

1 **TRANSGENDER LAW CENTER**  
2 ILONA M. TURNER (No. 256219)  
3 ilona@transgenderlawcenter.org  
4 SHAWN THOMAS MEERKAMPER (No. 296964)  
5 shawn@transgenderlawcenter.org  
6 P.O. Box 70976  
7 Oakland, CA 94612  
8 Telephone: (510) 587-9696  
9 Facsimile: (877) 847-1278

10 Attorneys for Petitioner  
11 a.t. furuya (f/k/a [REDACTED])

12 **IN THE SUPERIOR COURT OF CALIFORNIA**  
13 **IN AND FOR THE COUNTY OF SAN DIEGO**  
14 **UNLIMITED CIVIL JURISDICTION**

15 In the Matter of Petition of

16 A.T. FURUYA  
17 (f/k/a [REDACTED])

18 for Change of Name and Gender

19 Case No.:

20 **MEMORANDUM OF POINTS AND**  
21 **AUTHORITIES IN SUPPORT OF**  
22 **PETITION FOR CHANGE OF NAME**  
23 **AND GENDER**

1 Introduction

2 Petitioner is a thirty-four-year-old person whose gender identity is nonbinary. Friends and  
3 family know Petitioner as “a.t.” and refer to a.t. with gender-neutral pronouns, “they,” “them,”  
4 and “their”—instead of “he/she” or “his/hers” (Decl. at ¶ 4). Petitioner offers this Memorandum  
5 of Points and Authorities to assist the Court by providing context about nonbinary gender and  
6 that it is within this Court’s power to issue a Decree that recognizes Petitioner’s gender as  
7 nonbinary.  
8

9 Facts

10 Petitioner a.t. furuya was born in San Diego in 1982. Their parents named them  
11 “██████,” and their birth certificate was marked “female.” Despite this, a.t. has known that they  
12 are neither male nor female since high school (Decl. at ¶ 2). However, a.t. did not have a way to  
13 fully describe their gender until they were in their mid-twenties and met someone who was  
14 genderqueer<sup>1</sup> (Decl. at ¶ 3). They felt an enormous relief upon realizing that there was a  
15 vocabulary for who they are and that there were other people like them (*id.*). However, though  
16 a.t. has embraced their nonbinary gender identity, they regularly face harassment and challenges  
17 because of the perceived incongruence between a.t.’s gender nonconforming appearance and  
18 their stereotypically feminine name and female gender marker on their government-issued  
19 identification documents. For example, bank tellers frequently require a.t. to give additional  
20 information to access their accounts because their appearance does not match the gender marker  
21  
22  
23  
24  
25

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

1 on their state-issued ID (Decl. at ¶ 7). For a.t. to change their identification to “male” would be  
2 of no avail because they also are not male (Decl. at ¶¶ 5, 6, 8). Petitioner is aware that obtaining  
3 nonbinary identification on state-issued ID may be difficult in the near term because state  
4 agencies have only just begun to examine the issue.<sup>2</sup> However, a.t. submits this petition because  
5 they believe strongly those difficulties will be outweighed by the relief they will experience in  
6 having ID that accurately reflects who they are (Decl. at ¶¶ 9-10).

8 Argument

9  
10 **I. Individuals with nonbinary gender identities are recognized by legal systems,  
11 medical professionals, and researchers and represent a growing proportion of  
12 transgender communities.**

13 Gender identity is each person’s intrinsic understanding of their own gender. Many  
14 cultures maintain a nuanced and diverse understanding of the range of human physiology,<sup>3</sup>  
15 psychology, and social roles that acknowledge genders other than male or female.<sup>4</sup> Third genders  
16  
17  
18  
19  
20  
21

---

22 <sup>2</sup> See, e.g. Mary Emily O’Hara, *Movement for Third Gender Option ‘Exploding’ in U.S.*, NBC News, Dec. 15, 2016,  
23 available at <http://www.nbcnews.com/feature/nbc-out/movement-third-gender-option-exploding-u-s-n696446> (“A  
24 spokesperson for the California DMV told NBC Out via email that while the department ‘did not make a time  
25 commitment regarding non-binary gender designation,’ it is ‘committed to work towards adding an alternative  
26 gender designation choice for our customers.’”)

27 <sup>3</sup> Experts estimate that up to 2% of the population is intersex; in the United States, up to 63.8 million people might  
28 be living with intersex conditions. Melanie Blackless et al., *How sexually dimorphic are we?*, 12 Am. J. Human  
29 Biology 151 (2000). For example, the term “intersex” describes “people born with reproductive or sexual anatomy  
30 and/or a chromosome pattern that can’t be classified as typically male or female.” GLAAD, *Media Reference Guide*  
31 6 (10th ed. 2016), <http://www.glaad.org/sites/default/files/GLAAD-Media-Reference-Guide-Tenth-Edition.pdf>.  
32 People born with intersex traits may identify as male, female, or nonbinary.

33 <sup>4</sup> See, e.g., Walter L. Williams, *The “Two-Spirit” People of Indigenous North Americans*, The Guardian, Oct. 11,  
34 2010, available at <https://www.theguardian.com/music/2010/oct/11/two-spirit-people-north-america> (“Instead of  
35 seeing two-spirit persons as transsexuals who try to make themselves into “the opposite sex”, it is more accurate to  
36 understand them as individuals who take on a gender status that is different from both men and women.”).

1 are increasingly being legally recognized as well. Germany,<sup>5</sup> Australia,<sup>6</sup> New Zealand,<sup>7</sup> India,<sup>8</sup>  
2 and Nepal<sup>9</sup> all provide three gender options on ID documents like passports and birth certificates.  
3 Courts in California and Oregon have also recently issued orders legally recognizing individuals'  
4 nonbinary gender identities and directing birth certificates to be amended accordingly.<sup>10</sup> A  
5 federal court in Colorado recently determined that the State Department's refusal to issue a  
6 nonbinary passport was arbitrary and capricious and ordered the Department to reconsider its  
7 denial. *Zzyym v. Kerry*, No. 15-CV-02362-RBJ, 2016 WL 7324157 (D. Colo. Nov. 22, 2016).  
8

9 California law also already acknowledges the existence of nonbinary gender identities.  
10 Numerous provisions of California law prohibit discrimination based on "gender identity,"  
11 although that term is not defined in any California statute.<sup>11</sup> It is, however, defined in  
12 regulations. For example, California insurance regulations define "actual gender identity" (as  
13 distinct from "perceived gender identity") as "a person's internal sense of being: (1) male, (2)  
14 female, (3) a gender different from the gender assigned to the person at birth, (4) a transgender  
15 person, or (5) neither male nor female." Cal. Code Regs., tit. 10, § 2561.1(a). People with  
16  
17  
18

---

19 <sup>5</sup> Bill Chappell, *Germany Offers Third Gender Option on Birth Certificates*, NPR, Nov. 1, 2013, available at  
20 [http://www.npr.org/sections/thetwo-way/2013/11/01/242366812/germany-offers-third-gender-option-on-birth-](http://www.npr.org/sections/thetwo-way/2013/11/01/242366812/germany-offers-third-gender-option-on-birth-certificates)  
21 [certificates](http://www.npr.org/sections/thetwo-way/2013/11/01/242366812/germany-offers-third-gender-option-on-birth-certificates).

22 <sup>6</sup> Helen Davidson, *Third Gender Must Be Recognised by NSW After Norrie Wins Legal Battle*, The Guardian, Apr. 1,  
2014, available at [https://www.theguardian.com/world/2014/apr/02/third-gender-must-be-recognised-by-nsw-after-](https://www.theguardian.com/world/2014/apr/02/third-gender-must-be-recognised-by-nsw-after-norrie-wins-legal-battle)  
23 [norrie-wins-legal-battle](https://www.theguardian.com/world/2014/apr/02/third-gender-must-be-recognised-by-nsw-after-norrie-wins-legal-battle); *Australian Passports to Have Third Gender Option*, The Guardian, Sept. 15, 2011,  
24 available at <https://www.theguardian.com/world/2011/sep/15/australian-passports-third-gender-option>.

25 <sup>7</sup> John Godfrey, *Kiwis First to Officially Recognize Third Gender*, Nonprofit Quarterly, July 20, 2015, available at  
26 <https://nonprofitquarterly.org/2015/07/20/kiwis-first-to-officially-recognize-third-gender/>.

27 <sup>8</sup> Sophie McBain, *India's Supreme Court Recognises a Third Gender*, New Statesman, Apr. 16, 2014, available at  
28 <http://www.newstatesman.com/world-affairs/2014/04/india-s-supreme-court-recognises-third-gender>.

<sup>9</sup> Kyle Knight, *Third-Gender Passports May Be the Future of Trans Travel*, The Advocate, Oct. 26 2015, available  
at <http://www.advocate.com/commentary/2015/10/26/third-gender-passports-may-be-future-trans-travel>.

<sup>10</sup> Lauren Dake, *Jamie Shupe Becomes First Legally Non-Binary Person in the US*, The Guardian, June 16, 2016,  
available at <https://www.theguardian.com/world/2016/jun/16/jamie-shupe-first-non-binary-person-oregon>; Mary  
Emily O'Hara, *Californian Becomes Second US Citizen Granted 'Non-Binary' Gender Status*, NBC News, Sept. 26,  
2016, available at [http://www.nbcnews.com/feature/nbc-out/californian-becomes-second-us-citizen-granted-non-](http://www.nbcnews.com/feature/nbc-out/californian-becomes-second-us-citizen-granted-non-binary-gender-status-n654611)  
[binary-gender-status-n654611](http://www.nbcnews.com/feature/nbc-out/californian-becomes-second-us-citizen-granted-non-binary-gender-status-n654611).

<sup>11</sup> See, e.g., California Fair Employment and Housing Act of 1959 (Cal. Gov't Code §§ 12900-12996); Unruh Civil  
Rights Act of 1959 (Cal. Civ. Code § 51).

1 nonbinary gender identities identify as neither male nor female. Similarly, the California Fair  
2 Employment and Housing Council has proposed, and will soon implement, regulations defining  
3 “gender identity” as “each person's self-identification of their gender, or perception of such self-  
4 identification, which may include male, female, a combination of male and female, neither male  
5 nor female, a gender different from the person’s sex at birth, or transgender.” Cal. Fair  
6 Employment and Housing Council, *Further Modifications to Regulations Regarding*  
7 *Transgender Identity and Expression* (proposed Nov. 22, 2016) (to be codified as Cal. Code  
8 Regs. tit. 2, § 11030(c)), available at <http://www.dfeh.ca.gov/files/2016/09/Further->  
9 [Modifications-to-Text-of-Regulations-Regarding-Transgender-Identity-and-Expression.pdf](http://www.dfeh.ca.gov/files/2016/09/Further-Modifications-to-Text-of-Regulations-Regarding-Transgender-Identity-and-Expression.pdf).  
10  
11

12 The medical community also recognizes that gender exists on a spectrum and that a  
13 meaningful number of individuals identify as something other than male or female. The  
14 American Psychological Association defines “gender identity” as “an individual’s identification  
15 as male, female, or, occasionally, some category other than male or female.” Am. Psych. Ass’n,  
16 *Diagnostic and Statistical Manual of Mental Disorders* 451 (5th ed. 2014).  
17

18 The World Professional Association for Transgender Health (WPATH) is an  
19 international, multidisciplinary, professional association of medical providers, mental health  
20 providers, researchers, and others, with a mission of promoting evidence-based care and research  
21 for transgender health. WPATH publishes the *Standards of Care for the Health of Transsexual,*  
22 *Transgender, and Gender Nonconforming People*, which describes the growing number of  
23 individuals in the transgender community who identify in nonbinary terms:  
24

25 As a generation of transsexual, transgender, and gender-nonconforming  
26 individuals has come of age—many of whom have benefitted from different  
27 therapeutic approaches—they have become more visible as a community and  
28 demonstrated considerable diversity in their gender identities, roles, and  
expressions... Other individuals affirm their unique gender identity and no longer  
consider themselves to be either male or female. Instead, they may describe their

1 gender identity in specific terms such as transgender, bigender, or genderqueer,  
2 affirming their unique experiences that may transcend a male/female binary  
3 understanding of gender... Greater public visibility and awareness of gender  
4 diversity have further expanded options for people with gender dysphoria to  
5 actualize an identity and find a gender role and expression that are comfortable  
6 for them.

7 WPATH, *Standards of Care for the Health of Transsexual, Transgender, and Gender*  
8 *Nonconforming People* 9 (7th ed. 2011), available at

9 [https://s3.amazonaws.com/amo\\_hub\\_content/Association140/files/Standards%20of%20Care%20](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf)  
10 [V7%20-%202011%20WPATH%20\(2\)\(1\).pdf](https://s3.amazonaws.com/amo_hub_content/Association140/files/Standards%20of%20Care%20V7%20-%202011%20WPATH%20(2)(1).pdf) (internal citations omitted).

11 Nonbinary people represent a growing proportion of transgender communities and have  
12 seen increased public visibility in recent years.<sup>12</sup> In a recent survey of 27,715 transgender and  
13 gender nonconforming people, a full 31% identified as nonbinary. Sandy E. James, *et al*,

14 National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 44  
15 (2016).<sup>13</sup> Yet, like other transgender people, nonbinary people face startling rates of

16 discrimination, harassment, and even violence. See Jack Harrison et al., *A Gender Not Listed*  
17 *Here: Genderqueers, Gender Rebels, and Otherwise in the National Transgender*

18 *Discrimination Survey*, 2 LGBTQ Pol’y J. 13 (2012), available at

19 [http://www.thetaskforce.org/static\\_html/downloads/release\\_materials/agendernotlistedhere.pdf](http://www.thetaskforce.org/static_html/downloads/release_materials/agendernotlistedhere.pdf).

20 For example, 83% of nonbinary people report having experienced harassment due to bias in K-  
21 12 schools, and 32% report having suffered physical assault due to bias. *Id.* at 2, Table 2.

---

22  
23  
24  
25 <sup>12</sup> See, e.g. Steven Petrow, *Don't know what 'genderqueer' is? Meet someone who identifies that way.*, Washington  
26 Post, May 9, 2016, available at [https://www.washingtonpost.com/lifestyle/style/dont-know-what-genderqueer-is-](https://www.washingtonpost.com/lifestyle/style/dont-know-what-genderqueer-is-meet-someone-who-identifies-that-way/2016/05/06/aa59780e-1398-11e6-8967-7ac733c56f12_story.html)  
27 [meet-someone-who-identifies-that-way/2016/05/06/aa59780e-1398-11e6-8967-7ac733c56f12\\_story.html](https://www.washingtonpost.com/lifestyle/style/dont-know-what-genderqueer-is-meet-someone-who-identifies-that-way/2016/05/06/aa59780e-1398-11e6-8967-7ac733c56f12_story.html); Jessica  
28 Bennett, *She? Ze? They? What's In a Gender Pronoun*, N.Y. Times, Jan. 30, 2016, at ST2, available at  
<http://www.nytimes.com/2016/01/31/fashion/pronoun-confusion-sexual-fluidity.html>.

<sup>13</sup> In contrast, as similar survey from several years earlier did not contain an option for nonbinary and found that  
22% of respondents identified as genderqueer. Jaime M. Grant, et al., National Center for Transgender Equality &  
National Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender*  
*Discrimination Survey* 24 (2011).

1 Overall, 40% of transgender and gender nonconforming people (including nonbinary-identified  
2 people) report facing harassment when presenting an ID that does not match their gender identity  
3 or gender expression, with 15% saying they have been asked to leave the setting in which they  
4 presented that ID. Jaime M. Grant, et al., National Center for Transgender Equality & National  
5 Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender*  
6 *Discrimination Survey* 139 (2011), available at  
7 [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf). Petitioner in this case has  
8 experienced just that type of discriminatory treatment: they are regularly subject to additional  
9 scrutiny when they show their ID, with its “female” gender marker and traditionally female  
10 name. Bank tellers regularly ask for additional identifying information to prove that Petitioner is  
11 who they say they are, and bartenders have suggested that Petitioner’s ID is fraudulent because  
12 of the inconsistency between Petitioner’s appearance and the “female” gender marker on their  
13 ID.  
14  
15  
16

17         Given the growing legal, medical, and social recognition of nonbinary gender identities,  
18 and the harm that can result from denying recognition to an individual’s identity, this Court can  
19 and should join the emerging trend that respects and validates people with nonbinary gender  
20 identities.  
21

22         **II. The California Health and Safety Code allows for gender change to nonbinary.**

23         California Health & Safety Code § 103425(a) establishes the process for petitioning a  
24 court for an order recognizing a change of gender. Notably, § 103425 does not limit courts to  
25 orders recognizing petitioners’ genders as only male or female. The statute states: “Whenever a  
26 person has undergone clinically appropriate treatment for the purpose of *gender transition*, the  
27 person may file a petition with the superior court in any county seeking a judgment *recognizing*  
28

1 *the change of gender.” Id.* (emphasis added). The statute does not include limiting language such  
2 as “for the purpose of transition to male or female,” or “recognizing the change of gender to male  
3 or female.” Further, the term “gender” is not defined for purposes of the statute, yet, as  
4 mentioned above, other provisions of California law define “gender” as including those whose  
5 genders are nonbinary.  
6

7 Other courts have concluded that the same, or similar, statutory provisions allow for  
8 orders recognizing nonbinary gender identities. The Superior Court of California, County of  
9 Santa Cruz determined earlier this year that California statutes allow for nonbinary gender  
10 change orders and issued such an order. Decree Changing Name and Gender, *Petition of Sara M.*  
11 *Keenan for Change of Name and Gender*, No. 16CV02024 (2016), available at [http://media1.s-](http://media1.s-nbcnews.com/j/newscms/2016_39/1724546/160926-sara-kelly-keenán-court-order-jpo-248p_06d81ab4bbb0d9c081c1079574c822c8.nbcnews-ux-2880-1000.jpg)  
12 [nbcnews.com/j/newscms/2016\\_39/1724546/160926-sara-kelly-keenán-court-order-jpo-](http://media1.s-nbcnews.com/j/newscms/2016_39/1724546/160926-sara-kelly-keenán-court-order-jpo-248p_06d81ab4bbb0d9c081c1079574c822c8.nbcnews-ux-2880-1000.jpg)  
13 [248p\\_06d81ab4bbb0d9c081c1079574c822c8.nbcnews-ux-2880-1000.jpg](http://media1.s-nbcnews.com/j/newscms/2016_39/1724546/160926-sara-kelly-keenán-court-order-jpo-248p_06d81ab4bbb0d9c081c1079574c822c8.nbcnews-ux-2880-1000.jpg).  
14  
15

16 In addition, an Oregon court interpreting that state’s similar gender change statute agreed.  
17 General Judgement of Sex Change, *In the Matter of the Sex Change of Jamie Shupe*, No.  
18 16CA13991 (Cir. Ct. Or., Cnty. of Multnomah 2016), available at  
19 <https://www.scribd.com/doc/315373637/Order-Legal-Sex-Change-from-Female-to-Nonbinary>.  
20 Like the California statute, Oregon’s gender change statute does not explicitly limit gender  
21 changes to male or female: “A court ... may order a legal *change of sex* and enter a judgment  
22 *indicating the change of sex* of a person if the court determines that the individual has undergone  
23 ... treatment appropriate for that individual for the purpose of *gender transition* and that sexual  
24 reassignment has been completed.” Or. Rev. Stat. § 33.460(1) (emphasis added).  
25  
26  
27  
28

1 This Court can and should follow the emerging consensus that statutes governing gender  
2 change should be liberally construed to allow for the issuance of orders recognizing a nonbinary  
3 gender identity.  
4

5 **III. Petitioner’s physician’s affidavit is “conclusive proof” of petitioner’s gender  
6 change to nonbinary.**

7 California Health & Safety Code § 103430(a) provides that a physician’s affidavit in a  
8 gender change petition “shall be accepted as conclusive proof of gender change[.]”. The statute  
9 goes on to provide model language for a physician’s affidavit, noting that the affidavit should  
10 “contain *substantially* the following language:

11 ‘I, (physician's full name), (physician's medical license or certificate number), am  
12 a licensed physician in (jurisdiction). I attest that (name of petitioner) has  
13 undergone clinically appropriate treatment for the purpose of gender transition to  
14 (male or female). I declare that the foregoing is true and correct to the best of my  
15 knowledge.’”

16 *Id.* (emphasis added).

17 Petitioner has provided an affidavit from their physician that contains substantially the  
18 same language that is required under the statute. The affidavit contains the physician’s name,  
19 license number, and licensing jurisdiction. It contains Petitioner’s name and attests that Petitioner  
20 has undergone clinically appropriate treatment for the purpose of gender transition. It contains a  
21 declaration that its contents are true and correct. The only way in which Petitioner’s affidavit  
22 varies from the suggested statutory language is that it specifies that Petitioner has transitioned to  
23 nonbinary rather than male or female. Because Petitioner’s physician’s affidavit is conclusive  
24 proof of gender transition, this petition should be granted.  
25

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

28 As discussed above, this Court has the statutory authority to grant Petitioner’s request for  
an order recognizing their gender as nonbinary. However, even if this Court were to determine

1 that the existing statutory framework does not contemplate the issuance of a nonbinary gender  
2 change order, the Court should still exercise its inherent equitable authority to grant this petition.  
3 California courts have long recognized their ability to grant relief even where no statute directly  
4 authorized it. *See, e.g., Trope v. Katz*, 11 Cal. 4th 274 (1995) (inherent equitable authority  
5 exercised to grant attorney’s fees even where not authorized by statute); *Aldrich v. San Fernando*  
6 *Valley Lumber Co.*, 170 Cal. App. 3d 725 (Ct. App. 1985) (inherent equitable authority exercised  
7 to set aside a judgment under circumstances not authorized by statute).  
8

9  
10 Courts in other states have concluded that their inherent equitable authority allowed them  
11 to issue gender change orders more expansive than those contemplated by statute, even where  
12 there was no statute authorizing gender change orders of any kind. *See In re Heilig*, 372 Md.  
13 692, 714 (Md. Ct. App. 2003) (inherent equitable authority authorized gender change order for  
14 person born out of state where statute only applied to those born in state; noting, “There is  
15 nothing extraordinary about equity jurisdiction in these kinds of matters.”); *In re Petition for*  
16 *Change of Birth Certificate*, 22 N.E.3d 707, 709 (Ind. Ct. App. 2014) (“I.C. § 16–37–2–10  
17 provides general authority for the amendment of birth certificates, without any express limitation  
18 (in the statute or elsewhere) regarding gender amendments. In light of this statute, as well as the  
19 inherent equity power of a court of general jurisdiction, we conclude that the trial court had  
20 authority to grant the petition at hand.”).  
21

22  
23 Regardless of whether the Court’s authority arises from statute or the Court’s equitable  
24 powers, this Court can and should grant this petition recognizing Petitioner’s gender as  
25 nonbinary.  
26  
27  
28

1           **V.     The inability to obtain a birth certificate that matches Petitioner’s gender**  
2           **identity would raise serious constitutional concerns.**

3           The denial of this petition would effectively prohibit Petitioner from obtaining a birth  
4 certificate designating a nonbinary gender marker, implicating Petitioner’s rights under the First  
5 and Fourteenth Amendments of the United States Constitution.

6           First, if the statute were construed to allow gender changes only to male or female, the  
7 statute would plainly discriminate on the basis of gender. As a nonbinary person, Petitioner  
8 would be facially excluded from the benefits of a court-ordered gender change enjoyed by people  
9 whose genders are male or female. If the statute were interpreted in such a way, it would be  
10 subject to exacting scrutiny under the Equal Protection Clause of the Fourteenth Amendment.  
11 *See, e.g., U.S. v. Virginia*, 518 U.S. 515, 533 (1996) (differential treatment based on gender must  
12 be substantially related to an important government interest that is “exceedingly persuasive.”).  
13  
14

15           In addition, the Fourteenth Amendment’s Due Process Clause protects Petitioner’s right  
16 to privacy, including both their right to avoid disclosure of personal matters and their right to  
17 independence in making important personal decisions. *See, e.g., Whalen v. Roe*, 429 U.S. 589,  
18 599 (1977); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (“At the heart of liberty is the right to  
19 define one’s own concept of existence... Beliefs about these matters could not define the  
20 attributes of personhood were they formed under compulsion of the State.”). If Petitioner is  
21 unable to obtain government identification recognizing their nonbinary gender identity,  
22 Petitioner would be required to permanently disclose private medical information about their sex  
23 assigned at birth whenever they are required to present their birth certificate. Further, an inability  
24 to obtain identification recognizing Petitioner’s nonbinary gender identity would represent a  
25 barrier to Petitioner’s independence in making important personal decisions relating to their  
26 gender identity and gender expression—deeply intimate attributes of identity that are  
27  
28

1 inextricably related to other personal decisions including “marriage, procreation, contraception,  
2 family relationships, child rearing, and education.” *Lawrence*, 539 U.S. at 574.

3  
4 Finally, the First Amendment protects Petitioner against state-compelled speech that  
5 would require Petitioner to endorse a message of the state with which Petitioner fundamentally  
6 disagrees. *See, e.g. Wooley v. Maynard*, 430 U.S. 705 (1977) (state could not require motorist to  
7 display motto “Live Free or Die” on license plate); *Riley v. National Federation of the Blind of*  
8 *North Carolina, Inc.*, 487 U.S. 781 (1988) (state could not require people soliciting charitable  
9 donations to divulge certain financial information). Petitioner rejects the inherently ideological  
10 and scientifically unfounded message that there are only two genders and that Petitioner must be  
11 legally recognized as either one or the other. Moreover, in presenting an identification document  
12 like a birth certificate, Petitioner implicitly endorses the information on the document as true and  
13 correct. Petitioner cannot genuinely endorse the inaccurate message that they are either male or  
14 female.  
15

16  
17 With regard to any of these constitutional rights, courts engage in an analysis that tests  
18 whether the challenged state action is, at a minimum, rational. Recently, in considering the State  
19 Department’s refusal to issue a passport with a nonbinary gender marker, a federal court in  
20 Colorado found “no evidence that the Department followed a rational decision[-]making process  
21 in deciding to implement its binary-only gender passport policy.” *Zzyym v. Kerry*, No. 15-CV-  
22 02362-RBJ, 2016 WL 7324157 at \*3 (D. Colo. Nov. 22, 2016) While that decision was based in  
23 the federal Administrative Procedures Act, the court’s analysis paralleled that of the “rational  
24 basis” test for constitutional claims. The court roundly dismissed a wide range of justifications  
25 offered by the State Department. For example, the court rejected as irrational the State  
26 Department’s proffered justifications that other agencies do not recognize nonbinary gender  
27  
28

1 identities and that it would be administratively and technologically difficult to begin recognizing  
2 nonbinary gender identities. *Id.* at \*5. Similarly, here, there is no rational, non-discriminatory  
3 justification for denying nonbinary individuals like Petitioner access to a birth certificate that  
4 accurately reflects their identity.  
5

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

10 Conclusion

11 For the reasons above, Petitioner respectfully requests that this Court grant Petitioner’s  
12 request for an order recognizing their gender as nonbinary.  
13  
14  
15

16 DATED: December 20, 2016

TRANSGENDER LAW CENTER

17  
18 By:

Shawn Thomas Meerkamper

*Attorney for Petitioner*

A.T. FURUYA

(f/k/a [REDACTED] [REDACTED])  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28