

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of
JONES DAVID HOLLISTER,
Petitioner-Appellant.

Lane County Circuit Court
19CV20980

A171609

APPELLANT'S OPENING BRIEF AND EXCERPT OF RECORD

Appeal from the Order and General Judgment
After Hearing of the Circuit Court for Lane County
Entered on July 9, 2019
Honorable Charles D. Carlson

[Brief includes an as applied challenge to constitutionality of statute
ORS 33.460]

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STATEMENT OF CASE

1. Nature of the Action and Relief Sought.

Appellant seeks to have a judgment entered changing Appellant's legal sex designation to "nonbinary."

2. Nature of the Judgment.

The Circuit Court denied Appellant's request to change Appellant's legal sex designation to "nonbinary."

3. Appellate Jurisdiction.

The Order and General Judgment (Order) of the Circuit Court is an appealable order pursuant to ORS 19.250 (1).

4. Timeliness of Appeal.

On July 9, 2019, following a hearing, the Circuit Court entered its Order. On July 16, 2019, Appellant timely filed the Notice of Appeal pursuant to ORS 19.255(1) and ORS 19.260.

5. Question on Appeal.

Did the Circuit Court err in denying Appellant's request for a change of Appellant's legal sex designation to "nonbinary"?

6. Summary of the Argument.

Appellant is nonbinary and does not identify as male or female. The Circuit Court erred in denying Appellant's Petition for Sex Change (Petition) based on the Court's opinion that the statute only permitted

Appellant to choose from “male” or “female” The Court erred in denying Appellant’s Petition because the statute does limit legal sex designations to “male” and “female,” nor does it exclude a “nonbinary” designation. The legislative history supports that the legislature made the decision when amending ORS 33.460 to use gender identity when determining the appropriate legal sex designation for a petitioner. Even if the statute did not permit such a designation, the statute would then be unconstitutional as applied to Appellant because there is a constitutional right for Appellant’s legal sex designation to be consistent with their¹ gender identity.

7. Statement of Facts.

At the time of the Petition, Appellant, Jones “Jo” Hollister, was a 51-year-old elementary school teacher, married and living in Lane

¹ This brief uses the singular, gender-neutral pronouns “they” to refer to Appellant, which is consistent with Appellant’s identity. See *Merriam-Webster Dictionary*, <http://merriam-webster.com/dictionary/they> (accessed Oct. 24, 2019); Associated Press, *Associated Press Style Manual*, March 24, 2017 “they, them, their” entry; University of Chicago Press Staff, *The Chicago Manual of Style*, 215 (16th ed 2010).

County. Appellant does not identify as male or female, but instead identifies as nonbinary.

When Appellant was born in Washington state, Appellant's parents named them "Joanne" and the attending physician assigned Appellant "female." In the 1980 and 1990's, Appellant felt enormous relief when they met other people who identify as nonbinary and realized that there was a vocabulary for who they are and that there were other people like them.

Although Appellant has embraced their nonbinary gender identity, there have been challenges and concerns that regularly arose because of the perceived incongruence between their gender non-conforming appearance, their gendered name, and their legal status as "female." For Appellant to change their legal sex to "male" would be of no avail. They are not male. Neither designation is appropriate for Appellant and to select either would be inconsistent with Appellant's gender identity and dishonest since Appellant is neither.

Without the ability to obtain a change in legal designation pursuant to ORS 33.460, Appellant is stuck in a place of legal ambiguity. In addition to a change in legal designation pursuant to ORS 33.460, Oregon provides two administrative options for changing government issued documents. The Driver and Motor Vehicle Services Division of

the Oregon Department of Transportation (DMV) provides for a nonbinary “X” marker on DMV issued identification cards in addition to “F” and “M” markers. OAR 735-062-0013. Similarly, the Division of Vital Statistics (DVS) provides for a birth certificate to be issued or changed to reflect a nonbinary designation for anyone born in Oregon. OAR 333-011-0272. Administratively changing their ID or seeking a change to their Washington birth certificate would still leave Appellant in a legal quandary because their legal designation would still be “female,” even while their ID and birth certificate would be “nonbinary.”

Appellant does not want this discrepancy in place and seeks a legal change of their sex designation so that their nonbinary status will be both legal and administrative. A legal change of sex marker to nonbinary is widely available in other counties, as at least Multnomah, Benton, Washington, and Polk Counties have approved petitions for the nonbinary marker. See *In the Matter of Jackson Nicholas*, No. 17CV01994 (Benton County Circuit Court filed Jan. 20, 2017); *In the Matter of Jamie Shupe*, No. 16CV13991 (Multnomah County Circuit Court filed Apr. 26, 2016); *In the Matter of Krist Stefan Asherian*, No. 19CV41247 (Washington County Circuit Court filed Sept. 23, 2019); and *In the Matter of Charlie Justice McNabb*, No. 16CV31356 (Polk County Circuit Court filed Sept. 26, 2016).

The statewide forms promulgated by the Oregon Judicial Department (OJD) for change of legal sex include a pre-printed box marked “nonbinary.”² Nevertheless, when Appellant sought this relief in Lane County, they were told off the record at the *ex parte* hearing with The Honorable Charles Carlson that such relief would be denied. *In the Matter of Jones David Hollister*, No. 19CV05355 (Lane County Circuit Court Case filed Feb. 4, 2019). Appellant, who was also seeking a name change at the time, then withdrew the portion of the Petition requesting the change of legal sex designation and later asked for a hearing. Upon request by the Court, Appellant then filed a new Petition to request a nonbinary sex designation. Oral argument was held and the Court later issued an Order denying the requested relief.

8. FIRST ASSIGNMENT OF ERROR: The Court Erred In Denying the Petition Because the Statute Permits A Nonbinary Designation

8.1 Preservation of Error.

² Oregon Judicial Department website, Change of Name or Sex (accessed October 30, 2019) *available from* [https://www.courts.oregon.gov/forms/Documents/Name%20and%20Sex%20Change%20Packet%20\(Adult\).pdf](https://www.courts.oregon.gov/forms/Documents/Name%20and%20Sex%20Change%20Packet%20(Adult).pdf).

Appellant raised this issue in the Hearing Memorandum and at oral argument. *Hrg. Memo.* at ER-2 – ER-9; *Trans.* at ER-16 – ER-17, ER-19, ER-23.

8.2 Standard of Review

The standard of review is for errors of law. ORAP 5.45.

8.3 Argument

8.3.1 On Its Face ORS 33.460 Permits a Nonbinary Designation

The Circuit Court denied Appellant's Petition based on an erroneous interpretation of the statute. The Court held,

Unfortunately, based on the clear language of ORS §33.460 and the statutory analysis of legislative intent of HB 2673, this Court may not issue a General Judgment for change of sex to nonbinary.

Order at ER-32. The statute, however, does not explicitly limit gender changes to male or female:

A circuit court may order a legal change of sex and enter a judgment indicating the change of sex if the individual attests that the individual has undergone surgical, hormonal or other treatment appropriate for the individual for the purpose of affirming gender identity.

Or. Rev. Stat. §33.460 (1).

The wording does not just necessarily contemplate changing a petitioner's legal sex designation so that it comports with their gender

identity, it requires the court to do so. This must include individuals, like Appellant, whose gender identity is neither male nor female. In fact, there is no Oregon statute that limits legal sex designations to male and female. ORS §33.410 does not define “gender identity,” but “gender identity” is more fully addressed in ORS §659A.030, which prohibits discrimination, including when based on someone’s

gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated [with the sex assigned to them at birth].

ORS §174.100(7).

Despite the statutory language that includes reference to “affirming gender identity,” the Circuit Court in this case believed it was required to consider only a person’s “sex” and not their “gender” when determining whether to permit a change of legal sex to nonbinary: “I’m not questioning the issue about gender.... I think the problem is... I have a statute that seems to make a distinction between sex and gender.”

Trans. at ER-19.

Further, the Court relied on an understanding of “sex” that is not supported by law or fact. For example, in its Order, the Court states,

ORS §§33.410 and 33.460 allow individuals living in Oregon to petition for a change of sex via court order. These statutes do not use

specific sex classifications and only use the generic term, “change of sex.”

Order at ER-30. The Court focused on the use of the term “sex” to the exclusion of the phrase “affirming gender identity.” At oral argument, the Court stated,

And we do have the commentary that it says that I’m supposed to exercise to reflect somebody’s gender identity, and that is in there, but it also says back to a sex change.

Trans. at ER-21. It appears that the “commentary” the Court referred to is actually the last three words of the statute.

The Circuit Court put great weight on the use of the term “sex” in the statute and specifically found that,

While the terms “sex” or “gender” are not defined in the context of these statutes the language chosen by the legislature clearly addresses a change of sex rather than gender.

Order at ER-31. This is not, in fact, consistent with the legislative history makes it clear that the terms “sex” and “gender” were being used interchangeably during the public hearings when the bill was passed.

While the concept of sex and gender might be complex intellectual inquiry, the text of the statute and the legislative history reflect the Legislature’s clear decision to join the medical community is using gender identity as the definite test for a petitioner’s legal sex designation. In this respect, the language is unambiguous and is

consistent with legislative intent to do away with an arbitrary distinction between sex and gender.

In the Legislative Assembly Recording Log for the 2017 Regular Session on March 15, 2017, Rep. Nosse, District 42, does not use the term “sex” at any point, only the term “gender identity.” Although the term “sex” is used in the bill, those who introduced the bill do not use it when discussing the purpose and intended protected persons.³ In fact, the systemic lack of the term “sex” throughout the hearings supports the contention that “sex” and “gender” are being used interchangeably for the purposes of this statute.

It is not at all clear what the Court was referring to when using the term “sex” in the context of a legal change of sex designation. At oral argument, the Court stated, “My concern is the statute says, ‘sex change’...which demarks to the Court, at least traditionally, has been two choices. And so it’s not a gender.” *Trans.* at ER-16.

³ Audio Recording, Legislative Assembly, HB 2673, March 15, 2017 (comments of Rep. Nosse), *available at* http://oregon.granicus.com/MediaPlayer.php?view_id=46&clip_id=22865&meta_id=883348

8.3.2 The Court's Reliance on the Fallacy That There are Only Two Sexes is Not Supported by Law or Fact.

The Court's reliance on the fallacy that there are only two sexes is also not supported by law or fact. The Court's views of sex being binary are not only unsupported, they are demonstrably wrong. Both health care providers and the law have long recognized that there are nonbinary people.

The medical community has long recognized that gender exists on a spectrum and that a meaningful number of individuals identify as something other than male or female.⁴ Over time, it has become accepted that characteristics associated with sex designations did not always align. These characteristics include: chromosomes, gonads, hormones/secondary sex characteristics, internal reproductive characteristics, internal reproductive structures, external genitalia, sex of

⁴ Greenburg, Julie A., *Defining Male and Female: Intersexuality and the Coalition Between Law and Biology*, 41 Ariz. L. Rev. 265 (1999); Julia A. Greenberg and Marybeth Herald, *You Can't Take It With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 Wash. L. Rev. 819, 825, 827-832 (2005).

rearing, and gender identity.⁵ By 2014, The American Psychological Association defined “gender identity” as “an individual’s identification as male, female, or, occasionally, some category other than male or female.” Am. Psych. Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2014).

Nonbinary people represent a growing proportion of transgender communities and have seen increased public visibility in recent years. In a recent survey of 27,715 transgender and gender non-conforming people, a full 31% identified as nonbinary.⁶ Sandy E. James, *et al*, National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 44 (2016). Like other transgender people, nonbinary people face startling rates of discrimination, harassment, and

⁵ Zucker, Kenneth, *Intersexuality and Gender Identity Differentiation*, *J Pediatr Gynecol* (2202) 15:3-13.

⁶ In contrast, as similar survey from several years earlier did not contain an option for nonbinary and found that 22% of respondents identified as genderqueer. Jaime M. Grant, *et al.*, National Center for Transgender Equality & National Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 24 (2011).

violence.⁷ For example, 83% of nonbinary people report having experienced harassment due to bias in K-12 schools and 32% report having suffered physical assault due to bias. *Id* at 2, Table 2.

Overall, 40% of transgender and gender nonconforming people (including nonbinary people) report facing harassment when presenting an ID that does not match their gender identity or gender expression, with 15% saying they have been asked to leave the setting in which they presented that ID.⁸

Following the lead of the legal community, third genders are increasingly being legally recognized across the world as jurisdictions work to eliminate sanctioned discrimination against nonbinary individuals

⁷ See Jack Harrison et al., A Gender Not Listed Here: Genderqueers, Gender Rebels, and Other Wise in the National Transgender Discrimination Survey, 2 LGBTQ Pol'y J. 13 (2012), available at http://www.thetaskforce.org/static_html/downloads/release_materials/agendernotlistedhere.pdf.

⁸ Jaime M. Grant, et al., National Center for Transgender Equality & National Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 139 (2011), available at <http://www.thetaskforce.org/downloads/reports/reports/ntdsfull.pdf>.

like Appellant. While the requirements vary by jurisdiction, Australia⁹, Argentina¹⁰, Canada¹¹, Denmark¹², Germany¹³, India¹⁴, Malta¹⁵, Nepal¹⁶,

⁹ *NSW Registrar of Births, Deaths and Marriages v Norrie (2014) High Court of Australia HCA 1; G 77/2018-9* (Australian Constitutional Court).

¹⁰ *Ley 26.743 de Identidad de Genero* (Law 26.743 of Gender Identity).

¹¹ Senate Bill C-16, *Amending Canadian Human Rights Act* (2017).

¹² Motion to Amend the Act on the (Danish) Civil Registration System, Art. 2, Paragraph 2. (2014).

¹³ 1 BvR 2019/16 Bundesverfassungsgericht (Federal Constitutional Court).

¹⁴ *Supreme Court of India writ petition* (civil) No. 400 of 2012 and writ petition (civil) No. 604 of 2013.

¹⁵ Malta, Gender Identity, Gender Expression and Sex Characteristics Act 2015 [No. XI of 2015] para 13(2).

¹⁶ *Pant v Nepal* [2007] Supreme Court Division Bench Nepal Writ No. 917 of the Year 2064 BS.

the Netherlands¹⁷, New Zealand¹⁸, and Pakistan¹⁹ all provide three options on ID documents like passports or birth certificates. Jurisdictions across the US also allow legal recognition of individuals' nonbinary gender identities. Colorado²⁰, California²¹, the District of Columbia²²,

¹⁷ Dutch Civil Code Article 1:19d (211, 58), Brink, Reuß and Tigchelaar 284-7.

¹⁸ New Zealand Public Act 1993 No. 82 ("Human Rights Act 1993").

¹⁹ *Khaki v SSP* [2009] Supreme Court of Pakistan Constitution Petition No. 43 of 2009.

²⁰ 5 Colo. Code Regs. 1006-1 § 4.1.

²¹ Cal. Health & Safety Code § 103426

²² L22-0184, effective Nov 27, 2018; DC Register Vol. 65, p. 13709.

Indiana²³, Maine²⁴, Nevada²⁵, New Jersey²⁶, New Mexico²⁷, New York City²⁸, Utah²⁹, Vermont³⁰, Oregon³¹, and Washington³² all now allow

²³ Ind. Code Ann. § 16-37-2-10, Indiana State Form 56713 (5-19)

²⁴ Maine Bureau of Motor Vehicles Gender Designation Form (accessed October 25, 2019), *available at* <https://www1.maine.gov/sos/bmv/forms/GENDER%20DESIGNATION%20FORM.pdf>.

²⁵ Nev. Admin. Code § 440.030; Nev. Admin. Code § 483.070.

²⁶ N.J. Rev. Stat. § 26:8-40.12.

²⁷ N.M. Stat. § 24-14-25.

²⁸ N.Y.C. Admin. Code § 8102(23).

²⁹ Lang, Nico and Sosin, Kate, *Utah Among Growing Number of State Issuing Gender-Neutral IDs* (accessed October 25, 2019), *available at* <https://www.nbcnews.com/feature/nbc-out/utah-among-growing-number-states-issuing-gender-neutral-ids-n984326>

³⁰ 1 V.S.A 144; Vermont Department of Motor Vehicles, Self Designated Descriptors (accessed October 25, 2019), *available at*, <https://dmv.vermont.gov/licenses/identity-documents/self-designated-descriptors>

³¹ OAR 735-062-0013(3)(c).

³² Washington State Department of Health, Sex Designation Change Adult (accessed October 25, 2019), *available at* <https://www.doh.wa.gov/Portals/1/Documents/Pubs/422-143-SexDesignationChangeAdult.pdf>.

some form of designation change on DMV issued ID cards, birth certificates, or other legal documents.

Numerous provisions of California law recognize nonbinary people. Similar to Oregon, the statute governing discrimination in California includes a prohibition on discrimination based on “gender identity.” Although the term is not defined in any California statute. It is defined in regulations.

California statutes specifically allow for nonbinary gender change orders. Cal. Civ. Proc. §1277-9. Before that statute was amended, courts were recognizing nonbinary sex designations. Decree Changing Name and Gender, *Petition of Sara M. Keenan for Change of Name and Gender*, No. 16CV02024 (Superior Court of California, County of Santa Cruz, 2016).

California insurance regulations goes further, defining “actual gender identity,” as distinct from “perceived gender identity,” as

a person's internal sense of being: (1) male, (2) female, (3) a gender different from the gender assigned to the person at birth, (4) a transgender person, or (5) neither male nor female.

Cal. Code Regs., title 10, §2561.1(a). Similarly, the California Fair Employment and Housing Council has implemented regulations defining “gender identity” as

each person's internal understanding of their gender, or the perception of a person's gender identity, which may include male, female, a combination of male and female, neither male nor female, a gender different from the person's sex assigned at birth, or transgender.

Cal. Code Regs. title 2, § 11030(b)).

A federal court in Colorado determined that the State Department's refusal to issue a nonbinary passport was arbitrary and capricious and ordered the Department to reconsider its denial. *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248 (D. Colo. Sept. 19, 2018). The State Department filed a Notice of Appeal on November 19, 2018 and moved to stay the judgment pending appeal. *Zzyym v. Pompeo*, 2019 U.S. Dist. LEXIS 27647 (D. Colo. Feb. 21, 2019). The court denied the State Department's motion, stating that the State Department did not demonstrate a substantial likelihood of success on the merits of an appeal, which is necessary to justify the issuance of a stay. *Id* at 11-12.

Given the legal, medical, and social recognition of nonbinary gender identities and the harm that can result from denying recognition to an individual's identity, this Court can and should follow the emerging consensus that statutes governing sex and gender be construed to allow for the recognition of a nonbinary designations.

8.3.3 ORS 33.460 Permits Entry of a Judgment Changing Appellant's Designation to Nonbinary and Prohibits an Inquiry into Anything Other than Gender Identity.

There is nothing in the record before the Circuit Court regarding Appellant's sex or gender beyond the sex they were assigned at birth and their current gender identity. This is because the statute does not require the Court to make findings about this. In fact, inquiries into a petitioner's DNA, external genitalia, internal sex organs, gonads, fertility, hormones, secondary sex characteristics, intersex status, and other private health information are no longer permitted during the legal process. This is indeed precisely one of the reasons that ORS 33.460 was amended to permit attestation rather than court findings before a petition is granted. During the Senate Committee's public hearing on May 3, 2017,³³ the participants primarily discussed the need to eliminate proof requirements by moving to an attestation only process. Witnesses

³³ Audio Recording, Senate Committee on Judiciary, HB2673A, May 3, 2017, *available at* http://oregon.granicus.com/MediaPlayer.php?clip_id=235112

referenced the lack of a private process and the safety implications of releasing private medical information in court.

For example, Brook Shelley of Basic Rights Oregon states that during the court process, transgender individuals are often “asked sensitive, private, medical information in open court” because of the proof requirements that were included in the process. [00:40:50]. Neola Young, transgender advocate and consultant, stated: “I work in healthcare where patient privacy is taken incredibly seriously because revealing someone’s personal health information can compromise safety and access to care. This bill addresses that issue... because it gives us the option to increase our privacy by eliminating those questions in open court...” [1:00:45]. Margot Presley, Nurse Practitioner at OHSU’s Transgender Health Program similarly stated: “Many transgender Oregonians fear being publicly outed by having sensitive medical and personal information disclosed in open court... Some courts also require the disclosure of intrusive evidence of gender transition.” [1:02:30].

Amy Penkin of the OHSU Transgender Health Program stated in testimony that “[m]any transgender Oregonians fear being publicly outed by having sensitive medical and personal information disclosed in open

court.”³⁴ Testimony from resident Joy Stoelting, when discussing helping her daughter change her identity documents, states: “In a medical situation, personal information relating to one’s body, genitals, medical care, etc. is protected by HIPAA. Yet, for some reason this information is openly revealed in public courthouses.”³⁵

In the case at bar, the Circuit Court implied that if Appellant had provided evidence that they were intersex, as was the case in *Zzyym*, that the outcome of the case may have been different. The Court dismissed the relevance of *Zzyym* because in the *Zzyym* case, there

was un rebutted sworn medical evidence that verified the Plaintiff’s sex is “intersex.” *Id* at 1252. Because Dana ZZY YM was the only plaintiff in this case, the court’s evaluation was expressly limited to the specific facts and circumstances regarding the Plaintiff. *Id* at 1260.

³⁴ Meeting Materials and Exhibits, Senate Committee on Judiciary, HB 2673A, May 3, 2017 (testimony of Amy Penkin) *available at* <https://olis.leg.state.or.us/liz/2017R1/Downloads/CommitteeMeetingDocument/123947>.

³⁵ Meeting Materials and Exhibits, Senate Committee on Judiciary, HB 2673A, May 3, 2017 (testimony of Joy Stoelting) *available at* <https://olis.leg.state.or.us/liz/2017R1/Downloads/CommitteeMeetingDocument/100703>.

Order at ER-32.

The implication that there the Court may have made a different decision had Appellant provided “unrebutted sworn medical evidence that verified” their sex as intersex is clear, but to put on such evidence would directly contradict the language of the statute removing any requirement that private information about a petitioner’s body be disclosed in order to obtain a change of their legal sex designation.

In 2017, ORS 33.460 was amended. Among other changes, the new language removed the requirement that the court must determine “that the individual has undergone surgical, hormonal or other treatment appropriate for that individual for the purpose of gender transition and that sexual reassignment has been completed.” Now, petitioners need only attest “that the individual has undergone surgical, hormonal or other treatment appropriate for the individual for the purpose of affirming gender identity.” This change recognizes that individuals, including nonbinary people, are entitled to a change in their legal sex designation whether or not they chose to undergo any hormonal or surgical treatment to affirm their gender identity.

It is difficult to understand the Court’s focus on sex in the context of this statute. The Court appears to be importing a belief not only that sex is binary, but it is applying a legally outdated understanding of what

it means to “change one's sex.” The misconception that sex is binary and everyone is either male or female is inaccurate not only for intersex people, but also for transgender and nonbinary people who are not intersex. ORS 33.460 now directs the Court to issue orders without inquiring into private facts such as DNA, external genitalia, internal sex organs, gonads, fertility, hormones, or secondary sex characteristics and instead directs the Court to rely on the attestation of the petitioner in a case that the request for a change of their legal sex designation will affirm their gender identity. The legislature has determined that a person's gender identity is a more accurate way of defining their sex than any particular anatomical or physiological trait. For Appellant, whose gender identity is nonbinary, this means that a nonbinary legal sex designation must be permitted.

8.3.4 The Administrative Process Is Not Equivalent to the Legal Process

The Court appeared to be under the impression that the process set forth to change the sex designation on an Oregon birth certification was the equivalent to a court order changing someone's legal sex. The Court states,

Presently, individuals born in Oregon may change their sex under OAR 333-011-0272 or OAR 333-011-0275, which require the individual to submit a form through the Oregon Health Statistics Agency that allows individuals

to request a change of sex to female, male, or nonbinary.

Order at ER-30.

However, the Court was mistaken in its assertion that these OARs allow for a legal change of sex designation.³⁶ These rules only govern the issuance of a revised birth certificate. That administrative process does nothing to impact someone's legal sex designation. All it does it change the birth certificate. Moreover, in this case, Appellant cannot use this process since they were not born in Oregon. While the DMV recognizes a third, nonbinary gender designation,³⁷ it is unclear what impact, if any, this administrative change has on one's legal status. There is, for example, no indication that any other state or the federal government will recognize an administrative change, a concern that was raised in a work session on May 4, 2017, of the Senate Judiciary

³⁶ At oral argument, the Court asserted that the statutes and administrative rules all referred to "gender." *Trans* at ER-20. This is not supported by a review of the statutes and rules, which contain language similar to 432.235.

³⁷ An Oregon driver license must contain certain identifying information, including a descriptor of gender, "shown as 'M' for male, 'F' for female or 'X' for not-specified." OAR 735-062-0013(3)(c).

Committee was concerned about the likelihood that other states will not recognize the administrative process.³⁸ [00:39:00]. Had the legislature believed the administrative processes at the DMV and DVS to be the same as a legal change of sex, then there would have been no need to update ORS 33.460 and, in fact, it could have just been eliminated.

8.4 Legislative History Also Supports an Order of a Nonbinary Designation

ORS 33.360 on its face allows a Circuit Court to issue an order changing the legal sex of a petitioner to nonbinary. An inquiry into the legislative history of the statute further supports this position.

In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.

ORS 174.010. Further,

³⁸ Audio Recording, Senate Committee on Judiciary, HB2673A, May 4, 2017 *available at* http://oregon.granicus.com/MediaPlayer.php?clip_id=23538

(a) In the construction of a statute, a court shall pursue the intention of the legislature if possible.

(b) To assist a court in its construction of a statute, a party may offer the legislative history of the statute.

ORS 174.020 (1). “[T]he court’s task is to discern the intent of the legislature.” *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 317 Or. 606, 610, 859 P.2d 1143, 1145 (1993); *State v. Gaines*, 346 Or. 160, 171, 206 P.3d 1042, 1050 (2009); see also ORS 174.020.

Although the term “nonbinary” was not explicitly used in the available legislative history of 2017 HB 2673, there is evidence that the bill was intended to include and protect persons who identify as such. During a public hearing in the House Committee on Health Care on February 27, 2017, several community members and legislators used terminology that indicates their intention that the bill include people who identify as nonbinary. For example, Rep. Williamson, House District 36, stated that the purpose is to make sure that a person’s legal identity matches “who they really are” [40:00] and uses the term “gender identity” throughout [42:00]. At no time does Rep. Williamson use the term “sex,” nor does he use the terms “male” or “female” when speaking. Neola Young, a Transgender Advocate and Consultant, uses the term “gender non-conforming” [54:10] throughout their testimony. In addition, Oblio Stroyman, Executive Director of Trans*Ponder, uses the term

“gender diverse people” [58:40].³⁹

Although Senator Arnie Roblan states that HB 2673 “provides a new process to allow transgender people to change their identity marker with respect to *female* or *male*,” this narrowing of the definition does not seem to be echoed by others.⁴⁰ Audio Recording, Oregon Legislative Assembly, HB 2673, May 10, 2017, at 01:07:35.

While the exact term “nonbinary” is not used, the majority of the statements and language indicate that the true intention of the bill was to include everyone whose legal documentation does not accurately reflect their gender identity. The language used by legislators and the public during discussions of the bill indicates that the intended protected persons include those who identify as nonbinary. Senator Roblan’s comments make clear that the legislature could have limited the

³⁹ Audio Recording, House Committee on Health Care, HB2673, February 27, 2017 *available at* http://oregon.granicus.com/MediaPlayer.php?view_id=46&clip_id=22630&meta_id=848949.

⁴⁰ *Available at* http://oregon.granicus.com/MediaPlayer.php?clip_id=ba9f9361-abe8-4cf5-9e5e-b473f692aa3d&meta_id=88c0f05e-7cf9-4986-b956-d2429a97ecbd.

language to restrict designations to only “male” or “female,” but chose not to.

Given the available legislative history, it is reasonable to believe that the legislature knew of the existence of nonbinary Oregonians and took that into account when they chose not to include language limiting ORS §432.235 designations to “male” and “female.”

8.5 Even if the statute Does Not allow for Nonbinary Gender Change Orders, This Court has the Inherent Equitable Authority to Issue Such an Order.

As discussed above, this Court has the statutory authority to grant Appellant’s request for an order recognizing their gender as nonbinary. However, even if this Court were to determine that the existing statutory framework does not contemplate the issuance of a nonbinary gender change order, the Court should still exercise its inherent equitable authority to grant this petition.

Oregon courts have long recognized their ability to grant relief even where no statute directly authorized it. *See, e.g. Gilbert v. Hoisting & Portable Engineers*, 237 Or 130, 137 (1963) (inherent equitable authority exercised to grant attorney’s fees even where not authorized by statute); *Vinson & Vinson*, 57 OrApp 355, 359 (1982) (inherent equitable authority exercised to set aside a judgment under circumstances not authorized by statute).

Courts in other states have concluded that their inherent equitable authority allowed them to issue sex/gender change orders more expansive than those contemplated by statute, even where there was no statute authorizing sex/gender change orders of any kind. *See In re Heilig*, 372 Md. 692, 714 (Md. Ct. App. 2003) (inherent equitable authority authorized gender change order for person born out of state where statute only applied to those born in state; noting, “There is nothing extraordinary about equity jurisdiction in these kinds of matters.”).

Regardless of whether the Court’s authority arises from statute or the Court’s equitable powers, this Court can and should grant this Petition recognizing Appellant’s gender as nonbinary.

9. SECOND ASSIGNMENT OF ERROR: Appellant has a Constitutionally Protected Right to Have Their Legal Sex Designation Changed to Nonbinary

9.1 Preservation of Error.

Appellant raised this issue in the Hearing Memorandum. *Hrg Memo* at ER-10 – ER-14.

9.2 Standard of Review

The standard of review is for errors of law. ORAP 5.45.

9.3 Argument

The denial of this Petition implicates Appellant's rights under the First and Fourteenth Amendments of the United States Constitution. If the statute were construed to allow gender changes only to male or female, the statute would plainly discriminate on the basis of gender. As a nonbinary person, Appellant would be facially excluded from the benefits of a court-ordered gender change enjoyed by people whose genders are male or female. If the statute were interpreted in such a way, it would be subject to exacting scrutiny under the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (differential treatment based on gender must be substantially related to an important government interest that is "exceedingly persuasive.").

The Oregon Supreme Court concluded that although Oregon has no constitutional equal rights provision specifically related to gender, Article I, Section 20 forbids the state from granting privileges to "'any citizen' or any 'class of citizens.'" "Classification of one's personal privileges and immunities by one's gender is at least as old as by race, and as much based on unexamined societal stereotypes and prejudices." *Hewitt v. State Accident Ins. Fund Corp. (In re Williams)*, 294 Or 33, 45-46 (1982). "Gender. . . bears no relation to ability to

contribute to or participate in society. . . [W]e hold that when classifications are made on the basis of gender, they are, like racial, alienage and nationality classifications, inherently suspect. The suspicion may be overcome if the reason for the classification reflects specific biological differences between men and women. It is not overcome when other personal characteristics or social roles are assigned to men or women because of their gender and for no other reason. That is the kind of stereotyping which renders the classification suspect in the first place.” *Id* at 46.

In addition, the Fourteenth Amendment’s Due Process Clause protects Appellant’s right to privacy, including both their right to avoid disclosure of personal matters and their right to independence in making important personal decisions. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“At the heart of liberty is the right to define one’s own concept of existence... Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”) If Appellant is unable to obtain recognition of their nonbinary gender identity, Appellant would be required to permanently disclose private medical information about their sex assigned at birth whenever they are required to disclose their legal sex. Further, an inability to obtain legal recognition of Appellant’s

nonbinary gender identity would represent a barrier to Appellant's independence in making important personal decisions relating to their gender identity and gender expression—deeply intimate attributes of identity that are inextricably related to other personal decisions including “marriage, procreation, contraception, family relationships, child rearing, and education.” *Lawrence*, 539 U.S. at 574.

Finally, the First Amendment protects Appellant against state-compelled speech that would require Appellant to endorse a message of the state with which Appellant fundamentally disagrees. *See, e.g. Wooley v. Maynard*, 430 U.S. 705 (1977) (state could not require motorist to display motto “Live Free or Die” on license plate); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988) (state could not require people soliciting charitable donations to divulge certain financial information). Appellant rejects the inherently ideological and scientifically unfounded message that there are only two genders and that Appellant must be legally recognized as either one or the other. Moreover, in being required to list their legal sex on the many documents that require disclosure of one's sex/gender, Appellant would be forced to implicitly and explicitly endorse the information on the document as true and correct. Appellant cannot genuinely endorse the inaccurate message that they are either male or female.

With regard to any of these constitutional rights, courts engage in an analysis that tests whether the challenged state action is, at a minimum, rational. Recently, in considering the State Department's refusal to issue a passport with a nonbinary gender marker, a federal court in Colorado found "that the administrative record does not show that the decision making process that resulted in the [binary-only gender] policy in question was rational." *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, 1261 (D. Colo. Sept. 19, 2018) While that decision was based in the federal Administrative Procedures Act, the court's analysis paralleled that of the "rational basis" test for constitutional claims. The court roundly dismissed a wide range of justifications offered by the State Department. For example, the court rejected as irrational the State Department's proffered justifications that other agencies do not recognize nonbinary gender identities and that it would be administratively and technologically difficult to begin recognizing nonbinary gender identities. *Id* at 5. Similarly, here, there is no rational, non-discriminatory justification for denying nonbinary individuals like Appellant access to a government issued ID that accurately reflects their identity.

Because a denial of this Petition would interfere with Appellant's fundamental rights to privacy, free speech, and equal protection, the

Court should interpret the law to avoid those constitutional questions and grant the petition.

RELIEF REQUESTED

Appellant will request that the Court reverse the Order and General Judgment signed on July 3, 2019, to change Appellant's legal sex to nonbinary.

Dated: November 1, 2019.

s/ Lorena Reynolds
Lorena Reynolds, OSB # 981319
Attorney for Petitioner/Appellant
Jones David Hollister

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word-count limitation in ORAP 5.05, which word count is 6,020 (excluding the cover, table of contents, table of authorities, excerpt of record, certificate of service, other certificates and signature block). I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

Dated: November 1, 2019.

s/ Lorena Reynolds
Lorena Reynolds, OSB # 981319
Attorney for Petitioner/Appellant
Jones David Hollister

CERTIFICATE OF FILING

I further certify that on the 1st day of November 2019, I electronically filed the Appellant's Opening Brief and Excerpt of Record with the Appellate Court Administrator.

Appellate Court Administrator
Appellate Court Records Section
1163 State Street
Salem, OR 97301-2563

Dated: November 1, 2019.

s/ Lorena Reynolds
Lorena Reynolds, OSB # 981319
Attorney for Petitioner/Appellant
Jones David Hollister

CERTIFICATE OF SERVICE

I further certify that on the 1st day of November 2019, I served by U.S. Postal Service, first-class mail, postage prepaid, a true copy of Appellant's Opening Brief and Excerpt of Record to:

Attorney General of the State of Oregon
Office of the Solicitor General
400 Justice Building
1162 Court Street NE
Salem, OR 97301-4096

Dated: November 1, 2019.

s/ Lorena Reynolds
Lorena Reynolds, OSB # 981319
Attorney for Petitioner/Appellant
Jones David Hollister

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE

In the Matter of the sex change of:
JONES DAVID HOLLISTER.

Case No.:
HEARING MEMORANDUM

1. Introduction

Petitioner is a person whose gender identity is nonbinary. Friends and family know Petitioner as "Jo" and refer to Jo with the gender-neutral pronouns "they," "them," and "their" instead of "he/him" or "she/her." Petitioner offers this Hearing Memorandum to assist the Court by providing context about nonbinary gender and that it is within this Court's power to issue a General Judgment of Sex Change that recognizes Petitioner's sex and gender as nonbinary.

2. Facts

When Petitioner was born, their parents named them "Joanne" and their birth certificate was marked "female." Despite this, Petitioner does not identify as male or female. Upon meeting other GenderQueer¹ people in the 1980s and 1990s, Petitioner

¹ "Nonbinary" and "genderqueer" are generally synonymous. The World Professional Association for Transgender Health defines "genderqueer" as "[an] identity label that may be used by individuals whose gender identity and/or role does not conform to a binary understanding of gender as limited to the categories of man or woman, male or female." World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 96 (7th ed. 2011), available at [https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf).

1 felt an enormous relief upon realizing that there was a vocabulary for who they are and
2 that there were other people like them.

3 Petitioner is a 51-year-old elementary school teacher. They are married and live
4 in Lane County. Although Petitioner has embraced their nonbinary gender identity, there
5 are challenges and concerns that regularly present themselves because of the
6 perceived incongruence between Petitioner's gender nonconforming appearance and
7 their gendered name and female gender marker on their government-issued
8 identification documents. For Petitioner to change their identification to "male" would be
9 of no avail because they also are not male. The Department of Motor Vehicles provides
10 for a non-binary marker. Petitioner seeks a legal change so the nonbinary designation
11 will be legal as well as administrative. This relief is available in at least Multnomah,
12 Benton, and Polk Counties. The statewide sex change forms promulgated by the
13 Oregon Judicial Department include a pre-printed box marked "nonbinary."
14 Nevertheless, when Petitioner sought this relief in Lane County, they were told off the
15 record at the *ex parte* meeting with Judge Charles Carlson that such relief would be
16 denied.

17 3. Argument

18 **I. Individuals with nonbinary gender identities are recognized by legal** 19 **systems, medical professionals, and researchers and represent a growing** 20 **proportion of transgender communities.**

21 Gender identity is each person's intrinsic understanding of their own gender.
22 Many cultures maintain a nuanced and diverse understanding of the range of human
23 physiology,² psychology, and social roles that acknowledge genders other than male or

24 ² See, e.g. Mary Emily O'Hara, *Movement for Third Gender Option 'Exploding' in U.S.*, NBC News, Dec. 15, 2016,
25 available at <http://www.nbcnews.com/feature/nbc-out/movement-third-gender-option-exploding-u-s-n696446> ("A
26 spokesperson for the California DMV told NBC Out via email that while the department 'did not make a time
commitment regarding non-binary gender designation,' it is 'committed to work towards adding an alternative
gender designation choice for our customers.'"); Christopher Mele, *Oregon Court Allows a Person to Choose
Neither Sex*, The New York Times, June 13, 2016, available at <https://www.nytimes.com/2016/06/14/us/oregon->

1 female.³ Third genders are increasingly being legally recognized as well. Germany,
 2 Australia, New Zealand, India, and Nepal⁴ all provide three gender options on ID
 3 documents like passports and birth certificates. Courts in Oregon and California have
 4 also issued orders legally recognizing individuals' nonbinary gender identities and
 5 directing birth certificates to be amended accordingly. A federal court in Colorado
 6 recently determined that the State Department's refusal to issue a nonbinary passport
 7 was arbitrary and capricious and ordered the Department to reconsider its denial.

8
 9
 10 nonbinary-transgender-sex-gender.html (the "executive director of the Transgender Law Center . . . described the
 11 decision . . . as a 'historic step' toward the government's recognizing 'nonbinary members of our community and
 12 ensuring they have access to identity documents that reflect who they are, just like everyone else'"); Bennett Hall, *A*
 13 *Question of Identity*, Corvallis Gazette-Times, March 26, 2017, available at
 14 [https://www.gazettetimes.com/albany/news/local/a-question-of-identity/article_b7784905-27b0-5bb3-aec1-](https://www.gazettetimes.com/albany/news/local/a-question-of-identity/article_b7784905-27b0-5bb3-aec1-dc7d2ee2d556.html)
 15 [dc7d2ee2d556.html](https://www.gazettetimes.com/albany/news/local/a-question-of-identity/article_b7784905-27b0-5bb3-aec1-dc7d2ee2d556.html) ("[Plaintiff] Nicholas sees legal recognition for non-binary individuals . . . as a step toward
 16 social acceptance for people who don't conform to gender stereotypes")³ Experts estimate that up to 2% of the
 17 population is intersex; in the United States, up to 63.8 million people might be living with intersex conditions.
 18 Melanie Blackless et al., *How sexually dimorphic are we?*, 12 Am. J. Human Biology 151 (2000). For example, the
 19 term "intersex" describes "people born with reproductive or sexual anatomy and/or a chromosome pattern that can't
 20 be classified as typically male or female." GLAAD, *Media Reference Guide* 6 (10th ed. 2016),
 21 <http://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf>. People born with
 22 intersex traits may identify as male, female, or nonbinary.

23 ³ See, e.g., Walter L. Williams, *The "Two-Spirit" People of Indigenous North Americans*, The Guardian, Oct. 11,
 24 2010, available at <https://www.theguardian.com/music/2010/oct/11/two-spirit-people-north-america> ("Instead of
 25 seeing two-spirit persons as transsexuals who try to make themselves into "the opposite sex", it is more accurate to
 26 understand them as individuals who take on a gender status that is different from both men and women.").

⁴ Bill Chappell, *Germany Offers Third Gender Option on Birth Certificates*, NPR, Nov. 1, 2013, available at
[http://www.npr.org/sections/thetwo-way/2013/11/01/242366812/germany-offers-third-gender-option-on-birth-](http://www.npr.org/sections/thetwo-way/2013/11/01/242366812/germany-offers-third-gender-option-on-birth-certificates)
[certificates](http://www.npr.org/sections/thetwo-way/2013/11/01/242366812/germany-offers-third-gender-option-on-birth-certificates). Helen Davidson, *Third Gender Must Be Recognised by NSW After Norrie Wins Legal Battle*, The
 Guardian, Apr. 1, 2014, available at [https://www.theguardian.com/world/2014/apr/02/third-gender-must-be-](https://www.theguardian.com/world/2014/apr/02/third-gender-must-be-recognised-by-nsw-after-norrie-wins-legal-battle)
[recognised-by-nsw-after-norrie-wins-legal-battle](https://www.theguardian.com/world/2014/apr/02/third-gender-must-be-recognised-by-nsw-after-norrie-wins-legal-battle); *Australian Passports to Have Third Gender Option*, The Guardian,
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Californian Becomes Second US Citizen Granted 'Non-Binary' Gender Status, NBC News, Sept. 26, 2016,
 available at [http://www.nbcnews.com/feature/nbc-out/californian-becomes-second-us-citizen-granted-nonbinary-](http://www.nbcnews.com/feature/nbc-out/californian-becomes-second-us-citizen-granted-nonbinary-gender-status-n654611)
[gender-status-n654611](http://www.nbcnews.com/feature/nbc-out/californian-becomes-second-us-citizen-granted-nonbinary-gender-status-n654611). See, e.g., California Fair Employment and Housing Act of 1959 (Cal. Gov't Code §§ 12900-
 12996); Unruh Civil Rights Act of 1959 (Cal. Civ. Code § 51).

1 *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248 (D. Colo. Sept. 19, 2018). The State
2 Department filed a Notice of Appeal on November 19, 2018 and moved to stay the
3 judgment pending appeal. *Zzyym v. Pompeo*, 2019 U.S. Dist. LEXIS 27647 (D. Colo.
4 Feb. 21, 2019). The court denied the State Department's motion, stating that the State
5 Department did not demonstrate a substantial likelihood of success on the merits of an
6 appeal, which is necessary to justify the issuance of a stay. *Id.* at *11-12.

7 The Driver and Motor Vehicle Services Division of the Oregon Department of
8 Transportation recognizes a third, nonbinary gender designation.⁵ Likewise, individuals
9 who identify as neither "male" nor "female" may seek a change on a record of live birth
10 to support the individual's gender identity.⁶

11 In 2017, Governor Kate Brown signed HB 2673A, which abolished outdated
12 procedural requirements for individuals seeking changes to their birth certificates.
13 Before HB 2673A, a public notice of the application for a change of sex or name was a
14 prerequisite to the entry of a judgment. Additionally, HB2673A removed the
15 requirement that the court must "determine[] that the individual has undergone surgical,
16 hormonal or other treatment appropriate for that individual for the purpose of gender
17 transition and that sexual reassignment has been completed." Now, "the individual
18 [need only] attest[] that the individual has undergone surgical, hormonal or other
19 treatment appropriate for the individual for the purpose of affirming gender identity."
20 This change clearly recognizes nonbinary individuals, who may not undergo any
21 hormonal or surgical treatment to transition to male or female.

22 California law also acknowledges the existence of nonbinary gender identities.
23 Numerous provisions of California law prohibit discrimination based on "gender identity,"

24
25 ⁵ An Oregon driver license must contain certain identifying information, including a descriptor of gender, "shown as
26 'M' for male, 'F' for female or 'X' for not-specified." OAR 735-062-0013(3)(c).

⁶ OAR 333-011-0272 ("An applicant may request an administrative change to the sex of a registrant on the record of
live birth when the sex on the record of live birth does not match the gender identity of the registrant.")

1 although that term is not defined in any California statute. It is, however, defined in
 2 regulations. For example, California insurance regulations define "actual gender
 3 identity" (as distinct from "perceived gender identity") as "a person's internal sense of
 4 being: (1) male, (2) female, (3) a gender different from the gender assigned to the
 5 person at birth, (4) a transgender person, or (5) neither male nor female." Cal. Code
 6 Regs., tit. 10, § 2561.1(a). People with nonbinary gender identities identify as neither
 7 exclusively male nor female. Similarly, the California Fair Employment and Housing
 8 Council has implemented regulations defining "gender identity" as "each person's
 9 internal understanding of their gender, or the perception of a person's gender identity,
 10 which may include male, female, a combination of male and female, neither male nor
 11 female, a gender different from the person's sex assigned at birth, or transgender." Cal.
 12 Code Regs. tit. 2, § 11030(b)).

13 In Oregon, Circuit Courts in at least three counties (Benton, Multnomah, and
 14 Polk) have recognized the non-binary designation. See Benton County Circuit Court
 15 case No. 17CV01994, Multnomah County Circuit Court case No. 16DV13991, and Polk
 16 County Circuit Court case No. 16CV31356. California has followed this trend. For
 17 example, the Superior Court of California, County of Santa Cruz determined that
 18 California statutes allow for nonbinary gender change orders and issued such an order.
 19 Decree Changing Name and Gender, *Petition of Sara M. Keenan for Change of Name*
 20 *and Gender*, No. 16CV02024 (2016), available at [http://media1.s-](http://media1.s-nbcnews.com/j/newscoms/2016_39/1724546/160926-sara-kelly-keen-an-court-order-ipo-248p_06d81ab4bbb0d9c081c1079574c822c8.nbcnews-ux-2880-1000.jpg)
 21 [nbcnews.com/j/newscoms/2016_39/1724546/160926-sara-kelly-keen-an-court-order-ipo-](http://media1.s-nbcnews.com/j/newscoms/2016_39/1724546/160926-sara-kelly-keen-an-court-order-ipo-248p_06d81ab4bbb0d9c081c1079574c822c8.nbcnews-ux-2880-1000.jpg)
 22 [248p_06d81ab4bbb0d9c081c1079574c822c8.nbcnews-ux-2880-1000.jpg](http://media1.s-nbcnews.com/j/newscoms/2016_39/1724546/160926-sara-kelly-keen-an-court-order-ipo-248p_06d81ab4bbb0d9c081c1079574c822c8.nbcnews-ux-2880-1000.jpg). Senate Bill
 23 No. 179 (the "Gender Recognition Act"), which was signed by Governor Jerry Brown on
 24 October 15, 2017, amended California law to streamline the process through which non-
 25 binary individuals can acquire official state identification that matches their gender
 26

1 identity.⁷ Commencing on September 1, 2018, the Gender Recognition Act deleted the
 2 requirement that a person had to have undergone some form of treatment prior to
 3 seeking a judgment recognizing a change of gender. Furthermore, starting on January
 4 1, 2019, the Gender Recognition Act requires an applicant for an original driver's license
 5 or renewal of a driver's license to choose a gender category of female, male, or
 6 nonbinary, and requires the Department of Motor Vehicles to adopt regulations to
 7 provide a process for an amendment to a gender category.

8 Other states are passing laws and adopting regulations to recognize individuals
 9 whose gender identity is neither male nor female. On January 2, 2019, the Washington
 10 Department of Health adopted regulations allowing individuals to change their sex
 11 designation on a birth certificate to "X". WAC 246-490-075. Beginning on June 11,
 12 2018, Maine began to allow the non-binary designation of "X" on state identification
 13 cards.⁸ The designation is displayed as a sticker reading "Gender has been changed to
 14 X – Non-binary"; beginning in July of 2019, new licenses will include the "X" gender
 15 designation, and the stickers will be phased out. The Colorado Department of
 16 Revenue, which oversees the Division of Motor Vehicles, adopted a rule allowing
 17 individuals to choose "X" to represent their gender on state identification cards; the rule
 18 went into effect on November 30, 2018.⁹

19 The medical community also recognizes that gender exists on a spectrum and
 20 that a meaningful number of individuals identify as something other than male or
 21 female. The American Psychological Association defines "gender identity" as "an
 22 individual's identification as male, female, or, occasionally, some category other than
 23

24 ⁷ Senate Bill No. 179, available at

https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB179

25 ⁸ Maine Bureau of Motor Vehicles, *Maine BMV to offer non-binary gender designation on driver's licenses, ID*
cards, June 11, 2018, available at <https://www.maine.gov/sos/news/2018/genderdesignationdld.html>.

26 ⁹ Elise Schmelzer, *Colorado to allow use of X as sex identifier on driver's licenses starting this month*, The Denver
 Post, November 8, 2018, available at <https://www.denverpost.com/2018/11/08/colorado-drivers-license-x-gender/>.

1 male or female." Am. Psych. Ass'n, *Diagnostic and Statistical Manual of Mental*
 2 *Disorders* 451 (5th ed. 2014).

3 The World Professional Association for Transgender Health (WPATH) is an
 4 international, multidisciplinary, professional association of medical providers, mental
 5 health providers, researchers, and others, with a mission of promoting evidence-based
 6 care and research for transgender health. WPATH publishes the *Standards of Care for*
 7 *the Health of Transsexual, Transgender, and Gender Nonconforming People*, which
 8 describes the growing number of individuals in the transgender community who identify
 9 in nonbinary terms:

10 As a generation of transsexual, transgender, and gender-
 11 nonconforming individuals has come of age—many of whom have
 12 benefitted from different therapeutic approaches—they have
 13 become more visible as a community and demonstrated
 14 considerable diversity in their gender identities, roles, and
 15 expressions... Other individuals affirm their unique gender identity
 16 and no longer consider themselves to be either male or female.
 17 Instead, they may describe their gender identity in specific terms
 18 such as transgender, bigender, or genderqueer, affirming their
 19 unique experiences that may transcend a male/female binary
 20 understanding of gender... Greater public visibility and awareness
 21 of gender diversity have further expanded options for people with
 22 gender dysphoria to actualize an identity and find a gender role and
 23 expression that are comfortable for them.

24 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender*
 25 *Nonconforming People* 9 (7th ed. 2011), available at
 26 [https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf)
 27 [Care%20V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf) (internal citations omitted).

28 Nonbinary people represent a growing proportion of transgender communities
 29 and have seen increased public visibility in recent years.¹⁰ In a recent survey of 27,715

30 ¹⁰ See, e.g. Steven Petrow, *Don't know what 'genderqueer' is? Meet someone who identifies that way.*, Washington
 31 Post, May 9, 2016, available at [https://www.washingtonpost.com/lifestyle/style/dont-know-what-genderqueer-is-](https://www.washingtonpost.com/lifestyle/style/dont-know-what-genderqueer-is-meet-someone-who-identifies-that-way/2016/05/06/aa59780e-1398-11e6-8967-7ac733c56f12_story.html)
 32 [meet-someone-who-identifies-that-way/2016/05/06/aa59780e-1398-11e6-8967-7ac733c56f12_story.html](https://www.washingtonpost.com/lifestyle/style/dont-know-what-genderqueer-is-meet-someone-who-identifies-that-way/2016/05/06/aa59780e-1398-11e6-8967-7ac733c56f12_story.html); Jessica

transgender and gender nonconforming people, a full 31% identified as nonbinary. Sandy E. James, *et al*, National Center for Transgender Equality, The Report of the 2015 U.S. Transgender Survey 44 (2016). Yet, like other transgender people, nonbinary people face startling rates of discrimination, harassment, and even violence. See Jack Harrison et al., *A Gender Not Listed Here: Genderqueers, Gender Rebels, and OtherWise in the National Transgender Discrimination Survey*, 2 LGBTQ Pol'y J. 13 (2012), available at http://www.thetaskforce.org/static_html/downloads/release_materials/agendernotlistedhere.pdf. For example, 83% of nonbinary people report having experienced harassment due to bias in K-12 schools and 32% report having suffered physical assault due to bias. *Id* at 2, Table 2.

Overall, 40% of transgender and gender nonconforming people (including nonbinary-identified people) report facing harassment when presenting an ID that does not match their gender identity or gender expression, with 15% saying they have been asked to leave the setting in which they presented that ID. Jaime M. Grant, et al., National Center for Transgender Equality & National Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 139 (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

Petitioner in this case is concerned about experiencing this type of discriminatory treatment and being subjected to additional scrutiny when they show their ID, with its "female" gender marker. The same discrimination is likely to occur were they to present

Bennett, *She? Ze? They? What's In a Gender Pronoun*, N.Y. Times, Jan. 30, 2016, at ST2, available at <http://www.nytimes.com/2016/01/31/fashion/pronoun-confusion-sexual-fluidity.html>.¹³ In contrast, as similar survey from several years earlier did not contain an option for nonbinary and found that 22% of respondents identified as genderqueer. Jaime M. Grant, et al., National Center for Transgender Equality & National Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 24 (2011).

1 an ID card with a "male" gender marker, regardless of the gender-neutrality of their
2 name.

3 Given the growing legal, medical, and social recognition of nonbinary gender
4 identities and the harm that can result from denying recognition to an individual's
5 identity, this Court should continue Oregon's emerging trend that respects and validates
6 people with nonbinary gender identities.

7 Oregon's gender change statute does not explicitly limit gender changes to male
8 or female: "A circuit court may order a *legal change of sex* and enter a judgment
9 indicating the change of sex if the individual attests that the individual has undergone
10 surgical, hormonal or other treatment appropriate for the individual for the *purpose of*
11 *affirming gender identity*." Or. Rev. Stat. § 33.460(1) (emphasis added). The wording
12 necessarily contemplates individuals whose gender identity is neither male nor female.
13 Counseling, for example, may constitute "other treatment" appropriate for affirming an
14 individual's nonbinary gender identity. In fact, there is no Oregon statute that limits
15 gender designators to male and female. The Oregon Judicial Department sex change
16 forms even include a box to check for "nonbinary."

17 This Court can and should follow the emerging consensus that statutes
18 governing gender change should be liberally construed to allow for the issuance of
19 orders recognizing a nonbinary gender identity.

20 **II. Even if the statute did not allow for nonbinary gender change orders, this**
21 **Court has the inherent equitable authority to issue such an order.**

22 As discussed above, this Court has the statutory authority to grant Petitioner's
23 request for an order recognizing their gender as nonbinary. However, even if this Court
24 were to determine that the existing statutory framework does not contemplate the
25 issuance of a nonbinary gender change order, the Court should still exercise its inherent
26 equitable authority to grant this petition. Oregon courts have long recognized their ability

1 to grant relief even where no statute directly authorized it. *See, e.g. Gilbert v. Hoisting &*
 2 *Portable Engineers*, 237 Or 130, 137 (1963) (inherent equitable authority exercised to
 3 grant attorney's fees even where not authorized by statute); *Vinson & Vinson*, 57 OrApp
 4 355, 359 (1982) (inherent equitable authority exercised to set aside a judgment under
 5 circumstances not authorized by statute).

6 Courts in other states have concluded that their inherent equitable authority
 7 allowed them to issue sex/gender change orders more expansive than those
 8 contemplated by statute, even where there was no statute authorizing sex/gender
 9 change orders of any kind. *See In re Heilig*, 372 Md. 692, 714 (Md. Ct. App. 2003)
 10 (inherent equitable authority authorized gender change order for person born out of
 11 state where statute only applied to those born in state; noting, "There is nothing
 12 extraordinary about equity jurisdiction in these kinds of matters.").

13 Regardless of whether the Court's authority arises from statute or the Court's
 14 equitable powers, this Court can and should grant this petition recognizing Petitioner's
 15 gender as nonbinary.

16 **III. The inability to obtain a driver's license certificate that matches**
 17 **Petitioner's gender identity would raise serious constitutional concerns.**

18 The denial of this petition implicates Petitioner's rights under the First and
 19 Fourteenth Amendments of the United States Constitution. If the statute were construed
 20 to allow gender changes only to male or female, the statute would plainly discriminate
 21 on the basis of gender. As a nonbinary person, Petitioner would be-facially excluded
 22 from the benefits of a court-ordered gender change enjoyed by people whose genders
 23 are male or female. If the statute were interpreted in such a way, it would be subject to
 24 exacting scrutiny under the Equal Protection Clause of the Fourteenth Amendment.
 25 *See, e.g., U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (differential treatment based on
 26

1 gender must be substantially related to an important government interest that is
2 "exceedingly persuasive.").

3 The Oregon Supreme Court concluded that although Oregon has no
4 constitutional equal rights provision specifically related to gender, Article I, Section 20
5 forbids the state from granting privileges to "'any citizen' or any 'class of citizens.'"
6 "Classification of one's personal privileges and immunities by one's gender is at least as
7 old as by race, and as much based on unexamined societal stereotypes and
8 prejudices." *Hewitt v. State Accident Ins. Fund Corp. (In re Williams)*, 294 Or 33, 45-46
9 (1982). "Gender. . . bears no relation to ability to contribute to or participate in society. . .
10 [W]e hold that when classifications are made on the basis of gender, they are, like
11 racial, alienage and nationality classifications, inherently suspect. The suspicion may be
12 overcome if the reason for the classification reflects specific biological differences
13 between men and women. It is not overcome when other personal characteristics or
14 social roles are assigned to men or women because of their gender and for no other
15 reason. That is the kind of stereotyping which renders the classification suspect in the
16 first place." *Id* at 46.

17 In addition, the Fourteenth Amendment's Due Process Clause protects
18 Petitioner's right to privacy, including both their right to avoid disclosure of personal
19 matters and their right to independence in making important personal decisions. *See*,
20 *e.g.*, *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Lawrence v. Texas*, 539 U.S. 558, 574
21 (2003) ("At the heart of liberty is the right to define one's own concept of existence...
22 Beliefs about these matters could not define the attributes of personhood were they
23 formed under compulsion of the State.") If Petitioner is unable to obtain recognition of
24 their nonbinary gender identity, Petitioner would be required to permanently disclose
25 private medical information about their sex assigned at birth whenever they are required
26 to disclose their legal sex. Further, an inability to obtain legal recognition of Petitioner's

1 nonbinary gender identity would represent a barrier to Petitioner's independence in
2 making important personal decisions relating to their gender identity and gender
3 expression—deeply intimate attributes of identity that are inextricably related to other
4 personal decisions including “marriage, procreation, contraception, family relationships,
5 child rearing, and education.” *Lawrence*, 539 U.S. at 574.

6 Finally, the First Amendment protects Petitioner against state-compelled speech
7 that would require Petitioner to endorse a message of the state with which Petitioner
8 fundamentally disagrees. *See, e.g. Wooley v. Maynard*, 430 U.S. 705 (1977) (state
9 could not require motorist to display motto “Live Free or Die” on license plate); *Riley v.*
10 *National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988) (state
11 could not require people soliciting charitable donations to divulge certain financial
12 information). Petitioner rejects the inherently ideological and scientifically unfounded
13 message that there are only two genders and that Petitioner must be legally recognized
14 as either one or the other. Moreover, in being required to list their legal sex on the many
15 documents that require disclosure of one's sex/gender, Petitioner would be forced to
16 implicitly and explicitly endorse the information on the document as true and correct.
17 Petitioner cannot genuinely endorse the inaccurate message that they are either male
18 or female.

19 With regard to any of these constitutional rights, courts engage in an analysis
20 that tests whether the challenged state action is, at a minimum, rational. Recently, in
21 considering the State Department's refusal to issue a passport with a nonbinary gender
22 marker, a federal court in Colorado found “that the administrative record does not show
23 that the decision making process that resulted in the [binary-only gender] policy in
24 question was rational.” *Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, 1261 (D. Colo. Sept.
25 19, 2018) While that decision was based in the federal Administrative Procedures Act,
26 the court's analysis paralleled that of the “rational basis” test for constitutional claims.

1 The court roundly dismissed a wide range of justifications offered by the State
2 Department. For example, the court rejected as irrational the State Department's
3 proffered justifications that other agencies do not recognize nonbinary gender identities
4 and that it would be administratively and technologically difficult to begin recognizing
5 nonbinary gender identities. *Id* at 5. Similarly, here, there is no rational, non-
6 discriminatory justification for denying nonbinary individuals like Petitioner access to a
7 government issued ID that accurately reflects their identity.

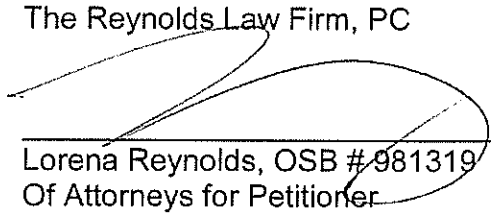
8 Because a denial of this Petition would interfere with Petitioner's fundamental
9 rights to privacy, free speech, and equal protection, the Court should interpret the law to
10 avoid those constitutional questions and grant the petition.

11 4. Conclusion

12 When a hearing is set pursuant to Petitioner's request, Petitioner will request that
13 the Court amend the General Judgment of Name and Sex Change signed on February
14 4, 2019, to change Petitioner's legal sex to nonbinary.

15 DATED: 4-30-19

17 The Reynolds Law Firm, PC

18 
19 Lorena Reynolds, OSB #981319
20 Of Attorneys for Petitioner

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE

COURTROOM NO. 303

HON. CHARLES D. CARLSON

In the Matter of:

JONES DAVID HOLLISTER

)

)

) Case No. 19CV20980

) CA A171609

)

TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, JUNE 19, 2019

APPEARANCES:

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EUGENE, OREGON; WEDNESDAY, JUNE 19, 2019; 9:24 A.M.

THE COURT: All right. This is the matter of Jones David Hollister, Case No. 19CV20980. This is the time set for a hearing on a motion for an entry of judgment for a change of sex.

Counsel.

MS. REYNOLDS: Good morning, Your Honor. We're here today to talk about the change of gender/sex designation for my client. I've submitted the hearing memorandum. I understand that you've already read that.

THE COURT: Is it the same memo you filed in the prior case?

MS. REYNOLDS: It is.

THE COURT: Okay. I read it then. I started reading it and -- this morning. And it's a very good memo. And it reflects -- my primary concern here is -- no question the sincerity of this proceeding or the issue with regard to gender identity.

My concern is the statute says "sex change," and -- which demarks to the Court, at least traditionally, has been two choices. And so it's not a gender.

My concern is the statute that the judges have with regard to name changes, which evolve from the name changes, then to sex change, has never changed from sex

1 change. The legislature hasn't done that. That's more my
2 principal focus and concern is.

3 And I think -- I think that's probably reflective
4 of what other judges in other counties have had. I recognize
5 some counties -- what? Three or four?

6 MS. REYNOLDS: There's at least three counties
7 that I'm aware actually -- there's at least three, and I
8 think at least -- and there may be two others that have done
9 these. I'm only aware of one other county that has denied it.

10 Basically the problem that we have at this
11 particular juncture is that the DMV, for example, is allowing
12 an X marker through an administrative process. So for folks
13 like my client who were born out of state, they can go and
14 get a DMV with an X marker, but that -- there's an open
15 question as to whether that's a legal sex gender change or
16 not. And so they go through life with this sort of dual
17 presentation, and it's unclear how they're supposed to mark
18 their designation for such things as insurance applications.

19 Their -- for example, my client would be unable to
20 get an X marker on their passport. So I don't know if the
21 Court's aware, but there is one case now where the state
22 department has been ordered to issue a non-binary passport.
23 That cannot happen unless you have a designation at the local
24 level for -- for the X marker.

25 THE COURT: Maybe I'm wrong, but I think a federal

1 judge has stayed execution of his judgment pending the
2 appeal? At least the last time I heard. Is that not correct?

3 MS. REYNOLDS: The last time that I looked, which
4 has not been in the last couple of weeks, that --

5 THE COURT: I looked a long -- I looked a long
6 time before that, okay.

7 MS. REYNOLDS: The last time that I had saw it was
8 not stayed because they did not think that they would be
9 successful on appeal -- that the government would not be
10 successful on appeal opposing the X marker.

11 THE COURT: Have the circuit court ruled on a
12 request for a stay?

13 MS. REYNOLDS: The district court. It's in
14 federal court in Colorado, my under --

15 THE COURT: Right. But the government had
16 appealed it, as I understood it.

17 MS. REYNOLDS: Correct. And my understanding is
18 that there is not a stay on that. Like I said, I've not
19 looked it up since I briefed it, but that's --

20 THE COURT: So is the state department actually
21 issuing passports now?

22 MS. REYNOLDS: My understanding is they have
23 issued that passport.

24 THE COURT: Okay.

25 MS. REYNOLDS: So for my client, if -- even if

1 that -- even if that was stable and that is ruled on if it's
2 permitted, they still would not be able to be in a position
3 to be getting a passport unless they had a court order from
4 the state designating that -- having that designation.

5 So --

6 THE COURT: And there's no legislative fix pending
7 that -- I'm not aware of any.

8 MS. REYNOLDS: I'm not aware of a legislative fix,
9 and I think that's primarily because the relief is available
10 to folks in many of the counties that are available.

11 There's nothing in the statute that says that you
12 can't do it. The history of non-binary folks is very long.
13 They've been part of our community for many generations.

14 THE COURT: I'm not questioning the issue about
15 gender. I just -- I think the problem is, is I have a
16 statute that seems to make a distinction between sex and
17 gender.

18 As I understand it, if someone -- if your client
19 is born in Oregon, there is a statute with the Department of
20 Vital Statistics that allows a gender change in declaration.
21 It just doesn't apply if you're not a native born Oregonian.
22 Is that correct?

23 MS. REYNOLDS: That's correct. Well, there's an
24 administrative procedure that you can get a new birth
25 certificate issued, and you can also get the DMV certificate --

1 THE COURT: And it reflects gender and they use
2 the word "gender," I think.

3 MS. REYNOLDS: I believe it still says "sex." I
4 think all of these statutes are using the word "sex," but I
5 would have to pull that up. I have not had that issue come
6 up before in other hearings on this.

7 THE COURT: Okay.

8 MS. REYNOLDS: So the problem is, though, that
9 then you have a birth certificate that says one thing. You
10 have a -- you have a DMV license that says one thing, but you
11 don't have a legal designation, and so that puts people in
12 these binds with what is their legal -- what is their -- what
13 are they supposed to check for those boxes?

14 And for my client, checking either box is a lie.
15 They don't identify as male or female, and so for them to be
16 having to check one of those boxes is not an accurate
17 reflection of what -- of what their experience.

18 And so it's asking them to say something that is
19 not true every time they have to fill out those boxes.

20 THE COURT: Well, I recognize that. I recognize
21 the dilemma. I recognize -- I would liked to have the
22 legislators make it real clear that this is a gender decision
23 and not a sex change. That's the problem I'm having.

24 I have no problem -- I have no policy issues with
25 this, and I wish there was an administrative -- I wish there

1 was administrative remedy, to be perfectly honest, for the
2 record, that we did name changes and sex changes and
3 everything administratively because I think it would be more
4 efficiently handled.

5 The court systems operate on an adversarial
6 setting where somebody else is checking things and
7 representations. We don't have that, and there is no
8 adversary. And I don't want to be the adversary.

9 The problem is, is that I simply have the statute
10 that was, I guess, selected by the legislature because it was
11 a process to change things that was originally just a name
12 change statute.

13 I don't think -- I don't want to be insulting, but
14 I'm not sure if you're old enough to remember when it was
15 just a name change statute, but then we had the sex --

16 MS. REYNOLDS: I'm not.

17 THE COURT: Okay. They added the -- but they
18 added the sex change because that seemed to be a natural
19 place to put it, and they had a lot of prerequisites for it,
20 which have since disappeared.

21 MS. REYNOLDS: Un-huh.

22 THE COURT: And we do have the commentary that it
23 says that I'm supposed to exercise to reflect somebody's
24 gender identity, and that is in there, but it also says back
25 to a sex change.

1 Does that mean I'm declaring a gender or am I
2 still trying to do a sex change?

3 MS. REYNOLDS: Well, I think -- I think at this
4 point in time in terms of how the gender marker is used from
5 a practical perspective, it's a distinction without a
6 difference.

7 We're not talking about -- I mean, I'm not sure if
8 the Court is talking, in terms of sex, if they're talking
9 about chromosomes or if they're talking about genitalia or if
10 they're talking about what we use ID for. We use IDs for the
11 purpose of being able to identify whether somebody is the ID
12 that they are showing somebody.

13 And so for somebody to have a gender marker on an
14 ID that does not comply with how they present defeats the
15 purpose of having the gender marker on -- the sex marker on
16 the ID card at all. That's really sort of the box that my
17 client is in, the dilemma that they're in, because they have
18 an ID that does not reflect what they present as.

19 So having an ID card that represents -- it can't
20 possibly be chromosomes, because no, quote/unquote, sex
21 change is going to, you know, change somebody's chromosomes.
22 And in terms of genitalia, that's just not what the statute
23 requires anymore. We very clearly don't require either
24 hormonal therapy or surgical -- surgical intervention.

25 So we really do -- we can look at any type of

1 treatment, including counseling, to make sure that you're
2 aligning with -- with what's on your gender designation.

3 And that's really what the statute is. It's what
4 it envisions. There is not definition of sex, so you're
5 using a colloquial sort of way of looking at sex and gender
6 that's not really reflected in the statute that says that
7 we're going -- we have to do it one way or the other.

8 So for my client, who presents in this way, they
9 should be entitled to have a legal designation that reflects
10 what their gender identity is and how they present to the
11 world.

12 THE COURT: What's the other county that you say
13 -- you said one county had -- has ruled adversely?

14 MS. REYNOLDS: It's either Douglas County or the
15 one further south, Jackson.

16 THE COURT: Jackson or Josephine?

17 MS. REYNOLDS: Yes. No, Douglas or Jackson. No,
18 it's Jackson or Josephine. It's Douglas and either -- it's
19 one of those three. It's further south from here. Sorry.

20 THE COURT: All right.

21 MS. REYNOLDS: I'd have to look at my records.

22 THE COURT: My sense from the judicial conference
23 and talking to judges is there's more -- there's more --
24 there's been more rulings than that, but --

25 MS. REYNOLDS: Those are -- there's one that made

11

1 -- made its way to my office, and, of course, that person, as
2 with most folks, are deciding to go -- because there's no
3 venue requirement, they travel to another county in order to
4 get the designation changed in a legal setting.

5 My client doesn't want to do that. That's a
6 hardship and, frankly, just doesn't want to do that. They
7 want to have it done at home.

8 THE COURT: I'm not sure there's even a
9 citizenship requirement under the statute.

10 MS. REYNOLDS: There is not a citizenship
11 requirement under the statute. And I have done them for
12 student on student visas as well.

13 THE COURT: All right. Anything further?

14 MS. REYNOLDS: No, Your Honor.

15 THE COURT: All right. Well, I'm going to take
16 the matter under advisement. I want to read your memo again.

17 I have some clerks and externs available, as you
18 saw at ex parte. I'm going to have them take a look at this,
19 see if we can have some -- I want to make sure my
20 recollection of what the administrative statute says and
21 doesn't say is correct.

22 So we will look at that. Couldn't comment
23 directly on that, and I'm going to look at the issue of --
24 see, again, if I can find any legislative history we don't
25 have that explicitly addresses the third category.

1 MS. REYNOLDS: I'm happy --

2 THE COURT: And I haven't seen any.

3 MS. REYNOLDS: I haven't seen that either, but I'm
4 happy to provide additional briefing if there's specific
5 issues that Your Honor would like to read.

6 THE COURT: If I think -- I'm going to ask -- if I
7 think I need to ask something on specifically they can't
8 find, I'll let you know that.

9 MS. REYNOLDS: Okay. I'm happy to do that.

10 THE COURT: But I think what's important is I get
11 a ruling -- get a clear ruling either way, and if it's
12 adverse to your position here, you're in a position to have
13 an appeal. And I'm happy to be the sacrificial lamb that
14 would give guidance to the trial courts with regard to this
15 dilemma.

16 I think the creation of the statewide form is --
17 was just like everything else in the state of Oregon, driven
18 by Multnomah County coming to that conclusion, or some of
19 their judges, and all of a sudden the statewide form provides
20 that.

21 But I'll try to get a decision done expeditiously.
22 I think it will probably be sometime next week because I'm
23 going to be off a couple days and have some other issues, but
24 I'll try to get a clear decision out.

25 MS. REYNOLDS: Thank you, Your Honor.

1 THE COURT: But I -- I do think your brief is well
2 -- very well written and I think fully reflects all the
3 policy issues that should be considered.

4 I wish some legislator had read it and had done
5 some corrective -- or corrected this issue or made it clear
6 for the court so we had this and made it -- identified it
7 clearly as a gender statute. It would certainly be a whole
8 lot more helpful.

9 Thank you for -- thank you for your presentation.

10 MS. REYNOLDS: Unfortunately, Your Honor, for
11 folks like my client who don't have the ability to change
12 those laws, they're stuck in this between place where --

13 THE COURT: I recognize that, but I just want to
14 let you know I've made inquiry of some of our state senators,
15 at least down here, about "Can you fix this?"

16 And, you know, I think most of the questions that
17 everybody has now in their declaration for name change
18 actually reflected out of this courthouse -- out of this
19 court, and every one of those actually happened where we've
20 had people that were changing names for all kinds of
21 inappropriate purposes and we weren't asking or checking.

22 So I'm glad the administrative -- there's an
23 administrative procedure. I'm disappointed that it is not
24 open to everybody, whether you were born here or not.

25 But I thank you for your -- I'm not going to go to

1 other issues or other problems we have. This is a big enough
2 problem to deal with. All right?

3 MS. REYNOLDS: Thank you, Your Honor.

4 THE COURT: All right. I wish you well.

5 Thank you so much.

6 THE PETITIONER: Thank you.

7 (Proceedings conclude at 9:39 a.m.)

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C E R T I F I C A T E

STATE OF OREGON)
) ss.
County of Lane)

I, Lori A. Sosnoski, Court Transcriber for the State of Oregon, hereby certify that I transcribed the foregoing document, consisting of pages 1 through 14, which constitutes a full, true, and accurate transcription of certified audio recordings of oral proceedings in the above-entitled matter held before the Honorable Charles D. Carlson on June 19, 2019, to the best of my knowledge and belief.

Dated at Eugene, Oregon, this 31st day of July,
2019.



LORI A. SOSNOSKI, TRANSCRIBER
(541) 517-4535

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

FOR THE COUNTY OF LANE

In the Matter of:

JONES DAVID HOLLISTER

)

)

) Case No. 19CV20980

) CA A171609

)

CERTIFICATE OF FILING OF TRANSCRIPT

I certify that I prepared all of the transcript designated as part of the record for this appeal.

The transcript is now settled.

I certify that on August 26, 2019, the transcript or part thereof prepared by me was filed with the Appellate Court Administrator in electronic form in the form required by ORAP 3.35(2).

I certify that on August 26, 2019 a copy of this Certificate was served on:

Ms. Lorena M Reynolds

The Reynolds Law Firm PC

555 NW 5th St

Corvallis OR 97330

lorena@reynoldslaw.us

August 26, 2019



LORI A. SOSNOSKI
Court Transcriber

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE
125 E. 8th Ave. Eugene Oregon 97401

Case No: 19CV20980

In the Matter of: JONES DAVID HOLLISTER

Petitioner

**ORDER AND GENERAL
JUDGMENT**

Before the Court is Petitioner, Jones David Hollister, requesting a change of sex under ORS § 33.460 from female to nonbinary. Petitioner is represented by Attorney Lorena Reynolds, who has provided the court with the Hearing Memorandum to assist the Court in determining the issue at hand.

To summarize, Petitioner is a Lane County Oregon resident but was not born in Oregon. Petitioner identifies as nonbinary and uses gender-neutral pronouns such as “they”, “them” and “their”. Petitioner does not identify as either a male or female. Petitioner seeks a court ordered change of sex because Petitioner has experienced difficulties due to the perceived incongruency between Petitioner’s female gender marker on their government identification and their gender nonconforming appearance.

Presently, individuals born in Oregon may change their sex under OAR 333-011-0272 or OAR 333-011-0275, which require the individual to submit a form through the Oregon Health Statistics Agency that allows individuals to request a change of sex to female, male, or nonbinary. ORS §§ 33.410 and 33.460 allow individuals living in Oregon to petition for a change of sex via court order. These statutes do not use specific sex classifications and only use the generic term, “change of sex.” Section 33.460 was amended by HB 2673A which removed the pre-judgment public notice requirement and replaced the requirement of an objective determination that a petitioner underwent surgical, hormonal, or other appropriate treatment. Now, a petitioner need only attest to undergoing such interventions.

Petitioner argues, these statutes do allow this Court to order a change of sex to nonbinary for an Oregon resident that was not born in Oregon. The question before the Court is whether this Court may order a change of sex from female to nonbinary.

When interpreting a statute, a court must first examine the text and context. *State v. Gaines*, 346 Or. 160, 171 (2009). Second, the court may look to the legislative history, however, the evaluative weight of that history is at the discretion of the court. *Id.* at 172. Third, “[i]f the legislature’s intent remains unclear after examining text, context, and legislative history, the court may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty.” *Id.* The full text of the relevant statutes are as follows:

Or. Rev. Stat. § 33.410. Jurisdiction; grounds

Application for change of name of a person may be heard and determined by the probate court or, if the circuit court is not the probate court, the circuit court if its jurisdiction has been extended to include this section pursuant to ORS 3.275 of the county in which

the person resides. The change of name shall be granted by the court unless the court finds that the change is not consistent with the public interest.

Or. Rev. Stat. § 33.460. Application for legal change of sex; jurisdiction; procedure

(1) Application for legal change of sex of a person may be heard and determined by any circuit court in this state. A circuit court may order a legal change of sex and enter a judgment indicating the change of sex if the individual attests that the individual has undergone surgical, hormonal or other treatment appropriate for the individual for the purpose of affirming gender identity.

(2) The court may order a legal change of sex and enter the judgment in the same manner as that provided for change of name of a person under ORS 33.410.

(3) If a person applies for a change of name under ORS 33.410 at the time the person applies for a legal change of sex under this section, the court may order change of name and legal change of sex at the same time and in the same proceeding.

Petitioner argues that the text of ORS § 33.460(1) “necessarily contemplates individuals whose gender identity is neither male nor female,” indicating that this court may grant a change of sex to nonbinary. Petitioner’s Hearing Memorandum, 9. Essentially Petitioner argues the terms “sex” and “gender” should be interchangeable. However, Petitioner does not provide an argument regarding the context of § 33.460. Petitioner argues that the legislative history, notably the replacement of the objective determination requirement with a personal declaration, via HB 2673, “clearly recognizes nonbinary individuals, who may not undergo any hormonal or surgical treatment to transition to male or female.” *Id.* at 4. That argument is not consistent with the present wording of the “sex” change statute.

First, the text and context of § 33.460 does not indicate that the Oregon legislature intends this statute to include changes of sex to nonbinary which Petitioner concedes is a gender classification. The specific wording of this statute does not include the terms nonbinary or intersex. While the terms “sex” or “gender” are not defined in the context of these statutes the language chosen by the legislature clearly addresses a change of sex rather than gender. In comparison, California law makers established a provision allowing individuals to petition for “a judgment recognizing the change of gender to female, male, or nonbinary.” West’s Ann. Cal. Health & Safety Code § 103425(a). If the Oregon legislature intended the 2017 amendment of § 33.460 to allow for change of sex to nonbinary, the legislature could have included that language.

Second, the legislative history of § 33.460 does not indicate that the Oregon legislature intended HB 2673 to amend this statute to include changes of sex to nonbinary. The legislative hearing for HB 2673 contemplates the aforementioned amendments to make the process for receiving a legal change of sex easier for transgender individuals who are in the process of undergoing sexual reassignment procedures and treatments.¹ However, none of the discussion during the hearing suggested implementing a sex change processes for individuals who seek to identify as nonbinary genders.

Finally, Petitioner cites numerous cases in other jurisdictions with particular emphasis on a US passport case—*ZZYYM v. Pompeo*, 341 F.Supp.3d 1248 (10th Cir. 2018). In this case a Federal District Court in Colorado ordered an injunction requiring that the State Department issue a one-off passport with the sex marker “X” to the Plaintiff who was born and identifies as intersex.

¹ <https://olis.leg.state.or.us/liz/2017R1/Committees/HHC/2017-02-27-15-00/Agenda>

Id. at 1260. Before the court was un rebutted sworn medical evidence that verified the Plaintiff's sex is "intersex." *Id.* at 1252. Because Dana ZZYYM was the only plaintiff in this case, the court's evaluation was expressly limited to the specific facts and circumstances regarding the Plaintiff. *Id.* at 1260. The relief was granted under the Federal Administrative Procedures Act rather than a Writ of Mandamus. *Id.* The State Department was not ordered and has not revised their regulations or procedures to issue Passports with a sex marker of X or non-binary. The case did not involve a sex change rather it was cast in terms of a misclassification under Federal law and procedures.

While the court is sympathetic to the Petitioner's present circumstance it is for the Oregon legislature to determine whether they wish to abandon binary sexual classifications for gender classifications adding and defining a third classification of nonbinary and to formulate a procedure to implement this policy decision. Unfortunately, based on the clear language of ORS § 33.460 and the statutory analysis of legislative intent of HB 2673, this Court may not issue a General Judgment for change of sex to nonbinary.

Now, therefore IT IS HEREBY ORDERED and adjudged that Petitioner's request to enter a general judgment changing Petitioner's sex from female to nonbinary is DENIED.

Signed: 7/3/2019 04:31 PM



Charles D. Carlson, Circuit Court Judge

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF LANE
125 E. 8th Ave. Eugene Oregon 97401
541-682-4020 <http://courts.oregon.gov/lane>

July 09, 2019

Lorena M Reynolds
The Reynolds Law Firm PC
555 NW 5th St
Corvallis OR 97330

Re: In the Matter of: Jones David Hollister
Case #: 19CV20980 Case Type: Identity Record

NOTICE OF ENTRY OF JUDGMENT

The court entered a Judgment - General on 07/09/2019 in the court register.

Judgment Creditor:
Judgment Debtor:

Why did I get this notice?

Oregon law (ORS 18.078) requires the court to send this notice when a judgment is entered. If you have questions about the judgment, contact the other party.

If this Notice says that a judgment lien was created:

What is a lien?

A lien is a claim attached to the real property of the person who owes a debt. Depending on the type of case and the amount of the money award, some judgments automatically attach a lien to real property. A lien may prevent property from being sold, or it may require a buyer to pay off the judgment before the seller gets any money.

How do I get rid of a lien?

Judgment liens stay attached to real property until the judgment is paid off, including costs and fees. Once the judgment is paid, the creditor (the person receiving the payment) has to file a Satisfaction of Judgment, which tells the court that the judgment is paid.

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REGISTER OF ACTIONS

CASE No. 19CV20980

In the Matter of: Jones David Hollister

§
§
§
§
§

Case Type: **Identity Record**
Date Filed: **05/08/2019**
Location: **Lane**

PARTY INFORMATION

Petitioner **Hollister, Jones David**
415 E 36th Ave.
Eugene, OR 97405

Attorneys
Lorena M Reynolds
Retained
541 738-1800(W)

EVENTS & ORDERS OF THE COURT

	DISPOSITIONS
07/09/2019	Judgment - General (Judicial Officer: Carlson, Charles D) Comment (Pet's request is DENIED) Created: 07/09/2019 10:09 AM
	OTHER EVENTS AND HEARINGS
05/08/2019	Petition - Initiating <i>Sex Change / sent to CAR for review</i> Created: 05/09/2019 2:10 PM
05/08/2019	Statement <i>sent to CAR for review</i> Created: 05/09/2019 2:10 PM
06/19/2019	Hearing (9:00 AM) (Judicial Officer Carlson, Charles D) <i>Sex Change</i> Result: Held Created: 05/23/2019 11:47 AM
07/09/2019	Digitized Judgment Document (Judicial Officer: Carlson, Charles D) Signed Date: 07/03/2019 Created: 07/09/2019 10:09 AM
07/09/2019	Notice - Judgment Entry Created: 07/09/2019 10:09 AM
07/09/2019	Closed Created: 07/09/2019 10:10 AM
07/16/2019	Notice - Appeal A171609 Created: 07/18/2019 10:22 AM
07/18/2019	Certificate A171609 of Notice to Transcriber Lori Sosnoski Created: 07/18/2019 11:31 AM
08/26/2019	Notice A171609 to transcriber, transcript has settled Created: 09/17/2019 12:35 PM
08/27/2019	Notice A171609 Trial Court File requested by COA Created: 09/26/2019 11:57 AM
09/26/2019	Notice A171609 Trial Court File transmitted to COA Created: 09/26/2019 1:39 PM