COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

Case No. 21-11805

Matter of

[redacted] NOAKER, [redacted] a/k/a PRISCYLLA RENEE VON NOAKER,

Petitioner.

MEMORANDUM OF LAW IN SUPPORT OF NAME CHANGE PETITION AND UNCONSTITUTIONALITY OF THE FELONY BAR AT 54 Pa.C.S. § 702(c)(2)

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PRELIMINARY STATEMENT

Petitioner [redacted] Noaker, [redacted] a/k/a Priscylla Renee Von Noaker ("Petitioner" or "Ms. Von Noaker"), is a transgender woman who lives openly as the woman she is, but who is forced to use a legal name that does not reflect her gender identity or appearance. When going about everyday life, including trying to secure medical treatment, she is hampered by the discrimination and confusion that results when she shows ID that leads others to assume she is a man. As stated in the contemporaneously filed Name Change Petition, Ms. Von Noaker wants to change her name to reflect her female gender, but is barred from doing so solely because she was convicted of a felony almost 35 years ago.

More than 150 years after Pennsylvania's legislature established a name-change procedure in affirmance of Pennsylvanians' inherent right to control their names,[1] the legislature (in 1998) amended the name-change statute to bar name changes for individuals with certain felony convictions, including aggravated assault. 54 Pa.C.S. § 702(c)(2) (the "felony bar"). The felony bar precludes affected individuals from ever obtaining a court-ordered name change, no matter how long ago the convictions occurred, no matter the reasons for the name change, and no matter the adverse consequences. The asserted justification for the bar is to prevent fraud. But that justification does not withstand constitutional scrutiny, especially when applied to Ms. Von Noaker.

Privacy and Reputation, Pa. Const. art. I, § 1. The felony bar is unconstitutional on its face and as applied to Ms. Von Noaker under Pa. Const. art. I, § 1 because it unconstitutionally infringes on her: (1) right to independence in making

[1] *See Laflin & Rand Powder Co. v. Steytler*, 23 A. 215, 217 (Pa. 1892) (discussing the inherent right).

important, intensely private decisions; (2) right to avoid disclosure of highly personal matters; and (3) right to acquire, possess, and protect her reputation. The felony bar's infringement on these rights is unconstitutional under two (independently sufficient) tests:

First, the felony bar fails Pennsylvania's irrebuttable-presumption test. Pennsylvania courts have recognized that a presumption that one fact is statutorily conclusive of another fact will often run afoul of due process protections. Under settled law, an irrebuttable presumption is unconstitutional when it (1) encroaches on an interest protected by the due process clause, (2) the presumption is not universally true, and (3) reasonable alternative means exist for ascertaining the presumed fact. The felony bar creates an irrebuttable presumption that individuals convicted of felonies are seeking to change their names for fraudulent purposes and thus may not change their names, and (as explained below at pp. 23–31) it fails each prong of the irrebuttable-presumption test.

Second, the felony bar fails traditional means-end review, which is a separate and independent analysis for determining the constitutionality of a Pennsylvania law. Under means-end review, courts weigh the rights infringed by the law against the interest sought to be achieved by it, and scrutinize the relationship between the law (the means) and that interest (the end). Where laws infringe rights considered "fundamental"—such as the right to reputation and the right to privacy—courts apply a strict-scrutiny test, which asks whether the law is "narrowly tailored to a compelling state interest." The felony bar fails strict scrutiny because it prevents individuals with legitimate reasons for seeking a name change (*e.g.*,

religion, family ties, gender status) from obtaining one, and the name-change statute already includes means to protect against fraudulent name changes.[2] Even under a rational-basis standard of review, the felony bar is unconstitutional because there is no rational basis for assuming that every person convicted of a felony who is seeking a name change intends to perpetrate a fraud.

Compelled Speech, Pa. Const. art. I, § 7. The felony bar is also unconstitutional on its face and as applied to Ms. Von Noaker under Pa. Const. art. I, § 7 because it compels speech that is readily associated with the person it affects. In Pennsylvania, government-issued ID is required to vote for the first time in a precinct, travel overseas, drive, and even enter government buildings. Outside of name changes due to marriage, divorce, or naturalization, the only way to obtain a name change on a government-issued ID is to go through the court-ordered name change process under 54 Pa.C.S. § 701 *et seq.* Expressing one's unwanted and incorrect name on government-issued ID is "speech" just as much as expressing "Live Free or Die" on one's government-issued license plate (which the government also may not compel under controlling law) is speech.[3] The constitutional

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[2] For example, the petitioner must provide the court and State Police with a set of fingerprints and "[t]he reason for the name change" so that the reason can be tested in court. The petitioner also must publish notice of the name-change hearing in two newspapers of general circulation, allowing those who might have a lawful objection to make one. At the hearing, the petitioner must present an official search showing there are no judgments, decrees of record, or other similar matters against the petitioner. Once the hearing concludes, the Court sends notice of the name change to the Attorney General, the State Police, and the District Attorney. On receipt, the State Police include the name-change information in the central repository. None of these aspects of the statute are challenged here.

[3] *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (holding that State requirement that license plates display "Live Free or Die" is unconstitutional compelled speech).

harm is being forced to speak rather than to remain silent, and that harm does not turn on whether speech is ideological, factual, or something else. Because the felony bar results in compelled speech, it is content-based, and thus subject to strict scrutiny, a standard under which the bar cannot pass muster.

Individuals like Ms. Von Noaker suffer daily harm from the felony bar. There is no justification or need to inflict that harm, and fundamental protections prohibit it. This Court should declare the felony bar to be unconstitutional on its face and as applied to Ms. Von Noaker, and permit her to obtain a name change under the name-change statute.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Pennsylvania Constitution – article I, § 1:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Pennsylvania Constitution – article I, § 7:

> The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty

Pennsylvania Name-Change Statute – 54 Pa.C.S. § 702(c) (Convicted felons):

> (1) The court may order a change of name for a person convicted of a felony, subject to provisions of paragraph (2), if:
>
> > (i) at least two calendar years have elapsed from the date of completion of a person's sentence and that person is not subject to the probation or parole jurisdiction of any court, county probation agency or the Pennsylvania Board of Probation and Parole; or

(ii) the person has been pardoned.

(2) The court may not order a change of name for a person convicted of murder, voluntary manslaughter, rape, involuntary deviate sexual intercourse, statutory sexual assault, sexual assault, aggravated indecent assault, robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i) (relating to robbery), aggravated assault as defined in 18 Pa.C.S. § 2701(a)(1) or (2) (relating to aggravated assault), arson as defined in 18 Pa.C.S. § 3301(a) (relating to arson and related offenses), kidnapping or robbery of a motor vehicle or criminal attempt, criminal conspiracy or criminal solicitation to commit any of the offenses listed above or an equivalent crime under the laws of this Commonwealth in effect at the time of the commission of that offense or an equivalent crime in another jurisdiction.

(3) The court shall notify the Office of Attorney General, the Pennsylvania State Police and the office of the district attorney of the county in which the person resides when a change of name for a person convicted of a felony has been ordered. The Pennsylvania State Police, upon receipt of this notice, shall include the change of name information in the central repository as provided for in 18 Pa.C.S. Ch. 91.

BACKGROUND

A. The Commonwealth, through 54 Pa.C.S. § 702(c)(2), bars persons previously convicted of certain felonies from obtaining a name change.

A person's name is the designation by which he or she is "distinctively known in the community." *Laflin & Rand Powder Co. v. Steytler*, 23 A. 215, 217 (Pa. 1892). Although custom gives people the last name of their father and the first name of their parents' selection, "this is only a general rule, from which the individual may depart if he [or she] chooses." *Id.* "The [Pennsylvania] legislature in 1852 provided a mode of changing the name, but that act was in affirmance and aid of the common law, to make a definite point of time at which a change shall take effect." *Id.*; *see also* Joanne Ross Wilder et al., *Change of name*, 17 West's Pa. Prac., Family Law § 3:4 (7th ed.) (March 2021 Update).

In 1998, Pennsylvania's legislature amended the name-change statute to implement the provision at the heart of this case, the felony bar, which is codified at 54 Pa.C.S. § 702(c)(2) and is reproduced above. It also provided that a court must send the State Police a copy of the person's name-change petition and a set of the person's fingerprints before granting a name change. *See* 54 Pa.C.S. § 702(b); Act of June 18, 1998, P.L. 638, No. 83. Finally, the 1998 amendment added several record-keeping measures, including a requirement that the court "notify the Office of Attorney General, the Pennsylvania State Police and the office of the district attorney of the county in which the person resides when a change of name for a person convicted of a felony has been ordered." 54 Pa.C.S. § 702(c)(3). "The Pennsylvania State Police, upon receipt of this notice, shall include the change of name information in the central repository as provided for in 18 Pa.C.S. Ch. 91 (relating to criminal history record information)." *Id.*

In 2004, the legislature tacked on further requirements, specifically that the name-change petition recite the reason for the change, and that a petitioner publish notice of the hearing in two newspapers of general circulation. 54 Pa.C.S. § 701(a.1); Act of November 30, 2004, P.L. 1684, No. 214. At the hearing, the petitioner also must present proof of publication and an official search of the proper county offices showing no outstanding judgments against the petitioner. *Id.* Any person having a lawful objection to the name change can appear and be heard. *Id.* The court may then enter a decree changing the name as petitioned if the court is satisfied that there is no lawful objection to granting the petition. *Id.*

B. Ms. Von Noaker is adversely affected by the felony bar.

Ms. Von Noaker is a 70-year-old woman. *See* Affidavit of [redacted] Noaker, [redacted] ("Von Noaker Aff.") ¶ 5. She is also transgender. *Id.* She identifies as

American Indian Two Spirit and teaches about American Indian Two Spirit and transgender issues. *Id.* ¶ 6. As part of her religious beliefs as a Tsalagi and Lenape Two Spirit person, she believes that within her are two different spirits—male and female—and that the female spirit is stronger. *Id.* ¶ 7. Honoring her female spirit, including through the name she uses, is an important part of her religious observance. *Id.* Almost 35 years ago, in 1987, she was convicted of rape and served 10 years in prison. *Id.* ¶ 8. As such, under the felony bar, she can never change her name in Pennsylvania.

To the widest extent possible, Ms. Von Noaker goes by the name Priscylla Renee Von Noaker. *See* Von Noaker Aff. ¶ 1. She identifies as Priscylla Renee. *Id.* In her words, "Priscylla Renee Von Noaker is simply who I am." *Id.* ¶ 9. But her given name—to which she strongly objects—is "[redacted] Von Noaker, [redacted]" *Id.* ¶¶ 1, 4. Yet, the felony bar forces Ms. Von Noaker, like other individuals who cannot change their names, to reveal her given name on a daily basis. Government-issued ID must be displayed to vote for the first time in a precinct,[4] travel overseas,[5] board a domestic commercial flight,[6] drive,[7] and enter a military installation or federal building.[8] This is in addition to all of the situations where private entities—

[4] Pennsylvania Votes, Voter ID for First Time Voters, https://bit.ly/2QomtL8.

[5] U.S. Department of States, Bureau of Consular Affairs, U.S. Passports, How to Apply for a Passport, Photo Identification, https://bit.ly/3tEdCTN.

[6] U.S. Transportation Security Administration, Travel, Security Screening, Identification, https://bit.ly/3tyEswy.

[7] Pennsylvania Department of Transportation, Identification and Residency Requirements for U.S. Citizens, https://bit.ly/3lAMuT6.

[8] U.S. Department of Homeland Security, Preventing Terrorism, Real ID, Real ID Frequently Asked Questions, https://bit.ly/2ZrizFQ.

such as doctors' offices, office buildings, hotels, pharmacies, banks, shops, and bars—require people to show ID.[9] And it is not only through showing ID that Ms. Von Noaker must associate herself with her given name. In any official forms or paperwork that may require identity verification, she needs to print and sign her given name as her own name, an action that causes her considerable pain. *See* Von Noaker Aff. ¶¶ 11, 13.

Recently, Ms. Von Noaker suffered from a heart attack, as well as anemia, and a low hemoglobin count. *See* Von Noaker Aff. ¶ 11. However, when she goes to the hospital for treatment, she cannot use her chosen name; instead, she must use a name that does not match her gender expression and with which she has never identified. *Id.* Some of the doctors and medical staff at the hospital address her by her given name, and she needs to constantly remind them to use her chosen name instead. *Id.*

For Ms. Von Noaker, the requirement to use her given name adds to her fear of being abused or subject to violence because she is a transgender woman. *See* Von Noaker Aff. ¶ 12. Her fear, unfortunately, is well founded. The mismatch between one's identity and government-issued ID can lead to an involuntary disclosure with severe and life-threatening consequences. *See* Sandy E. James et al.,

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[9] *See* Julia Shear Kushner, *The Right to Control One's Name*, 57 UCLA L. Rev. 313, 352 (2009); Ayden I. Scheim, Amaya G. Perez-Brumer, & Greta R. Bauer, *Gender-concordant identity documents and mental health among transgender adults in the USA: a cross-sectional study*, Lancet Public Health 2020 e196 (April 2020) (noting that IDs are "required for immigration, travel, citizenship verification, security clearances, social service applications, and other major structural access points, as well as in daily activities such as socializing, purchasing items, and engaging in recreational activities").

The Report of the 2015 U.S. Transgender Survey, Washington DC: National Center for Transgender Equality (2016) ("USTS").[10] In a large national survey, nearly one third of transgender people who presented an ID with a name or gender marker that did not match their gender presentation experienced some form of mistreatment, such as being harassed, denied services, or attacked. *See* USTS at 89. Nearly half of all transgender people have experienced sexual violence in their lifetime. *Id.* at 202–05. American Indian transgender people experience some of the highest rates of these forms of violence. *Id.* at 89, 202, 205 (showing that 25% of all transgender people were mistreated when they showed gender-incongruent identification, while 39% of American Indian transgender people were mistreated; 13% of all transgender people had been physically attacked in the last year, while 25% of American Indian transgender people had been physically attacked; 47% of all transgender people had been sexually assaulted in their lifetime, while 65% of American Indian transgender people had been sexually assaulted).

This situation comes with significant health consequences, including high rates of depression and suicide. *See* Ayden I. Scheim, Amaya G. Perez-Brumer, & Greta R. Bauer, *Gender-concordant identity documents and mental health among transgender adults in the USA: a cross-sectional study*, Lancet Public Health 2020 e197 (April 2020).[11] As Ms. Von Noaker states, "[t]he constant need to identify myself with an unwanted name that does not match my gender expression and identity

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[10] The 2015 U.S. Transgender Survey is the largest survey examining the experiences of transgender people in the United States, with 27,715 respondents from all 50 states, the District of Columbia, American Samoa, Guam, Puerto Rico, and U.S. military bases overseas. *See* USTS at 4, https://bit.ly/3uVi1D9.

[11] https://bit.ly/2NDdTXS.

is psychologically tolling and a detriment to my emotional well-being." Von Noaker Aff. ¶ 13.

Gender-concordant identity documents thus play a pivotal and critical role in improving physical safety and mental health for transgender individuals. According to the first study in the United States to examine quantitatively the relationship between gender-concordant identity documents and psychological distress and suicidality among transgender adults, psychological distress, suicidal thinking, and plans to die by suicide were all significantly less common for people with gender-concordant documents. Scheim, *supra* at e196. As the study's author states in his expert report in this case, "legal name changes are a critical part of gender affirming treatment for transgender persons and are associated with substantial reductions in the mental health challenges they too often face. Legal name changes may also improve social, health, and economic conditions of transgender individuals by reducing their exposure to discrimination, harassment, and violence[.]" Declaration of Ayden Scheim ("Scheim Expert Declaration") ¶ 30.

Ms. Von Noaker wants to change her name so that her name reflects her gender expression and identity and avoid the serious health and safety problems associated with the mismatch between her identity and the name on her government-issued ID. To achieve that, however, she must challenge and displace the felony bar in 54 Pa.C.S. § 702(c)(2).

C. Commonwealth Court proceedings

Ms. Von Noaker initiated her first challenge to the felony bar in May 2019. Along with two other transgender women who seek a name change, she filed an original action in the Commonwealth Court, seeking a declaration that the felony

bar at 54 Pa.C.S. § 702(c)(1)–(2) is unconstitutional. *See Porter v. Commonwealth*, No. 3030 M.D. 2019 (Pa. Commw. Ct.). In that action, Petitioners named as Respondents the Commonwealth of Pennsylvania, the Pennsylvania Department of State, and Kathy Bookvar, in her capacity as Acting Secretary of the Commonwealth. The Attorney General appeared for Respondents, and the parties briefed the Petitioners' motion for summary relief and the Attorney General's preliminary objections.

The Commonwealth Court held oral argument on both motions and, on July 29, 2020, granted the Attorney General's preliminary objections in an unreported opinion, ruling that the Commonwealth of Pennsylvania, the Pennsylvania Department of State, and Kathy Bookvar were not proper parties to defend the law in an original action. The Commonwealth Court did not address the merits of Petitioners' claims. In fact, the Commonwealth Court expressly stated, "We express no opinion on the potential merits of a future suit against proper parties." July 29, 2020 Opinion at 9 n.5.

Ms. Von Noaker now raises her constitutional challenge as part of the standard name-change process that occurs in this Court. Ms. Von Noaker is simultaneously notifying and serving the Attorney General's Office with her Petition and this brief in accordance with Pennsylvania Rule of Civil Procedure 235. Under that same rule, the Attorney General now has the option to appear and defend the constitutionality of the felony bar.

ARGUMENT

"When addressing constitutional challenges to legislative enactments, we recognize that 'the General Assembly may enact laws which impinge on constitutional rights to protect the health, safety, and welfare of society,' but also that

'any restriction is subject to judicial review to protect the constitutional rights of all citizens.'" *Commonwealth v. Muhammad*, 241 A.3d 1149, 1154–55 (Pa. Super. Ct. 2020) (quoting *In re J.B.*, 107 A.3d 1, 14 (Pa. 2014)). As explained below, the felony bar infringes on the right to privacy and reputation in violation of Pa. Const. art. I, § 1, and unconstitutionally compels speech in violation of Pa. Const. art. I, § 7.

I. The felony bar is unconstitutional under Pa. Const. art. I, § 1.

As detailed below, (A) the felony bar infringes three independent constitutional rights that stem from Pa. Const. art. I, § 1 (due process), and (B) the infringement is unconstitutional under both the irrebuttable-presumption test and a traditional means-ends review.

A. The felony bar infringes three different constitutionally protected rights that stem from Pa. Const. art. I, § 1.

Article I, section 1 of the Pennsylvania Constitution states:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

"This section—like the Due Process Clause in the Fourteenth Amendment of the United States Constitution—guarantees certain inalienable rights." *Nixon v. Commonwealth*, 839 A.2d 277, 286 (Pa. 2003) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

As explained below, the "certain inalienable rights" at issue here are threefold: (1) the privacy right to independence in making important, intensely private

decisions; (2) the privacy right to avoid disclosure of highly personal matters; and (3) the right to acquire, possess, and protect reputation.

1. The right to independence in making important, intensely private decisions.

The "right to privacy" is a "fundamental" right protected by Pa. Const. art. I, § 1. *See Nixon*, 839 A.2d at 287 (citing *Stenger v. Lehigh Valley Hosp. Center*, 609 A.2d 796, 799–802 (Pa. 1992)). "Article I, Section 1 of the Pennsylvania Constitution provides even 'more rigorous and explicit protection for a person's right to privacy' than does the United States Constitution." *Pennsylvania State Educ. Ass'n v. Commonwealth, Dep't of Cmty. & Econ. Dev.*, 148 A.3d 142, 151 (Pa. 2016) (quoting *In re "B"*, 394 A.2d 419, 425 (Pa. 1978)). The fundamental right to privacy includes not only an individual's right to be left alone, but also her "'independence in making certain kinds of important decisions.'" *Pennsylvania State Educ. Ass'n*, 148 A.3d at 150 (quoting *Whalen v. Roe*, 429 U.S. 589, 598–601 (1977)).

Protection of a person's independence in making important decisions is crucial because "'[t]he greatest joy that can be experienced by mortal man is to feel himself master of his fate,—this in small as well as in big things.'" *Id.* at 151 (quoting *Commonwealth v. Murray*, 223 A.2d 102, 110 (Pa. 1966)). Accordingly, the right to privacy extends to choices that shape an individual's destiny and choices that are among life's momentous acts of self-definition. *McCusker v. W.C.A.B. (Rushton Min. Co.)*, 639 A.2d 776, 779 (Pa. 1994) (gathering cases related to the right to make certain kinds of important or intimate decisions); *see also Obergefell v. Hodges*, 576 U.S. 644, 666 (2015) (explaining that individual autonomy protection under the Due Process Clause extends to marriage because "[c]hoices about marriage shape

an individual's destiny" and are "among life's momentous acts of self-definition") (citation omitted).

It comes as no surprise that the right to control one's name is the type of "important decision" that shapes an individual's destiny—a name change is a momentous and a literal act of self-definition. "The right to identify our own existence lies at the heart of one's humanity." *Gonzalez v. Nevares*, 305 F. Supp. 3d 327, 334 (D.P.R. 2018). To say the least, "[m]ost people have strong feelings, whether articulated or implicit, about the idea of [k]eeping, or changing, their names." Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. Chi. L. Rev. 761, 769 (2007) (citing Margaret Jean Intons-Peterson & Jill Crawford, *The Meaning of Marital Surnames*, 12 Sex Roles 1163, 1165–71 (1985), and Deborah A. Duggan, Albert A. Cota, & Kenneth L. Dion, *Taking Thy Husband's Name: What Might It Mean?*, 41 Names 87, 91–92 (June 1993)).

And the reasons for these strong feelings are plain enough as well. "A name is more than just a representation or expression of oneself to others. Names form part of one's own self-concept, whether or not that self-concept is communicated to the public." Julia Shear Kushner, *The Right to Control One's Name*, 57 UCLA L. Rev. 313, 345 (2009) (citing Andrew M. Milz, *But Names Will Never Hurt Me?: El-Hakem v. BJY, Inc. and Title VII Liability for Race Discrimination Based on an Employee's Name*, 16 Temp. Pol. & Civ. Rts. L. Rev. 283, 293 (2006)). "Names are more than identifiers; they are descriptive and can communicate much about a person …. [They] can inform our own sense of who we are." Kushner, *supra*, *The Right to Control One's Name*, 57 UCLA L. Rev. at 324. From this most basic perspective, the right

to control one's name is encompassed within the privacy right of making important decisions under Pa. Const. art. I, § 1.[12]

2. The right to avoid disclosure of highly personal matters.

In addition to protecting an individual's independence in making important decisions, the privacy guarantee of Pa. Const. art. I, § 1 protects an individual's "'interest in avoiding disclosure of personal matters.'" *Pennsylvania State Educ. Ass'n*, 148 A.3d at 150 (quoting *Whalen*, 429 U.S. at 598–601). The Pennsylvania Supreme Court has recognized that there are "'certain types of information whose disclosure, by their very nature, would operate to the prejudice or impairment of a person's privacy, reputation, or personal security, and thus intrinsically possess a palpable weight that can be balanced by a court against those competing factors that favor disclosure.'" *Id.* at 155 (quoting *Tribune-Review Pub. Co. v. Bodack*, 961 A.2d 110, 115–16 (Pa. 2008)).

Of direct relevance here, information showing an individual to be transgender, by its very nature, invades an individual's privacy. Indeed, as courts

[12] For transgender people, the significance of a name is, if anything, greater. Name change is one of the most important steps in a transgender person's transition to living consistently with their identity. Scheim Expert Declaration ¶ 30. Simply being able to use a chosen name consistently is associated with better mental health outcomes and social functioning for transgender people. *Id.* In fact, it can even save lives. "[C]ompared to transgender individuals who had no identity documents reflecting the name they preferred, those who had the name they preferred on some or all documents were less likely to report psychological distress and suicidality." *Id.* ¶ 27. Name change is also a recognized aspect of treatment to alleviate gender dysphoria. *See* World Prof. Assoc. for Transgender Health (WPATH) Standards of Care at 10 (2012), https://bit.ly/2SkAMBc.

have recognized, "[t]he excrutiatingly [sic] private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate" and thus "the Constitution does indeed protect the right to maintain the confidentiality of one's transsexualism." *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999); *see also Love v. Johnson*, 146 F. Supp. 3d 848, 854 (E.D. Mich. 2015) (finding that requiring plaintiffs to publicize their transgender status cuts at "the very essence of personhood" and directly implicates the fundamental right of privacy); *K.L. v. Alaska, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05341, 2012 WL 2685183, at *6 (Alaska Super. Ct. Mar. 12, 2012) (concluding that an individual's transgender status qualifies for privacy protection under Alaska law); *Ray v. Himes*, No. 2:18-CV-272, 2019 WL 11791719, at *9 (S.D. Ohio Sept. 12, 2019) (finding that gender incongruent documents infringe on the right to privacy for transgender people both because they disclose highly sensitive, personal information and because they expose transgender people to risk of bodily harm); *Gonzalez*, 305 F. Supp. 3d at 333 ("Much like matters relating to marriage, procreation, contraception, family relationships, and child rearing, there are few areas which more closely intimate facts of a personal nature than one's transgender status.").

For this reason, courts routinely allow transgender plaintiffs to proceed under a pseudonym to protect their privacy. *See, e.g.*, *Foster v. Andersen*, No. 18-2552-DDC-KGG, 2019 WL 329548, at *2 (D. Kan. Jan. 25, 2019) (allowing a pseudonym in light of the fact that "other courts have recognized the highly personal and sensitive nature of a person's transgender status and thus have permitted transgender litigants to proceed under pseudonym"); *see also Doe v. City of Detroit*, No. 18-cv-11295, 2018 WL 3434345, at *2 (E.D. Mich. July 17, 2018) (permitting a transgender plaintiff to proceed by pseudonym after ruling that plaintiff's transgender status "certainly qualifies as information of the utmost intimacy") (citation and internal

quotation marks omitted); *Doe v. Blue Cross & Blue Shield of Rhode Island*, 794 F. Supp. 72, 74 (D.R.I. 1992) (allowing transgender plaintiff to proceed pseudonymously because "[a]s a transsexual, plaintiff's privacy interest is both precious and fragile, and this Court will not cavalierly permit its invasion"); *Doe v. McConn*, 489 F. Supp. 76, 77 (S.D. Tex. 1980) (explaining that transgender plaintiffs were "suing under fictitious names … to protect their privacy").

The consequences of forced disclosure of one's transgender status can be devastating. "Mismatches between ID documents and outward gender presentation can create risks to the health and safety of transgender people." *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1137 (D. Idaho 2018) (striking down Idaho statute barring correction of sex designation on birth certificates). "Transgender people who present mismatched identification are verbally harassed, physically assaulted, denied service or benefits, or asked to leave the premises." *Id.* (citing USTS); *see also Ray v. McCloud*, 507 F. Supp. 3d 925, 933 (S.D. Ohio 2020) (striking down Ohio policy barring correction of sex designation on birth certificates and noting, "It is not just Plaintiffs' own experiences that have caused them to fear disclosing their status but also a broader reality that, unfortunately, many transgender individuals do face a heightened risk of 'discrimination, harassment, and violence because of their gender identity.'") (quoting *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017)); *see also Corbitt v. Taylor*, No. 2:18CV91-MHT, 2021 WL 142282, at *2 (M.D. Ala. Jan. 15, 2021) ("Whenever plaintiffs show an identification document that calls them male, the reader of the document instantly knows that they are transgender. That, the record makes clear, is dangerous."). In Pennsylvania specifically, 30% of those who showed ID with a name or gender marker that did not match their gender presentation were "verbally harassed, denied benefits or service, asked to leave, or assaulted." *2015 U.S.*

Transgender Survey: Pennsylvania State Report, Washington, DC: National Center for Transgender Equality (Updated October 2017).[13]

These realities may be less surprising when considered in the broader context of violence and mental health consequences for transgender people. "Between 2013 and 2015, hate crimes against transgender people increased 239 percent, with LGBT people more likely than any other minority group to experience hate crimes in the United States." *Matter of M.E.B.*, 126 N.E.3d 932, 936 (Ind. Ct. App. 2019) (citing Haeyoung Park & Iaryna Mykhyalyshyn, *L.G.B.T. People Are More Likely to be Targets of Hate Crimes Than Any Other Minority Group*, N.Y. Times (June 16, 2016)[14]). The reported suicide attempt rate for transgender people is nearly nine times the rate of the US population on average, *see* USTS at 11, and "the prevalence of clinical depression in trans adults is estimated to be over 50%, compared with an estimated 30% lifetime prevalence among the US general population." Scheim, *supra*, at e197.[15] And, according to the Pennsylvania State Report of the USTS, the situation in Pennsylvania has been bad enough that 22% of transgender people avoided seeing a doctor when they needed to because of fear of being mistreated as a transgender person; 22% of those who had experienced homelessness avoided going to a shelter because of fear of being mistreated as a transgender person; and 60% said they would feel uncomfortable calling the police for help if they needed it. *2015 U.S. Transgender Survey: Pennsylvania State Report*, Washington, DC: National Center for Transgender Equality (Updated October 2017).[16]

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[13] https://bit.ly/3t5Bhf2.

[14] https://nyti.ms/38Vpglp.

[15] https://bit.ly/2NDdTXS.

[16] https://bit.ly/3t5Bhf2.

With these heart-wrenching statistics in hand, it is no wonder that gender-concordant identity documents play a significant role in improving mental health for transgender people. As referenced, according to the first study in the US to examine quantitatively the relationship between gender-concordant ID documents and psychological distress and suicidality among transgender adults, "respondents for whom all IDs were concordant had lower prevalence of serious psychological distress, suicidal ideation, and suicide planning" compared with those with no gender-concordant ID. *See* Scheim, *supra*, at e196.[17] Similar studies in Canada have yielded similar results. *See* Scheim Expert Declaration ¶ 24.

By employing the felony bar to deny certain transgender individuals, like Ms. Von Noaker, the ability to change their names, the Commonwealth forces them to broadcast an undesired name and publicize that they are transgender every time they need to use official documentation, which can occur multiple times a day. *See* Von Noaker Aff. ¶¶ 11, 13. "[F]orced disclosure of a transgender person's most private information is not justified by any legitimate government interest." *Gonzalez*, 305 F. Supp. 3d at 333. "It does not further public safety, such that it would amount to a valid exercise of police power." *Id.* (citing *Whalen*, 429 U.S. at 598). "To the contrary, it exposes transgender individuals to a substantial risk of stigma, discrimination, intimidation, violence, and danger." *Id.*; Von Noaker Aff. ¶¶ 11–13.

[17] For this study, "[t]he analytic sample included 22,286 respondents living full-time or part-time in a gender different form that assigned at birth." Scheim et al., *Gender-concordant identity documents and mental health among transgender adults in the USA: a cross-sectional study*, at e200.

3. The right to acquire, possess, and protect one's reputation.

Pa. Const. art. I, § 1 expressly acknowledges a right to "acquir[e], possess[], and protect[] … reputation." As the Pennsylvania Supreme Court has recognized, "the right of citizens to security in their reputations is not some lesser-order precept." *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d 560, 572 (Pa. 2018). Instead, in Pennsylvania, it is a "fundamental constitutional entitlement." *Id.* at 572–73 (citing Pa. Const. art. I, § 1); *see also Muhammad*, 241 A.3d at 1158 ("Reputation is an interest that is recognized and protected by our highest state law: our Constitution.") (citation omitted). "This foundational assurance of reputational security has remained substantively extant through four iterations of the state charter, dating back to our Constitution of 1790." *In re Fortieth Statewide Investigating Grand Jury*, 190 A.3d at 573. As such, our Supreme Court has recognized that the Pennsylvania Constitution "'places reputational interests on the highest plane, that is, on the same level as those pertaining to life, liberty, and property.'" *Id.* (quoting *Am. Future Sys., Inc. v. Better Bus. Bureau of E. Pennsylvania*, 923 A.2d 389, 395 n.7 (Pa. 2007)).

A person's name is the foundation on which one's reputation is built. In fact, the right to control one's name is intertwined, inextricably, with the right to acquire, possess, and protect one's reputation. That is why the constitutional right has often been described in terms of protecting one's "good name" or "clearing" one's name. *See Berg v. Consol. Freightways, Inc.*, 421 A.2d 831, 833 (Pa. Super. Ct. 1980) (noting that plaintiff had been advised that he had to "clear his name" and stating "Pennsylvania has always permitted a person to protect his good name and reputation") (citing *Barr v. Moore*, 87 Pa. 385 (1878)); *see also Barr*, 87 Pa. at 393 ("The security of [a person's] reputation or good name … are rights to which every man is entitled by reason and natural justice."); *In re D.A.C.*, 2014 Pa. Dist. & Cnty Dec.

LEXIS 625, at *11 (C.P. Allegheny Oct. 31, 2014) (finding no error in decision to grant name change because court "found that the reputation of [a former name] will have a negative social stigma within the community …."). It is also why the Superior Court has emphasized the importance of one's good name in reversing an unwarranted denial of a name change. *See In re Miller*, 824 A.2d 1207, 1214 (Pa. Super. Ct. 2003) (quoting Shakespeare's observation that "'[g]ood name in man and woman, dear my lord, is the immediate jewel of their souls'" and finding that baseless name-change denials "rob the applicant of that which in no way enriches, or protects, the public and makes the applicant poor indeed").

Because she cannot change her name on official records and documents, Ms. Von Noaker cannot effectively acquire a reputation. She must repeatedly use a name that does not reflect who she is, and does not reflect how she seeks to be known. Because of the bar, every time she has to show ID, go to the doctor, use a credit card, or fill out official paperwork, she must use a name that she otherwise seeks never to use. This predicament makes it impossible to establish a consistent reputation based on her name.

Also, because her given name is so closely associated with men, it interferes with her ability to secure and protect her reputation. She has to constantly remind people of her preferred name, which has taken a significant psychological toll on her. *See* Von Noaker Aff. ¶¶ 11–13. It is perhaps small wonder that low-income transgender women of color who have completed legal name changes have been found "more likely to be employed, to report incomes above $1000 per month, and to rent or own their own housing," and less likely to postpone needed medical care, than those who have not yet changed their names. *See* Scheim Expert Declaration ¶ 22.

Additionally, Ms. Von Noaker has worked hard to rebuild her life and make amends by contributing positively to her community since she finished serving her sentence. The law itself conveys the message that as someone who was convicted of a serious crime, the only possible reason Ms. Von Noaker could have for changing her name involves fraud. In all these ways, the bar makes it impossible for her to acquire or defend her reputation and thereby infringes this independent constitutional guarantee.

B. The infringement of the constitutionally protected rights is unlawful under both the "irrebuttable presumption" test and a "means-ends review."

As noted above, a court may determine that a government restriction unconstitutionally infringes a due process right under two separate and independent tests: the irrebuttable presumption test, and a means-end review. Under both tests, the felony bar is unconstitutional.

1. The felony bar fails the irrebuttable presumption test.

The felony bar infringes the constitutionally protected reputation and privacy rights on its face and as applied to Ms. Von Noaker. The law is unconstitutional as written, and its application to Ms. Von Noaker deprives her of her constitutional rights. Pennsylvania law permits parties to raise facial and as-applied challenges in the same proceeding. *See Muhammad*, 241 A.3d at 1155 ("It is permissible to raise both facial and as-applied challenges to a statute.").

a. On its face, the felony bar fails the irrebuttable presumption test.

Here, on its face, the felony bar constitutes an unconstitutional irrebuttable presumption. The procedures associated with the name-change statute serve one main interest: preventing individuals from changing their name to commit fraud. As the Pennsylvania Supreme Court has expressly stated, "the primary purpose of the Judicial Change of Name Statute, other than with regard to minor children, is to prohibit fraud by those attempting to avoid financial obligations." *Matter of McIntyre*, 715 A.2d 400, 402 (Pa. 1998) (citing *Commonwealth v. Goodman*, 676 A.2d 234 (Pa. 1996) (emphasis added)); *In re Miller*, 824 A.2d 1207, 1210–11 (Pa. Super. Ct. 2003) (same). Similarly, the penalty provision of the name-change statute punishes only those violating the statute "for purpose of avoiding payment of taxes or other debts[.]" 54 Pa.C.S. § 705.

By its terms, therefore, the felony bar at 54 Pa.C.S. § 702(c)(2) creates an irrebuttable presumption that individuals convicted of felonies are seeking to change their names for fraudulent purposes and thus cannot obtain a name change. Under all circumstances, that irrebuttable bar equates having a felony conviction with having the purpose of committing fraud in seeking a name change, including for those individuals with legitimate reasons for seeking such a change, like Ms. Von Noaker. No individualized inquiry is permitted.

The Pennsylvania Supreme Court has recognized that the legislature sometimes "utiliz[es] presumptions that the existence of one fact [is] statutorily conclusive of the truth of another fact." *J.B.*, 107 A.3d at 14. These are known as "irrebuttable presumptions," and they "often run afoul of due process protections." *Peake v. Commonwealth*, 132 A.3d 506, 519 (Pa. Commw. Ct. 2015). "[The] Supreme Court

has declined to 'pigeonhole' an irrebuttable presumption challenge as a procedural or substantive due process challenge." *Muhammad*, 241 A.3d at 1155 (citing *Commonwealth v. Torsilieri*, 232 A.3d 567, 581 (Pa. 2020)). The irrebuttable presumption challenge also does not depend on whether the underlying interest or right is "fundamental." *See, e.g.*, *Commonwealth Department of Transportation v. Clayton*, 684 A.2d 1060, 1063 (Pa. 1996) (applying irrebuttable presumption test to law that impacted a citizen's interest in driving); *Peake*, 132 A.3d at 521 (applying irrebuttable presumption test to law that impacted a citizen's interest in employment). Thus, courts "address this claim simply as an 'irrebuttable presumption' challenge." *Muhammad*, 241 A.3d at 1155.

"An irrebuttable presumption is unconstitutional when it (1) encroaches on an interest protected by the due process clause, (2) the presumption is not universally true, and (3) reasonable alternative means exist for ascertaining the presumed fact." *Muhammad*, 241 A.3d at 1155 (citing *J.B.*, 107 A.3d at 14). A number of Pennsylvania court decisions provide guidance on how and when this irrebuttable presumption analysis applies:

Clayton – In *Clayton*, the Pennsylvania Supreme Court addressed a Department of Transportation regulation that mandated the suspension of a driver's license for one year where the licensee experienced a seizure, regardless of whether the licensee's physician determined the person competent to drive. 684 A.2d at 1063. The Court recognized that the irrebuttable presumption made the license suspension "a foregone conclusion" and concluded that it violated due process. *Id.* at 1065.

J.B. – In *J.B.*, the Pennsylvania Supreme Court addressed SORNA's requirement that the police maintain a statewide registry of sexual offenders based on the

presumption that all juvenile sexual offenders pose a high risk of committing additional sexual offenses. 107 A.3d at 16. Several juvenile offenders argued that SORNA's irrebuttable presumption violated their due process rights. *Id.* The Court agreed and held that (1) SORNA's presumption impinges on juvenile offenders' right to reputation without giving them a meaningful opportunity to challenge the presumption, (2) the presumption was not universally true, and (3) it was possible to use an individualized assessment process to consider whether juvenile sexual offenders posed a high risk of recidivating. *Id.* at 16–19.

Peake – In *Peake*, the Commonwealth Court addressed a provision of the Older Adults Protective Services Act that categorically prohibited persons with certain convictions from being employed in the care of older adults. 132 A.3d at 509. The petitioners argued that the provision contained an unconstitutional irrebuttable presumption. *Id.* The court agreed and explained that "a statutory irrebuttable presumption is not an appropriate means because there are reasonable alternative means for ascertaining the presumed fact." *Id.* at 521.

Torsilieri – In *Torsilieri*, an adult convicted of aggravated indecent assault claimed that SORNA created an unconstitutional irrebuttable presumption that all sexual offenders pose a high risk of recidivism. 232 A.3d 567. The trial court agreed on grounds that SORNA applied not only to sexual offenses but also to crimes such as unlawful restraint, which did not necessarily entail sexual conduct. On appeal, the Pennsylvania Supreme Court acknowledged that the defendant presented "colorable constitutional challenges," but remanded to allow the parties to present additional argument and evidence on whether a scientific consensus has developed regarding adult sexual offenders' recidivism rates and the effectiveness of a tier-based registration system as it relates to the prongs of the irrebuttable presumption doctrine. *Id.* at 587–88.

Muhammad – Most recently, in *Muhammad*, the Superior Court addressed a defendant's argument that SORNA is unconstitutional because it creates an irrebuttable presumption that her convictions for "interference" and "conspiracy" make her a risk to commit additional sexual offenses. 241 A.3d 1149. The Superior Court held that SORNA involves an irrebuttable presumption that was unconstitutional as applied to the defendant. According to the Superior Court, the presumption (1) impacted the defendant's right to protect her reputation; (2) was not universally true—the defendant, in particular, did not present a high risk of recidivating; and (3) reasonable alternatives existed to determine whether she was a high risk to recidivate—in fact, Pennsylvania authorities had different and "well-established risk assessment tools." *Id.* at 1159.

Here, just as in these cases, the felony bar fails each prong of the irrebuttable-presumption test. As detailed below, (1) the felony bar encroaches on an interest protected by the due process clause; (2) the presumption that persons with felony convictions are seeking a name change to commit fraud is not universally true; and (3) reasonable alternative means exist for ascertaining the presumed fact that the individual is seeking a name change to commit fraud.

First prong. The felony bar plainly and irrefutably encroaches on at least three interests protected by the due process clause: (1) the right to acquire, possess, and protect reputation; (2) the privacy right to independence in making important, intensely private decisions; and (3) the privacy right to avoid disclosure of personal matters. *See supra* at pp. 12–22. These exact interests have formed the basis for other successful irrebuttable-presumption challenges. *See, e.g.*, *J.B.*, 107 A.3d at 17 ("[W]e conclude that the Juveniles have asserted a constitutionally protected interest in their reputation that has been encroached by the use of an irrebuttable

presumption."); *Muhammad*, 241 A.3d 1158 ("SORNA, as applied to this case, creates an irrebuttable presumption that encroaches upon Appellant's constitutional interest in her reputation.").

The right to control one's name is intertwined with fundamental reputation and privacy rights listed above. At a minimum, it evokes an "interest" protected by the due process clause. *See Muhammad*, 241 A.3d at 1155 ("An irrebuttable presumption is unconstitutional when it … encroaches on an interest protected by the due process clause ….") (emphasis added). Citizens of this Commonwealth have long had a protected interest in controlling their names. *See* Adam Candeub, *Privacy and Common Law Names: Sand in the Gears of Identification*, 68 Fla. L. Rev. 467, 483 (2016) ("Common law in England and the United States has always permitted common law names. An individual may choose any name he wishes—provided the reasons for requesting the name change are not fraudulent.") (citing *Linton v. First Nat'l Bank of Kittanning*, 10 F. 894 (W.D. Pa. 1882)).

Well over a century ago, in 1892, the Pennsylvania Supreme Court recognized a settled point:

> A man's name is the designation by which he is distinctively known in the community. Custom gives him the family name of his father, and such *praenomina* as his parents choose to put before it, and appropriate circumstances may require 'Sr.' or 'Jr.' as a further constituent part. But all this is only a general rule, from which the individual may depart if he chooses. The legislature in 1852 provided a mode of changing the name, but that act was in affirmance and aid of the common law, to make a definite point of time at which a change shall take effect. But without the aid of that act a man may change his name or names, first or last, and, when his neighbors and the community have acquiesced and recognized him by his new designation, that becomes his name.

Laflin, 23 A. at 217 (emphasis added). In sum, the felony bar encroaches on an interest protected by the due process clause.

Second prong. The presumption that persons with felony convictions are seeking a name change to commit fraud is not universally true. People seek name changes for many reasons other than to commit fraud. Common non-fraudulent reasons for seeking a name change include recognizing family ties, expressing religious convictions, or matching a person's name to their gender identity and appearance. *See Petition of Alexander*, 394 A.2d 597, 599 n.3 (Pa. Super. Ct. 1978) ("Certainly a religion-inspired desire to change one's name is not an unworthy motive or trivial or capricious or vainglorious.") (citation omitted); Kushner, *supra*, at 324 ("Names are more than identifiers; they are descriptive and can communicate much about a person including gender, ethnic or national background, social status, religion, and familial ties."); *Id.* at 353–54 ("That disallowing petitioners from discarding undesired names functions as a burden on the right is perhaps most clear in the case of transgender petitioners. These individuals commonly seek to discard names with undesired gender associations."). People with felony convictions—just like people without felony convictions—have these legitimate reasons for seeking a name change.

It is contrary to science and common sense to presume that <u>every</u> person convicted of a felony seeks to perpetrate a fraud when they seek to change their names. The fact that individuals with felony convictions can (and often do) seek name changes for non-fraudulent purposes is evidenced by the fact that certain states have name-change statutes that specifically focus on individuals with felony

convictions, but allow these individuals to obtain a name change if they can overcome a presumption that they are acting for a fraudulent purpose.[18] If it were universally true that people with felony convictions are seeking a name change for a fraudulent purpose, there would be no point in having a process for someone to show they are not seeking a name change for a fraudulent purpose.

Moreover, while no state condones efforts to seek name changes for fraudulent purposes, name-change statutes in many states make no distinction for name-change seekers with felony convictions.[19] Others simply require people with various criminal histories to provide notice to specified agencies and otherwise permit an ordinary name change process.[20]

Finally, the fact that the presumption is not universally true is evidenced here by Ms. Von Noaker, who has submitted an affidavit explaining that she seeks a name change so her name can match her gender identity and appearance and so she can honor her religious beliefs and traditions, not for any fraudulent purpose.

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[18] *See, e.g.*, Michigan, Mich. Comp. Laws Ann §§ 711.1-711.3; North Dakota, N.D. Cent. Code Ann. § 32-28-02; Virginia, Va. Code Ann. § 8.01-217. Unlike these states, which have a rebuttable presumption that a person with a felony conviction is seeking a name change for a fraudulent purpose, Pennsylvania employs an ***ir***rebuttable presumption. The name change petitioner with a felony conviction does not even have an opportunity to show why they are seeking a name change.

[19] *See, e.g.*, Alaska, Alaska R. Civ. P. 84; Arkansas, AR Code § 9-2-101; Georgia, Ga. Code Ann. § 19-12-1; Kansas, Kan. Stat. Ann. §§ 60-1401 to 60-1403; Kentucky, Ky. Rev. Stat. Ann. §§ 401.010-401.040; Maine, Me. Rev. Stat. tit. 18-A, § 1-701; Massachusetts, Mass. Gen. Law Ann. Ch. 210 § 12-14; Missouri, Mo. Ann. Stat. §§ 527.270 to 527.290; Montana, Mont. Code Ann. 27-31-201 to 27-31-205; New Mexico, N.M. Stat. Ann. §§ 40-8-1 to 40-8-3; Rhode Island, R.I. Gen. Laws Ann. §§ 33-22-11 & 33-22-28; South Dakota, SD. Codified Laws §§ 21-37-1 to 21-37-10; Wyoming, Wyo. Stat. Ann. §§ 1-25-101 to 1-25-104.

[20] *See, e.g.*, New York, N.Y. Civ. Rights Law § 62(2).

The felony bar cannot survive the second prong of the irrebuttable presumption test under these circumstances. *See Peake*, 132 A.3d at 522 (striking down legislation that included an irrebuttable presumption based on a conviction because "it defies logic to suggest that *every* person who has at any time been convicted of any of the crimes listed in Section 503 of the Act, including misdemeanor theft, presents a danger to those in an Act-covered facility") (emphasis in original).

Third prong. Alternative means exist for ascertaining fraudulent intent. In fact, those means are already embodied in Pennsylvania's name-change statute.

First, upon filing a petition, a person seeking a name change must provide the court with a set of fingerprints, which are then forwarded to the Pennsylvania State Police along with a copy of the name change petition. 54 Pa.C.S. § 702(b)(1).

Second, the statute requires the petitioner to present "[t]he reason for the name change" so that the reason can be tested in court. 54 Pa.C.S. § 701(a.1)(2)(ii).

Third, the statute requires the petitioner to publish notice of the scheduled name-change hearing in two newspapers of general circulation, and allows for any person having lawful objection to the name change to appear at the hearing. 54 Pa.C.S. § 701(a.1)(3) & (4). "[T]he hearing required by 54 Pa.C.S. § 701(a.1)(3) is intended to provide a forum for individuals or creditors to oppose a proposed name change based on suspected fraudulent purposes or other nefarious intent." *In re A.S.D.*, 175 A.3d 339, 343 (Pa. Super. Ct. 2017) (Bowes, J., concurring) (citing *In re Miller*, 824 A.2d at 1210–11).

Fourth, at the hearing, the petitioner must present an official search of the proper county offices showing that there are no judgments, decrees of record, or other similar matters against the petitioner. 54 Pa.C.S. § 701(a.1)(4)(ii)(B).

Finally, the court must send notice of the name change to the Office of Attorney General, the Pennsylvania State Police, and the Office of the District Attorney. Upon receiving the notice, the State Police shall include the change of name information in the central repository. 54 Pa.C.S. § 702(c)(3).

Ms. Von Noaker does not challenge these aspects of the name-change statute. These provisions are specifically targeted (like a scalpel) to prevent fraudulent name changes. The felony bar is broadly categorical (like a blunt instrument) and, given the other safeguards that exist, the felony bar unnecessarily prevents court-ordered name changes for individuals who have legitimate reasons for seeking them.

b. As applied, the felony bar fails the irrebuttable-presumption test because Ms. Von Noaker is not perpetrating a fraud.

For all of the reasons discussed above, the irrebuttable-presumption test renders the felony bar unconstitutional on its face. The Court need "not look beyond the statute's explicit requirements or speculate about hypothetical or imaginary cases" to hold that the felony bar fails the irrebuttable-presumption test. *Muhammad*, 241 A.3d at 1155 (analyzing the standard for a facial challenge). In any event, though, the felony bar at least fails the irrebuttable-presumption test as applied to Ms. Von Noaker, who has not been convicted of any felony concerning fraud, and who has alleged a valid reason for her name change that no one has disputed. Therefore, with respect to Ms. Von Noaker, there can be no dispute that (1) the felony bar encroaches on an interest protected by the due process clause; (2) the presumption that persons with felony convictions are seeking a name change to commit fraud is not universally true; and (3) reasonable alternative

means exist for ascertaining the presumed fact that the individual is seeking a name change to commit fraud. *See Muhammad*, 241 A.3d at 1159 ("[W]e hold that, as applied to Appellant, SORNA's provision that sexual offenders pose a high risk of recidivating is an irrebuttable presumption that clearly, palpably, and plainly violates Appellant's constitutional right to reputation. Appellant's convictions for interference and conspiracy to interfere with custody of children were not sexual offenses.").

2. The felony bar fails a means-end review.

The felony bar also fails a traditional means-end review, which is a separate and independent analysis for determining the constitutionality of a Pennsylvania law. As the Pennsylvania Supreme Court has made clear, one form of analysis applied to laws that impede upon protected rights is a "means-end review," legally referred to as a "substantive due process analysis." *Nixon*, 839 A.2d at 286. Under this analysis, courts weigh the rights infringed by the law against the interest sought to be achieved by it, and scrutinize the relationship between the law (the means) and that interest (the end). *Id.* at 286–87. As discussed below, (a) the felony bar fails strict-scrutiny review because it infringes on fundamental rights; and, in any event, (b) the felony bar fails rational-basis review because it is unreasonably and unduly oppressive.

a. The felony bar fails strict-scrutiny review because it infringes on fundamental rights.

"Where laws infringe upon certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate, courts apply a strict scrutiny test." *Nixon*, 839 A.2d at 287 (emphasis added); *see also In re Fortieth*

Statewide Investigating Grand Jury, 190 A.3d 560, 578 ("Under the Declaration of Rights set forth in the Pennsylvania Constitution, individuals enjoy the fundamental right to the protection of their reputations.") (emphasis added). Under strict scrutiny, a law is constitutional only if it is "narrowly tailored to a compelling state interest." *Id.*; *D.P. v. G.J.P.*, 146 A.3d 204, 210 (Pa. 2016) (same). "[T]he narrow tailoring requirement means the statutory scheme must have been 'structured with precision' and that the Legislature must have chosen the 'le[ast] drastic means' of effectuating its objectives." *D.P.*, 146 A.3d at 215–16 (quoting *Danson v. Casey*, 399 A.2d 360, 370 (Pa. 1979)).

As explained above, the right to control one's name is intertwined with the right to acquire, possess, and protect one's reputation. *See supra* at pp. 20–22. The right to control one's name also is an integral part of the right to privacy, which guarantees independence in making important decisions, *supra* at pp. 13–15, and protects people from disclosure of highly personal matters, *supra* at pp. 15–19. Strict scrutiny applies here because both the right to reputation and the right to privacy are "fundamental" rights under Art. I, section 1 of the Pennsylvania Constitution, and the felony bar implicates each of these rights, *supra* at pp. 13–22.

Although the Commonwealth may have an interest in preventing fraudulent court-ordered name changes, the Commonwealth's means (*i.e.*, the felony bar) of promoting that interest are not narrowly tailored.[21] As also explained above, the

[21] In an analogous situation, the U.S. District Court for the Southern District of Ohio held that an Ohio law categorically prohibiting people from changing the sex markers on their birth certificates was unconstitutional, reasoning: "The Court does not doubt that fraud prevention is an important or even compelling government interest, but Defendants have failed to justify how their Policy's total prohi-

felony bar prevents individuals with legitimate reasons for seeking a name change (*e.g.*, religion, family ties, and gender status) from obtaining a name change, and the name-change statute already includes means to protect against fraudulent name changes. *See supra* at pp. 30–31. In addition, the Commonwealth can hardly claim that the felony bar is necessary, given that: most states do not have a similar bar, *see supra* at pp. 28–29; Pennsylvania did not have one for more than two centuries (without demonstrated harm); and the felony bar does not apply to name changes outside the court-petition process, such as when someone obtains a name change through marriage. As a Michigan federal court recognized under similar circumstances, "[a]t least 25 of the states and the District of Columbia do not require a transgender person to undergo surgery to change the gender on his or her driver's license or state ID card. The Court seriously doubts that these states have any less interest in ensuring an accurate record-keeping system." *Love*, 146 F. Supp. 3d at 857 (internal citation omitted).

Accordingly, the felony bar is not the "le[ast] drastic means" of effectuating a compelling state objective, and it is not "structured with precision" as required to show that it is narrowly tailored to a compelling state interest and thus acceptable under strict-scrutiny review. *See D.P.*, 146 A.3d at 215–16 (quoting *Danson*, 399 A.2d at 370). The felony bar at § 702(c)(2) thus cannot withstand strict scrutiny.

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bition on changing sex markers furthers this goal in the least restrictive means possible, or even that this Policy is substantially related to this goal." *Ray v. McCloud*, 507 F. Supp. 3d 925, 939 (S.D. Ohio 2020).

b. The felony bar fails rational-basis review because it is unreasonably and unduly oppressive.

Because the felony bar infringes rights that are "fundamental," thus triggering strict scrutiny, the Court need not undertake any further means-end review. In any event, the felony bar fails rational-basis review as well.

Where laws restrict important rights protected under Pa. Const. art. I, § 1 that are not fundamental, Pennsylvania courts apply a "rational basis test." *Nixon*, 839 A.2d at 287. According to that test, a law "'must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained.'" *Id.* at 287–88 (quoting *Gambone v. Commonwealth*, 101 A.2d 634, 637 (Pa. 1954)). Although the due process guarantees provided by the Pennsylvania Constitution are substantially coextensive with those provided by the United States Constitution, "Pennsylvania courts have analyzed due process challenges under [the] rational basis test 'more closely' than the United States Supreme Court." *Id.* at 287 n.15 (quoting *Pa. State Bd. of Pharmacy v. Pastor*, 272 A.2d 487, 490–91 (Pa. 1971)).[22]

For the reasons discussed above, the felony bar is "unreasonable" and the means it employs lack a "real and substantial relation to the objects sought to be attained." *Nixon*, 839 A.2d at 287–88 (quoting *Gambone*, 101 A.2d at 637). There is

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[22] "In our federal system, the Constitution of the United States provides a minimum level of protection for individual rights. A state constitution may, however, provide greater protection for those rights. We have recognized that Pennsylvania may afford greater protection to individual rights under its Constitution." *W. Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 515 A.2d 1331, 1333–34 (Pa. 1986) (citations omitted).

no rational basis for assuming that every person convicted of a felony who is seeking a name change intends to perpetrate a fraud. Ms. Von Noaker's own situation—which is by no means unique—lays this notion firmly to rest. The felony bar undeniably prevents individuals with legitimate reasons for seeking a name change (*e.g.*, religion, family ties, and gender status) from obtaining a name change, and there is no reason for that. The name change statute already includes means to protect against fraudulent name changes. The bar is unconstitutional no matter what perspective one adopts.

II. The felony bar is unconstitutional under Pa. Const. art. I, § 7.

Article I, § 7 of the Pennsylvania Constitution states, in relevant part, that "[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." This provision "indicates a more expansive protection than the First Amendment [to the U.S. Constitution]," but First Amendment jurisprudence nonetheless can be instructive for purposes of interpreting Article I, § 7 of the Pennsylvania Constitution because "the Constitution of the United States provides a minimum level of protection for individual rights." *W. Pennsylvania Socialist Workers 1982 Campaign v. Connecticut Gen. Life Ins. Co.*, 515 A.2d 1331, 1333, 1338 (Pa. 1986).

In *Wooley v. Maynard*, the U.S. Supreme Court affirmed that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." 430 U.S. 705, 714 (1977). The first step in a *Wooley*-style analysis is to determine whether the state has compelled speech. This is a four-part test. There must be (1) speech; (2) to which the plaintiff objects; (3) that is compelled; and (4) that is readily associated with the plaintiff. *Cressman v. Thompson*, 798 F.3d 938,

949–51 (10th Cir. 2015); *Doe 1 v. Marshall*, 367 F. Supp. 3d 1310, 1324 (M.D. Ala. 2019). If the state has compelled speech under this four-part test, the state's action is a "content-based" regulation. *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). This is a "strict scrutiny" analysis. *Id.* at 164.

On analysis, the felony bar meets all four elements for compelled speech.

First, expressing one's unwanted and incorrect name on a government-issued ID is "speech" just as much as expressing "Live Free or Die" on one's government-issued license plate is speech, as the U.S. Supreme Court held in *Wooley*. 430 U.S. at 715. Additionally, as the U.S. Supreme Court explained in *Riley v. National Federation of the Blind*, "cases cannot be distinguished because they involve compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech." 487 U.S. at 797–98. "'The constitutional harm—and what the First Amendment prohibits—is being forced to speak rather than to remain silent, and that harm does not turn on whether speech is ideological, factual, or something else." *Doe 1*, 367 F. Supp. 3d at 1324 (citation omitted).

Second, Ms. Von Noaker objects to this speech. "Though even a minor disagreement with a message is enough for constitutional purposes," *Doe 1*, 367 F. Supp. 3d at 1325 (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 411 (2001)), Ms. Von Noaker strongly objects to the expression of her unwanted name. *See* Von

Noaker Aff. ¶ 4. It is a betrayal of her own identity, her religious beliefs, and the gender she knows herself to be and in which she lives her life.

Third, Ms. Von Noaker is compelled to display a name that is not hers. "Carrying and displaying identification is a virtual necessity in contemporary society." *State v. Hill*, --- So.3d ---, 2020-0323, 2020 WL 6145294, at *8 (La. Oct. 1, 2020); *see also Doe 1*, 367 F. Supp. 3d at 1325 ("State-issued photo ID is a virtual necessity these days."). "One must show ID to enter some businesses, to cash checks, to get a job, to buy certain items, and more . . . like the situation in *Wooley*." *Doe 1*, 367 F. Supp. 3d at 1325. Beyond displaying her ID, she also must print, sign, or say her given name in any situation that may involve identity verification. She wishes to refrain from speaking, by not disclosing her given name. *See* Von Noaker Aff. ¶¶ 4, 11–13.

In Pennsylvania, government-issued ID (with a person's government-recognized name) is required in order to vote for the first time in a precinct,[23] travel overseas, drive, and even enter government buildings.[24] Although the felony bar does not apply to name changes due to marriage, divorce, or naturalization, the only way to obtain a name change to a first or middle name on a government-issued ID for a person who, like Ms. Von Noaker, is not changing her citizenship, is to go through the court-ordered name change process under 54 Pa.C.S. § 701 *et*

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[23] https://bit.ly/3u01gWJ.

[24] https://bit.ly/3b7Pa6H ("Beginning October 1, 2020, Pennsylvanians will need a REAL ID-compliant driver's license, photo ID card, or another form of federally-acceptable identification (such as a valid passport or military ID) to board a domestic commercial flight or enter a federal building or military installation that requires ID.").

seq. Specifically, for a Pennsylvania photo ID, one cannot obtain a name change without presenting a court order, a marriage certificate, or a Social Security card with the new desired name[25]; and for a Social Security card, one cannot obtain a name change without presenting a court order, marriage certificate, divorce decree, or certificate of naturalization with the new desired name.[26] In addition, for a passport, one cannot obtain a name change without presenting a court order, marriage certificate, divorce decree, or valid state-issued ID with the new desired name.[27] Thus, unless Ms. Von Noaker chooses to relinquish her constitutionally protected rights to vote and travel freely, she is compelled to express her undesired name by force of law.

Fourth, the name on the ID is "readily associated" with Ms. Von Noaker. "Even more so than a license plate on a car [as in *Wooley*], an identification card is personalized to such an extent that it is readily associated with the bearer." *Hill*, 2020 WL 6145294, at *11; *Doe 1*, 367 F. Supp. 3d at 1326 (holding that "the message on the branded IDs is 'readily associated' with Plaintiffs."). Ms. Von Noaker must literally identify herself as the compelled speech.

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[25] https://bit.ly/3nw0Ncu (Photo ID form DL-54B, stating "CHANGE YOUR NAME—If you desire to use your birth name, you must present your state issued birth certificate with a raised seal. If your name changed by permission of court, you must present a Certified Copy of the Court Order. If you desire to use your spouse's surname, you must present your marriage certificate. If you desire to use another name, you must present your Social Security Card, together with two other sources issued in the desired name such as: Tax Records, Selective Service Card, Voter Registration Card, Passport, any form of Photo I.D. issued by a governmental agency, banking records, or baptismal certificate.").

[26] https://bit.ly/33exLoq.

[27] https://bit.ly/3tgQ3Qx.

The fact that the Commonwealth issues the IDs does not alter the fact that speech is readily associated with Ms. Von Noaker. The U.S. Supreme Court addressed this point in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200 (2015). There, the Court held that Texas's specialty license plate designs constituted government speech, such that the State could refuse to issue a plate proposed by the Sons of Confederate Veterans that featured the Confederate flag. *Id.* at 219. However, in doing so, the Court dispelled any notion that designating speech as "government speech" eliminates private-speech concerns. *Id.* The Court emphasized that its "determination that Texas's license plate designs are government speech does not mean that the designs do not also implicate the free speech rights of private persons," and noted that "the Free Speech Clause itself may constrain the government's speech if, for example, the government seeks to compel private persons to convey the government's speech." *Id.* In other words, even though license plate designs may have been government speech, drivers "convey the messages communicated through those designs," and a State runs afoul of the First Amendment if it "compel[s] a party to express a view with which the private party disagrees." *Id.*

Based on this, courts analyzing compelled speech issues in the context of government IDs have held that a State cannot claim that the ID is government speech and avoid the constitutional challenge. *See Doe 1*, 367 F. Supp. 3d at 1325 ("The message here is indeed government speech. After all, the State issues the ID cards and controls what is printed on them. But the fact that a license is government speech does not mean it is immune from the compelled speech analysis.") (citation omitted); *Hill*, 2020 WL 6145294, at *11 ("Even more so than a license plate on a car, an identification card is personalized to such an extent that it is readily associated with the bearer.") (citation omitted).

In short, because the Commonwealth has compelled speech under the four-part test, the felony bar is a content-based regulation that is subject to strict scrutiny and may be justified only if the Commonwealth proves that it is narrowly tailored to serve compelling state interests. Although the Commonwealth may have an interest in preventing fraudulent name changes, the Commonwealth's means (*i.e.*, the felony bar) of promoting that interest are not narrowly tailored. As also explained above, the felony bar prevents individuals with legitimate reasons for seeking a name change (*e.g.*, religion, family ties, and gender status) from obtaining a name change, and the name-change statute already includes means intended to protect against fraudulent name changes, which are not challenged here. Accordingly, the felony bar is not the least drastic means of effectuating a compelling state objective, and it is not structured with precision as required to show that it is narrowly tailored to a compelling state interest and thus acceptable under strict-scrutiny review. Thus, the felony bar is also unconstitutional because it impermissibly compels speech in violation of Pa. Const. art. 1, § 7.

CONCLUSION

The name change statute's felony bar at 54 Pa.C.S. § 702(c)(2) is unconstitutional on its face and as applied to Ms. Von Noaker, a transgender woman. Accordingly, this Court should declare the felony bar to be unconstitutional and grant the Name-Change Petition.

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Respectfully submitted,

/s/ Zachary S. Roman

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CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Zachary S. Roman

CERTIFICATE OF SERVICE

On September 27, 2021, and pursuant to Pennsylvania Rule of Civil Procedure 235, I caused a copy of the foregoing to be served via certified mail on the following:

Pennsylvania Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120

/s/ Zachary S. Roman