a provocative manner, showing male genitalia. Gomez discussed this incident with respondent Lopez, who responded, "No more guys with skirts."

17. In late 2002, respondents instituted a dress code for its clientele. The dress code provided that:

Women can wear a dress or pants. Men can wear pants but not dresses or skirts.  
Tank tops on men are prohibited. Shoes are required.

18. On adoption of the dress code at Marion's Place, transgender individuals who were perceived by the security staff at the door of the club to be males were not permitted entry to the club if they were wearing dresses or skirts. Male-to-female transgender

individuals were still welcomed as customers at Marion's Place, as long as they abided by the male dress code, and wore pants.

19. One evening in November 2002, complainant Arreola went to Marion's Place for the first time. She was accompanied by a friend, Jesus Morales. Arreola wore a skirt, blouse, scarf, and nylons. At the entrance of the nightclub, Arreola was stopped by security and told that she needed to wear pants, not a skirt, because of the rules of the club. Arreola and Morales then left the nightclub.

20. Arreola was upset that respondents would not allow her into the nightclub wearing a skirt. She felt humiliated. This humiliation was particularly acute because she had been identified by respondents as a man, rather than as a woman, in front of her friend.

21. The next day, Arreola returned to the club with Jesus Morales to speak to the owner, respondent Lopez. Lopez told Arreola that at Marion's Place, under the club's rules, men had to wear pants, not dresses.

22. Arreola's treatment at Marion's Place led to her experiencing simultaneous feelings of impotence and anger. She cried when she reflected on how she had been humiliated. She had been trying to live her life as a woman, had even applied for political asylum, and now the rejection and humiliation by Marion's Place rendered her both powerless and angry. She felt that respondents' security personnel had ridiculed her because of her gender identity. Previously, she had enjoyed dressing up to look her best, to go out with friends. She no longer enjoyed confidence in her appearance because of her treatment at the nightclub.

23. After six to seven months, Arreola reluctantly returned to Marion's Place, at the urging of her friends. When she went back, however, in about May 2003, she did not feel confident enough to dress in a skirt. Instead, she wore pants, because she feared being embarrassed once more at the club if she wore a skirt or dress. That evening, she was admitted to the club.

24. Arreola visited the nightclub two additional times later in 2003. She remained fearful of being embarrassed, so wore pants, not a skirt, and each time was admitted to the nightclub.

25. Some time prior to the events alleged in the accusation, Arreola applied for political asylum with the then United States Immigration and Naturalization Service (I.N.S.), based on the persecution she faced in Mexico as a transgender. On about June 4, 2003, the I.N.S. issued Arreola an Employment Authorization Card. The I.N.S. designated complainant's sex as "female." On August 15, 2003, Arreola was issued a California Department of Motor Vehicles ID card. That ID also designated Arreola as "female."

26. At the time of hearing, respondents continued to maintain their dress code policy at Marion's Place, prohibiting prospective customers respondents considered to be men from

entering the club wearing skirts or dresses. There were still fights and verbal disputes at the nightclub from time to time. Of approximately 25 fights at Marion's Place in the past five years, about two or three involved transgenders in skirts or dresses. In at least two incidents after adoption of the dress code, transgenders wearing pants were subjected to physical attacks.

## DETERMINATION OF ISSUES

### Liability

Complainant Arreola, as a male-to-female transgender individual, asserts her right to wear traditionally feminine clothing, i.e., a skirt or a dress, as a customer in Marion's Place.

The Department alleges that respondents' refusal to allow complainant Arreola to enter Marion's Place when dressed in a skirt constituted arbitrary discrimination under the Unruh Civil Rights Act, as incorporated into the FEHA by Government Code section 12948. (Civ. Code, § 51, Gov. Code, § 12948.) Both the Department and amicus curiae argue that complainant is protected under the Unruh Civil Rights Act based on her sex and gender identity, and that respondents' dress code barring men from wearing a dress or skirt violates the Act's prohibition against arbitrary, discriminatory conduct by a business establishment.

Respondents deny any violation of the Unruh Civil Rights Act or the FEHA, asserting that they have never discriminated against transgender individuals, and that respondents' dress code prohibiting men from wearing skirts or dresses is reasonable and justified for legitimate business reasons.

### The Unruh Civil Rights Act

At the time of the acts alleged in the second amended accusation,<sup>2</sup> Civil Code section 51, subdivision (b), stated: "All persons within the jurisdiction of this state are free and

<sup>2</sup> Effective January 1, 2006, Civil Code section 51, subdivision (b), was amended to include marital status and sexual orientation as enumerated protected bases under the Unruh Civil Rights Act and to define sex to include gender and gender identity. (Added by Stats. 2005, ch. 420, § 3 (Assembly Bill 1400, Laird) [A.B. 1400].) With the enactment of these amendments to section 51, the parties argue respectively for and against retroactivity, with the Department and amicus curiae arguing that the amendments "clarify" the Unruh Civil Rights Act and do not change existing law. Respondents argue that, to the contrary, A.B. 1400 is a change in the law extant prior to January 1, 2006.

In *North Coast Women's Care Medical Group v. Super. Ct.* (Dec. 5, 2005) \_ Cal.App.4th \_ [2005 WL 3251789], the first appellate court to consider the issue held that A.B. 1400 was a change to the existing law and to be applied prospectively only (analyzing the effect of A.B. 1400's adding "marital status" as an enumerated category in Civil Code section 51.) Thus, under *North Coast Women's Care Medical Group*, the amendments do not apply retroactively to incorporate gender and gender identity expressly into Civil Code section 51's statutory definition of sex. The issue remains whether respondents' dress code discriminates on the basis of "sex" as it existed prior to the passage of A.B. 1400. This decision concludes below that it does.

equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”<sup>3</sup>

Enacted in 1959, the Unruh Civil Rights Act amended a California 1897 statute declarative of a common law doctrine requiring business establishments “to serve all customers on reasonable terms without discrimination and ... to provide the kind of product or service reasonably to be expected from their economic role.” (*Koebke v. Bernardo Heights Country Club* (2005) 36 Cal.4th 839 (*Koebke*), citing *In re Cox* (1970) 3 Cal.3d 205 (*Cox*)).

It is well settled that a bar or nightclub, such as the one at issue in this case, qualifies as a “business establishment.” (*Stoumen v. Reilly* (1951) 37 Cal.2d 713, 716 [criticized on other grounds in *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1154-1155, [*Harris*]; *Gayer v. Polk Gulch, Inc.* (1991) 231 Cal.App.3d 515, 519.) Thus, Marion’s Place is a business establishment within the meaning of the Unruh Civil Rights Act.

It is important to recognize that the issue of barring all transgenders from the nightclub is not presented in this case. It is the mode of attire of customers, specifically transgender customers, that is being regulated. On its face, respondents’ dress code delineates permissible attire for customers expressly and unambiguously based on their sex—whether they are men or women. Respondents’ intent in adopting the policy, however, and the effect of the dress code as applied at Marion’s Place, were to regulate the dress of transgender customers. (See *Harris, supra*, 52 Cal.3d at p. 1175 [the Unruh Civil Rights Act requires a showing of intentional discrimination, and the Title VII or FEHA’s disparate impact analysis does not apply; however, relevant evidence of disparate impact may be probative of intentional discrimination in the appropriate case.”].) Respondents’ dress code, in effect, precludes male-to-female transgender customers from patronizing Marion’s Club if they choose to dress in the clothing most traditionally associated in this culture with exclusively female attire—a dress or skirt.

The Unruh Civil Rights Act is to be liberally construed to effectuate the purposes for which it was enacted and to promote justice. (*Rotary Club of Duarte v. Bd. of Directors of Rotary Internat., et al.* (1986) 178 Cal.App.3d 1035, 1046-1047; *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 28; *Winchell v. English* (1976) 62 Cal.App.3d 125, 128.) One of the policies underlying the enactment of the Unruh Civil Rights Act is the eradication of sex discrimination by business establishments in the furnishing of “accommodations, advantages, facilities, privileges, or services.” (Civ. Code, § 51; *Rotary Club of Duarte v. Bd. of Directors of Rotary Internat., et al., supra*, 178 Cal.App.3d at p. 1047; *Koire v. Metro Car Wash, supra*, 40 Cal.3d at p. 36; *Winchell v. English, supra*, 62 Cal.App.3d at p. 128.) The Unruh Civil Rights Act is “clearly a declaration of California’s public policy mandate and

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<sup>3</sup> Civil Code section 51 is incorporated into the FEHA by Government Code section 12948, making it an “unlawful practice” under the FEHA to deny the rights created by Civil Code section 51. (Gov. Code, § 12948; Civ. Code, § 51.)



objective that men and women be treated equally.” (*Koire v. Metro Car Wash, supra*, 40 Cal.3d at p. 37.)

California courts have held that, in addition to the particular forms of discrimination specifically enumerated in the statute, the Unruh Civil Rights Act also protects judicially recognized classifications: unconventional dress or appearance (*Cox, supra*, 3 Cal.3d at p. 217); family status (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721); sexual orientation (*Rolon v. Kulwitzky* (1984) 153 Cal.App.3d 289, 292); and persons under the age 18 (*O’Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790, 794). (*Hessians Motorcycle Club v. J. C. Flanagans et al.* (2001) 86 Cal.App.4th 833, 836 [*Hessians Motorcycle Club*].)

Thus, in addition to making arbitrary sex discrimination by a business unlawful, the Unruh Civil Rights Act also prohibits a business establishment’s barring a prospective customer solely on that individual’s manner or mode of dress or unorthodox appearance. (*Cox, supra*, 3 Cal.3d at p. 217.)<sup>4</sup> In *Cox*, the California Supreme Court held that the Unruh Civil Rights Act protected prospective customers with long hair and unconventional dress from arbitrary exclusion from a shopping center. (*Cox, supra*, 3 Cal.3d at p. 217.)<sup>5</sup>

This is not to suggest that dress codes *per se* are unlawful. As the *Cox* Court notes, “[a] business establishment may, of course, promulgate reasonable department regulations that are rationally related to the services performed and the facilities provided.” (*Cox, supra*, 3 Cal.3d at p. 217; see *Orloff v. Los Angeles Turf Club* (1951) 36 Cal.2d 734, 740-741.)

In *Harris*, the Supreme Court adopted a three-part analysis, subsequently consistently followed by the courts, to determine the future reach of the Unruh Civil Rights Act consistent with legislative intent. (*Harris, supra*, 52 Cal.3d at pp. 1159-1169; *Hessians Motor Cycle Club, supra*, 86 Cal.App.4th at p. 836.) In determining whether the dress code in issue in this case violates the Unruh Civil Rights Act, this decision follows the *Harris* three-part analysis by examining first, the language of the statute, second, the legitimate business interests asserted by the defendants, and finally, the consequences of allowing the discrimination claim. (*Ibid.*)

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<sup>4</sup> The Supreme Court’s decision in *Cox* predated the Legislature’s adding “sex” to the enumerated categories protected under the Unruh Civil Rights Act, in 1974. (Added by Stats. 1974, ch.1193, p. 2568, § 1.)

<sup>5</sup> Notwithstanding the Supreme Court’s admonition in *Harris, supra*, 52 Cal.3d at pp. 1148-1155, cautioning against courts’ future expansion of the Unruh Civil Rights Act’s reach, the *Harris* Court did not overrule *Cox* or other earlier decisions where courts had treated the statute’s list of statutory classifications as “illustrative rather than restrictive.” (*Harris, supra*, 52 Cal.3d at p. 1152; *Hessians Motorcycle Club, supra*, 86 Cal.App.4th at p. 836; *Scripps Clinic v. Superior Ct.* (2003) 108 Cal.App.4th 917, 932.)

## Application of *Harris*' Three-Part Analysis

### 1. Sex as a Protected Basis Under the Language of the Statute

By its clear and unambiguous wording, respondents' dress code expressly bars "men" from wearing dresses or skirts. "Women" are permitted to wear either pants or dresses. Thus, the dress code, on its face, treats prospective customers differently based on their sex.

Such a sex-based dress code in a business establishment may violate the Unruh Civil Rights Act. In *Hales v. Ojai Valley Inn and Country Club* (1977) 73 Cal.App.3d 25, 28, the court held that a male patron in a "leisure suit" who was refused service at the country club because he was not wearing a tie, while female patrons in leisure suits were served food and drink, stated a cause of action for sex discrimination under the Unruh Civil Rights Act.<sup>6</sup>

The Department and amicus curiae assert that respondents' dress code, as applied specifically and intentionally against transgenders, is a form of sex stereotyping. They argue that such sex stereotyping constitutes unlawful discrimination based on sex, as recognized by the United States Supreme Court in the Title VII employment case *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 250-251. In *Price Waterhouse*, the Supreme Court held that being treated differently by one's employer for not conforming to sex stereotypes of "femininity" is cognizable as sex discrimination under Title VII [42 U.S.C. § 2000e et seq.]. (*Ibid.*)<sup>7</sup>

The Unruh Civil Rights Act prohibits "all forms of stereotypical discrimination...." (*Koire v. Metro Car Wash, supra*, 40 Cal.3d at pp. 35-36.) In *Koire*, the California Supreme Court that a business establishment's policy of charging men and women different prices

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<sup>6</sup> The court in *Hales* reversed the trial court's sustaining of a demurrer without leave to amend, stating, "Whether the requirement that men wear ties but women need not is arbitrary or reasonable ... requires a factual showing as to what is meant by the term "leisure suit" and by a factual determination, based on the nature of defendant's establishment and on local community standards of dress for both sexes. (*Hales v. Ojai Valley Inn and Country Club, supra*, 73 Cal.App.3d at pp. 28-29.)

<sup>7</sup> Under Title VII, it is unlawful to fire a woman because she does not "look like a woman" if that entails imposing a stereotyped view of what constitutes "feminine appearance." (See *Price Waterhouse v. Hopkins, supra*, 490 U.S. at 235-37 [stating that supervisor's view that female employee should "dress more femininely" evidences sex stereotyping and discrimination].) Current federal jurisprudence, post-*Price Waterhouse*, has applied the Supreme Court's analysis to recognize the rights of transgenders and transsexuals to be protected from discrimination based on sex. (See for example, *Schwenk v Hartford* (9th Cir. 2000) 204 F.3d 1187 [transsexual prisoner assaulted by guard stated a claim for sex discrimination based on *Price Waterhouse*]; *Rosa v. Park West Bank & Trust Co.* (1st Cir. 2000) 214 F.3d 213 [bank customer in "feminine" attire, whose loan application was refused because he was not dressed in masculine clothes, stated a claim for sex discrimination, citing *Price Waterhouse*]; *Smith v. City of Salem* (6th Cir. 2004) 378 F.3d 566 [transsexual fire department officer who manifested a "feminine" appearance stated a claim for sex stereotyping under *Price Waterhouse*]; *Barnes v. City of Cincinnati* (6th Cir. 2005) 401 F.3d 729 [transsexual police officer established a prima facie case of sex discrimination involving sex stereotyping, as recognized in *Price Waterhouse*].)

constituted “sex-based discounts [which] impermissibly perpetuate sexual stereotypes,” in violation of the Unruh Civil Rights Act. (*Ibid.*)<sup>8</sup>

Here, respondents’ policy is both based on and promulgates the sex stereotype that men should not wear clothing traditionally associated with exclusively “feminine” attire. As such, the policy is a form of discrimination on sex-based stereotypes.<sup>9</sup> And as the Department and amicus persuasively argue, under the Unruh Civil Rights Act, the exclusion of a prospective customer for failing to conform to such sex stereotypes is unlawful, under *Koire v. Metro Car Wash*, unless it can be justified by a legitimate business reason.

Moreover, to the extent that dresses or skirts are not conventionally, in this culture, worn by men, respondent’s dress code on its face also regulates “unconventional” dress or appearance, a protected category first recognized by the California Supreme Court in *Cox*. (*Cox, supra*, 3 Cal.3d at p. 217.)

Whether respondents’ dress code is arbitrary discrimination that violates the Unruh Civil Rights Act, however, requires analysis of the legitimacy of respondents’ business interests underlying the dress code and whether there is a rational relationship between the dress code and respondents’ club and facilities. (*Harris, supra*, 52 Cal.3d at pp. 1162-1163; and *Cox, supra*, 3 Cal.3d at p. 217.)

## 2. Legitimate Business Reasons

Respondents assert that their dress code is justified for legitimate business reasons relating to the safety and security of the nightclub. Specifically, respondents assert that prior to institution of the dress code, customers mistook “men wearing dresses” for anatomical females, and fights resulted. Respondents also assert that some transgenders wearing skirts danced provocatively and offended other customers. Respondents next assert that some of the transgender individuals at the club were involved in acts of solicitation. Finally, respondents assert that it is more difficult to check for a weapon at the door if a “man is dressed in a skirt.”

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<sup>8</sup> The California Supreme Court has granted review of a recent Unruh Civil Rights Act decision where a club charged customers different admission fees based on their sex. (*Angelucci v. Century Supper Club*, review granted Oct. 19, 2005, S136154.)

<sup>9</sup> Respondents cite *Hessians Motor Cycle Club, supra*, 86 Cal.App.4th at p. 836, and *Gatto v. County of Sonoma* (2002) 98 Cal.App.4th 744, upholding, respectively, a sports bar’s ban on wearing motorcycle club colors, and a county fair’s ejection of a member of the Hell’s Angels who refused to take off motor cycle club insignia. Respondents argue that these cases authorize respondents’ dress code as a mere regulation of clothing. The Department, however, persuasively argues that these cases are distinguishable, because they apply to all individuals, regardless of any protected bases under the Unruh Civil Rights Act. This is a significant distinction. (Gov. Code, § 51, subd. (c).) Neither case regulates the right of entry on the basis of sex-based dress code, as occurred here.

The Department disputes the legitimacy of respondents' claimed business reasons, asserting that they lack evidentiary support in the record and that the business reasons are themselves based on impermissible sex and gender stereotypes.

While a business must take reasonable steps to preserve the safety and security of their place of business (*Cox, supra*, 3 Cal.3d at p. 217), the security issues identified by respondents here relate to customers' conduct, not their attire. The offending individuals, none of whom was identified in the record, were all customers at the club whose behavior deviated from socially acceptable norms—dancing lewdly or provocatively, fighting, carrying weapons or soliciting sex acts. Respondents' dress code is misguided, because it focuses on attire, not the underlying problem behavior. And notably, the record showed that it was non-transgender customers who instituted most of the objectionable conduct at the nightclub.

It is significant that there was never a suggestion or even a hint of evidence in the record that complainant Arreola ever participated in any improper conduct, whether at Marion's Place or elsewhere.

As the Court noted in *Cox*, "Clearly, an entrepreneur need not tolerate customers who damage property, injure others, or otherwise disrupt his business." (*Cox, supra*, 3 Cal.3d 205, at p. 217.) However, an individual who has committed no misconduct cannot be excluded solely because he or she falls within a class of persons whom the owner believes is more likely to engage in misconduct than other classes. (*Marina Point, Ltd. v. Wolfson, supra*, 30 Cal.3d at p. 725; *Orloff v. Los Angeles Turf Club, supra*, 36 Cal.2d at pp. 740-741; *Stoumen v. Reilly* (1951) 37 Cal.2d. at p. 716; *Rolon v. Kulwitzky, supra*, 153 Cal.App.3d at p. 292.)<sup>10</sup> Thus, under established Unruh case law, complainant may not be excluded simply because other customers, even transgender customers in skirts, engaged in misconduct.

Furthermore, the evidence in this case does not support respondents' assertion that the dress code bears a rational relationship to the safety and security of the business. The record showed, for example, that non-transgender female prostitutes came to respondents' club and solicited sex acts on the premises. Respondents, however, did not impose a dress code to regulate female prostitutes' clothing. Respondents further assert that the dress code prevented fights. The record showed, however, that most fights at the club did not involve transgenders in skirts. Respondents next assert that it is men who carry weapons, and that if men are allowed to wear skirts, security can not perform weapons searches. This argument is unpersuasive. Respondents, of course, have a legitimate interest in preventing customers' from bringing weapons into their club, but how a skirt thwarts an effective search was not made clear.

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<sup>10</sup> As the California Supreme Court noted in *Stoumen v. Reilly, supra*, 37 Cal 2d at p. 716:

Members of the public of lawful age have a right to patronize a public restaurant and bar so long as they are acting properly and are not committing illegal and immoral acts; the proprietor has no right to exclude or eject a person 'except for good cause,' and if he does so without good cause he is liable in damages. (See Civ. Code, §§ 51, 52).

Respondents also objected to lewd and provocative dancing by certain transgender individuals wearing short skirts. Respondent Lopez testified that these individuals would “wiggle their butts and it didn’t look right,” indicating that respondents’ objection had more to do with subjective opinion on what was “appropriate,” rather than issues of safety or security. One particular incident shortly preceded respondents’ adoption of the dress code. Alex Gomez, head of security, testified that one night a transgender dancing in a very short skirt bared male genitalia, and that when Gomez informed respondent Lopez of the incident, Lopez announced, “No more guys in skirts.” Respondents’ decision at that time was to bar all “men in skirts,” rather than address the conduct of that particular individual to prohibit nude displays of genitalia.

As applied, respondents’ dress code requires that respondents’ security personnel at the club entrance exercise the power to ascertain a prospective customer’s sex. As amicus persuasively argues, “Short of performing genital checks on all patrons ... wearing a dress or a skirt, ... security staff is forced to rely on unlawful sex stereotypes in order to enforce this dress code.” Such reliance on subjective perceptions of who appears “sufficiently feminine” or “too masculine” runs the inherent danger of arbitrarily imposing unlawful sex stereotypes to bar or permit a prospective customer into the club if wearing a skirt.

In sum, respondents’ articulated business reasons of safety and security are not shown in this case to be rationally related to respondents’ adoption of the dress code.

### 3. Consequences of Recognizing This Claim

The Department asserts that recognizing this claim furthers the purpose of the Unruh Civil Rights Act to guarantee access to public accommodations by all persons, regardless of their sex or other protected characteristic that has “no bearing on a person’s status as a responsible consumer.” (*Harris, supra*, 52 Cal.3d at p. 1168.) Respondents argue that if their dress code is found to violate the Unruh Civil Rights Act “no business owner may impose any dress code.”

The Department’s argument is persuasive. Recognizing complainant’s right not to be excluded from respondents’ club based on her apparel upholds the intent and underlying purposes of the Unruh Civil Rights Act. (*Harris, supra*, 52 Cal.3d at p. 1168.) The evidence did not establish that complainant’s wearing a dress or skirt had any bearing on her being a responsible customer in the nightclub.

Moreover, contrary to respondents' dire predictions, the right of a business to regulate the conduct of its business by reasonable department regulations is preserved.<sup>11</sup> This decision is a narrow one, finding that dress codes *per se* are not unlawful; however, where a dress code impermissibly and arbitrarily discriminates on the basis of sex, as occurred here, and is not justified by legitimate business reasons, it is in violation of the Unruh Civil Rights Act.

Thus, based on the foregoing, the Department established that respondents' dress code violates the Unruh Civil Rights Act, Civil Code section 51, as incorporated in the FEHA by Government Code section 12948.

### Respondents' Liability

The Department's second amended accusation charges Marion's Place, Inc., Marion Lopez dba Marion's Place, and Mary Ann Lopez Dewitt dba Marion's Place as respondents in this proceeding. The evidence established that Marion Lopez founded and owned the business known as Marion's Place in partnership with his late wife. The club business was incorporated in 2004, after the filing of the original accusation in this case.

The evidence showed that Marion's Place, Inc., acquired all of Marion's Place's assets and equipment, kept the same employees, principals and managers, and operated continuously in the same line of business and at the same location. Thus, Marion's Place, Inc., qualifies as a successor-in-interest business establishment under the FEHA. (See *DFEH v. La Victoria Tortilleria, Inc.* (Apr. 4, 1985) No. 85-04, 17-18, FEHC Precedential Decs. 1984-85, CEB 13 [1985 WL 62883 (Cal.F.E.H.C.)].) Accordingly both respondent Marion Lopez, as the owner at the time of the acts alleged herein, and Marion's Place, Inc., the successor entity, are liable for the violation of complainant's rights under the Unruh Civil Rights Act as incorporated in the FEHA.

The evidence was insufficient, however, to determine any liability of respondent Mary Ann Lopez Dewitt as an owner or in a capacity doing business as Marion's Place. Accordingly, the accusation against her will be dismissed.

### Remedy

Having established that respondents violated the Act, the Department is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury she

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<sup>11</sup> Notably, the Legislature has recognized California employers' right to impose dress codes in the workplace, consistent with their employees' gender identity, as follows:

Nothing in this part relating to gender-based discrimination affects the ability of an employer to require an employee to adhere to reasonable workplace appearance, grooming, and dress standards not precluded by other provisions of state or federal law, provided that an employer shall allow an employee to appear or dress consistently with the employee's gender identity. (Gov. Code, § 12949.)

suffered as a result. The Department must demonstrate, where necessary, the nature and extent of the resultant injury, and respondent must demonstrate any bar or excuse it asserts to any part of these remedies. (Gov. Code, § 12970, subd. (a); Cal. Code Regs., tit. 2, § 7286.9; *Donald Schriver, Inc. v. Fair Empl. & Hous. Com.* (1986) 220 Cal.App.3d 396, 407; *Dept. Fair Empl. & Hous. v. Madera County* (Apr. 26, 1990) No. 90-03, FEHC Precedential Decs. 1990-91, CEB 1, pp. 33-34 [1990 WL 312871 (Cal.F.E.H.C.)].)

The Department's second amended accusation seeks compensatory damages for emotional distress, out-of-pocket losses, attorney's fees, an administrative fine, and affirmative relief.

#### A. Make-Whole Relief

##### 1. Compensatory Damages for Emotional Distress

The Department seeks an award of compensatory damages as a result of emotional injury complainant suffered as a result of respondents' unlawful conduct. The Department seeks three times the amount of actual damages, citing Civil Code section 52 as authority for the Commission to treble any such damages awarded. The Department argues that Civil Code section 52 applies to Commission proceedings because Government Code section 12970, subdivision (a)(3), permits the Commission to order "actual damages as may be available in civil actions."

Government Code section 12970, subdivision (a)(3), added to the FEHA as part of broad revisions to the Commission's remedial authority on January 1, 1993 (Stats. 1992, ch. 911), provides that the Commission, on finding that a respondent has engaged in an unlawful practice, may order, *inter alia*:

The payment of actual damages as may be available in civil actions under this part, except as otherwise provided by this section.  
(Gov. Code § 12970, subd. (a)(3).)

"In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose, i.e., the object to be achieved and the evil to be prevented by the legislation. [citations omitted] (*Kizer v. Hanna* (1989) 48 Cal. 3d 1, 8 [citations omitted] 'If a statute's language is clear, then the Legislature is presumed to have meant what it said, and the plain meaning of the language governs.').)" (*Harris, supra*, 52 Cal.3d at p. 1159.)

The plain language of Government Code section 12970, subdivision (a)(3), is self-limiting. The Legislature expressly qualified the Commission's remedial authority under subdivision (a)(3) to reach actual damages awardable in civil proceedings under *this part*. "This part" is Part 2.8, the FEHA, Government Code sections 12900, et seq. Civil proceedings that can be maintained under "this part," as an alternative to the Commission's administrative proceedings, are found at Government Code sections 12965, subdivisions (b),

(c) and (d); 12980, subdivision (h); 12989; 12989.1; 12989.2 and 12989.3. The FEHA does not incorporate damages that may be awardable by a civil court under Civil Code section 52.

Moreover, in Government Code section 12970, subdivision (a)(3), the Legislature expressly excepted actual damages “as otherwise provided by this section.” This exception includes the statutory measure for compensatory damages for emotional distress awardable in administrative proceedings before the Commission. (Gov. Code § 12970, subd. (a)(3).)

As the Department is seeking compensatory damages for complainant’s emotional distress, and as such damages are expressly provided for at Government Code section 12970, subdivision (a)(3), the Department’s argument that Civil Code section 52 provides the measure of damages in this case, including the trebling of actual damages, is unavailing.<sup>12</sup>

Accordingly, Government Code section 12970, not Civil Code section 52, governs the award of damages by the Commission under Government Code section 12948, incorporating the Unruh Civil Rights Act.

Government Code section 12970, subdivision (a)(3), authorizes the Commission to award damages to compensate for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, \$150,000 per aggrieved person per respondent. (Gov. Code, § 12970, subd. (a)(3).) In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, § 12970, subd. (b); *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (Mar. 10, 1988) No. 88-05, FEHC Precedential Decs. 1988-89, CEB 4 [1988 WL 242635 (Cal.F.E.H.C.)].)

The evidence at hearing established that Arreola was humiliated and angry by being denied admission into Marion’s Place because she was dressed in a skirt. She felt embarrassed and humiliated to be judged a man, and felt ridiculed by the security staff. These feelings were particularly acute because it had happened in front of her friend, Jesus Morales. Up to that point, Arreola had very much enjoyed dressing her best to go out with her friends at a club. She no longer enjoyed confidence in her appearance because of her treatment at respondents’ nightclub. The rejection by Marion’s Place also made Arreola cry with feelings of powerlessness and anger, as for so many years she had been trying to

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<sup>12</sup> The Department’s second amended accusation also seeks complainant’s “reasonable attorney’s fees” under Civil Code section 52. Even if the Commission were authorized to apply Civil Code section 52, complainant was not represented by counsel in this proceeding.



live her life as a woman and had applied for political asylum, based on her transgender identity.

It was more than six or seven months before Arreola, with some reluctance, and only after being urged by friends, went back to Marion's Place. Too afraid to wear a skirt, she instead wore tailored pants, and was admitted to the nightclub. Arreola visited Marion's Place twice more in 2003. She remained fearful of being rejected at the door and embarrassed, so wore pants, not a skirt, and was admitted to the nightclub.

Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (a)(3), respondents will be ordered to pay complainant \$2,500 in actual damages for her emotional distress. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

## 2. Out of Pocket Losses

The Department sought an order directing respondents to pay complainant all costs and expenses incurred in filing and pursuing her complaint of discrimination.

Complainant credibly testified that she missed two days of work in order to attend the hearings, and that she normally worked an eight-hour shift and was paid at the hourly rate of \$7.25. To compensate complainant's out of pocket losses, she will be awarded \$116 in lost wages. Interest shall accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

## B. Administrative Fine

The Department seeks an order of an administrative fine for respondents' "willful, intentional and purposeful discrimination." The Commission has the authority to order administrative fines where it finds, by clear and convincing evidence, a respondent guilty of oppression, fraud, or malice, express or implied, as required by Civil Code section 3294. (Gov. Code, § 12970, subd. (d).) The amount of an administrative fine, in combination with any amount awarded to compensate for emotional distress, can not exceed \$150,000 per respondent. (Gov. Code, § 12970, subd. (a)(3).) The monies derived from any administrative fine awarded are to be deposited in the state's General Fund. (Gov. Code, § 12970, subd. (d).)

In determining the appropriate amount of an administrative fine, the Commission shall consider relevant evidence of, including but not limited to, the following: willful, intentional, or purposeful conduct; refusal to prevent or eliminate discrimination; conscious disregard for the rights of the complainant; commission of unlawful conduct; intimidation or harassment; conduct without just cause or excuse, or multiple violations of the Act. (Gov. Code, § 12970, subd. (d).)

Here, respondents' imposition of a dress code in an attempt to address issues between some of its transgender and heterosexual customers, while misconceived and arbitrary, and found in this decision to be in violation of the Unruh Civil Rights Act, does not rise to the level of willful, malicious, oppressive or fraudulent conduct envisaged under Government Code section 12970 or Civil Code section 3294. Thus, this proposed decision will not order an administrative fine.

### C. Affirmative Relief

The Department asks that respondents be ordered to: cease and desist from discriminating against complainant and all other of their customers on the bases of actual or perceived sex, sexual orientation or gender identity; develop and implement a written policy prohibiting discrimination; conduct training for all owners, managers, supervisors and employees regarding that policy; develop and implement a formal complaint process for customers; and the posting of notices, as forms of affirmative relief, under the Act.

The Act authorizes the Commission to order affirmative relief, including an order to cease and desist from any unlawful practice, and an order to take whatever other actions are necessary, in the Commission's judgment, to effectuate the purposes of the Act. (Gov. Code, § 12970, subd. (a)(5).)

Respondents will be ordered to cease and desist from imposing its dress code to the extent that it discriminates against individuals based on sex. Respondent will also be ordered to post a notice acknowledging its unlawful conduct toward complainant (Attachment A) along with a notice of customers' rights and obligations regarding unlawful discrimination under the Act (Attachment B). Finally, respondents will be ordered to provide training on discrimination under the Unruh Civil Rights Act to its corporate president, directors and officers, current managers and supervisors, and all employees currently working at Marion's Place.

### ORDER

1. The accusation against respondent Mary Ann Lopez Dewitt only is dismissed.
2. Respondents Marion Lopez and Marion's Place, Inc., shall immediately cease and desist from arbitrarily discriminating against customers and prospective customers based on sex.
3. Within 60 days of the effective date of this decision, respondents Marion Lopez and Marion's Place, Inc., jointly and severally, shall pay to complainant Francis Arreola the amount of \$2,500 in emotional distress damages. Interest shall accrue on this amount at the rate of ten percent per year, compounded annually, running from the effective date of this decision to the date of payment.

4. Within 60 days of the effective date of this decision, respondents Marion Lopez and Marion's Place, Inc., jointly and severally, shall pay to complainant Francis Arreola the amount of \$116 in lost wages. Interest shall accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

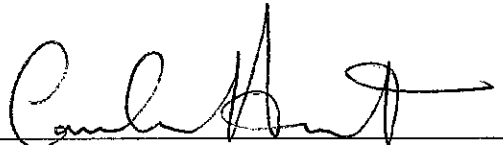
5. Within 60 days of the effective date of this decision, respondent Marion's Place, Inc., shall develop a written policy prohibiting discrimination and conduct training for all owners, managers, supervisors and employees currently working at Marion's Place, regarding that policy, at respondents' expense.

6. Within 10 days of the effective date of this decision, respondent Marion's Place, Inc.'s president or other authorized representative of respondent Marion's Place, Inc., shall complete, sign and post a clear and legible copy of the notice conforming to Attachment A. This notice shall not be reduced in size, defaced, altered or covered by any material. Attachment A shall be posted for a period of 90 working days.

7. Within 100 days after the effective date of this decision, respondents Marion Lopez and Marion's Place, Inc., shall notify the Department and the Commission in writing of the nature of their compliance with sections three through six of this Order.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the Department, Commission, respondent, and complainant.

DATED: January 9, 2006



CAROLINE L. HUNT  
Administrative Law Judge

ATTACHMENT A

MARION'S PLACE, INC.

NOTICE TO ALL PROSPECTIVE CUSTOMERS

Posted by Order of the  
FAIR EMPLOYMENT AND HOUSING COMMISSION  
An Agency of the State of California

After a full hearing, the California Fair Employment and Housing Commission has found that Marion's Place, Inc.'s dress code violated the Fair Employment and Housing Act and Unruh Civil Rights Act as a form of arbitrary discrimination against a prospective customer based on sex. (Gov. Code, § 12948, Civil Code § 51.) (*Dept. Fair Empl. & Hous. v. Marion's Place, Inc., et al.* (2006) No. 05-\_\_\_\_.)

As a result of the violation, Marion Lopez and Marion's Place, Inc., have been ordered to post this notice and to take the following actions:

1. Cease and desist from arbitrarily discriminating against individuals based on sex in violation of the provisions of the Unruh Civil Rights Act as incorporated into the Fair Employment and Housing Act.
2. Pay the customer compensatory damages for emotional distress and out of pocket damages.
3. Adopt a policy of customers' rights and remedies regarding discrimination based on sex and conduct training about these rights.
4. Post a notice concerning customers' rights and remedies regarding discrimination based on sex.

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Authorized Representative for Marion's  
Place, Inc.

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS FROM THE DATE OF POSTING AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

# **Attachment**

**N**



U.S. Citizenship  
and Immigration  
Services

HQOPRD 70/6

## Interoffice Memorandum

To: REGIONAL DIRECTORS  
SERVICE CENTER DIRECTORS  
DISTRICT DIRECTORS, INCLUDING OVERSEAS  
DIRECTOR, OFFICE OF INTERNATIONAL AFFAIRS

From: William R. Yates /s/  
Associate Director for Operations  
U.S. Citizenship and Immigration Services

Date: April 16, 2004

Re: Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by,  
Transsexual Individuals.

### I. Purpose

The purpose of this memorandum is to provide guidance related to the adjudication of petitions and applications filed by or on behalf of, or document requests by, transsexual individuals, including those who have either undergone sex reassignment surgery, or are in the process of doing so.

### II. Summary Conclusion

In the context of adjudicating spousal and fiancé petitions, CIS personnel shall not recognize the marriage, or intended marriage, between two individuals where one or both of the parties claims to be a transsexual, regardless of whether either individual has undergone sex reassignment surgery, or is in the process of doing so. In instances where an individual claims to be a transsexual, but the gender of the individual is not pertinent to the underlying application or petition, CIS personnel shall consider the merits of the application without regard to the applicant's transsexuality. Any documentation (whether original or replacement) issued as a result of the adjudication shall reflect the outward, claimed and otherwise documented sex of the applicant at the time of CIS document issuance.

### III. Background

No Federal statute or regulation addresses specifically the question of whether someone born a man or a woman can surgically change his or her sex. Transsexualism is a condition in which a person feels persistently uncomfortable about his or her anatomical sex, and often seeks medical treatment, including hormonal therapy and "sex reassignment surgery." The former Immigration and Naturalization Service (INS) generally took the position that absent specific statutory authority recognizing sex changes for purposes of Federal immigration law; it could not recognize that a person can change his or her sex. In arriving at this conclusion, the INS stressed the following. First, whether a "marriage" qualifies for immigration purposes is a matter of Federal, not State or foreign, law. *Adams v. Howerton*, 673 F.2d 1036 (9<sup>th</sup> Cir. 1981). It is well settled that, in enacting immigration and nationality laws, Congress intended the terms "spouse" and "marriage" to include only the partners to a legal, monogamous marriage between one man and one woman. *Howerton, supra*. Moreover, the 1996 Defense of Marriage Act (DOMA), 1 U.S.C. § 7, bans any Federal recognition of same-sex marriages for immigration purposes, and defines marriage as an institution involving a "man" and a "woman." The legislative history of the DOMA also clearly supports a traditional view of marriage, especially one that ties its basic character and importance to children, even though the marriage laws do not require that a couple be physically or mentally ready and able to procreate. See, H.Rep. 104-664, reprinted in 1996 U.S. Code Cong. & Admin. News 2905, 2916-19. For all of these reasons, the former INS maintained, and its successor U.S. Citizenship and Immigration Services (CIS) agrees, that no legal authority permits recognition of homosexual relationships as "marriages" for purposes of immigration and nationality laws, regardless of whether the relationship may be recognized as a "marriage" under the law where the relationship came into existence.

However, neither the DOMA nor any other Federal statute addresses whether a marriage between (for example) a man and a person born a man who has undergone surgery to become a woman should be recognized for immigration purposes or considered invalid as a same-sex marriage. While whether a marriage may be recognized for immigration purposes is a matter of Federal law, almost one-half of the states authorize the issuance of "new" birth certificates to individuals who have undergone sex reassignment surgery, as long as they present appropriate medical documentation. These same states also permit the issuance of marriage licenses for couples where one member presents a newly issued birth certificate reflecting his or her name and/or sex reassignment.

Differing state practices related to the issuance of new birth certificates and marriage licenses, coupled with a general lack of detailed guidance in this area, have resulted in inconsistent adjudications within the INS and CIS offices of cases involving transsexual applicants.

Current CIS policy disallows recognition of a change of sex so that a marriage between two persons born of the same sex can be considered bona fide for the purpose of spousal immigrant petitions. W. Yates, Memorandum for Regional Directors et al, Spousal Immigrant Visa Petitions (AFM Update AD 2-16) (March 20, 2003). With respect to replacement documents, CIS has required that the sex at birth as identified in the A-file be used unless the original birth certificate shows a CIS error with respect to sex at birth. Furthermore, if an individual indicates or claims a different gender than the one he or she was born with as reflected in his or her A-file, CIS policy has mandated use of the gender listed in the alien's file unless the applicant presents a Federal court order directing CIS to change its records. I-90 Replacement National SOP at 6-22.

#### IV. Guidance

##### A. Spousal and Fiancé(e) Petitions

To ensure consistency with the legislative intent reflected in the DOMA, and to reiterate existing CIS policy, CIS personnel shall not recognize the marriage, or intended marriage, between two individuals where one or both of the parties claims to be a transsexual, regardless of whether either individual has undergone sex reassignment surgery, or is in the process of doing so. For example, a Form I-130, Petition for Alien Relative, or Form I-129F, Petition for Alien Fiancé(e), cannot be approved if one or both of the parties to the petition was born a sex other than what they claim to be at the time of filing. This same policy applies to any immigration benefit that is granted based on a marital relationship. For example, an individual shall not be approved for H-4 status based on a marriage to a principal alien if either the principal alien or the potential H-4 beneficiary was born a sex other than what they claim to be at the time of filing.

When adjudicating petitions and applications based on a spousal relationship, CIS officers should be guided by objective indicators, and avoid imposing subjective assumptions or judgments. For example, if the previous name used by the petitioner or the beneficiary is different than that contained elsewhere in the application materials or A-file, and is a name that would normally be used by the opposite sex, officers should issue a request for evidence (RFE) to establish that person's identity. The RFE should request copies of all birth certificates issued to that person and any court (or other) documentation evidencing the legal name change. Again, a petition or application based on a spousal relationship may only be approved if it has been clearly established that the underlying marriage is recognizable for immigration purposes, in accordance with the policy outlined in this memorandum.

##### B. Other Petitions or Applications

In instances where an individual claims to be a transsexual, but the gender of the individual is not pertinent to the underlying application or petition, CIS personnel shall consider the merits of the application without regard to the applicant's transsexuality. Any documentation (whether original or replacement) issued as the result of the adjudication shall reflect the outward, claimed and otherwise documented sex of the applicant at the time of CIS document issuance. For example, an alien with an approved Form I-140, Immigrant Petition for Alien Worker, and Form I-485, Application to Register Permanent Residence or Adjust Status, who underwent sex reassignment surgery shall be issued a Form I-551, Permanent Resident Card, reflecting the claimed sex of the alien at the time of issuance (provided, of course, that the alien submits appropriate medical and other documentation establishing the alien's new claimed gender and legal name). It is important to note that applicants are no longer required, as previously indicated in the I-90 Replacement National SOP at 6-22, to present a Federal court order directing the agency to change its records where such an individual indicates or claims a different gender than the one he or she was born with as reflected in his or her A-file.

In instances where an individual is requesting a replacement document to acknowledge a name change resulting from sex reassignment surgery, the alien must submit the birth certificate issued at birth, the newly issued birth certificate reflecting the name and/or claimed sex reassignment, and the court order granting the legal name change. Examples of such applications include, but are not limited to, Form I-765,



Application for Employment Authorization, or Form I-90, Application to Replace Alien Registration Receipt Card. Name changes arising in all other situations should be reviewed in accordance with established procedures.

Finally, as is the context of any other adjudication, all CIS officers shall perform their duties in a manner that accords maximal respect, sensitivity and consideration when adjudicating any petition, application or document request filed by, or on behalf of, a transsexual individual.

V. Further Information

CIS personnel with questions regarding the policy presented in this memorandum should raise them to Headquarters Operations through appropriate supervisory channels.

# Attachment

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C

U.S. Department of Justice

Executive Office for Immigration Review  
Board of Immigration Appeals

IN RE JOSE MAURICIO LOVO-LARA, BENEFICIARY OF A VISA PETITION FILED BY  
GIA TERESA LOVO-CICCONE, PETITIONER  
File A95 076 067 - Nebraska Service Center  
Decided May 18, 2005

\*746 (1) The Defense of Marriage Act, [Pub. L. No. 104-199, 110 Stat. 2419 \(1996\)](#), does not preclude, for purposes of Federal law, recognition of a marriage involving a postoperative transsexual, where the marriage is considered by the State in which it was performed as one between two individuals of the opposite sex.

(2) A marriage between a postoperative transsexual and a person of the opposite sex may be the basis for benefits under section 201(b)(2)(A)(i) of the Immigration and Nationality Act, [8 U.S.C. § 1151\(b\)\(2\)\(A\)\(i\) \(2000\)](#), where the State in which the marriage occurred recognizes the change in sex of the postoperative transsexual and considers the marriage a valid heterosexual marriage.

FOR PETITIONER:

Sharon M. McGowan, Esquire,  
New York, New York

FOR THE DEPARTMENT OF HOMELAND SECURITY:

Allen Kenny,  
Service Center Counsel

BEFORE: Board Panel: GRANT, HESS and PAULEY, Board Members.

GRANT, Board Member:

In a decision dated August 3, 2004, the Nebraska Service Center ("NSC") director denied the visa petition filed by the petitioner to accord the beneficiary immediate relative status as her husband pursuant to section 201(b)(2)(A)(i) of the Immigration and Nationality Act, [8 U.S.C. § 1151\(b\)\(2\)\(A\)\(i\) \(2000\)](#). The petitioner has appealed from that decision. The appeal will be sustained.

I. FACTUAL AND PROCEDURAL HISTORY

The petitioner, a United States citizen, married the beneficiary, a native and citizen of El Salvador, in North Carolina on September 1, 2002. On November 20, 2002, the petitioner filed the instant visa petition on behalf of the beneficiary based on their marriage. The record reflects that when the petitioner was born in North Carolina on April 16, 1973, she was of the male \*747 sex. However, an affidavit from a physician reflects that on September 14, 2001, the petitioner had surgery that changed her sex designation completely from male to female.

In support of the visa petition, the petitioner submitted, among other documents, her North Carolina birth certificate, which lists her current name and indicates

(Cite as: 23 I. & N. Dec. 746)

that her sex is female; the affidavit from the physician verifying the surgery that changed the petitioner's sex designation; a North Carolina court order changing the petitioner's name to her current name; the North Carolina Register of Deeds marriage record reflecting the marriage of the petitioner and the beneficiary; and a North Carolina driver's license listing the petitioner's current name and indicating that her sex is female.

On August 3, 2004, the NSC director issued his decision denying the instant visa petition. In support of his denial, the NSC director stated that defining marriage under the immigration laws is a question of Federal law, which Congress clarified in 1996 by enacting the Defense of Marriage Act, [Pub. L. No. 104-199, 110 Stat. 2419 \(1996\)](#) ("DOMA"). Pursuant to the DOMA, in order to qualify as a marriage for purposes of Federal law, one partner to the marriage must be a man and the other partner must be a woman. In his decision the NSC director stated as follows:

While some states and countries have enacted laws that permit a person who has undergone sex change surgery to legally change the person's sex from one to the other, Congress has not addressed the issue. Consequently, without legislation from Congress officially recognizing a marriage where one of the parties has undergone sex change surgery ..., this Service has no legal basis on which to recognize a change of sex so that a marriage between two persons born of the same sex can be recognized.

The NSC director concluded that "since the petitioner and beneficiary were born of the same sex, their marriage is not considered valid for immigration purposes and the beneficiary is not eligible to be classified as the spouse of the petitioner under section 201(b) of the Act."

The petitioner filed a timely Notice of Appeal (Form EOIR-29) and subsequently filed a brief in support of her appeal. The Department of Homeland Security ("DHS") Service Center Counsel also filed a brief in support of the NSC director's decision.

## II. ISSUE

The issue presented by this case is whether a marriage between a postoperative male-to-female transsexual and a male can be the basis for benefits under section 201(b)(2)(A)(i) of the Act, where the State in which the marriage occurred recognizes the change in sex of the postoperative transsexual and considers the marriage valid.

## \*748 III. ANALYSIS

In order to determine whether a marriage is valid for immigration purposes, the relevant analysis involves determining first whether the marriage is valid under State law and then whether the marriage qualifies under the Act. See [Adams v. Howerton, 673 F.2d 1036, 1038 \(9th Cir. 1982\)](#). The issue of the validity of a marriage under State law is generally governed by the law of the place of celebration of the marriage. [Id. at 1038-39.](#)

In this case, the petitioner and the beneficiary were married in North Carolina. [Section 51-1 of the General Statutes of North Carolina](#) provides that "[a] valid and sufficient marriage is created by the consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other." The terms "male" and "female" are not defined in the statute, but [section 51-1](#) makes it clear by its terms that the State of North Carolina does not permit individuals of the same sex to marry each other. See also [N.C. Gen. Stat. § 51-1.2 \(2004\)](#).

[Section 130A-118 of the General Statutes of North Carolina](#) governs the amendment of birth certificates. That statute provides, in relevant part, as follows:

A new certificate of birth shall be made by the State Registrar when:

- ...
- (4) A written request from an individual is received by the State Registrar to

**(Cite as: 23 I. & N. Dec. 746)**

change the sex on that individual's birth record because of sex reassignment surgery, if the request is accompanied by a notarized statement from the physician who performed the sex reassignment surgery or from a physician licensed to practice medicine who has examined the individual and can certify that the person has undergone sex reassignment surgery.

[N.C. Gen. Stat. § 130A-118\(b\)\(4\) \(2004\)](#).

As noted above, the documents submitted by the petitioner reflect that she underwent sex reassignment surgery. Consequently, the State of North Carolina issued her a new birth certificate that lists her sex as female and registered her marriage to the beneficiary, listing her as the bride. In light of the above, we find that the petitioner's marriage to the beneficiary is considered valid under the laws of the State of North Carolina. We also note that neither the NSC director nor the DHS counsel has asserted anything to the contrary on this point.

The dispositive issue in this case, therefore, is whether the marriage of the petitioner and the beneficiary qualifies as a valid marriage under the Act. Section 201(b)(2)(A)(i) of the Act provides for immediate relative classification for the "children, spouses, and parents of a citizen of the United States." The Act does not define the word "spouse" in terms of the sex of the parties. However, the DOMA did provide a Federal definition of the terms "marriage" and "spouse" as follows:

**\*749** In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.

DOMA § 3(a), 110 Stat. at 2419 (codified at [1 U.S.C. § 7 \(2000\)](#)).

Neither the DOMA nor any other Federal law addresses the issue of how to define the sex of a postoperative transsexual or such designation's effect on a subsequent marriage of that individual. The failure of Federal law to address this issue formed the main basis for the NSC director's conclusion that this marriage cannot be found valid for immigration purposes. As stated above, the NSC director found that because Congress had not addressed the issue whether sex reassignment surgery serves to change an individual's sex, there was no legal basis on which to recognize a change of sex. Accordingly, he concluded that he must consider the marriage between the petitioner and the beneficiary to be a marriage between two persons of the same sex, which is expressly prohibited by the DOMA.

In determining the effect of the DOMA on this case, we look to the rules of statutory construction. The starting point in statutory construction is the language of the statute. See [INS v. Cardoza-Fonseca, 480 U.S. 421, 431 \(1987\)](#); [INS v. Phinpathya, 464 U.S. 183, 189 \(1984\)](#). If the language of the statute is clear and unambiguous, judicial inquiry is complete, as we clearly "must give effect to the unambiguously expressed intent of Congress." [Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 \(1984\)](#). We find that the language of section 3(a) of the DOMA, which provides that "the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife," is clear on its face. There is no question that a valid marriage can only be one between a man and a woman. Marriages between same-sex couples are clearly excluded.

This interpretation is further supported by the legislative history of the DOMA. The House Report specifically states that the DOMA was introduced in response to a 1993 decision of the Hawaii Supreme Court that raised the issue of the potential legality of same-sex marriages in Hawaii. See [H.R. Rep. No. 104-664, at 2-6 \(1996\)](#), reprinted in 1996 U.S.C.C.A.N. 2905, 2906-10, [1996 WL 391835 \(Leg. Hist.\)](#) (citing [Baehr v. Lewin, 852 P.2d 44 \(Haw. 1993\)](#) (remanding for application of strict scrutiny under the Hawaii equal protection clause to the question of the denial of marriage licenses to same-sex couples)). Throughout the House Report, the terms "same sex" and "homosexual" are used interchangeably. The House Report also repeatedly refers to the consequences of permitting homosexual couples to marry.

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However, with regard to one of the specific issues we are facing in this case, i.e., whether the DOMA applies to invalidate, for Federal purposes, a marriage involving a postoperative transsexual, it is notable that Congress did **\*750** not mention the [case of M.T. v. J.T., 355 A.2d 204 \(N.J. Super. Ct. App. Div. 1976\)](#), which recognized a transsexual marriage. [FN1] Nor did it mention the various State statutes that at the time of consideration of the DOMA provided for the legal recognition of a change of sex designation by postoperative transsexuals. Rather, Congress's focus, as indicated by its consistent reference to homosexuals in the floor discussions and in the House Report, was fixed on, and limited to, the issue of homosexual marriage.

Furthermore, a specific statement in the House Report's section-by-section analysis provides support for the conclusion that Congress did not consider transsexual marriages to be per se violative of the DOMA. According to that statement, "Prior to the Hawaii lawsuit, no State has ever permitted homosexual couples to marry. Accordingly, federal law could rely on state determinations of who was married without risk of inconsistency or endorsing same-sex 'marriage.'" [H.R. Rep. No. 104-664](#), at 30 (emphasis added). As noted above, M.T. v. J.T., supra, and the statutory provisions in several States recognizing a legal change of sex after surgery were in existence at the time the House Report was issued.

**\*751** We therefore conclude that the legislative history of the DOMA indicates that in enacting that statute, Congress only intended to restrict marriages between persons of the same sex. There is no indication that the DOMA was meant to apply to a marriage involving a postoperative transsexual where the marriage is considered by the State in which it was performed as one between two individuals of the opposite sex. [FN2]

There is also nothing in the legislative history to indicate that, other than in the limited area of same-sex marriages, Congress sought to overrule our long-standing case law holding that there is no Federal definition of marriage and that the validity of a particular marriage is determined by the law of the State where the marriage was celebrated. See [Matter of Hosseinian, 19 I&N Dec. 453, 455 \(BIA 1987\)](#). While we recognize, of course, that the ultimate issue of the validity of a marriage for immigration purposes is one of Federal law, that law has, from the inception of our nation, recognized that the regulation of marriage is almost exclusively a State matter. See, e.g., [Boddie v. Connecticut, 401 U.S. 371 \(1971\)](#); [Sherrer v. Sherrer, 334 U.S. 343 \(1948\)](#). [FN3] Interestingly, with regard to this point, the House Report stated the following:

If Hawaii or some other State eventually recognizes homosexual "marriage," Section 3 will mean simply that that "marriage" will not be recognized as a "marriage" for purposes of federal law. Other than this narrow federal requirement, the federal **\*752** government will continue to determine marital status in the same manner it does under current law.

[H.R. Rep. No. 104-664](#), at 31 (emphasis added). Therefore, we also conclude that Congress need not act affirmatively to authorize recognition of even an atypical marriage before such a marriage may be regarded as valid for immigration purposes, assuming that the marriage is not deemed invalid under applicable State law. [FN4]

The DHS counsel appears to argue that in determining whether a particular marriage is valid under the DOMA, we must look to the common meanings of the terms "man" and "woman," as they are used in the DOMA. Counsel asserts that these terms can be conclusively defined by an individual's chromosomal pattern, i.e., XX for female and XY for male, because such chromosomal patterns are immutable. However, this claim is subject to much debate within the medical community. According to medical experts, there are actually eight criteria that are typically used to determine an individual's sex. They are as follows:

1. Genetic or chromosomal sex -- XX or XY;
2. Gonadal sex -- testes or ovaries;
3. Internal morphologic sex -- seminal vesicles/prostate or vagina/uterus/fallopian tubes;

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4. External morphologic sex -- penis/scrotum or clitoris/labia;
5. Hormonal sex -- androgens or estrogens;
6. Phenotypic sex (secondary sexual features) -- facial and chest hair or breasts;
7. Assigned sex and gender of rearing; and
8. Sexual identity.

See Julie A. Greenberg, [Defining Male and Female: Intersexuality and the Collision Between Law and Biology](#), 41 Ariz. L. Rev. 265, 278 (1999).

While most individuals are born with 46 XX or XY chromosomes and all of the other factors listed above are congruent with their chromosomal pattern, there are certain individuals who have what is termed an "intersexual condition," where some of the above factors may be incongruent, or where an ambiguity within a factor may exist. [Id. at 281](#). For example, there are individuals with a chromosomal ambiguity who do not have the typical 46 XX or XY chromosomal pattern but instead have the chromosomal patterns of XXX, XXY, XXXY, XYY, XYYY, XYYYY, or XO. [Id.](#) Therefore, because a chromosomal pattern is not always the most accurate determination of an individual's gender, the DHS counsel's reliance on chromosomal patterns as the ultimate determinative factor is questionable.

\*753 Moreover, contrary to the suggestion of the DHS counsel, reliance on the sex designation provided on an individual's original birth certificate is not an accurate way to determine a person's gender. [FN5] Typically, such a determination is made by the birth attendant based on the appearance of the external genitalia. However, intersexed individuals may have the normal-appearing external genitalia of one sex, but have the chromosomal sex of the opposite gender. Greenberg, *supra*, at 283-92. Moreover, many incongruities between the above-noted factors for determining a person's sex, and even some ambiguities within a factor, are not discovered until the affected individuals reach the age of puberty and their bodies develop differently from what would be expected from their assigned gender. [Id. at 281-92](#).

We are not persuaded by the assertions of the DHS counsel that we should rely on a person's chromosomal pattern or the original birth record's gender designation in determining whether a marriage is between persons of the opposite sex. Consequently, for immigration purposes, we find it appropriate to determine an individual's gender based on the designation appearing on the current birth certificate issued to that person by the State in which he or she was born.

#### IV. CONCLUSION

We have long held that the validity of a marriage is determined by the law of the State where the marriage was celebrated. The State of North Carolina considers the petitioner to be a female under the law and deems her marriage to the beneficiary to be a valid opposite-sex marriage. We find that the DOMA does not preclude our recognition of this marriage for purposes of Federal law. As the NSC director did not raise any other issues regarding the validity of the marriage, we conclude that the marriage between the petitioner and the beneficiary may be the basis for benefits under section 201(b)(2)(A)(i) of the Act. Accordingly, the petitioner's appeal will be sustained, and the visa petition will be approved.

ORDER: The petitioner's appeal is sustained, and the visa petition is approved.

FN1. The case of *M.T. v. J.T.*, *supra*, was decided by the New Jersey Superior Court and involved a case where a wife had filed a complaint seeking support and maintenance from her husband. Her husband responded with the defense that his wife was actually a male-to-female transsexual and therefore their marriage was void. In rejecting his defense, the court upheld the validity of the marriage. The court began its analysis by accepting the "fundamental premise ... that a lawful marriage requires the performance of a ceremonial marriage of two persons of the opposite sex, a male and a female," and that New Jersey law would not permit recognition of a marriage between persons of the same sex. [Id. at 207](#). The court then directly confronted the issue "whether the marriage between a male and a postoperative

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transsexual, who has surgically changed her external sexual anatomy from male to female, is to be regarded as a lawful marriage between a man and a woman." *Id.* at 208. The court concluded that "for marital purposes if the anatomical or genital features of a genuine transsexual are made to conform to the person's gender, psyche or psychological sex, then identity by sex must be governed by the congruence of these standards." *Id.* at 209. On this basis, the court affirmed the finding of the trial court that the postoperative male-to-female transsexual was a female at the time of her marriage and entered into a valid marriage. *Id.* at 211.

In 1977, the Department of Health, Education, and Welfare prepared a Model State Vital Statistics Act that specifically provided for the amendment of a birth certificate upon proof of a change of sex by surgical procedure in section 21(e). See [In re Heilig, 816 A.2d 68, 82-83 \(Md. 2003\)](#). By 1996, at the time of consideration of the DOMA, several States had enacted legislation patterned after section 21(e) to provide a mechanism for amending a person's birth certificate to reflect a change of sex upon submission of a court order recognizing a sex change by surgical procedure. See, e.g., [Ariz. Rev. Stat. § 36-337 \(2005\)](#) (previously at § 36-326); [Cal. Health & Safety Code §§ 103425, 103430](#) (West 2005); [Haw. Rev. Stat. § 338-17.7 \(2003\)](#); [La. Rev. Stat. Ann. § 40:62 \(2004\)](#); [Mich. Comp. Laws § 333.2831 \(2005\)](#); [Neb. Rev. Stat. § 71-604.01 \(2004\)](#). A recent review of State legislation indicates that 22 States and the District of Columbia have now enacted provisions specifically permitting legal recognition of changes of sex by postoperative transsexuals. See *In re Heilig*, *supra*, at 83 & n.8 (collecting the relevant statutory provisions).

FN2. Our conclusion in this regard is consistent with an April 16, 2004, Interoffice Memorandum from William R. Yates, Associate Director for Operations of the United States Citizenship and Immigration Services ("CIS"), respecting the "Adjudication of Petitions and Applications Filed by or on Behalf of, or Document Requests by, Transsexual Individuals." That memorandum acknowledges that "neither the DOMA nor any other Federal statute addresses whether a marriage between (for example) a man and a person born a man who has undergone surgery to become a woman should be recognized for immigration purposes or considered invalid as a same-sex marriage."

FN3. In deference to this fundamental aspect of our system of government, Federal statutes purporting to outlaw certain types of marriage are few and far between, and no Federal statute affirmatively authorizing a type of marriage appears to exist. Apart from the DOMA, the only other Federal statutory provisions purporting to outlaw certain types of marriage that our research has discovered are found at section 101(a)(35) of the Act, [8 U.S.C. § 1101\(a\)\(35\) \(2000\)](#), which, in defining the terms "spouse," "husband," and "wife" for purposes of the Act, specifically excludes recognition of so-called proxy marriages "where the contracting parties thereto are not physically in the presence of each other, unless the marriage shall have been consummated," and in the Mann Act, which was construed by the Supreme Court to prohibit the interstate transportation of women for purposes of engaging in polygamy. See [Cleveland v. United States, 329 U.S. 14 \(1946\)](#); see also section 212(a)(10)(A) of the Act, [8 U.S.C. § 1182\(a\)\(10\)\(A\) \(2000\)](#) (rendering inadmissible any immigrant coming to the United States to practice polygamy). Section 3(a) of the DOMA would also appear to have as an incidental effect the declaration of invalidity of polygamy, as it provides that "the word 'marriage' means only a legal union between one man and one woman as husband and wife." (Emphasis added.)

FN4. This conclusion is entirely consistent with *Adams v. Howerton*, *supra*, relied on by the DHS. In that case, the court held that even if a homosexual marriage between an American citizen and an alien was valid under Colorado law, the parties were not "spouses" under section 201(b) of the Act. The court reached its result through an interpretation of section 201(b) itself and the term "spouse" as used therein, not by finding a general Federal public policy against the recognition of such marriages.

FN5. We note that there could be anomalous results if we refuse to recognize a postoperative transsexual's change of sex and instead consider the person to be of the sex determined at birth in accordance with the DHS's suggestion. For example,



**(Cite as: 23 I. & N. Dec. 746)**

the marriage of a postoperative male-to-female transsexual to a female in a State that recognizes marriages between both opposite-sex and same-sex couples would be considered valid, not only under State law, but also under Federal law, because, under the DHS's interpretation, the postoperative transsexual would still be considered a male, despite having the external genitalia of a female.

23 I. & N. Dec. 746, Interim Decision (BIA) 3512, 2005 WL 1181062 (BIA)

END OF DOCUMENT

# **Attachment**

**P**

TRANSGENDER LAW CENTER  
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Attorney for Applicant  
XXX XXX

In the Matter of Political Asylum  
Application of XXX XXX

A Number 97124550

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF POLITICAL  
ASYLUM APPLICATION OF XXX XXX

Date: August 21, 2003

Time: 8:30 am

*The Introduction Section and Part A were redacted*

**B. XXX is a Member of a Distinct Social Group that is Persecuted in Mexico**

XXX qualifies as a refugee because she was persecuted on the basis of her membership in a particular social group(s): transgender women and/or gay men with feminine characteristics or who wear women's clothing.

These characteristics are grounds for membership in a social group. *Hernandez-Montiel v. INS*,<sup>1</sup> *Matter of Toboso-Alfonso*.<sup>2</sup> In *Matter of Toboso-Alfonso* the Board of Immigration Appeals held that a gay man from Cuba was eligible for asylum due to his membership in a "particular social group." The BIA specifically held that homosexuality

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<sup>1</sup> 225 F.3d 1084 (9<sup>th</sup> Cir. 2000)

<sup>2</sup> 20 I&N Dec. 819 (BIA 1990)

was an immutable characteristic.<sup>3</sup> In June of 1994, the Attorney General designated *Matter of Toboso-Alfonso* as precedent in all matters involving the same issues.<sup>4</sup> In *Hernandez-Montiel*, the 9<sup>th</sup> Circuit similarly held that sexual identity (in that case referring to a transgender woman who was identified as a man in a dress) is “so fundamental to one’s identity that a person should not be required to abandon” it.<sup>5</sup>

Clearly, XXX fits into the same social group as Hernandez-Montiel. While XXX understands herself to be a woman, she is largely perceived by her family, neighbors, employers, and government officials as an effeminate man wearing women’s clothing. Other people with these same characteristics in XXX’s town and throughout Mexico were singled out for persecution and viewed as particularly vulnerable to coercion due to their social position.

C. **XXX Should be Granted Asylum because She Was Persecuted in Mexico**

In order to establish past persecution, an applicant for asylum must show:

He or she has suffered persecution in the past in his or her country of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group, or political opinion, and that he or she is unable or unwilling to return or avail himself or herself of the protection of that country owing to such persecution.<sup>6</sup>

The Ninth Circuit explained that persecution is “the infliction of suffering or hard on those who differ ... in a way regarded as offensive.”<sup>7</sup> Persecution need not come from the

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<sup>3</sup> *Matter of Toboso-Alfonso*, at 823.

<sup>4</sup> Attorney General Order No. 1895 (June 19, 1994).

<sup>5</sup> *Hernandez-Montiel* at 24.

<sup>6</sup> 8 C.F.R. sec 208.13(b)(1).

<sup>7</sup> *Hernandez-Montiel*, at 34-35 (quoting *Desir v. Ilchert*, 840 F.2d 723, 726-27 (9<sup>th</sup> Cir. 1988).)

government, but can come from persons the government is “unwilling or unable to control,” and no physical suffering is required.<sup>8</sup>

Furthermore, the Ninth Circuit has held that a claim of asylum may be based on substantial economic disadvantage resulting from any ground delineated by 8 U.S.C. § 1101(a)(42)(A). In *Gonzalez v. INS*,<sup>9</sup> an asylum applicant was found to have suffered past persecution due to the withholding of her ration card and administrative action against her business.<sup>10</sup> The standard for determining economic persecution was made clear in *Borca v. INS*.<sup>11</sup> In *Borca*, the court held that economic persecution exists when a “deliberate imposition of substantial economic disadvantage [occurs] on account” of a protected ground for asylum.<sup>12</sup>

As explained above and in her application, XXX was subjected to systematic and continuous persecution virtually her entire life in Mexico because she is transgender and perceived to be a gay man. Her father disdained her from the time she was born and made that point clear through neglect, physical abuse, and psychological abuse. She felt uncomfortable around his friends and feared being sexually assaulted by them. Her older siblings alienated her and her younger brother physically abused her. Not only did the other youth in her town assault adult transgender women and gay men, but they attacked her as well. The adults in her community, her teachers, and law enforcement officials all allowed this to happen to XXX and other transgender women and gay men. Clearly,

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<sup>8</sup> *Arteaga v. I.N.S.*, 826 F.2d 1227, 1231 (9<sup>th</sup> Cir. 1988)

<sup>9</sup> 82 F.3d 903 (C.A.9, 1996)

<sup>10</sup> *Gonzalez*, At 910.

<sup>11</sup> 77 F.3d 210 (C.A.7,1996)

<sup>12</sup> *Borca* at 216

government officials were either unwilling or unable to protect transgender women and gay men from physical and psychological persecution.

Furthermore, transgender women and gay men are severely alienated from the workforce. As is clear from XXX's declaration, transgender women and gay men are denied employment in almost every aspect of the economy. Such denial was clearly based on XXX's membership as a transgender woman who is perceived as an effeminate gay man. Even when XXX was able to find work she risked severe sexual harassment in order to keep her low paying job.

Finally, federal narcotics agents are known for preying on transgender women. XXX knows of at least one woman who was killed by an agent when she refused to do what he asked her to do. The murder was never properly investigated and the agent knew he could act with impunity. XXX herself was targeted by one of these government employees and her life was threatened when she failed to be coerced by him. Due to her social status and his government employment, XXX knew that her only choices were to go along with his illegal activity or flee her home, family, and friends.

The documentation in support of XXX's application indicates that the Mexican authorities do not treat violence against homosexuals as a serious problem. Reports, for example, indicate that between 1994 and 1999, 495 gay or lesbian Mexicans were murdered but that in none of the cases were the perpetrators caught.<sup>13</sup> Indeed, the documentation shows in chilling detail the circumstances surrounding the deaths of more than a hundred individuals, along with the attitude of many in the government, that violence is merely the result of "passionate acts that take place during homosexual activity." Many more homophobic crimes go unreported because of the reluctance of the

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<sup>13</sup> *495 Murders of Gays go Unpunished*, Diego Cevallos, Aug, 13, 1999 -- Attachement VI (A)(2)

Mexican press to discuss homosexuality. Additionally, Mexican politicians have continually mandated arrests and continuing programs of harassment of gays, transvestites, and transgender people. These programs leave transgender people with no where to turn for help. Thus, the evidence supports XXX's belief that the police would not help her if she faced a violent attack.

**D. XXX Should be Granted Asylum because She Is Presumed to Have a Well-Founded Fear of Future Persecution**

A finding of past persecution creates a regulatory presumption that the applicant has a well-founded fear of persecution, which provisionally establishes the applicant's refugee status and eligibility for asylum. 8 C.F.R. sec 208.13(b)(1)(i). In order to rebut the regulatory presumption, the immigration services "must overcome by a preponderance of the evidence that country conditions have changed."<sup>14</sup> The immigration service must show that "country conditions have changed to such an extent that the basis for the finding of past persecution no longer exists."<sup>15</sup>

"[O]nce the applicant has established that he experienced persecution in the past, the only relevant question is whether conditions in the country have so changed that the threat no longer exists upon his return."<sup>16</sup> Furthermore, "[t]here is no burden on the applicant to show that his past experienced reflected conditions nationwide."<sup>17</sup> When the

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<sup>14</sup> *Hernandez-Montiel*, at 40-41; *Surita v. I.N.S.*, 95 F. 3d 814, 821 (9<sup>th</sup> Cir. 1996).

<sup>15</sup> *In re S-A-*, 2000 BIA Lexis 12, 18 (June 27, 2000).

<sup>16</sup> *Singh v. Ilchert*, 63 F.3d 1501, 1510 (9<sup>th</sup> Circuit, 1995). *See also Cruz-Elizondo v. I.N.S.*, 1998 U.S. App Lexis 671, 16-17 (same).

<sup>17</sup> *Singh* at 1510; *Cruz-Elizondo*, at 16-17.

persecution is at the hands of the government, it is presumed that the persecution is nationwide.<sup>18</sup>

In *In re S-A-*, the respondent suffered persecution, not by the government, but her own father.<sup>19</sup> The BIA noted that although the persecution was not at the hands of the government, the evidence established that even if respondent had turned to the government for help, “the Moroccan authorities would have been unable or unwilling to control her father’s conduct.”<sup>20</sup> Having established past persecution, the BIA concluded that the immigration service did not rebut the presumption of future persecution: “The Service has made no showing that conditions in Morocco have materially changed such that, upon her return, the respondent could reasonably expect governmental protection from her persecutor.”<sup>21</sup>

As demonstrated in the evidence submitted with XXX’s application, XXX unquestionably suffered systematic past persecution throughout her life in Mexico, based on her status as a transgender woman. Thus, there is a legal presumption that XXX has a well-founded fear of future persecution on account of her membership in this social group if she were ever to return to Mexico.

There is no evidence that country conditions in Mexico have change since XXX left last year. People like her face employment discrimination, assault, harassment, and continual violence. In short, no fundamental change has occurred in Mexico that would lessen XXX’s fear of future persecution and she can not avoid future persecution by simply relocating to a different part of Mexico. Neither of the two regulatory basis for

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<sup>18</sup> *Singh v. Moschorak*, 53 F.3d 1031, 1034 (9<sup>th</sup> Cir. 1995) (“It has never been thought that there are safe places within a nation when it is the nation’s government that has engaged in the acts...”)

<sup>19</sup> *In fe S-A* at 18.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 19.



which a finding that the presumed fear of persecution is rebutted in this case can be satisfied by a preponderance of the evidence as required by 8 C.F.R. 208.13(b)(1)(ii).

*Parts E and F and the Conclusion Section were redacted.*

# Attachment

Q

**MODEL PROTOCOLS ON THE TREATMENT OF  
TRANSGENDER PERSONS  
BY SAN FRANCISCO COUNTY JAIL**

**National Lawyers Guild  
&  
City & County of San Francisco Human Rights Commission**

**August 7, 2002**

**By Murray D. Scheel and Claire Eustace**

# MODEL PROTOCOLS ON THE TREATMENT OF TRANSGENDER PERSONS<sup>1</sup> BY SAN FRANCISCO COUNTY JAIL

## INTRODUCTION

Following are model protocols for the treatment of transgender people by San Francisco County jail personnel.<sup>2</sup> These protocols will help jail staff prevent discrimination against transgender inmates by articulating rules that are both respectful of transgender inmates' needs and administrable. The protocols will also bring San Francisco County Jail into compliance with local anti-discrimination laws.<sup>3</sup> These protocols are to be used by jail staff as a supplement to the existing jail protocols in order to protect the rights of transgender inmates.

These protocols are based on research by the National Lawyers Guild and the San Francisco Human Rights Commission. The Guild and the Commission began the research in response to allegations from the San Francisco transgender community of discrimination by the San Francisco police department and San Francisco County jails. The research incorporated interviews with service providers, members of the transgender community, and staff from the San Francisco Police Department and County Jail. It also included a review of law journals, legal cases, statutes, and regulations regarding both the transgender community and criminal law. Finally, the policies and practice of San Francisco were compared with other jurisdictions in the Bay Area and beyond (Alameda, San Mateo, Marin, and Los Angeles Counties, as well as Multnomah County, OR ).

This research uncovered three broad problem areas: disrespectful forms of address in the jail; jail housing that is either unsafe or overly isolating; and failure to provide appropriate access to hormone therapy. As a result, four goals must be met: (1) law enforcement personnel must find ways to recognize and prevent behavior that harasses transgender people; (2) law enforcement personnel must address inmates in a manner appropriate to their gender identity; (3) the County must formally adopt a written housing policy that safely houses transgender people according to their gender identity, not their genitalia; and (4) hormone therapy must be available through county jails' medical services.

For the most part, the San Francisco County Jail makes a strong effort to address the needs of transgender inmates. Its system for housing inmates is similar to other well-developed jail systems (Compare Los Angeles County, CA; Multnomah County, OR) and forms the basic structure for some of the housing recommendations in these protocols. However, like elsewhere, current and former inmates in San Francisco complain of unnecessary strip searches, overly isolating housing, and staff who refuses to use respectful forms of address with transgender inmates.

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<sup>1</sup> The term "transgender" includes any transsexual or intersex prisoner. Transsexual people are individuals who perceive themselves as members of gender or sex that is different from the one they were assigned at birth. (Survivor Project: Intersex & Trans Basics, at <http://www.survivorproject.org/basic.html> (last visited 7/12/02)).

"Intersexuality is a set of medical conditions that features 'congenital anomaly of the reproductive and sexual system.' That is, a person with an intersex condition is born with sex chromosomes, external genitalia, or an internal reproductive system that is not considered "standard" for either male or female." (Intersex Society of North America, at <http://isna.org/faq/faq-medical.html#what> (last visited 7/24/02)).

<sup>2</sup> Portions of these protocols are designed to help institutions follow state regulations; for example, CAL. CODE REGS. tit. 15, § 1050 ( 2002) sets minimum standards for local detention facilities or jails and requires jail administrators to develop and implement a *written classification plan* designed to properly assign inmates to housing units.

<sup>3</sup> SAN FRANCISCO, CAL., ADMIN. CODE chs. 12A, 12B, 12C, and POLICE CODE art. 33, prohibit discrimination based on gender identity by the Police Department and Sheriff's Office and their contractors; the San Francisco Human Rights Commission has the authority to enforce these provisions.

The National Lawyers Guild and the San Francisco Human Rights Commission intend that these protocols be used by the San Francisco County Sheriff's Department to comply more fully with the City's gender identity non-discrimination ordinances, and by other jurisdictions as a model to guide their own actions. The document begins with the recommended protocols (pp. 4-7), followed by commentary explaining the basis for the recommendations (pp. 8-15). A list of sources (pp. 16-21), contacts for further information (p. 22), and an appendix with suggested protocols for use by police departments are also provided.

## PROTOCOLS

- I. Name Usage, Forms of Address, Searches:** the jail will process a transgender arrestee according to normal booking procedures, with the following exceptions.
- a. *Booking Name:* When booking a transgender arrestee, the San Francisco Sheriff's Department will use the Field Arrest Card from the arresting agency. If the Sheriff's Department is the arresting agency, it will include the arrestee's adopted name (i.e., non-birth name that the inmate uses in self-reference) in the booking, either as the primary name or as the "also known as" ("a.k.a."). The transgender inmate will be booked under the name appearing on the inmate's official identification (e.g., driver's license), as well as under an "a.k.a." name if applicable. If no I.D. is available, then the Sheriff's Department will use the adopted name for booking purposes, either as the primary or the "a.k.a." name. The arrestee's birth name will be used only if it is the arrestee's legal name or if there is a specific law enforcement reason for doing so, such as a prior arrest record. However, if the Sheriff's Department is not the arresting agency and the arresting agency failed to include the arrestee's adopted name on the Field Arrest Card, the Sheriff's Department will add the adopted name to the Field Arrest Card and to the record as an a.k.a.
  - b. *Forms of Address:* Jail staff will always address transgender inmates by the inmate's adopted name. This is true even if the inmate has not gotten legal recognition of the adopted name. In addressing or discussing an inmate who is transgender, staff will use pronouns appropriate for that person's gender identity. (e.g., "she, her, hers" for inmate who is male-to-female; "he, him, his" for an inmate who is female-to-male). If the staff is uncertain which pronouns are appropriate, then staff will respectfully ask the inmate for clarification.
  - c. *Strip Searches:* With respect to persons arrested for infraction or misdemeanor offenses that do not involve weapons, controlled substances, or violence, strip searches will only be conducted if "a peace officer has determined there is reasonable suspicion based on specific and articulable facts to believe such person is concealing a weapon or contraband."<sup>4</sup> All searches of the transgender inmate's person will be done by two officers of the gender requested by the transgender inmate. If the inmate does not specify a preference, then the search will be done by officers of the same gender as the transgender inmate's gender presentation (e.g., a female-to-male (FTM) inmate expressing no preference should be searched by a male officer). If gender presentation or identity is not clear to the inmate, the inmate will be searched by one female and one male officer.<sup>5</sup>

### *Conditions during Incarceration*

- II. Housing:** According to California law, a jail must implement a classification plan that includes segregating inmates on the basis of sex.<sup>6,7</sup> The regulation requiring the classification plan does not define "sex". At the time of the creation of these protocols, if jail staff determined that an inmate had

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<sup>4</sup> CAL. PENAL CODE § 4030 (f) (Deering 2001).

<sup>5</sup> When San Francisco County Jail strip searches a new inmate, the inmate strips in a private booth closed by a curtain. One deputy observes the inmate, while other deputies are present in the portion of the room not enclosed by the curtain. This arrangement provides adequate privacy and safety for the inmate.

<sup>6</sup> CAL. CODE REGS. tit. 15, § 1050 (a) (2002).

<sup>7</sup> Transsexual and intersexed inmates often do not fit into conventional categories of "male" and "female." Many do not think of their bodies as specifically "male" or "female."

“male” genitalia, that inmate was assigned to the men’s housing. If the jail staff determined that the inmate did not have “male” genitalia, then the inmate was assigned to the women’s housing.

- a. *Assigning Transgender Inmates to Housing:* All transgender inmates in San Francisco County jails will be assigned housing based on their gender identity, not their genitalia. Housing status will be determined first by referring to the inmate’s official identification (e.g., driver’s license), and the inmate will be housed according to the gender marker if the official identification is consistent with the inmate’s gender presentation.

If there is no updated or consistent I.D., then jail staff will ask the inmate whether she or he is female or male, and house accordingly. If the transgender inmate identifies as male and has had genital surgery, he will be housed in the male unit. For those transgender men who have not had genital surgery, the county will house them in a vulnerable male unit. If the transgender inmate identifies as female, she will be housed in the female section. For those transgender women who have not had genital surgery, the county is allowed to house them in a vulnerable female unit.<sup>8</sup>

If the inmate expresses uncertainty about her or his gender, then that inmate will be evaluated by a social worker or psychologist to determine appropriate housing.

When assigning the inmate to housing during the intake process, the jail will NOT use a strip search simply to determine genitalia.

The County jail is not allowed to house any transgender inmate in a unit based solely on the inmate’s birth-identified gender. Likewise, it is against good practice to force a transgender inmate into solitary housing.

- b. *Housing and Vulnerability:* An individualized assessment for appropriate housing will be made for each inmate, and reviewed periodically thereafter. Intake staff should assess the transgender inmate for potential vulnerability in the general prison population.

As part of the housing assessment for vulnerability, jail staff will ask the inmate his or her own opinion of his or her vulnerability in the general jail population. To solicit this information, the assessing staff member may ask questions such as:

- Have you been attacked before?
- Have you been in jail before? If so, how were you treated by other inmates?
- Do people call you names, intimidate, or harass you?
- Do you think other people might harm you because of the way you look?
- Among whom would you prefer to be housed (males, females, vulnerable unit)?

- c. *Inmates not suited to placement with a vulnerable population:* As with all other inmates, a transgender inmate will be assessed for factors that indicate the inmate would be an unusual security risk. If so, he or she should not be placed with other vulnerable inmates. However, this assessment must be made based on objective criteria, such as:

- (1) Inmate has been charged or convicted of a violent crime

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<sup>8</sup> As of July of 2002, San Francisco County jail had no “vulnerable female unit.”

- (2) A record of disruption or non-cooperation
  - (3) A history of escape attempts
  - (4) A history of victimizing others
  - (5) Marked or severe symptoms of mental illness that may require special housing
- d. *Protective Custody:* A transgender inmate will be housed in Protective Custody or Administrative Confinement ONLY when there is reason to believe the inmate presents a heightened risk to himself or herself or to others, and only for that limited period of time during which the heightened risk exists.

Grounds for Protective Custody may also exist if a transgender inmate has been, or fears they will be, vulnerable to victimization in any other housing setting, including shared vulnerable inmate housing. To guard against arbitrary confinement, all inmates in Protective Custody have a right to:

- a written statement explaining the reason for the confinement;
  - a brief plan for returning the inmate to less restrictive housing;
  - approximate time period for returning the inmate to shared housing units.
- e. *Access to Services:* Inmates in the unit for vulnerable prisoners will have access to all of the same services as inmates in the general population (e.g., education, jail jobs, drug treatment). The unit for vulnerable prisoners will not be so isolated from other facilities or prisoners that it effectively becomes a form of administrative confinement, nor will it be administered in a way that puts its inmates on unnecessary display.<sup>9</sup>
- f. *Clothing and Cosmetics:* Transgender inmates will be permitted to wear, and provided with, the same clothing and cosmetics as any other inmates of their gender (a male-to-female inmate is permitted to wear female clothing).
- g. *Genital Sex and Gender:* These model protocols favor housing based on gender identity rather than genitalia in order to treat transsexual persons appropriately with respect to their gender and to enhance safety. For example:

An MTF pre-operative or non-operative transsexual with male genitalia who is on hormones is more safely housed with females than even with vulnerable males.

An FTM pre-operative or non-operative transsexual with female genitalia is more safely housed with vulnerable males than with the general population of women. Housing FTMs who have not had genital surgery with vulnerable males rather than with the women also ensures the safety of the women since FTMs may be physically stronger than most women.

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<sup>9</sup> Inmates housed in the B pod of County Jail 8 have complained about a sense of being on display because after official “lights out” at night, the lights in their cells remained on longer than those in other parts of the unit.



### **III. Medical Treatment**

- a. The jail medical staff will be trained on the evaluation and counseling process used to determine whether hormones are appropriate therapy, so that the jail medical staff may either:
  - continue the transgender inmate on his or her evaluation process; or
  - begin hormone therapy for an inmate who has been identified as a candidate for hormone therapy, but did not begin therapy prior to incarceration; or,
  - determine that a previously undiagnosed inmate is a good candidate for hormone therapy and prescribe that therapy.
- b. Transgender inmates shall have access to all other necessary medical and mental health care, including psychotherapy if needed.
- c. Jail medical staff will be trained on the interactions between hormones and HIV, other STD's, and other common ailments.

### **IV. Alternative Dispute Resolution**

There are existing means of redress available to all inmates; however, agencies outside the San Francisco County Sheriff's Department continue to receive complaints about the treatment of transgender inmates. These complaints suggest that the available methods of redress are ineffective. We recommend that the San Francisco Human Rights Commission, as designated by the San Francisco Sheriff's Department, be given the ability to mediate disputes between transgender prisoners and jail personnel, such disputes limited to issues covered by these protocols.

# **Attachment**

**R**

211 F.3d 1275 (Table), 2000 WL 222611 (9th Cir.(Cal.))

**Unpublished Disposition**

(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)

United States Court of Appeals, Ninth Circuit.

Torey Tuesday SOUTH, Plaintiff-Appellee,

v.

James H. GOMEZ, Director, individually and as Director of California Dept of  
Corrections, Sacramento, Defendant,

and

STEVIIG; Benson; Weaver; Battalino; Duncan, Defendants--Appellants.

No. 99-15976.

DC No. CV-95-01070-DFL.

Argued and Submitted Dec. 7, 1999.

Decided Feb. 25, 2000.

Appeal from the United States District Court for the Eastern District of California, David  
F. Levi, District Judge, Presiding.

Before ALDISERT, [\[FN\\*\\*\]](#) [O'SCANNLAIN](#), and [HAWKINS](#), Circuit Judges.

[FN\\*\\*](#). Ruggero J. Aldisert, Senior Judge, United States Court of Appeals for the Third  
Circuit, sitting by designation.

MEMORANDUM [\[FN\\*\]](#)

[FN\\*](#). This disposition is not appropriate for publication and may not be cited to or by the  
courts of this circuit except as provided by 9th Cir. R. 36-3.

**\*\*1** Five California state corrections officials (collectively, "Battalino") appeal the denial  
of their qualified immunity defense in a damages action brought by Torey Tuesday  
South, a former California state prisoner, under [42 U.S.C. § 1983](#). The district court  
denied Battalino qualified immunity after finding that Battalino, by abruptly and  
peremptorily terminating South's cycle of female hormone therapy, acted with deliberate  
indifference to her serious medical need.

On appeal, Battalino argues that he is entitled to qualified immunity because any right of  
South that he allegedly violated was not clearly established under existing law. The facts  
and prior proceedings are known to the parties; they are not restated herein except as  
necessary.

I

Before proceeding to the merits, a brief discussion of our jurisdiction is appropriate.  
Although the district court's denial of qualified immunity to Battalino was accompanied  
by a grant of summary judgment in favor of South on the issue of liability, the district  
court's order is not final within the meaning of [28 U.S.C. § 1291](#) because South's  
damages remain to be determined at trial. See, e.g., [In re Frontier Properties, Inc.](#), [979](#)  
[F.2d 1358, 1362 \(9th Cir.1992\)](#); [Hain Pure Food Co. Inc. v. Sona Food Prods. Co.](#), [618](#)  
[F.2d 521 \(9th Cir.1980\)](#). Appeal from the district court's order is thus permissible only  
on an interlocutory basis.

The interlocutory nature of this appeal places strict limits upon our jurisdiction. A denial  
of qualified immunity is an appealable "final decision" under [28 U.S.C. § 1291](#) "to the

extent that it turns on an issue of law." [Mitchell v. Forsyth, 472 U.S. 511, 530 \(1985\)](#). We therefore have jurisdiction to decide the legal questions of (1) whether the district court correctly defined the right allegedly violated by Battalino and (2) whether this right was clearly established under existing law. See [id. at 528](#). Under [Johnson v. Jones, 515 U.S. 304 \(1995\)](#), however, we lack jurisdiction to review factual findings by the district court, even findings made in the qualified immunity context. To the extent that Battalino disputes the district court's factual findings with respect to Battalino's deliberate indifference to South's serious medical need, we lack jurisdiction over his claims.

## II

Battalino claims that he is entitled to qualified immunity because inmates suffering from gender dysphoria (more commonly known as transsexualism), such as South, have no clearly established right to female hormone therapy. Battalino attempts to define the right at issue too narrowly. Our precedents make clear that with respect to prisoner medical claims, the right at issue should be defined as a prisoner's Eighth Amendment right "to officials who are not 'deliberately indifferent to serious medical needs.'" [Kelley v. Borg, 60 F.3d 664, 667 \(9th Cir.1995\)](#) (quoting [Estelle v. Gamble, 429 U.S. 97, 106 \(1976\)](#)). We have repeatedly rejected attempts by defendants to define the right allegedly violated with greater specificity. See [Jackson v. McIntosh, 90 F.3d 330, 332 \(9th Cir.1996\)](#) (rejecting an attempt by prison doctors to define the issue as whether established law required them to provide a kidney transplant to a prisoner on dialysis); [Carnell v. Grimm, 74 F.3d 977, 979- 80 \(9th Cir.1996\)](#); [Kelley, 60 F.3d at 667](#) ("To hold that the magistrate judge should have defined the right at issue more narrowly ... would be to allow Appellants, and future defendants, to define away all potential claims."). Thus, our cases make clear that (1) the right allegedly violated by Battalino was South's Eighth Amendment right not to have prison officials be deliberately indifferent to her serious medical needs, and (2) this right was clearly established at the time of the challenged actions by Battalino.

**\*\*2** Battalino attempts to extricate his case from the unbroken line of precedents set forth above by citing cases in which other circuits found no Eighth Amendment violation when prison officials denied transsexual inmates long-term female hormone therapy. As the district court correctly recognized, however, the case at bar differs in several important respects from the cases relied upon by Battalino:

The question in this case ... is far narrower [than in the cases cited by Battalino]. The critical element here is that plaintiff *was already receiving female hormones* when she was transferred from [one prison to a second prison]. ... Upon her transfer [to the second prison], the hormones were abruptly cut off, but not because of any considered medical judgment. Thus, the question becomes whether Eighth Amendment standards [can be] violated when a course of hormone treatment is abruptly terminated. All of the doctors and experts in this case are of one opinion that once hormone therapy is begun it should only be terminated by gradually tapering it, and not by halting it peremptorily. In light of the particular facts of this case, as set forth above by the district court, the decisions relied upon by Battalino are inapposite. In sum, the district court correctly identified the right of South that was allegedly violated and concluded that it was clearly established at the time of the challenged actions by Battalino.

## III

For the foregoing reasons, the district court's denial of qualified immunity to Battalino was proper.

AFFIRMED.

C.A.9 (Cal.),2000.

South v. Gomez

211 F.3d 1275 (Table), 2000 WL 222611 (9th Cir.(Cal.)) Unpublished Disposition

**Attachment**

**S**

BILL NUMBER: AB 1586 CHAPTERED  
BILL TEXT

CHAPTER 421

FILED WITH SECRETARY OF STATE SEPTEMBER 29, 2005

APPROVED BY GOVERNOR SEPTEMBER 29, 2005

PASSED THE ASSEMBLY SEPTEMBER 7, 2005

PASSED THE SENATE SEPTEMBER 6, 2005

AMENDED IN SENATE JULY 1, 2005

AMENDED IN SENATE JUNE 20, 2005

INTRODUCED BY Assembly Members Koretz, Goldberg, Laird, Leno, and Lieber

(Principal coauthor: Senator Kuehl)

(Coauthors: Senators Kehoe and Migden)

FEBRUARY 22, 2005

An act to amend Section 1365.5 of the Health and Safety Code, and to amend Section 10140 of the Insurance Code, relating to insurance.

LEGISLATIVE COUNSEL'S DIGEST

AB 1586, Koretz Insurers: health care service plans: discrimination.

Existing law provides for licensing and regulation of health care service plans by the Department of Managed Health Care. Existing law provides for licensing and regulation of insurers by the Department of Insurance.

Existing law prohibits certain discriminatory acts by health care service plans and insurers. With respect to health care service plans, certain discrimination based on the sex of an enrollee is prohibited. With respect to life and disability insurers, an insurer may not refuse to accept an insurance application, or issue or cancel insurance under conditions less favorable to the insured than in other comparable cases, except for reasons applicable alike to persons of every race, color, religion, national origin, ancestry, or sexual orientation. The Insurance Commissioner has authority to assess specified administrative penalties for a violation of these provisions.

This bill would add "sex" to the insurance provision governing life and disability insurers. The bill, for purposes of both of these provisions, would provide that "sex" shall have the same meaning as "gender," as defined. The bill would state the intent of the Legislature in that regard.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1365.5 of the Health and Safety Code is amended to read:

1365.5. (a) No health care service plan or specialized health care service plan shall refuse to enter into any contract or shall cancel or decline to renew or reinstate any contract because of the

race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, or age of any contracting party, prospective contracting party, or person reasonably expected to benefit from that contract as a subscriber, enrollee, member, or otherwise.

(b) The terms of any contract shall not be modified, and the benefits or coverage of any contract shall not be subject to any limitations, exceptions, exclusions, reductions, copayments, coinsurance, deductibles, reservations, or premium, price, or charge differentials, or other modifications because of the race, color, national origin, ancestry, religion, sex, marital status, sexual orientation, or age of any contracting party, potential contracting party, or person reasonably expected to benefit from that contract as a subscriber, enrollee, member, or otherwise; except that premium, price, or charge differentials because of the sex or age of any individual when based on objective, valid, and up-to-date statistical and actuarial data are not prohibited. Nothing in this section shall be construed to permit a health care service plan to charge different premium rates to individual enrollees within the same group solely on the basis of the enrollee's sex.

(c) It shall be deemed a violation of subdivision (a) for any health care service plan to utilize marital status, living arrangements, occupation, sex, beneficiary designation, ZIP Codes or other territorial classification, or any combination thereof for the purpose of establishing sexual orientation. Nothing in this section shall be construed to alter in any manner the existing law prohibiting health care service plans from conducting tests for the presence of human immunodeficiency virus or evidence thereof.

(d) This section shall not be construed to limit the authority of the director to adopt or enforce regulations prohibiting discrimination because of sex, marital status, or sexual orientation.

(e) "Sex" as used in this section shall have the same meaning as "gender," as defined in Section 422.56 of the Penal Code.

SEC. 2. Section 10140 of the Insurance Code is amended to read:

10140. (a) No admitted insurer, licensed to issue life or disability insurance, shall fail or refuse to accept an application for that insurance, to issue that insurance to an applicant therefor, or issue or cancel that insurance, under conditions less favorable to the insured than in other comparable cases, except for reasons applicable alike to persons of every race, color, religion, sex, national origin, ancestry, or sexual orientation. Race, color, religion, national origin, ancestry, or sexual orientation shall not, of itself, constitute a condition or risk for which a higher rate, premium, or charge may be required of the insured for that insurance. Unless otherwise prohibited by law, premium, price, or charge differentials because of the sex of any individual when based on objective, valid, and up-to-date statistical and actuarial data or sound underwriting practices are not prohibited.

(b) Except as otherwise permitted by law, no admitted insurer, licensed to issue disability insurance policies for hospital, medical, and surgical expenses, shall fail or refuse to accept an application for that insurance, fail or refuse to issue that insurance to an applicant therefor, cancel that insurance, refuse to renew that insurance, charge a higher rate or premium for that insurance, or offer or provide different terms, conditions, or benefits, or place a limitation on coverage under that insurance, on

the basis of a person's genetic characteristics that may, under some circumstances, be associated with disability in that person or that person's offspring.

(c) No admitted insurer, licensed to issue disability insurance for hospital, medical, and surgical expenses, shall seek information about a person's genetic characteristics for any nontherapeutic purpose.

(d) No discrimination shall be made in the fees or commissions of agents or brokers for writing or renewing a policy of disability insurance, other than disability income, on the basis of a person's genetic characteristics that may, under some circumstances, be associated with disability in that person or that person's offspring.

(e) It shall be deemed a violation of subdivision (a) for any insurer to consider sexual orientation in its underwriting criteria or to utilize marital status, living arrangements, occupation, sex, beneficiary designation, ZIP Codes or other territorial classification within this state, or any combination thereof for the purpose of establishing sexual orientation or determining whether to require a test for the presence of the human immunodeficiency virus or antibodies to that virus, where that testing is otherwise permitted by law. Nothing in this section shall be construed to alter, expand, or limit in any manner the existing law respecting the authority of insurers to conduct tests for the presence of human immunodeficiency virus or evidence thereof.

(f) This section shall not be construed to limit the authority of the commissioner to adopt regulations prohibiting discrimination because of sex, marital status, or sexual orientation or to enforce these regulations, whether adopted before or on or after January 1, 1991.

(g) "Genetic characteristics" as used in this section shall have the same meaning as defined in Section 10123.3.

(h) "Sex" as used in this section shall have the same meaning as "gender," as defined in Section 422.56 of the Penal Code.

SEC. 3. This act is not intended to mandate that health care service plans or insurers must provide coverage for any particular benefit, nor is it intended to prohibit sound underwriting practices or criteria based on objective, valid, and up-to-date statistical and actuarial data. Rather, the purpose of this act is to prohibit plans and insurers from denying an individual a plan contract or policy, or coverage for a benefit included in the contract or policy, based on the person's sex, as defined.



# **Attachment**

**T**

## Position Statement

June 18, 2003

Administrative Law Judge XX  
Department of Social Services  
P.O. Box 944243 MS 19-37  
Sacramento, CA 94244-2430

**Re: XX**

Dear Judge XX:

This case concerns Central Coast Alliance for Health's denial of Treatment Authorization Request Control Number XX.

### **I. STATEMENT OF FACTS**

Mr. XX XX is a Medi-Cal client who receives health services from the Central Coast Alliance for Health. Mr. XX is also a female to male transsexual. From an early age, Mr. XX has known that his physical body did not correspond to his own, internal understanding of his gender. (June 16<sup>th</sup> Declaration of XX. Exhibit A). This incongruity has caused Mr. XX a near lifetime of emotional and mental stress and anguish. (Exhibit A).

Later in life, Mr. XX was diagnosed as having Gender Identity Disorder (June 17, 2003 Letter from Dr. XX. Exhibit B). Following the advice of medical professionals made in accordance with well recognized medical protocols, Mr. XX has begun to transition from female to male. He has begun to live full-time as a man and started to undergo hormone therapy in late 2001 in order to alter several of his sexual characteristics. (June 21, 2002 letter from Dr. XX. Exhibit C).

In or around the summer of 2002, Mr. XX began to consider undergoing a double mastectomy as a part of his transition. For a number of years, Mr. XX has been binding his breasts with an ace bandage. (Exhibit A). Mr. XX does so in order to better conform his physical appearance to his internal understanding of his gender. When Mr. XX does not bind his breast he suffers mental and emotional anguish manifesting as feelings of depression, anxiety, anger management problems, and an inability to form meaningful social relationships. (Exhibit A).

However, binding his breasts puts Mr. XX in physical pain and compromises his well-being. The binding is physically uncomfortable and often results in painful acne. (Exhibit A). It can also prevent him from participating in physical exercise as it often causes him to overheat. (Exhibit A).

In addition, even when he is binding, Mr. XX experiences anxiety about having breasts. This anxiety manifests in a fear that his male friends will discover his binding. Mr. XX fears that such a discovery will lead to verbal harassment, physical assault, and/or social isolation. (Exhibit A). The very presence of his breast, whether bound or not, has also negatively affected his ability to establish a healthy romantic relationship. (Exhibit A). Again following medical advice and well recognized medical protocols, Mr. XX sought a surgeon to perform a double mastectomy.

In December of 2002, Mr. XX's surgeon, Dr. XX, submitted a Treatment Authorization Request to the Central Coast Alliance for Health for a Bilateral Mastectomy. (Treatment Authorization Request Control Number XX. Exhibit D). The underlying medical necessity of the Treatment Authorization Request (TAR) was two-fold: breast hypertrophy and gender dysphoria. (Exhibit D). This request was supported by letters from Dr. XX (Exhibit C), Dr. XX (July 1, 2002 letter from Dr. XX. Exhibit E), and XX (June 19, 2002 letter from XX. Exhibit F).

In a letter dated February 11, 2003, Dr. XX of the Central Coast Alliance for Health informed Mr. XX that his TAR had been denied. (February 11<sup>th</sup> letter from Dr. XX. Exhibit G). While that letter briefly mentioned Mr. XX's transition from female to male, the overwhelming majority of the letter was devoted to a discussion of Mr. XX's potential risks for breast cancer. In fact, the only stated reason for denying the TAR was that "prophylactic bilateral mastectomies are not medically indicated" to prevent breast cancer. (Exhibit G).

On April 21, 2003, Mr. XX filed a Request for a State Hearing on the basis that the findings of Dr. XX were erroneous. (Request for State Hearing. Exhibit H). Subsequent to that denial, Mr. XX has obtained additional letters from Dr. XX (May 22, 2003 letter from Dr. XX. Exhibit I), XX (May 28, 2003 letter from XX. Exhibit J), and Dr. XX

## II. DISCUSSION

### ***A. Central Coast Alliance for Health Failed to Fully Consider both Listed Medical Necessities Underlying Mr. XX's TAR.***

The TAR submitted for Mr. XX clearly lists two Diagnosis Descriptions underlying his request: breast hypertrophy and gender dysphoria. Yet, the Central Coast Alliance for Health only considered the medical necessity of the breast hypertrophy.

In his letter, Dr. XX assures Mr. XX that his TAR and accompanying materials were “reviewed in full.” (Exhibit G). And while Dr. XX quotes Dr. XX that the requested procedure will “greatly assist in conforming his body with his male identity,” the only explanation he provides for denying Mr. XX’s TAR was that prophylactic bilateral mastectomies “are not medically indicated.” (Exhibit G).

In fact, to this date, Central Coast Alliance for Health has produced no evidence that Mr. XX’s request for a double mastectomy based on his GID diagnosis has even been considered.

### ***B. A Double Mastectomy is a Commonly Prescribed Treatment for Female to Male Transsexuals Diagnosed with GID***

As a medical condition, transsexualism is defined as “the desire to change one’s anatomic sexual characteristics to conform physically with one’s perception of self as a member of the opposite sex.” Stedman’s Medical Dictionary 1841 (26th ed.1995). Widely referred to in the medical and psychiatric community as “gender dysphoria,” “transsexualism is classified as a specific form of a broader psychiatric disorder termed “gender identity disorder.” American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders IV (1994).

The leading medical protocols guiding health care providers working with transgender patients are the Harry Benjamin International Gender Dysphoria Association’s Standards of Care. (HBIGDA Standards of Care. Exhibit K.) Section X of the standards of care reads:

“In persons diagnosed with transsexualism or profound GID, sex reassignment surgery, along with hormone therapy and real-life experience, is a treatment that has proven to be effective. Such a therapeutic regimen, when prescribed or recommended by qualified practitioners, *is medically indicated and medically necessary. Sex reassignment is not “experimental,” “investigational,” “elective,” “cosmetic,” or optional in any meaningful sense. It constitutes very effective and appropriate treatment for transsexualism or profound GID.* (Emphasis added.) (Exhibit K, page 18.)

In Section XI, the standards of care directly address breast surgery for a female to male patient:

“For female-to-male patients, a [double] mastectomy procedure is usually the first surgery performed for success in gender presentation as a man; and for some patients it is the only surgery undertaken.” (Exhibit K, page 19.)

Therefore, according to the standards, not only is the requested procedure generally a medical necessity for someone who has been diagnosed with GID, but it is often considered to be complete sex reassignment surgery for female to male transsexuals.

In this specific case, Dr. XX, Dr. XX, and Ms. XX have all submitted documentation asserting their belief that such a procedure is necessary for Mr. XX’s physical and mental health and well-being. In stark contrast, Central Coast Alliance for Health has presented no documentation that such a procedure is not generally, nor specifically to Mr. XX, medically necessary. The logical reason being: no such evidence exists.

### ***B. Medi-Cal Must Cover Medically Necessary Treatments Related to Transsexualism***

In three different court decisions, California judges have held that Medi-Cal may not deny TARs for medically necessary treatments related to transsexualism without first undergoing an individualized review of the medical necessity of such a request.

The first two such decisions were companion cases from 1978. In Jane Doe v. Lackner, 80 Cal.App.3d 90, a transsexual woman, who had been diagnosed with GID appealed a denial of a TAR for gender reassignment surgery. (Exhibit L.) Two of her witnesses for the appellant testified that sex reassignment surgery was the only medically recognized therapy for GID. (Exhibit L at 93.) The only evidence presented by Medi-Cal was a department policy that transition related procedures are excluded from Medi-Cal coverage.

In holding for Doe, the court was forceful in their dismissal of this policy:

“The evidence presented in these proceedings establishes that Jane Doe has an illness and that as far as her illness affects her, the proposed surgery is medically reasonable and necessary and that there is no other effective treatment method. There has been no evidence to the contrary presented in this case ... and we believe we are required to rule ... on the evidence, not on the basis of a whimsical decision of the Director, Dr. Lackner.” (Exhibit L at 95.)

In deciding the companion case, the court came to the same result. The facts of G.B. v. Lackner, 80 Cal. App. 3d 64, are much the same as Doe. (G.B. v. Lackner. Exhibit M.) The main difference between the two cases was Medi-Cal’s stated reason for denial of the appellant’s TAR. In G.B., Medi-Cal posited that sex reassignment is a purely cosmetic procedure and therefore excluded from coverage by Medi-Cal.

Following some detailed analysis of the testimony from witnesses for G.B. and evidence of what qualifies as cosmetic surgery, the court held that, “It is clearly impossible to conclude that transsexual surgery is cosmetic surgery, even using the definition relied on by [Medi-Cal].” (Exhibit M at 71.)

More recently, the Superior Court in Sacramento, pursuant to a writ of mandate, ordered Medi-Cal “[t]o review any request for Medi-Cal coverage of a service or treatment related to transsexualism on a case-by-case basis, pursuant to the standards set forth in the Medicaid Act and federal regulations promulgated thereunder, and the Welfare and Institutions Act and the state regulations promulgated thereunder.” Doe v. Bonta, Case No. 00CS00954. (Exhibit N.) Again, the court was hearing an appeal from a denial by Medi-Cal’s director of a TAR submitted by a transsexual woman for gender reassignment surgery.

The court further ordered Medi-Cal “[t]o rescind its policy of denying Medi-Cal coverage to all medical services related to transsexualism regardless of the medical necessity of the service.”

### ***C. Mr. XX’s Evidence Supports the Medical Necessity of a Double Mastectomy***

As is clear from his declaration, Mr. XX will continue to experience negative mental and physical health consequences if he is not able to undergo a double mastectomy. (Exhibit A). Such negative consequences are the result of a defined disorder, GID. Dr. XX letter confirms that Mr. XX has been diagnosed with GID. (Exhibit B). Three other health care providers, Dr. XX, Dr. XX, and Ms. XX, have submitted letters or other documents confirming that such a procedure is medically necessary for Mr. XX. (Exhibits D, I, and J.)

In opposition to this evidence, Central Coast Alliance for Health has submitted nothing.

### **III. CONCLUSION**

Based on the fact that more than sufficient evidence has been presented that a double mastectomy is medically necessary for Mr. XX, he respectfully requests that a proposed order be issued approving TAR Control Number XX.

Respectfully submitted,

Christopher W. Daley, Esq.  
CBN #219054

# **Attachment**

**U**

## BOARD OF EDUCATION ADMINISTRATIVE REGULATION

R5163

### ARTICLE 5: STUDENTS

#### SECTION: Non-Discrimination for Students and Employees

This regulation is meant to advise school site staff and administration regarding transgender and gender non-conforming student concerns in order to create a safe learning environment for all students, and to ensure that every student has equal access to all components of their educational program.

#### **California Law Prohibits Gender-Based Discrimination in Public Schools**

The California Education Code states that “all pupils have the right to participate fully in the educational process, free from discrimination and harassment.” Cal. Ed. Code Section 201(a). Section 220 of the Education Code provides that no person shall be subject to discrimination on the basis of gender in any program or activity conducted by an educational institution that receives or benefits from state financial assistance. The Code further provides that public schools have an affirmative obligation to combat sexism and other forms of bias, and a responsibility to provide equal educational opportunity to all pupils. Cal. Ed. Code Section 201(b).

The California Code of Regulations similarly provides that “No person shall be excluded from participation in or denied the benefits of any local agency's program or activity on the basis of sex, sexual orientation, gender, ethnic group identification, race, ancestry, national origin, religion, color, or mental or physical disability in any program or activity conducted by an ‘educational institution’ or any other ‘local agency’ . . . that receives or benefits from any state financial assistance.” 5 CCR Section 4900(a).

The California Code of Regulations defines “gender” as: “a person's actual sex or perceived sex and includes a person's perceived identity, appearance or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with a person's sex at birth.” 5 CCR Section 4910(k).

#### **SFUSD Board Policy Prohibits Gender-Based Harassment**

SFUSD Board Policy 5163 requires that “All educational programs, activities and employment practices shall be conducted without discrimination based on . . .sex, sexual orientation, [or] gender identity . . .” Board Policy 5162 requires that “students should treat all persons equally and respectfully and refrain from the willful or negligent use of slurs against any person” based on sex or sexual orientation.

Therefore, transgender and gender non-conforming students must be protected from discrimination and harassment in the public school system. Staff must respond appropriately to ensure that schools are free from any such discrimination or harassment.



## **Names/Pronouns**

Students shall have the right to be addressed by a name and pronoun corresponding to their gender identity that is exclusively and consistently asserted at school. Students are not required to obtain a court ordered name and/or gender change or to change their official records as a prerequisite to being addressed by the name and pronoun that corresponds to their gender identity. This directive does not prohibit inadvertent slips or honest mistakes, but it does apply to an intentional and persistent refusal to respect a student's gender identity. The requested name shall be included in the SIS system in addition to the student's legal name, in order to inform teachers of the name and pronoun to use when addressing the student.

## **Official Records**

The District is required to maintain a mandatory permanent pupil record which includes the legal name of the pupil, as well as the pupil's gender. 5 Cal. Code Reg. 432(b)(1)(A), (D). The District shall change a student's official records to reflect a change in legal name or gender upon receipt of documentation that such legal name and/or gender have been changed pursuant to California legal requirements.

## **Restroom Accessibility**

Students shall have access to the restroom that corresponds to their gender identity exclusively and consistently asserted at school. Where available, a single stall bathroom may be used by any student who desires increased privacy, regardless of the underlying reason. The use of such a single stall bathroom shall be a matter of choice for a student, and no student shall be compelled to use such bathroom.

## **Locker Room Accessibility**

Transgender students shall not be forced to use the locker room corresponding to their gender assigned at birth. In locker rooms that involve undressing in front of others, transgender students who want to use the locker room corresponding to their gender identity exclusively and consistently asserted at school will be provided with the available accommodation that best meets the needs and privacy concerns of all students involved. Based on availability and appropriateness to address privacy concerns, such accommodations could include, but are not limited to:

- Use of a private area in the public area (i.e., a bathroom stall with a door, an area separated by a curtain, a PE instructor's office in the locker room);
- A separate changing schedule (either utilizing the locker room before or after the other students); or
- Use of a nearby private area (i.e., a nearby restroom, a nurse's office).

### **Sports and Gym Class**

Transgender students shall not be denied the opportunity to participate in physical education, nor shall they be forced to have physical education outside of the assigned class time. Generally, students should be permitted to participate in gender-segregated recreational gym class activities and sports in accordance with the student's gender identity that is exclusively and consistently asserted at school. Participation in competitive athletic activities and contact sports will be resolved on a case by case basis.

### **Dress Codes**

School sites can enforce dress codes that are adopted pursuant to Education Code 35291. Students shall have the right to dress in accordance with their gender identity that is exclusively and consistently asserted at school, within the constraints of the dress codes adopted at their school site. This regulation does not limit a student's right to dress in accordance with the Dress/Appearance standards articulated in the Student and Parent/Guardian Handbook, page 23.

### **Gender Segregation in Other Areas**

As a general rule, in any other circumstances where students are separated by gender in school activities (i.e., class discussions, field trips), students shall be permitted to participate in accordance with their gender identity exclusively and consistently asserted at school. Activities that may involve the need for accommodations to address student privacy concerns will be addressed on a case by case basis. In such circumstances, staff shall make a reasonable effort to provide an available accommodation that can address any such concerns.