

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

JOHN DOE, formerly known as JANE DOE,

Plaintiff,

v.

MICHAEL PENCE, in his official capacity as Governor of the State of Indiana; GREGORY ZOELLER, in his official capacity as Attorney General for the State of Indiana; MYLA A. ELDRIDGE, in her official capacity as Marion County Clerk of the Court; and LILIA G. JUDSON, in her official capacity as Executive Director of the Indiana Supreme Court Division of State Court Administration,

Defendants.

Case No. 1:16-cv-02431-JMS-DML

**PLAINTIFF’S RESPONSE IN OPPOSITION TO DEFENDANT MYLA A. ELDRIDGE’S
MOTION TO DISMISS FIRST AMENDED COMPLAINT**

Through this action, John Doe—a Hoosier, an asylee from Mexico, and a transgender man—challenges the constitutionality of Indiana Code Section 34-28-2-2.5(a)(5), which uniformly prohibits non-citizens from changing their legal names. Myla A. Eldridge, in her official capacity as Marion County Clerk of the Court (“the Clerk” or “the Clerk’s Office”), claims she has no role in enforcing this discriminatory statute and thus Plaintiff lacks standing. This despite the Clerk’s duty to enforce the unlawful statute that discriminates against non-citizens. Moreover, the Clerk’s Office is required not only to follow the law, but also to inform and educate people about the law. Here, the Clerk’s Office advises non-citizens that they are ineligible, maintains and distributes literature that advertises to non-citizens that they are ineligible, and processes name-change petitions through a system in which non-citizens have no chance of success. The Clerk’s Office further asserts that Plaintiff’s claims against it are moot

because the Clerk’s counsel has represented—only now, in response to litigation—that the Clerk’s Office would be willing to accept and process Plaintiff’s petition for change of name—and forward it on to certain denial.

Neither the Clerk’s claim that others are more responsible for the deprivation of Plaintiff’s rights, nor the suggestion that Plaintiff ought to submit a frivolous and futile petition in state court, are sufficient to deprive this Court of jurisdiction to hear Plaintiff’s claims against the Clerk. Plaintiff seeks to ensure that the Clerk is required not to enforce the law, because it is unconstitutional. The Court should deny the Clerk’s Motion to Dismiss.

RELEVANT FACTS

Plaintiff John Doe is a transgender man who was granted asylum from Mexico in 2015 because he is transgender. First Amended Complaint (“Complaint”), Dkt. 24, ¶ 28. Plaintiff is recognized as male on his Indiana driver’s license and U.S. immigration documents. *Id.* at ¶ 37. However, because Indiana Code Section 34-28-2-2.5(a)(5) prohibits all non-citizens from changing their legal names, Plaintiff John Doe’s official IDs also bear his birth name “Jane.” *Id.* at ¶¶ 38-39. This mismatch causes Plaintiff serious distress, causes others to question the authenticity of his official identification, and forces Plaintiff to disclose that he is transgender against his will. *Id.* at ¶¶ 41-45.

In 2013, Plaintiff went to the Clerk’s Office to inquire about changing his legal name. Complaint at ¶ 59. Clerk’s Office employees gave Plaintiff an information packet that explained that non-citizens are barred from obtaining changes of legal name. *Id.* When Plaintiff sought to clarify the citizenship requirement, Clerk’s Office employees confirmed that non-citizens are prohibited from changing their names and asked multiple questions about Plaintiff’s citizenship and immigration status. *Id.* at ¶ 61. Clerk’s Office employees then made statements to the effect

that “It looks like the only requirement you don’t meet is being a citizen,” and, “If you do become a citizen, then we would have no problem changing your name.” *Id.* Having clearly received the message that he would not be permitted to change his legal name, Plaintiff left the Clerk’s Office without filing a petition. *Id.* at 62; Dkt. 52-2 at Admission No. 1.

After the complaint in this action was filed, the Clerk’s counsel contacted Plaintiff’s counsel and advised that the Clerk’s Office would accept and process any name-change petition Plaintiff might file and would forward that petition to a judge for formal denial. Dkt. 52-2 at Admissions No. 4-5. Plaintiff has declined to file such a frivolous and futile petition. *Id.* Plaintiff seeks an injunction requiring the Clerk’s Office to accept and process name-change petitions from non-citizens *and* permanently enjoining all defendants from enforcing any laws excluding non-citizens from accessing changes of legal names. The Clerk’s Office plays a role in enforcing Indiana Code Section 34-28-2-2.5(a)(5) by advising non-citizens that they are ineligible for name changes, maintaining and distributing literature that advertises the non-citizen exclusion, and processing petitions through a discriminatory system in which non-citizens have no chance of success. Complaint at ¶ 11.

STANDARD OF REVIEW

The Clerk’s Office moves to dismiss for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).¹ For purposes of a 12(b)(1) motion, including those challenging standing, courts accept all plausible factual allegations in a complaint as true. *Lewert v. P.F. Chang’s China Bistro, Inc.*, 819 F.3d 963, 968 (7th Cir. 2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

¹ As the Clerk has raised no objections to the substance of Plaintiff’s claims under Rule 12(b)(6), any such objections have been waived.

ARGUMENT

I. Plaintiff has established standing with respect to his claims against the Clerk.

Plaintiff meets the requirements for Article III standing to establish subject-matter jurisdiction for his claims against the Clerk.² To establish standing, a plaintiff must satisfy three elements: (1) an “injury in fact”; (2) causation; and (3) a likelihood that a favorable decision will redress the injury. *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

a. Plaintiff has adequately pled that the Clerk’s actions have injured Plaintiff.

The Clerk’s Office does not contest that Plaintiff has suffered an injury in fact. However, it may be useful to reiterate what that injury is. To be sure, the most obvious injury Plaintiff suffered at the hands of the Clerk occurred when the Clerk’s staff explained to Plaintiff the requirements of Indiana Code Section 34-28-2-2.5(a)(5) and actively dissuaded him from filing a name-change petition. Complaint at ¶¶ 59-61. But even setting aside that concrete incident, the Clerk’s Office indisputably plays an ongoing role in enforcing the statute, the existence of which bars Plaintiff from obtaining the name change that would protect him from the discrimination and harassment he experiences on a regular basis when his traditionally female birth name, and thus his transgender status, is revealed to others without his consent.

Specifically, as noted, the Clerk’s Office plays a role in enforcing the statute by advising non-citizens, when asked, that they are ineligible for name changes; by maintaining and distributing literature that advertises the non-citizen exclusion; and by processing petitions through a discriminatory system in which non-citizens have no chance of success. Complaint at ¶ 11. These actions serve to publicize and reinforce the statute’s discriminatory exclusion, and

² Plaintiff has separately responded to a motion to dismiss challenging standing as to State Defendants Governor Mike Pence, Attorney General Gregory Zoeller, and Director of State Court Administration Lilia Judson. Dkt. 50.

inherently serve to intimidate and dissuade non-citizens like Plaintiff from filing sure-to-be-futile name-change petitions, conveying a message that non-citizens are inherently unequal in the eyes of the state.

These are real harms, cognizable under Article III. For example, in *Baskin v. Bogan*, 12 F. Supp. 3d 1144, 1153 (S.D. Ind. 2014), this Court found that plaintiff same-sex couples had asserted a sufficiently concrete injury against the state's Department of Revenue Commissioner where the state's bar on same-sex marriage required them to "fill out three federal tax returns in order to file separate returns for Indiana." Citing the Seventh Circuit's ruling that "an identifiable trifle is enough for standing," *Harris v. City of Zion, Lake County, Ill.*, 927 F.2d 1401, 1406 (7th Cir. 1991), this Court "[f]ound] that this is an identifiable trifle," and denied the Commissioner's motion for summary judgment on the ground of standing. *Baskin*, 12 F. Supp. 3d at 1153. Receiving a message from the Clerk that the State views Plaintiff as undeserving of equal treatment, and will not treat him equally, is an injury significantly more than a "trifle." He has therefore alleged an adequate injury in fact for purposes of standing in his claims against the Clerk.

b. Plaintiff has adequately pled a "causal connection" between the Clerk's actions and Plaintiff's injury.

To satisfy the cause requirement of standing, plaintiffs need only show that their injuries are "fairly trace[able] to the challenged action of the defendant." *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 500 (7th Cir. 2005) (internal citations omitted). Standing can be established even where the causal connection is "weak." *Banks v. Secretary of Ind. Family and Soc. Serv. Admin.*, 997 F.2d 231, 239 (7th Cir. 1993). Put another way, a defendant in a constitutional challenge must play some role in the enforcement of the challenged statute. *See, e.g., Love v. Pence*, 47 F. Supp. 3d 805, 807 (S.D. Ind. 2014).

Moreover, a defendant need not be entirely responsible for the harm suffered: “a plaintiff does not lack standing merely because the defendant is one of several persons who caused the harm.” *Norton*, 422 F.3d at 500.

The Clerk’s Office assists in the enforcement of Indiana Code Section 34-28-2-2.5(a)(5) by acting to exclude non-citizens from the name-change process. The Clerk’s Office makes the confusing argument that, while it does inform members of the public about name-change requirements, including the non-citizen exclusion, it purportedly does not and cannot discourage people from filing petitions. Dkt. 53 at 3. This is a distinction without a difference. In reality, of course, informing a non-citizen about the non-citizen exclusion will have the inescapable effect of discouraging that person from filing a petition. The Clerk’s Office distributes literature that advertises the non-citizen exclusion and advises non-citizens in person that they are ineligible. Then, it says, it welcomes non-citizens to fill out a petition, pay fees and costs in excess of \$200,³ and wait for the certain denial of their name-change petition. The Clerk’s Office may wish that state law were not such that its employees must discourage non-citizens from pursuing name-change petitions, but with Indiana Code Section 34-28-2-2.5(a)(5) in place, the Clerk’s Office has no choice but to play its part and deliver the state’s clear message: non-citizens need not apply.

This case is similar to *Harris v. McDonnell*, 988 F. Supp. 2d 603 (D.W.V. 2013), in which a West Virginia same-sex couple sought injunctive and declaratory relief against a court

³ The filing fee for a civil petition in Marion County is \$156. *See* Marion County Clerk’s Office, *Filing Fees* (effective July 1, 2015), <http://www.indy.gov/eGov/County/Clerk/civil/Pages/Filing-Fees.aspx>. Money Orders are to be made payable to the “Marion County Clerk.” *Id.* Name-change petitioners must also pay a publication fee to a local newspaper. *See* Marion County Clerk’s Office, *Name Change*, <http://www.indy.gov/eGov/County/Clerk/civil/filing/Pages/Name-Change.aspx>.

clerk whose employee had informed them that same-sex couples were not permitted to marry in the state. The clerk argued that the plaintiffs lacked standing because they had not actually submitted an application for a marriage license after being informed by the clerk's staff that it would not be granted. *Id.* at 612. The court, however, held that such a futile act was not required before standing could be recognized. *Id.* at 612-13, citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365-66 (1977) (“If an employer should announce his policy of discrimination by a sign reading ‘Whites Only’ on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs... When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.”); *LeClerc v. Webb*, 419 F.3d 405, 413-14 (5th Cir. 2005) (finding nonimmigrant aliens challenging a law prohibiting them from sitting for the Louisiana Bar had standing and ripe claims when there was no reason to believe that the filing of a completed application would result in any outcome other than denial).

Here, the Clerk's Office communicated to Plaintiff John Doe in stark terms, “If you do become a citizen, then we would have no problem changing your name.” Complaint at ¶ 61. The Clerk would have the Court parse her employee's words as if some even more definitive statement of exclusion were necessary or possible. It does not matter if the Clerk's Office somehow impliedly offered Plaintiff the illusory option to submit a frivolous and futile name-change petition. Nor does it make a difference that a state Circuit Court judge would also be bound by Indiana Code Section 34-28-2-2.5(a)(5) to take the final step and officially deny such a

petition.⁴ What matters, for causation purposes, is that the Clerk's Office is obliged to play a role in enforcing the non-citizen exclusion, helping to ensure that non-citizens do not access changes of legal name. Plaintiff has satisfied the causation requirement.

c. Plaintiff has injuries that will be redressed by an order declaring Indiana Code Section 34-28-2-2.5(a)(5) unconstitutional and enjoining the Clerk from enforcing the statute.

To establish standing, a plaintiff must show that their injury "is likely to be redressed by a favorable judicial decision." *Hollingsworth v. Perry*, -- U.S. --, 133 S. Ct. 2652, 2661 (2013). A decision granting Plaintiff's requested relief against the Clerk will be critical to ensure that his injuries are fully redressed and that he is able to access a legal change of name unimpeded.

The Clerk's Office claims that no decision from this Court will change how it acts. Not so. Even if the Clerk disagrees with the law, her role in enforcing it is nonetheless clear. And the Clerk's Office does participate in carrying out the law's discriminatory exclusion, treating non-citizens differently than citizens because of Indiana Code Section 34-28-2-2.5(a)(5). The Clerk's Office distributes literature, both online and at its office, that explains to U.S. citizens that they may obtain a change of legal name, and explains to non-citizens that they may not. Complaint at ¶¶ 59, 62. If asked, Clerk's Office employees will explain to otherwise qualified

⁴ See, e.g., *Barber v. Bryant*, No. 3:16-CV-417-CWR-LRA, -- F. Supp. 3d --, 2016 WL 3562647, at *14-15 (S.D. Miss. June 30, 2016) ("The contention here is that any injuries [stemming from Mississippi law authorizing discrimination against same-sex couples] will be caused by third parties—like a clerk who refuses to promptly issue a marriage license to a same-sex couple—and therefore that the plaintiffs should sue those third parties. The argument is unpersuasive. On July 1, the plaintiffs will be injured by the state-sponsored endorsement of a set of religious beliefs over all others. Regardless of any third-party conduct, the bill creates a statewide two-tiered system that elevates heterosexual citizens and demeans LGBT citizens. The plaintiffs' injuries are therefore caused by the State... and will at a minimum be enforced by officials like Davis [Executive Director of state Department of Human Services, responsible for licensure of foster parents] and Moulder [state registrar responsible for recording recusal notices from clerks who refuse to issue marriage licenses.]") (internal citations omitted).

U.S. citizens that they may obtain a change of legal name, and they will explain to otherwise qualified non-citizens that they may not: “It looks like the only requirement you don’t meet is being a citizen,” they said to Plaintiff. Complaint at ¶ 62; Dkt. 53 at 3. And after taking these actions, when a petition is submitted, the Clerk’s Office will require payment of the \$156 filing fee and process the petition through a system where U.S. citizens may succeed and where non-citizens have no chance of success.

Plaintiff’s requested relief, an order from this Court declaring Indiana Code Section 34-28-2-2.5(a)(5) unconstitutional and enjoining all defendants from enforcing the statute, will ensure that he is not again subject to those injuries by the Clerk. Such an order will prevent the Clerk’s Office from treating non-citizens, including Plaintiff, differently from U.S. citizens, or from communicating the stigmatizing and discriminatory message of the non-citizen exclusion. Such an order will also ensure that the Clerk’s Office can fulfill its ordinary duties and play a concrete role in facilitating Plaintiff’s efforts to obtain a change of legal name, thus preventing the unconsented disclosure of his transgender status he otherwise faces on a regular basis. Plaintiff has satisfied the redressability requirement.

II. Plaintiff’s claim against the Clerk is not moot because the Clerk’s Office continues to enforce Indiana Code Section 34-28-2-2.5(a)(5).

Mootness doctrine serves to prevent federal courts from issuing mere advisory opinions by ensuring there is still a “live” controversy between parties such that a court’s ruling may grant some “effectual relief” to the prevailing party. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000). A case is not moot where a defendant remains free to resume wrongful conduct they have voluntarily ceased in response to litigation. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 169 (2000).

The Clerk's Office has claimed, in response to Plaintiff filing suit, that it would accept and process a name-change petition from Plaintiff and forward it on to certain denial. It asserts that such hollow assurances make Plaintiff's claims against it moot. Yet, the Clerk's Office also admits that it continues to inform and advise non-citizen that they are ineligible for a change of legal name, thus treating non-citizens differently from U.S. citizens. Dkt. 53 at 3. Because Indiana Code Section 34-28-2-2.5(a)(5) is still in place, the Clerk's Office cannot assure that it treats non-citizens the same as U.S. citizens in its communications to the public. Nor can it claim that name-change petitions it accepts from non-citizens will be treated on equal footing. Indeed, to accept the Clerk's view of mootness would be to allow any government official involved with a discriminatory program—be it in housing or education, employment or government services—to evade liability simply by inviting applications from target groups, even while acknowledging publicly that those applications are certain to be denied.

Despite the Clerk's laudable voluntary commitment to minimize its role in effectuating the statute's bar, it cannot escape its obligation to participate in the statute's discriminatory scheme by publicizing its requirements. The relief Plaintiff seeks from this Court, therefore, is still indisputably meaningful: the Clerk will be enjoined from enforcing Indiana Code Section 34-28-2-2.5(a)(5) by treating non-citizens differently in any way from U.S. citizens. Plaintiff's claims against the Clerk are not moot.

CONCLUSION

Plaintiff has standing to pursue his claims against the Clerk, and those claims are not mooted by the assertions of Clerk's counsel that the Clerk would not actually refuse to comply with a direct request from a non-citizen like Plaintiff to process a name-change petition, despite its inherently contradictory communications to the public that the statute bars granting of such a

petition. Plaintiff has satisfied the causation requirement because the Clerk's Office plays a role in enforcing the non-citizen exclusion, and a favorable decision in this Court would redress those injuries. Plaintiff's claims against the Clerk are not moot because the Clerk's Office continues to enforce the non-citizen exclusion. For the foregoing reasons, Plaintiff respectfully requests that the Court deny the Clerk's motion to dismiss.

Dated: January 5, 2017

Respectfully submitted,

/s/ Shawn Thomas Meerkamper
Shawn Thomas Meerkamper (admitted *pro hac vice*)
Ilona M. Turner (admitted *pro hac vice*)
TRANSGENDER LAW CENTER
P.O. Box 70976
Oakland, California 94612
Telephone: (510) 587-9696
shawn@transgenderlawcenter.org
ilona@transgenderlawcenter.org

Thomas A. Saenz (admitted *pro hac vice*)
Matthew J. Barragan (admitted *pro hac vice*)
MEXICAN AMERICAN LEGAL DEFENSE AND
EDUCATIONAL FUND
634 South Spring Street, 11th Floor
Los Angeles, California 90014
Telephone: (213) 629-2512
tsaenz@maldef.org
mbarragan@maldef.org

Veronica Cortez (admitted *pro hac vice*)
MEXICAN AMERICAN LEGAL DEFENSE AND
EDUCATIONAL FUND
11 East Adams, Suite 700
Chicago, IL 60603
Telephone: (312) 427-0701
vcortez@maldef.org

Barbara J. Baird
LAW OFFICE OF BARBARA J. BAIRD

445 North Pennsylvania Street, Suite 401
Indianapolis, Indiana 46204-0000
Telephone: (317) 637-2345
bjbaird@bjbairdlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2017, a copy of the foregoing *Plaintiff's Response in Opposition to Defendant Myla A. Eldridge's Motion to Dismiss First Amended Complaint* was filed electronically. Service of this filing will be made on all ECF-registered counsel by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

Betsy M. Isenberg
Matthew Keith Phillips
Philip Alan Gordon
OFFICE OF THE ATTORNEY GENERAL
Betsy.Isenberg@atg.in.gov
Matthew.Phillips@atg.in.gov
Philip.Gordon@atg.in.gov

Donald E. Morgan
Thomas J. O. Moore
OFFICE OF CORPORATION COUNSEL
donald.morgan@indy.gov
thomas.moore@indy.gov

/s/ Shawn Thomas Meerkamper
Shawn Thomas Meerkamper (admitted *pro hac vice*)
Ilona M. Turner (admitted *pro hac vice*)
TRANSGENDER LAW CENTER
P.O. Box 70976
Oakland, California 94612
Telephone: (510) 587-9696
shawn@transgenderlawcenter.org
ilona@transgenderlawcenter.org

Thomas A. Saenz (admitted *pro hac vice*)
Matthew J. Barragan (admitted *pro hac vice*)
MEXICAN AMERICAN LEGAL DEFENSE AND
EDUCATIONAL FUND
634 South Spring Street, 11th Floor
Los Angeles, California 90014
Telephone: (213) 629-2512
tsaenz@maldef.org
mbarragan@maldef.org

Veronica Cortez (admitted *pro hac vice*)
MEXICAN AMERICAN LEGAL DEFENSE AND
EDUCATIONAL FUND
11 East Adams, Suite 700
Chicago, IL 60603
Telephone: (312) 427-0701
vcortez@maldef.org

Barbara J. Baird
LAW OFFICE OF BARBARA J. BAIRD
445 North Pennsylvania Street, Suite 401
Indianapolis, Indiana 46204-0000
Telephone: (317) 637-2345
bjbaird@bjbairdlaw.com