

STATE OF INDIANA)
)
COUNTY OF ELKHART)

IN THE ELKHART SUPERIOR COURT

CASE NO: _____

IN RE THE NAME GENDER CHANGE OF:

Person Filing

**MEMORANDUM OF LAW IN SUPPORT OF
VERIFIED REQUEST TO PROHIBIT PUBLIC ACCESS AND/OR WAIVE
PUBLICATION PURSUANT TO RULES ON ACCESS TO COURT RECORDS**

1. This memorandum of law was drafted by Indiana Legal Services’ LGBT Project to support self-represented litigants who fear for their safety to a request pursuant to the Rules on Access to Court Records¹ to waive publication and sale the records of their case.
2. Name change cases are subject to the public access rules contained in Indiana Rules of Court Administration 9. Ind. Code § 34-28-2-2.5(b).
- I. HAVING TO PUBLISH NOTICE IN A NEWSPAPER AND HAVING THEIR CASE PUBLICLY AVAILABLE PUTS PETITIONER AT SUBSTANTIAL RISK OF HARM.**
3. The Court of Appeals is clear that the evidence of heightened risk of harassment, violence, and homicide to transgender individuals nationally and in Indiana is enough to demonstrate significant risk of harm warranting prohibiting public access. In re Name Change of M.E.B., 19A-MI-118 at ¶ 11 (June 21, 2019).
4. The purpose of the Access to Court Records Rule is, among other things, to minimize an individual’s risk of injury. The Commentary to the Rule recognizes “that unrestricted access to certain information in Court Records could result in an unwarranted invasion of personal privacy or unduly increase the risk of injury to individuals and businesses.” Ind. Access to Court Records 1, cmt. “. . . The goal of the Rules on Access to Court Records is proactive; it seeks to prevent harm. To force petitioners to wait until they have already experienced that harm would vitiate the purpose of the rule.” Id.; accord In Re K.H., 127 N.E.3d 257 (Ind. Ct. App. 2019)

¹ The Access to Court Records Rules replaced Administrative Rule 9 on January 1, 2020. Rules on Access to Court Records moved portions of Administrative Rule 9 and placed them in a more organized manner. A.C.R. Rule 6 is Administrative Rule 9(G)(4) without change.

5. A.C.R. Rule 6 requires Judges to look at the totality of the circumstances to evaluate if a substantial risk of harm exists and to proactively protect applicants' safety. Rule 6 does not require that Plaintiff endure targeted threats, violence, or abuse before granting temporary and permanent sealing and a publication waiver. In *Re M.E.B.*, 126 N.E.3d 932 at 934 (Ind. Ct. App. 2019); In *Re K.H.*, 127 N.E.3d 257 (Ind. Ct. App. 2019)
6. Part of the circumstances to consider is the reality that transgender people are disproportionately impacted by violence and homicide. The United States is the third most deadly country for trans people.
7. 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. Haeyoung Park and Iaryna Mykhyalshyn, 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.
8. The systemic violence transgender people experience neither begins nor ends with hate crimes, physical assault or homicide. Transgender people are more likely than the general population to experience discrimination, harassment, and violence in every facet of life, including family relations, education, employment, housing, public accommodations, obtaining accurate identification documents, and accessing adequate and appropriate medical treatment. . See e.g. James et al., *The Report of the 2015 U.S. Transgender Survey* (2016), available at <http://www.ustranssurvey.org/reports/>; National Coalition of Anti-Violence Programs, *A Report from the National Coalition of Anti-Violence Programs: Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2013* (2014), available at http://avp.org/wp-content/uploads/2017/04/2013_ncavp_hvreport_final.pdf; Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 2* (2011), available at http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.
9. This is no less true in the state of Indiana. A survey of transgender people in Indiana conducted in conjunction with the National Transgender Discrimination Survey found that 73% of respondents reported harassment in their K-12 school; and 27% reported physical assault. National Center for Transgender Equality and the National Gay and Lesbian Task Force, *Findings of the National Transgender Discrimination Survey: Indiana Results* (2015), available at <http://www.transequality.org/sites/default/files/docs/usts/USTSINStateReport%201017%29.pdf>.

10. In another study of Transgender Hoosiers, 74% of respondents reported experiencing harassment or mistreatment on the job. Christy Mallory and Brad Sears, Employment Discrimination Based on Sexual Orientation and Gender Identity in Indiana, August 2017, available at https://williamsinstitute.law.ucla.edu/research/in_discrimination_aug_2017/.
11. In 2016, an Indiana transgender woman was shot in the face while their attacker yelled anti transgender sentiments. Alleged Hate Group Member Charged in Shooting of Trans Woman in Indiana, The Advocate (July 17, 2016), available at <http://www.advocate.com/transgender/2016/7/17/alleged-hate-group-member-charged-shooting-trans-woman-indiana>. Across the nation, violence against transgender individuals is on the rise. Maggie Astor, Violence Against Transgender People Is on the Rise, Advocates Say, N.Y. TIMES, Nov. 9, 2017.
12. Though the data on violence is staggering, the actual violence against transgender people is likely much worse, due to the underreporting of crimes. See. E.g. Lucas Waldron, Deadnamed: The way cops in Jacksonville and other jurisdictions investigate the murders of transgender women adds insult to injury and may be delaying justice, available at <https://www.propublica.org/article/deadnamed-transgender-black-women-murders-jacksonville-police-investigation>; Emma Keith et. al, Lack of trust in law enforcement hinders reporting of LBGTQ crimes, available at <https://www.publicintegrity.org/2018/08/24/22138/lack-trust-law-enforcement-hinders-reporting-lbgtq-crimes>.
13. The Court of Appeals is clear that these significantly higher rates of discrimination, harassment, and violence experienced by transgender people as compared to cisgender people (people who are not transgender) is enough to satisfy that there was clear and convincing evidence that the Petitioner would face a significant risk of substantial harm if their transgender status was disclosed to the public. In re Name Change of A.L., 81 N.E.3d 283, 291 (2017).
14. The Court of Appeals rejected the trial court's reasoning that Rule 9 was not applicable because the petitioner had not shown they were subjected to any specific threats or violence because of their gender identity. Id. At 290-91. Trial courts have no jurisdiction to disregard appellate precedent. Cf. Ross v. State, 877 N.E.2d 829, 835 (Ind. Ct. App. 2007) (appellate precedent is binding on trial courts), trans. denied.

15. There—on an evidentiary record substantively identical to that submitted here—the court found that the significant risk of harm came from the general public being able to access, on the internet, in perpetuity, information about petitioner being transgender.² Id.

II. COURT DOCUMENTS IDENTIFY PETITIONER AS TRANSGENDER, WHICH UNLAWFULLY DISCLOSES CONFIDENTIAL MEDICAL INFORMATION IN VIOLATION OF A.C.R. 5(A)(1).

16. A.C.R. Rule 5(A)(1) mandates that records declared confidential by Indiana statute or court rule must be excluded from public access. Both medical and mental health records are confidential and protected from public disclosure.

17. That Petitioner's is transgender is protected medical information. I.C. § 16-39-3-10 declares a patient's "mental health record or testimony related to a patient's mental health" offered in a legal proceeding to be a confidential court record.

18. Gender transitions involve both physical and social elements. Social elements, such as wearing clothing more readily associated with a specific gender, changing one's name and updating their identity documents to reflect their experienced sex, are therapeutic treatments for the psychological treatment of gender dysphoria. STANDARDS OF CARE FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER-NONCONFORMING PEOPLE, WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH (7th ed. 2011), available at <https://www.wpath.org/publications/soc>.

19. The records in this case constitute protected health records that Indiana law requires trial courts to keep confidential. See Ind. Code § 16-39-3-10 (a "mental health record or testimony related to a patient's mental health" offered in a legal proceeding is a confidential court record). Trial courts have no discretion, and therefore no jurisdiction, to order such records be made publicly available. E.g. Groth v. Pence, 67 N.E.3d 1104, 1112 (Ind. Ct. App. 2017) ("as a matter of law," records declared confidential by statute "shall not be disclosed"), trans. denied.

² A publication notice in a local newspaper lives on past the three weeks in which it is published. All public notices published in Indiana are archived and searchable through the Hoosier State Press Association. Indiana Public Notice Search, available at <http://www.indianapublicnotices.com/>. Once publication is made or the court file accessed, it cannot be undone.

III. BEING OUTED AS TRANSGENDER VIOLATES PETITIONER'S PRIVACY INTERESTS PROTECTED BY THE ACCESS TO COURT RECORDS RULES AND THE 4TH AMENDMENT OF THE US CONSTITUTION.

20. The purpose of the Rules on Access to Court Records is, among other things, to protect the privacy interests of litigants. The Commentary to the Rule recognizes “that unrestricted access to certain information in Court Records could result in an unwarranted invasion of personal privacy or unduly increase the risk of injury to individuals and businesses.” Ind. Access to Court Records Rule 1, cmt.
21. Petitioner has a fundamental right of privacy in preventing the release of their highly personal and intimate medical and mental health information and in deciding under what circumstances to release information that has a statistically significant likelihood to subject them to substantial harm. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 464-65 (1977) (instructed that intrusions on legitimate informational privacy expectations must be weighed against the public interest in accessing that information); *NASA v. Nelson*, 562 U.S. 134, 138 (2011) (reaffirming Nixon balancing test); *Denius v. Dunlap*, 209 F.3d 944, 956 (7th Cir. 2000) (holding 4th Amendment right to informational privacy protects the “clearly established ‘substantial’ right in the confidentiality of medical information that can only be overcome by a sufficiently strong state interest”).
22. The United States Supreme Court has recognized that a constitutional right to information privacy protected by the 4th Amendment applies to the states under the 14th Amendment. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). This constitutional right to privacy means one has a venerable right “not to have intimate facts concerning one’s life disclosed without one’s consent.” *Bartnicki v. Vopper*, 200 F.3d 109, 122 (3d Cir. 1999). In fact, “the more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny.” *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 112 (3d Cir. 1987). This right to privacy has been deemed by Federal Courts to include an individual’s gender identity. See *Powell v. Schriver*, 175 F.3d 107 (2d Cir. 1999).

Denying Petitioner’s Access to Court Records request would make public the fact that Petitioner is pursuing therapeutic treatment for their gender dysphoria and reveal medical and mental health information to a large number of disinterested

persons with no legitimate interest in that information, in violation of the 14th Amendment to the United States Constitution, I.C. § 16-39-3-10, and the purpose of the Access to Court Records Rule.

*Prepared in January 2020 for use by pro se parties by:
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