Claudia D. Work, Esq. (#018701)
CAMPBELL LAW GROUP, CHARTERED
3101 North Central Avenue, Suite 840
Phoenix, Arizona 85012
Phone: (602) 254-5557
cwork@campbellazlaw.com

Attorney for Amicus Curiae Transgender Law Center

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

In re the Marriage of:

THOMAS T. BEATIE,

Petitioner,

v.

NANCY J. BEATIE,

Respondent.

No. FC 2012-051183

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE TRANSGENDER LAW CENTER IN SUPPORT OF SUBJECT-MATTER JURISDICTION OVER PETITIONER'S PETITION FOR DISSOLUTION

(Assigned to the Honorable Douglas Gerlach)

Pursuant to Rule 16 of Arizona's Rules of Civil Appellate Procedure, Transgender Law Center, through undersigned counsel, respectfully moves the Superior Court of Arizona in Maricopa County for leave to file the accompanying proposed *amicus curiae* brief in support of this Court's subject-matter jurisdiction over Petitioner's Petition for Dissolution. Proposed *amicus* has read all the relevant pleadings in the case. This motion is unopposed by either of the parties to this case.

MEMORANDUM

While Arizona has no rule governing *amicus curiae* briefs in the trial courts, trial courts have inherent authority to permit filing an *amicus curiae* brief in the absence of a rule. *See Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated in part on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995); *Wilderness Society v. U.S. Bureau of Land Management,* 2010 WL 2594853 at *1 (D. Ariz. 2010). As one court has noted, "No specific rule permits amicus participation in the trial court, but neither is there any rule prohibiting it. We can see no reason a trial judge should not have discretion to permit such

participation if it may be helpful to the court." *Parsons v. State Dept. of Social and Health Servs.*, 118 P.3d 930, 934 (Wash. App. 2005).

1. Interests of Proposed *Amicus*

Transgender Law Center is a public interest legal organization that is committed to promoting justice and equality for transgender people, under the principle that all individuals should be able to live free from discrimination regardless of their gender expression or gender identity. Transgender Law Center carries out its mission by educating courts, policymakers, and the public about the legal needs and rights of transgender people. Transgender Law Center has a direct interest in protecting the rights of transgender people to access the legal system, to marry, to have children, and to gain legal recognition of their affirmed sex when they have undergone clinically appropriate treatment for gender transition.

Transgender Law Center's mission is directly implicated by the issue before this Court: consideration: whether an Arizona court has subject-matter jurisdiction to grant a petition for dissolution in a marriage involving a transsexual spouse. A holding that this Court lacks jurisdiction over Mr. Beatie's marriage dissolution petition would deprive him of access to the legal system, based solely upon his identity as a transsexual man. Denying recognition to Mr. Beatie's legal sex and to his valid opposite-sex marriage from Hawaii would both be unlawful under the relevant Arizona and Hawaii statutes and would unconstitutionally deprive him of the fundamental right to have children.

2. Why Accepting the *Amicus Curiae* Brief Is Desirable

Transgender Law Center is a leading expert on transgender legal issues throughout the country, and as such is well positioned to provide important legal information and resources about this subject area to the Court. Given the nature of this case and the uniqueness of the factual circumstances presented, it is imperative that the Court hear all relevant information surrounding the legal issues in question. Indeed, the Court would be greatly disadvantaged if it did not receive all significant information with regard to the potentially complicated and confusing legal issues involving transgender individuals. Transgender Law Center's

expertise in the area of transgender law will therefore be of significant value to the Court in this case.

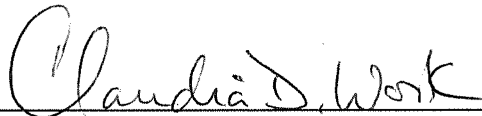
Amicus briefs are normally accepted when a party is not represented competently or is not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case, or when the *amicus* can provide information, perspective, or argument that can help the court beyond the help that the lawyers for the parties have provided. In this case, the parties are competently represented, but Transgender Law Center's experience with transgender lives and legal issues would provide significant assistance that would be helpful to the Court in rendering its decision.

CONCLUSION

For the foregoing reasons, Transgender Law Center respectfully requests that this Court grant its unopposed motion for leave to file the accompanying brief *amicus curiae* in support of this Court's subject-matter jurisdiction over the petition for dissolution of the parties' marriage.

RESPECTFULLY SUBMITTED this 27th day of November, 2012.

CAMPBELL LAW GROUP, CHARTERED



Claudia D. Work
3101 N. Central Ave., Suite 840
Phoenix, Arizona 85012
Counsel for Amicus Curiae Transgender Law Center

ORIGINAL filed this same day with:

Family Court Administration
201 W. Jefferson
Phoenix, AZ 85003

COPY hand-delivered to:

Honorable Douglas Gerlach
Northeast Court-H
18380 N. 40th Street
Phoenix, AZ 85032

COPY of the foregoing mailed
this 27th day of November, 2012 to:

Michael P. Clancy, Esq.
David Cantor, Esq.
CANTOR LAW GROUP, PLLC
One E. Washington Street, Suite 1800
Phoenix, Arizona 85004
Attorneys for Petitioner

David B. Higgins, Esq.
211 E. Osborn Road
Phoenix, Arizona 85012
Attorney for Respondent

By: Tim Farell

Claudia D. Work, Esq. (#018701)
CAMPBELL LAW GROUP, CHARTERED
3101 North Central Avenue, Suite 840
Phoenix, Arizona 85012
Phone: (602) 254-5557
cwork@campbellazlaw.com

Attorney for Amicus Curiae Transgender Law Center

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

In re the Marriage of: THOMAS T. BEATIE, Petitioner, v. NANCY J. BEATIE, Respondent.	No. FC 2012-051183 **BRIEF OF AMICUS CURIAE TRANSGENDER LAW CENTER IN SUPPORT OF SUBJECT-MATTER JURISDICTION OVER PETITIONER'S PETITION FOR DISSOLUTION** (Assigned to the Honorable Douglas Gerlach)

I. Introduction

This Court has subject matter jurisdiction to grant the parties' divorce because their marriage is a valid opposite-sex marriage under both Arizona law and the law of Hawaii, where the marriage was entered into. Arizona's ordinary rules of comity apply here and require that the court recognize the parties' marriage. To hold that the marriage is void because Mr. Beatie gave birth to the couple's children would not only contravene Arizona's own law that grants transsexual people legal recognition of their change of sex, but would infringe upon Mr. Beatie's fundamental constitutional right to have children. The Court should find that it has subject matter jurisdiction to grant the requested divorce.

II. Under Arizona's Well-Established Law of Comity This Court Must Recognize the Parties' Valid Out-of-State Opposite-Sex Marriage.

Here, the record confirms that the parties' opposite-sex marriage is valid under the laws of Hawaii as well as the laws of Arizona. Therefore, under Arizona's longstanding rule of

marriage recognition, their marriage should be recognized as valid in this state. As a result, this Court has subject matter jurisdiction to consider and grant the dissolution petition.

A. Arizona's Law of Comity Requires Recognition of Valid Opposite-Sex Out-of-State Marriages.

Like all other United States jurisdictions, Arizona follows the general rule of comity that requires its courts to recognize the validity of court orders and administrative legal actions, like marriages, that take place in other jurisdictions. Under the principle of comity, "Courts of one jurisdiction will give effect to the laws and judicial decisions of another jurisdiction[.]" *Leon v. Numkena,* 142 Ariz. 307, 311, 689 P.2d 566, 570 (Ariz. Ct. App. 1984).

Arizona's longstanding common-law rule of comity was codified in 1996 as follows:

> A. Marriages valid by the laws of the place where contracted are valid in this state, except marriages that are void and prohibited by section 25-101.
>
> B. Marriages solemnized in another state or country by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state, except marriages that are void and prohibited by section 25-101.
>
> C. Parties residing in this state may not evade the laws of this state relating to marriage by going to another state or country for solemnization of the marriage.

A.R.S. § 25-112.

The limited category of "void and prohibited marriages" are also clearly identified by Arizona statute:

> A. Marriage between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the one-half as well as the whole blood, and between uncles and nieces, aunts and nephews and between first cousins, is prohibited and void.
>
> B. Notwithstanding subsection A, first cousins may marry if both are sixty-five years of age or older or if one or both first cousins are under sixty-five years of age, upon approval of any superior court judge in the state if proof has been presented to the judge that one of the cousins is unable to reproduce.
>
> C. Marriage between persons of the same sex is void and prohibited.

A.R.S. § 25-101.

By statute, then, Arizona must recognize valid out-of-state marriages from other jurisdictions except for the narrow exceptions listed in A.R.S. Section 25-101 for marriages between close relatives and same-sex couples. A.R.S. § 25-112. Similarly, applying the common-law rule of comity, Arizona courts have long held that the state will recognize the validity of marriages from other jurisdictions so long as they would not violate the strong public policy of this state, both before and after the codification of that principle in A.R.S. § 25-112. For example, common-law marriages, while not authorized in Arizona, are nonetheless recognized in this state when validly entered into in another jurisdiction. *See, e.g.*, *Grant v. Superior Court In & For Pima County*, 27 Ariz. App. 427, 429, 555 P.2d 895, 897 (App. 1976) ("Although Arizona does not authorize common law marriage, it will accord to such a marriage entered into in another state the same legal significances as if the marriage were effectively contracted in Arizona."); *In re Trigg's Estate*, 3 Ariz. App. 385, 386, 414 P.2d 988, 989 (App.1966) (Arizona laws "specifically provide . . . for recognition of the validity of marriages valid by the laws of the place where contracted"), *aff'd*, 102 Ariz. 140, 426 P.2d 637 (1967).

This presumption of recognition applies to all valid out-of-state marriages unless the legislature has provided an exception from recognition based on Arizona's "strong public policy." Refusing to recognize out-of-state marriages for "strong public policy" reasons is limited to those exceptions spelled out by the Arizona Legislature in A.R.S. §§ 25–101 and –112. *Cook*, 209 Ariz. at 492, 104 P.3d at 862 ("The 'strong public policy exceptions' we look to in determining which state's law to apply are those pronounced by the *Arizona* legislature."). This requirement is based on the "preeminence of Arizona legislature's express statutory enactments." *Cook*, 104 P.3d 857, 863.

For example, Arizona courts have denied recognition to marriages between close relatives because the Legislature specifically provided in A.R.S. §§ 25–101(A) that such marriages are void and prohibited. In *In re Mortenson's Estate*, 83 Ariz. 87, 90, 316 P.2d 1106, 1108 (1957), an Arizona court denied recognition to a marriage between first cousins that would have been void if entered in Arizona. Marriage between first cousins was clearly

prohibited under A.R.S. § 25-101(A) ("Marriage between parents and children, including grandparents and grandchildren of every degree, between brothers and sisters of the one-half as well as the whole blood, and between uncles and nieces, aunts and nephews **and between first cousins**, is prohibited and void.") (emphasis added). *But see Cook supra,* 209 Ariz. at 493, 104 P.3d at 863 (Ariz. Ct. App. 2005) (first cousins lawfully married in Virginia, but the Arizona court determined wife had vested right in the recognition of her marriage despite Arizona's statutory prohibition of first-cousin marriage).

On the contrary, Arizona law contains no express prohibition for marriages involving a transsexual spouse. In general, in fact, Arizona law applies a strong presumption in favor of the validity of a marriage. As the Arizona Supreme Court has held,

> 'Both the law and public policy favor matrimony and when it is once shown that a marriage has been celebrated, the contract, the parties' capacity to enter into it, and in fact every act necessary to its validity, will be presumed, in the absence of proof to the contrary. The presumption that it was legal and valid in all respects is one of the strongest known to the law[.]'

Roy v. Industrial Commission, 97 Ariz. 98, 100, 397 P.2d 211, 213 (1964) (quoting *Kolombatovich v. Magma Copper Co.*, 43 Ariz. 314, 318, 30 P.2d 832, 834 (1934)). In every state, including Arizona, when two people have obtained a marriage license and participated in a ceremonial marriage, as the parties did here, the marriage is presumed to be valid in the absence of a law **expressly** barring the marriage. *See In re Trigg's Estate*, *supra*, 3 Ariz. App. at 387-88, 414 P.2d at 990-91. *See also, e.g.*, 36 Am. Jur. 2d *Proof of Facts* § 441 ("Once a marriage has been shown to exist, it is presumed to be a legal and valid marriage . . . .This presumption has been variously described by the courts as strong, very strong, extremely strong, and one of the strongest known to the law."); *Lardo v. Lardo*, 112 Minn. 257, 266, 127 N.W. 1125, 1128 (1910) ("The primary rule of interpretation, which we regard as controlling in this situation, is the familiar one, 'Semper presumitur pro matrimonia.' 'Every intendment of the law leads to matrimony,' says Mr. Bishop, Marriage & Divorce & Separation, 956. 'When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of proofs, the law raises a strong presumption of its legality-not only casting the burden

of proof upon the person objecting, but requiring him throughout in every particular to make plain against the constant pressure of this presumption the truth of law and fact that it is illegal and void. * * * It being for the highest good of the parties, of the children, and of the community that all intercourse between the sexes in form matrimonial should be such in fact, the law, when administered by enlightened judges, seizes upon all probabilities, and presses into service all things else which can help it, in every particular case, to sustain the marriage, and repel the conclusion of unlawful commerce.'").

Denying recognition to a long-established marriage from another jurisdiction not only upsets the expectations of the spouses and of other adult third parties, but can be particularly harmful with respect to children, calling into question their legitimacy, legal parentage, and entitlement to support from both parents. The strong presumption of recognition "confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state." Richman & Reynolds, Understanding Conflict of Laws § 116(a) (2d ed. 1993).

Accordingly, the Arizona Supreme Court has observed that

> 'Infinite mischief and confusion must necessarily arise to the subjects of all nations with respect to legitimacy, succession, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by the subjects of those countries abroad; and therefore all nations have consented, or are presumed to consent, for the common benefit and advantage, that such marriages shall be good or not according to the laws of the country where they are celebrated.'

Horton v. Horton, 22 Ariz. 490, 494-95, 198 P. 1105, 1107 (1921) (quoting Story, Conflict of Laws (7th Ed.) par. 121 (quoting Sir Edward Simpson, *Scrimshire v. Scrimshire*, 2 Hagg. Const. 395)). Other authorities have likewise consistently recognized the importance of this principle. *See, e.g.*, Scoles & Hay, Conflict of Laws (1984) at p. 429 ("Refusal to recognize the validity of a foreign marriage ... tends to render uncertain one of the most important of human relations, a relationship in which certainty is surely as imperatively demanded as in commercial transactions."); *Henderson v. Henderson*, 199 Md. 449, 457-458, 87 A.2d 403,

408 (1952) ("The reason for this rule [of comity] is that it is desirable that there should be uniformity in the recognition of the marital status, so that persons legally married according to the laws of one State will not be held to be living in adultery in another State, and that children begotten in lawful wedlock in one State will not be held illegitimate in another."); *Beddow v. Beddow*, 257 S.W.2d 45, 47 (Ky. 1952) ("The sanctity of the home and every just and enlightened sentiment require uniformity in the recognition of the marital status.").

Applying those well-established principles, this Court should recognize the validity of the parties' marriage and its jurisdiction to dissolve it.

B. Petitioner Met All the Requirements Under Hawaii Law to Legally Change His Sex and Enter a Valid Opposite-Sex Marriage

Mr. Beatie lived in Hawaii from the time of his birth in 1974 until after the time of his marriage to Mrs. Beatie in 2003. *See* Decl. of Thomas Beatie ¶¶ 2, 19. While residing in Hawaii, Mr. Beatie took all necessary steps to change his sex from female to male and to have that change of sex legally recognized across all his identification documents. He was therefore able to enter into a lawful opposite-sex marriage with Mrs. Beatie on February 6, 2003. *See* Decl. of Thomas Beatie ¶ 17.

Hawaii law provides that the sex marker on an individual's birth certificate can be changed in limited circumstances, including the following:

> (4) Upon receipt of an affidavit of a physician that the physician has examined the birth registrant and has determined the following:
>
> (A) The birth registrant's sex designation was entered incorrectly on the birth registrant's birth certificate; or
>
> (B) The birth registrant has had a sex change operation and the sex designation on the birth registrant's birth certificate is no longer correct; provided that the director of health may further investigate and require additional information that the director deems necessary[.]

Haw Rev. Stat. Ann. § 338-17.7(a)(4). In this case, after several years of testing and treatment, Mr. Beatie's physician, Michael L. Brownstein, M.D., FACS, completed an affidavit on March 1, 2002, affirming that (1) physiological and medical testing had

determined that Mr. Beatie was male; and (2) that Mr. Beatie had undergone extensive hormonal and surgical procedures to correct his anatomy and appearance. *See* Decl. of Thomas Beatie, Ex. A, Aff. from Michael L. Brownstein, M.D.., FACS, dated March 1, 2002. Specifically, Mr. Beatie had undergone chest reconstruction surgery encompassing a "double mastectomy, areola reshaping, grafting and contouring the chest to effectuate a male cavity." *See* Decl. of Thomas Beatie at ¶11.

This irreversible surgery to change the appearance and function of his body from female to male met the requirements under Hawaii law to qualify as a "sex change operation." Haw. Rev. Stat. Ann. § 338-17.7 (a)(4). The Hawaii statute (like Arizona's) respects a person's fundamental right to conceive children and does **not** require that qualifying sex-change surgery must involve sterilization or surgery to the genitals. *See id.* Sterilization or genital surgery are also not required under contemporary medical standards to effectuate a change in sex from female to male; rather, chest reconstruction surgery like that undertaken by Mr. Beatie can be sufficient to complete the individual's transition. *See* World Professional Organization for Transgender Health, Standards of Care, at 57 (2011), available at:

http://www.wpath.org/documents/Standards%20of%20Care%20V7%20%202011%20 WPATH.pdf (hereafter "WPATH Standards of Care"). Indeed, studies show that as few as 2% of female-to-male transsexuals undergo phalloplasty (construction of a phallus), and only 21% undergo hysterectomy. *See* J.M. Grant, L.A. Mottet, J. Tanis, J. Harrison, J.L Herman, M. Keisling, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey, at 79 (2011), available at:

http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf.

Therefore, in absence of language to the contrary, the best reading of the Hawaii (and Arizona) gender-change statutes require a transsexual individual to demonstrate only that he or she has undergone some type of surgical procedure—and not specifically genital surgery or sterilization— sufficient to change his or her sex in accordance with the recommendations of his or her doctor and contemporary medical standards. In this case, that is precisely what occurred. As a result of receiving Mr. Beatie's physician's declaration, which not only showed

that he had met the contemporary medical standards for gender transition, but which also conformed with the statutory standard spelled out in Haw Rev. Stat. Ann. § 338-17.7, the Hawaii Department of Health properly amended Mr. Beatie's birth certificate to reflect his male sex. *See* Decl. of Thomas Beatie, Ex. D, Certification of Live Birth.

In addition to amending his birth certificate, Mr. Beatie took other measures to legally change his sex by amending other identification documents. Mr. Beatie changed the sex designation on his Hawaii driver's license to "male" on or about June 25, 2002. *See* Decl. of Thomas Beatie at ¶¶ 10 –17, Ex. B, Haw. Driver's License for Tracy Lehuanani Lagondino. He was able to do so pursuant to Hawaii Administrative Rules § 5-22-3(c), which provides that "for those persons desiring alteration of their state identification card based on **change** of **sex**, a medical document certifying the completion of a **sex change** or other certified document indicating the same shall be presented."

In January of 2003, Mr. Beatie petitioned for a legal name change from the traditionally female name he was assigned at birth to his new male name, Thomas Trace Beatie. That legal name change was granted in an order dated January 29, 2003. *See* Decl. of Thomas Beatie, Ex. C, Order dated Jan. 29, 2003. On that date he also obtained a new Hawaii driver's license reflecting his new male name as well as his male sex. *See* Decl. of Thomas Beatie, Ex. B, Haw. Driver's License for Thomas Trace Beatie. Later that year he also amended the name and sex marker on his United States passport. *See* Decl. of Thomas Beatie at ¶ 17-18, Ex. F, United States of America Passport of Thomas Trace Beatie.

Hawaii, like Arizona, only recognizes marriages between different-sex couples, and has always prohibited marriage between same-sex couples. *See* Haw. Rev. Stat. Ann. § 572-1.[1]

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[1] The requirements for entering a valid marriage in Hawaii are codified in Haw. Rev. Stat. Ann. § 572-1:

> In order to make valid the marriage contract, which shall be only between a man and a woman, it shall be necessary that:
>
> . . .
>
> (2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2;
>
> . . .

1 While Hawaii's marriage law (like Arizona's) does not define "sex" for purposes of eligibility
2 for marriage, by the time of his marriage to Mrs. Beatie on February 6, 2003, Mr. Beatie had
3 clearly met the legal requirements for changing his sex to male under all provisions of Hawaii
4 law that do specify the requirements for recognition of a legal gender change. As a result, he
5 was able to present identification demonstrating that his sex was male to obtain a valid
6 marriage license identifying him as male and his wife as female.[2] Their marriage was therefore
7 valid in Hawaii as a different-sex marriage at the time it was entered into.[3]

8 In sum, Mr. Beatie met all the legal requirements for entering a valid opposite-sex
9 marriage under Hawaii law at the time of his marriage to Mrs. Beatie. Their marriage was
10 granted by the Hawaii State Registrar on February 6, 2012. *See* Decl. of Thomas Beatie, Ex. E,

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11 (6) The man and woman to be married in the State shall have duly obtained a license for that purpose
12 from the agent appointed to grant marriage licenses; and

13 (7) The marriage ceremony be performed in the State by a person or society with a valid license to
solemnize marriages and the man and the woman to be married and the person performing the marriage
14 ceremony be all physically present at the same place and time for the marriage ceremony.

15 [2] Hawaii's Department of Health requires that one form of identification be provided when applying for a
marriage license, in order to verify eligibility for marriage including proof of age. Acceptable forms of
16 identification can include either a valid I.D., a driver's license, or a birth certificate. *See* Haw. Dept. of Health,
Who is Eligible to Apply for a Marriage License?, at http://hawaii.gov/health/vital-records/vital-
17 records/marriage/index.html#eligible (last visited Nov. 25, 2011).

18 [3] While the exact date that Mr. Beatie obtained his amended birth certificate appears uncertain from the record,
it is clear that by the date of the marriage, Feb. 6, 2003, he had nonetheless met the legal requirements for a
19 change of sex, making the marriage a valid opposite-sex marriage. A birth certificate is not a required form of
identification for purposes of obtaining a marriage license in Hawaii if the applicant is age 19 or over. Another
20 form of I.D. including a driver's license may be presented. *See* Haw. Dept. of Health, *Who is Eligible to Apply
for a Marriage License?*, at http://hawaii.gov/health/vital-records/vital-records/marriage/index.html#eligible
21 (last visited Nov. 25, 2011). Mr. Beatie obtained a Hawaii driver's license that reflected his male sex on June
25, 2002, and another that additionally reflected his new male name on January 29, 2003. That amended Hawaii
22 driver's license was sufficient proof of eligibility to obtain a valid marriage license.

23 Moreover, even in cases where there is initially an obstacle to entering a valid marriage but that obstacle is
24 subsequently overcome during the marriage, the marriage will not be considered void. For instance, in *Medlin v.
Medlin*, 194 Ariz. 306, 981 P.2d 1087 (App. Ariz. 1999), the husband argued that he was not legally married to
25 his wife under Arizona law because he had been a minor at the time the marriage was celebrated in Nevada. 981
P.2d at 1088. The court determined that the marriage was voidable but had been ratified by the husband who
26 had continued to live with his wife as husband and wife for seven years after his eighteenth birthday. 981 P.2d
at 1089. Therefore, the marriage was recognized for purposes of granting a dissolution of the marriage and
27 ordering spousal support. 981 P.2d at 1089. Similarly, here, even if Mr. Beatie had not completed all the
ministerial requirements to recognize his legal change of sex prior to the date of the marriage ceremony, that
28 obstacle was removed when he did receive his amended birth certificate, which occurred at latest shortly after
the parties' wedding. *See* Decl. of Thomas Beatie, ¶ 15.

Certificate of Marriage. Therefore, under Arizona's rule of comity as codified in A.R.S. § 25-112(A), this Court should recognize the validity of the parties' marriage and grant the requested dissolution petition.

C. Arizona Law Likewise Recognizes Mr. Beatie's Legal Sex as Male and the Parties' Marriage as a Valid Opposite-Sex Marriage.

In addition to being a valid opposite-sex marriage in Hawaii, the state in which the marriage was celebrated, the parties' marriage is also a legal opposite-sex marriage under Arizona law. It is therefore entitled to recognition in this state. *See* A.R.S. § 25-112(A).

The state of Arizona has made clear that it recognizes Mr. Beatie's sex as male and recognizes the parties' marriage as a valid opposite-sex marriage. Since moving to Arizona in 2010, the parties have enjoyed every benefit accorded to married couples. *See* Decl. of Thomas Beatie, ¶ 29. For instance, the parties have been able to file joint income tax returns with the state of Arizona as a married couple, Decl. of Thomas Beatie, ¶ 30, and they successfully filed a joint petition for bankruptcy the United States District Court of Arizona in 2011, Decl. of Thomas Beatie, ¶ 31.

Arizona's birth-certificate statute is very similar to Hawaii's. Like Hawaii's statute, it directs the state registrar to change the gender marker on the birth certificate of a transsexual individual "who has undergone a sex change operation or has a chromosomal count that establishes the sex of the person as different than in the registered birth certificate" upon receipt of "[a] written statement by a physician that verifies the sex change operation or chromosomal count." A.R.S. § 36-337(A)(3). Similarly, the procedure for changing the sex marker on an Arizona driver's license is provided in regulations issued by the state Department of Transportation. The applicant must simply submit a letter from a physician stating that the individual is "irrevocably committed to the sex change procedure." Ariz. Dept. of Transportation, Policy No. DL 400.15(IV)(A)(3)(b).

As described above, and as elaborated further in Mr. Beatie's declaration accompanying Petitioner's Memorandum in Support of Subject Matter Jurisdiction, Mr. Beatie's medical history demonstrates that he easily meets each of those standards, because he underwent a surgical sex change procedure prior to the parties' 2003 marriage. *See* Decl. of Thomas Beatie,

¶¶ 11-12. Mr. Beatie's physician certified in 2002, prior to his marriage, that Mr. Beatie had undergone irreversible surgical, hormonal, and psychological procedures to correct his anatomy and appearance, and that his sex should be legally recognized as male. *See* Decl. of Thomas Beatie, Ex. A, Aff. from Michael L. Brownstein, M.D, FACS.

Because Arizona recognizes Mr. Beatie's legal sex as male, the parties' marriage is entitled to recognition as a valid opposite-sex marriage. Petitioner's marriage is not a same-sex marriage, as prohibited under A.R.S. § 25-101(A). Arizona law contains no prohibition against recognition of opposite-sex marriages in which one spouse has legally changed their sex. In the absence of any such statutory prohibition, under Arizona's longstanding rule of comity the court must recognize the parties' valid opposite-sex marriage for purposes of granting their dissolution petition.

D. <u>Other Courts Recognize Marriages Following Gender Transition as Valid Opposite-Sex Marriages</u>

Courts across the country have recognized the validity of marriages including a transsexual spouse as valid opposite-sex marriages. *See, e.g.*, *Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638 Health, Welfare, Eye & Dental Fund*, - F.Supp.2d -, 114 Fair Empl. Prac. Cas (BNA) 1126, 2012 WL 1094452 (D. Minn. 2012) (recognizing the validity of opposite-sex marriage involving a male-to-female transgender spouse under Minnesota law); *In re Lovo-Lara*, 23 I. & N. Dec. 746, 753 (BIA 2005) (recognizing a North Carolina marriage between male-to-female transsexual and male as valid for purpose of a marriage-based visa petition); *Carter v. Carter*, Case Nos. 139,251 and 139,252, Louisiana Family Court, East Baton Rouge Parish (Jan. 16, 2002) (affirming validity of an opposite-sex marriage involving a transsexual spouse); *In re Marriage of Vecchione*, Case No. 96D003769 (Cal. Super. Ct. Oct. 22, 1998) (same); *M.T. v. J.T.,* 140 N.J. Super. 77, 355A.2d 204 (Sup. Ct. N.J. 1976) (same).

For example, in *Radtke*, the Federal District Court of Minnesota concluded that a marriage involving a transsexual woman and a non-transsexual man was valid as a different-sex marriage under both Minnesota law and the federal Defense of Marriage Act, which prohibit recognition of marriage between same-sex couples. Minn. Stat. Ann. §157.01, 1 U.S.C. §1.While Minnesota had no statute that specifically **<u>authorized</u>** opposite-sex marriage

for transsexual people post-gender-transition (in fact, no state has such a statute), the court found conclusive the fact that the state had adopted no statute to **prohibit** marriages involving transsexuals:

> The fact that some other states, such as Texas and Kansas, do not recognize marriages such as the Radtkes' is irrelevant to this analysis. Once even one state—New Jersey—did recognize such marriages, Minnesota was aware of the issue and of the fact that such marriages would be recognized in Minnesota unless the legislature acted. The Minnesota legislature chose not to act.

Radtke, 2012 WL 1094452 at *12.

In the absence of specific statutory guidance on the definition of a "same-sex" marriage, the Minnesota court held that the state's marriage laws must be interpreted in conformity with the birth-certificate-change statute to permit a transsexual person who has changed his or her sex to marry as a member of the sex to which he or she has transitioned. It concluded, "The only logical reason to allow the sex identified on a person's original birth certificate to be amended is to permit that person to actually use the amended certificate to establish his or her legal sex for other purposes, such as obtaining a driver's license, passport, or marriage license." *Id.* at *11. In that case, the transsexual spouse had been recognized as female by the state of Minnesota and the federal government for purposes of her driver's license, passport, etc. The court held that "[t]here is no basis to conclude that Minnesota recognizes Plaintiff as female for some purposes—birth records and driver's licenses, but not for others—marriage certificates." *Id.*

Similarly, here, Mr. Beatie has been issued a birth certificate, driver's license, and U.S. passport all recognizing his legal gender as male. *See* Decl. of Thomas Beatie at ¶ 17-18, Ex. F, United States of America Passport of Thomas Trace Beatie. It would be illogical to deny legal effect to all these documents demonstrating his legal sex as male in conformity with the well-established standards set forth by Hawaii, Arizona, and federal law, and to thereby deny the validity of the parties' marriage. Nothing in Arizona law gives this Court the authority to deny the parties' marriage recognition.

While a few courts have declined to recognize marriages involving a transsexual spouse, those decisions are distinguishable in that the marriages in question generally took

place in states that did **not** permit transsexual individuals to legally change their sex. *See Kantaras v. Kantaras*, 884 So.2d 155 (Fla. App. 2004); *In re Estate of Gardiner*, 273 Kan. 191, 42 P.3d 120 (2002), cert. denied 123 S.Ct. (2002); *Littleton v. Prange*, 9 S.W.3d 223 (Tex. App. 1999), cert. denied 121 S.Ct. 174; *In re Ladrach*, 32 Ohio Misc.2d 6, 513 N.E.2d 828 (Prob. Ct.1987).[4] Indeed, the Ohio court in *Ladrach* specifically held that "[i]t seems obvious . . . that if a state permits such a change of sex on the birth certificate of a post-operative transsexual, either by statute or administrative ruling, then a marriage license, if requested, must issue to such a person provided all other statutory requirements are fulfilled." *Ladrach*, 32 Ohio Misc. 2d at 9, 513 N.E.2d at 831.

In *Kantaras v. Kantaras*, 884 So. 2d at 161, the court noted that the Florida legislature did not recognize any form of legal sex change.[5] This is a sharp contrast from Arizona and Hawaii law which specifically provide procedures to enable transsexual individuals to legally change their sex. Similarly, *In re Estate of Gardiner*, supra, 273 Kan 191, 42 P. 3d 120, the Kansas Supreme Court does not indicate that any Kansas law or policy permitted individuals to legally change their sex. In *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. Ct. App. 1999) the court concluded that Texas Health and Safety Code §191.028 allowed an individual the ability to amend the sex on their birth certificate based only on inaccuracy at the time the original certificate was recorded (i.e. at birth).[6]

Under Hawaii (and Arizona) law, on the contrary, a transsexual individual like Mr. Beatie can change his sex decades after birth to reflect a legal sex change. *See* Haw. Rev. Stat. Ann. § 338-17.7 (a) (4); A.R.S. § 36-337. Under the plain logic of the Ohio decision in *Ladrach*, it therefore "seems obvious . . . that" because Arizona "permits such a change of sex

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[4] In 2005, the Illinois Court of Appeals also invalidated a marriage involving a transgender person, but it did so based on the unique facts of the case, not on a general prohibition against marriage by transgender persons. *In re Marriage of Simmons*, 825 N.E.2d 303 (1st Dist. 2005).

[5] Following the *Kantaras* decision, the Florida Office of Vital Statistics subsequently established a process for transgender individuals to obtain new birth certificates. Fla. Admin. Code Ann. r. 64V-1.003(1)(f) (2006).

[6] The *Littleton* decision has similarly been overridden by the subsequent adoption of a change to the Texas Family Code to state that a person may present "an original or certified copy of a court order relating to the applicant's . . . sex change" when applying for a marriage license. Tex. Fam. Code Ann. § 2.005(b)(8) (2009).

on the birth certificate of a post-operative transsexual, . . . then a marriage license, if requested, must issue to such a person[.]" *Ladrach*, supra, 32 Ohio Misc. 2d at 9, 513 N.E.2d at 831. Since Arizona expressly permits an individual legally to change his or her sex, and would itself issue a marriage license to the parties if sought, it must recognize the parties' valid marriage from Hawaii under the rule of comity.

III. Denying Recognition of Mr. Beatie's Male Sex and His Marriage Based on His Decision to Bear Children Would Violate His Constitutional Right to Procreation.

An interpretation of A.R.S. § 36-337 that would effectively require that a transsexual individual be sterilized before their gender identity can be legally recognized would violate the fundamental constitutional right to privacy for Mr. Beatie and all similarly situated transsexual people in this state, under both the federal Constitution and the Arizona Constitution. This is because the right to choose whether or not to have children, and specifically the right to be free from forced sterilization, has been recognized by both the U.S. Supreme Court and the Arizona Supreme Court as an integral part of the fundamental right to privacy, which includes the right to autonomy in making personal decisions about marriage, child-bearing, and child-rearing. *See, e.g., Skinner v. Oklahoma*, 316 U.S. 535 (1942) (holding that states cannot sterilize individuals as a consequence of committing a crime); *Griswold v. Connecticut,* 381 U.S. 479 (1965) (striking down a law that prohibited the use of contraceptives by married couples).

This right to privacy "emanat[es]" from several provisions of the United States Constitution, including the Due Process Clause of the Fourteenth Amendment. *Soos v. Superior Court*, 182 Ariz. 470, 474, 897 P.2d 1356, 1360 (App. 1994). In the Arizona Constitution, the even-stronger right to privacy is made explicit in Article II, Section 8. *See Simat Corp. v. Ariz. Health Care Cost Containment Sys.*, 203 Ariz. 454, 457, 56 P.3d 28, 31 (2002) ("Unlike the federal constitution, our constitution confers an explicit right of privacy on our citizens."); *In re Rasmussen*, 154 Ariz. 207, 215, 741 P.2d 674, 682 (1987) (recognizing state constitutional right to privacy in an individual's right to refuse medical treatment). Those constitutional provisions "protect 'individual decisions in matters of childbearing from unjustified intrusion by the State.'" *Soos* (quoting *Carey v. Population Ser. Int'l,* 431 U.S. 678, 687, 97 S.Ct. 2010, 2017, 52 L.Ed.2d 675 (1977)). Preserving personal autonomy in those

areas is essential because "[m]arriage and procreation are fundamental to the very existence and survival of the race." *Soos*, 182 Ariz. at 474, 897 P.2d at 1360 (quoting *Skinner*, 316 U.S. at 541). They are therefore among the most important personal rights that the Constitution guarantees all citizens.

The United States Supreme Court has specifically held that, because of the importance of these rights, a state cannot impose sterilization on an unwilling individual, even as punishment for a crime. *Skinner*, 316 U.S. 535. Such a deprivation causes "irreparable injury, . . . forever depriv[ing the individual] of a basic liberty": the ability to procreate. *Id.* at 541. The Supreme Court held that the right to procreate is "one of the basic civil rights of man" guaranteed by the Constitution. *Id.*

The right to privacy is of course not unlimited, as the U.S. Supreme Court noted in *Roe v. Wade*: "[D]ecisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate." 410 U.S. 113, 154 (1973). With respect to abortion, for instance, states "may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." *Id.* Here, however, no state interests are advanced by peering into which spouse bore the couple's children during the marriage in order to determine whether a lawful marriage between a man and a woman should be or can be dissolved. Regardless of their personal choices with respect to procreation, all couples should be afforded the same marital rights, including the right to dissolution, as are given to every other different-sex married couple in this state.

The state's responsibility to refrain from interference with the right to procreate extends beyond refraining from inflicting sterilization on those under its custody, as in *Skinner*. It is well established that the state also may not constitutionally withhold access to a statutory right or benefit to those who decline to forego a fundamental constitutional right, particularly with respect to a right as fundamental as procreation. *Simat*, 203 Ariz. at 463, 56 P.3d at 37.Simply put, courts cannot impose consequences on individuals for the private exercise of how they choose to have, or not to have, a family. In *Simat*, the Arizona Supreme Court held that "the state cannot deprive a woman of the right of choice by conditioning the receipt of benefits

upon a citizen's willingness to give up a fundamental right" – in that case, the right to terminate a pregnancy. *Id.*

Here, if A.R.S. § 36-337 is interpreted to require transsexual individuals not only to undergo irreversible medical treatment to physically transition to their new sex, but also to be sterilized and forego forever the opportunity to bear biological children, that would unconstitutionally infringe that most-fundamental of rights. The Legislature may not empower or require the courts of this state to evaluate how a lawfully married couple exercises their right to bear children in determining whether to grant a dissolution of a marriage.

Therefore, this Court should interpret Arizona's statutory scheme **not** to require transsexual individuals to undergo forced sterilization, so as to avoid the conclusion that the statutory scheme is unconstitutional. "When considering a statute we are required to give it, if possible, a constitutional interpretation. In a circumstance 'where alternate constructions are available, [the court] should choose that which avoids constitutional difficulty.'" *Cook v. Cook*, 209 Ariz. 487, 493, 104 P.3d 857, 863 (Ct. App. 2005) (internal citations omitted) (quoting *Slayton v. Shumway,* 166 Ariz. 87, 92, 800 P.2d 590, 595 (1990)). For all the reasons set forth previously, not only is an alternative interpretation of the marriage statute available, but by far the most logical and internally consistent interpretation is to recognize Mr. Beatie's legal sex as male and the parties' marriage as a valid different-sex marriage.

IV. Conclusion

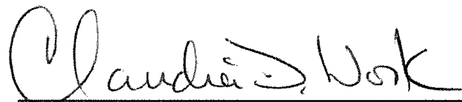
Mr. Beatie has met all the legal requirements under both Hawaii and Arizona law to legally change his sex. He has made a permanent commitment to irreversibly change his sex by undergoing hormone treatment and chest reconstruction, as well as a metoidioplasty. *See* Decl. of Thomas Beatie at ¶11. As a result, Mr. Beatie was able to legally amend his birth certificate, change his name, and amend other critical documents including his driver's license, passport and Social Security card. Because Mr. Beatie was legally recognized as male in Hawaii he was able to obtain a marriage license for his marriage to Mrs. Beatie as a valid opposite sex-marriage. The parties' marriage is not void or prohibited under any Arizona statutory provisions. Therefore, under this state's longstanding rule of comity, A.R.S. § 25-

112(A), this Court must recognize the validity of Mr. Beatie's legal change of sex and legal opposite-sex marriage.

Moreover, to deny recognition to the parties' marriage because the couple elected to have biological children the only way that they could would unconstitutionally deprive them and countless transsexual people of the fundamental right to bear children and raise families. The Court should instead interpret the statutory scheme in a manner consistent with the state and federal constitutional guarantee of family privacy, recognizing the parties' marriage as valid and granting the dissolution petition requested here by both spouses.

RESPECTFULLY SUBMITTED this 27th day of November, 2012.

CAMPBELL LAW GROUP, CHARTERED



Claudia D. Work
3101 N. Central Ave., Suite 840
Phoenix, Arizona 85012
Counsel for Amicus Curiae Transgender Law Center

ORIGINAL filed this same day with:

Family Court Administration
201 W. Jefferson
Phoenix, AZ 85003

COPY hand-delivered to:

Honorable Douglas Gerlach
Northeast Court-H
18380 N. 40th Street
Phoenix, AZ 85032

COPY of the foregoing mailed
this 27th day of November, 2012 to:

Michael P. Clancy, Esq.
David Cantor, Esq.
CANTOR LAW GROUP, PLLC
One E. Washington Street, Suite 1800
Phoenix, Arizona 85004
Attorneys for Petitioner

David B. Higgins, Esq.
211 E. Osborn Road
Phoenix, Arizona 85012
Attorney for Respondent

By: [signature] Tim Farrell