No. 20-1656

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KAREN KREBS,	)	
	)	Appeal from the United
Plaintiff-Appellant,	)	States District Court for the
	)	Eastern District of Wisconsin
v.	)	
	)	District Court No. 2:19-cv-634
MICHAEL GRAVELEY,	)	
	)	Hon. J.P. Stadtmueller,
Defendant-Appellee.	)	Judge Presiding

BRIEF AND SHORT APPENDIX OF PLAINTIFF-APPELLANT KAREN KREBS

Law Office of Adele D. Nicholas
5707 W. Goodman Street
Chicago, Illinois 60630
847-361-3869
adele@civilrightschicago.com

Law Office of Mark G. Weinberg
3612 N. Tripp Avenue
Chicago, Illinois 60641
773-283-3913
mweinberg@sbcglobal.net

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 20-1656

Short Caption: Krebs v. Graveley

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Karen Krebs

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Law Office of Adele D. Nicholas; Law Office of Mark G. Weinberg

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

n/a

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

n/a

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Adele D. Nicholas Date: 6-29-20

Attorney's Printed Name: Adele D. Nicholas

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: Law Office of Adele D. Nicholas, 5707 W. Goodman St., Chicago, IL 60630

Phone Number: 847-361-3869 Fax Number: 312-528-7670

E-Mail Address: adele@civilrightschicago.com

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Attorney's Signature: s/ Mark G. Weinberg Date: 6-29-20

Attorney's Printed Name: Mark G. Weinberg

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: Law Office of Mark G. Weinberg, 5707 W. Goodman St., Chicago, IL 60630

Phone Number: 773-283-3913 Fax Number: 312-528-7670

E-Mail Address: mweinberg@sbcglobal.net

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JURISDICTIONAL STATEMENT

This action was originally filed in the United States District Court for the Eastern District of Wisconsin. Plaintiff's complaint is an action under 42 U.S.C. §1983 alleging violations of the First Amendment of the United States Constitution. The district court had federal question jurisdiction under 28 U.S.C. §1331. The Seventh Circuit has jurisdiction pursuant to 28 U.S.C. §1291. This is an appeal from a final judgment on the merits resolving all claims as to all parties.

The district court granted Defendant's motion for summary judgment and denied Plaintiff's cross motion for summary judgment on March 26, 2020. ECF 38, Memorandum Opinion and Order, A. 1-6.[1] The district court entered judgment against Plaintiff and in favor of Defendant on March 26, 2020. ECF 39, Judgment Order, A. 7.

Plaintiff filed a timely notice of appeal on April 21, 2020. ECF 40.

ISSUE PRESENTED FOR REVIEW

Plaintiff Karen Krebs,[2] a transgender woman, seeks to legally change her first name from Kenneth to Karen to match her gender identity and express something deeply personal about who she is, how she sees herself, and how she wishes to be seen by others. Because of a 1992 conviction, she is permanently barred from

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[1] References in this brief to "A." and "ECF" refer to the Appendix and the district court docket entries, respectively.

[2] Plaintiff's legal name is Kenneth Krebs. As explained in full below, Plaintiff is a transgender woman who has used the name Karen since the 1990s. Plaintiff has been prohibited from legally changing her name pursuant to the statute challenged herein. In this brief, Plaintiff employs her preferred name and gender pronouns.

changing her name pursuant to Wis. Stat. §301.47(2)(a), a statute which makes it a felony for anyone who is required to register as a sex offender with the State of Wisconsin to "change his or her name." The statute forces Plaintiff to use and disclose a name with which she has not identified for decades in any situation in which she must show government-issued identification.

The question presented is whether the district court erred in granting summary judgment to Defendant Kenosha County District Attorney Michael Graveley on Plaintiff's claim that Wis. Stat. §301.47(2)(a) violates the First Amendment as applied to Plaintiff.

STATEMENT OF THE CASE

I. The Name-Change Statute

Wisconsin law makes it a Class H felony for anyone who is required to register as a sex offender with the State of Wisconsin to "change his or her name." A.8, Wis. Stat. §301.47(2)(a) (hereinafter "the Name-Change Statute" or "the Statute"). A person who changes his or her name in contravention of the Statute is subject to criminal prosecution and penalties including imprisonment for up to six years and/or a fine of up to $10,000.00. Wis. Stat. §939.50. The Name-Change Statute was enacted in 2003. Wis. Stat. §301.47, A.8. The Name-Change Statute also prohibits anyone required to register as a sex offender from "[i]dentif[ing] himself or herself by a name unless the name is one by which the person is identified with the department [of corrections]" on the registry. *Id.* at §(2)(b).[3]

[3] Plaintiff does not challenge the constitutionality of Wis. Stat. §301.47(2)(b).

II. Plaintiff Karen Krebs

Plaintiff Karen Krebs is a transgender woman. Plf. Statement of Facts, ECF 23 at ¶24.[4] At birth, Karen was given the name Kenneth Krebs. *Id*. She has not used that name since she came out as transgender in 1999. *Id*. For more than two decades, Plaintiff has lived as a woman and used the name Karen Krebs. *Id*. Plaintiff does not think of herself as Kenneth and does not identify with that name or with its implication—*i.e.*, that she is male. *Id.* at ¶25. Plaintiff considers the name Karen to be of central importance to her self-expression and identity. The name Karen matches Plaintiff's gender identity and accurately reflects who she is. *Id*. at ¶28. Conversely, the name Kenneth does not match Plaintiff's gender and does not accurately reflect her identity. *Id*. Because of a 1992 conviction, Plaintiff is required to register as a sex offender with the State of Wisconsin for the rest of her life. *Id*. at ¶¶5, 26.

Plaintiff wants to legally change her name, but she refrains from seeking to do so because of the threat of arrest and prosecution for violation of the Name-Change Statute. *Id*. at ¶27. Not being able to legally change her name causes numerous problems in Plaintiff's life. *Id*. at ¶28. The name Kenneth appears on official documents, including Plaintiff's state ID, bank accounts, medical records, tax forms, and mail. *Id*. at ¶29. This forces Plaintiff to disclose and respond to the name Kenneth in any situation where she must show a government-issued ID. *Id.* Plaintiff's inability to obtain an official ID with the name Karen causes confusion

[4] All record citations in this brief are to Plaintiff's Statement of Uncontested Material Facts (ECF 23), filed in conjunction with Plaintiff's motion for summary judgment.

and raises questions when Plaintiff applies for jobs, travels, interacts with medical professionals and government officials, votes, and manages her finances. *Id.* at ¶30. Not having an official ID that matches her identity causes Plaintiff embarrassment and distress. *Id.* It forces Plaintiff to disclose and explain that she is transgender to strangers with whom she interacts when she votes, seeks medical care, or goes to the bank, and it raises questions about the legitimacy of Plaintiff's government-issued ID because she does not appear and present as male. *Id.*[5]

Plaintiff does not seek to conceal her identity or her criminal record by changing her name. *Id.* at ¶31. Plaintiff has reported both "Kenneth" and "Karen" to the Department of Corrections as names by which she is identified. *Id.* Both Karen and Kenneth are listed on the Registry as Plaintiff's names. *Id.* at ¶32. Kenneth is listed as Plaintiff's name, and Karen is listed as an alias. *Id.* If Plaintiff were permitted to legally change her name, she would still register both names with the State's sex offender registry. *Id.* at ¶34.

III. Defendant Michael Graveley

Defendant Michael Graveley is the district attorney for Kenosha County, Wisconsin. Graveley is sued in his official capacity. Pursuant to Wis. Stats. §978.05, Graveley is responsible for "prosecut[ing] all criminal actions before any court" within Kenosha County. Graveley is thus the individual ultimately responsible for

[5] Plaintiff recently voted for the first time on April 7, 2020, in Wisconsin's primary. When Plaintiff showed her ID to obtain a ballot, the poll worker questioned whether the ID was actually hers because the name "Kenneth" does not match Plaintiff's feminine presentation. Details about this embarrassing experience were not included in Plaintiff's summary judgment briefing because she had not yet voted at that time. On remand, Plaintiff would seek to submit a supplemental declaration attesting to these facts.

enforcing the Name-Change Statute against Plaintiff. He is thus a proper Defendant pursuant to *Ex parte Young*, 209 U.S. 123 (1908). *See Council 31 of the AFSCME v. Quinn*, 680 F.3d 875, 882 (7th Cir. 2012) (The *Ex parte Young* doctrine "allows private parties to sue individual state officials for prospective relief to enjoin ongoing violations of federal law.") (citations omitted).

IV. The Registration Statute

The Wisconsin Department of Corrections maintains a registry of individuals who have been convicted of qualifying sex offenses. Wis. Stats. §301.45 ("the Registration Statute"). With respect to each registrant, the registry contains the individual's "name, including any aliases used by the person"; identifying characteristics such as "date of birth, gender, race, height, weight and hair and eye color"; "all addresses at which the person is or will be residing"; conviction information; and information concerning where the registrant is employed and/or attending school. *Id.* Individuals who have been convicted of qualifying sex offenses must register either for 15 years or for life, as determined by statute.

The requirement to register as a sex offender begins upon conviction, including while an individual is serving a term of imprisonment. ECF 23 at ¶2. A registrant who is no longer under the supervision of the criminal justice system (*e.g.*, parole, extended supervision or probation) must register annually with the Wisconsin Department of Corrections. *Id.* at ¶3. In addition to the annual registration requirement, individuals subject to the Registration Statute must provide the Department of Corrections with "updated information within 10 days" whenever

any of the information they are required to disclose changes. *Id.* at ¶4. A person who "knowingly fails to comply with any requirement to provide information" required by the Registration Statute is guilty of a Class H felony and subject to penalties including imprisonment for up to six years and/or a fine of up to $10,000.00. *Id.* at ¶6.

V. The Department of Corrections' Interpretation and Application of the Name-Change Statute

Grace Knutson is the Director of Sex Offender Programs for the Wisconsin Department of Corrections and is responsible for overseeing the sex offender registry, including the publicly available registry website. ECF 23 at ¶12. Knutson has worked for the Department of Corrections since 1992 and has been responsible for administration of the Wisconsin Sex Offender Registry since 2000. *Id.*

According to Knutson, at the time of initial registration, an individual subject to the Registration Statute must disclose all names by which they are known, including but not limited to any nicknames, aliases, or names they are called socially. *Id.* at ¶13. The Department lists the name that appears on the individual's judgment of conviction as the primary name. *Id.* at ¶14. Any other names or nicknames are listed as "aliases." *Id.* at ¶15. The Department generates a list of aliases (including nicknames) from the registrant's criminal history and whatever names, aliases or nicknames the registrant self-reports. *Id.* Once a name or alias is listed on the registry, the Department never removes it, even if the registrant reports that he no longer uses the name, alias or nickname. *Id.* at ¶16.

Prior to the passage of the Name-Change Statute, registrants were legally permitted to go by new names or nicknames as long as they properly disclosed them to the Department of Corrections. *Id.* at ¶20. When an individual disclosed a new name or nickname, the Department would add the new name to the list of "aliases." *Id.* Since the passage of the Name-Change Statute, the Department of Corrections has stopped including on the registry new names or nicknames that registrants disclose. *Id.* at ¶21. Now, if a registrant reports to the Department of Corrections that people are calling him or her something other than one of the names that currently appears on the registry (for example, a new nickname), the Department will not include the new name on the registry and will tell the registrant not to use the new name. *Id.*

If an individual's registration requirement began prior to passage of the Name-Change Statute in 2003, the Department interprets the Name-Change Statute as allowing the individual to identify him or herself by any name by which he or she was identified on the registry prior to passage of the law. *Id.* at ¶22. If an individual's registration requirement began after the passage of the Name-Change Statute, the Department interprets the Name-Change Statute as prohibiting the individual from adding any new nicknames or aliases after the initial registration. *Id.* at ¶23.

Plaintiff registered the name "Karen" with the Department of Corrections upon her initial registration, and "Karen" thus appears as an alias on the registry. According to Grace Knutson, if Plaintiff were permitted to legally change her name

to "Karen," the Department would not change anything about the information that is listed on the sex offender registry website. *Id.* at ¶35. That is, "Kenneth" would still appear as Plaintiff's name because that is the name that appears on Plaintiff's judgment of conviction, and "Karen" would still appear as an alias. *Id.*

VI. Searches of the Registry

Members of the public can search the website for the Wisconsin Sex Offender Registry by name or geography. ECF 23 at ¶17. In particular, one can type in (1) a zip code to see a list of every registrant residing within that zip code; (2) an address to see a list of every registrant residing within a specified radius of that address; or (3) a name to see whether a particular person searched is registered. *Id.* The "search by name" function on the registry website queries both the "name" and "alias" fields. *Id.* at ¶18. The "search by name" function requires a last name to be entered, but a first name is optional. *Id.* at ¶19.

If an individual searches the registry for "Karen Krebs," "Kenneth Krebs" or simply for the last name "Krebs," Plaintiff's listing on the registry is returned as a result. *Id.* at ¶33. If Plaintiff were permitted to legally change her name to "Karen," the information that members of the public would be able to access about her criminal conviction, residential information, and other identifying characteristics through the Registry website would be unchanged. *Id.* at ¶36. The upshot: members of the public would be directed to the same information if they searched for Plaintiff as "Karen Krebs" or "Kenneth Krebs." *Id.*

VII. The Government Purposes for the Registration and Name-Change Statutes

The homepage of Wisconsin's sex offender registry states that the purposes of the registry are "to make information more easily available and accessible" to the public and to "furnish the public with information regarding convicted sex offenders." ECF 23 at ¶37. Knutson agreed that those are the purposes of the registry website. *Id*. Knutson testified that these government interests would not be frustrated if Plaintiff were allowed to legally change her name to "Karen Krebs." ECF 23 at ¶38 ("Q: You've identified the purposes of registration as educating the public and making information available to the public ... Would any of those purposes be frustrated if Karen Krebs were allowed to legally change her name to 'Karen'? A. No.")

Knutson testified that it is her understanding that the purposes of the Name-Change Statute are to prohibit registrants from trying to remain anonymous in the community; to allow crime victims to track the whereabouts of the person who committed an offense against them; to allow law enforcement to determine whether someone is required to register; and to make information available to the general public. *Id.* at ¶39. Similarly, Defendant contends that the Name-Change Statute serves government interests in preventing individuals who have been convicted of sex offenses from "disappearing into society" by adopting new names. ECF 27 at 2. Knutson testified that these concerns could be adequately addressed by enforcement of the requirement that registrants must disclose all names by which they are known to the Department. ECF 23 at ¶40.

Knutson testified that the registry is potentially made less accurate and less complete by the Name-Change Statute. *Id.* at ¶41. This is so in two ways. One, it results in exclusion from the registry of new names or nicknames that a registrant self-reports. *Id.* Two, it has the potential to be confusing to members of the public if they are looking for someone on the registry who appears and presents as a woman, and uses a woman's name, but the registration information appears under a male name only. *Id.*

VIII. The Decision Below

The district court granted summary judgment to Defendant Graveley on Plaintiff's First Amendment claim, finding that "Plaintiff has failed to establish that Wisconsin's regulation of her ability to change her name implicates her First Amendment rights." A. 2. Thus, the district court declined to apply any level of First Amendment scrutiny to the Name-Change Statute. *Id.* In essence, the district court held that Plaintiff's testimony about the expressive implications of her name and the harm she suffers as a result of being prohibited from legally changing her name was insufficient to merit the invocation of First Amendment scrutiny. A. 5 ("Without her freedom of speech being implicated in the matter, she presents no claim at all.")

SUMMARY OF THE ARGUMENT

The district court erred in granting summary judgment to Defendant on Plaintiff's claim that the Name-Change Statute violates her rights under the First Amendment. The district court did not apply any level of First Amendment scrutiny

to the Name-Change Statute because it determined that Plaintiff had not "met her burden to demonstrate that the Name-Change Statute implicates her speech rights." A. 4.

The decision was in error because the evidence and argument before the district court provided ample support for Plaintiff's claim that the Statute has a profound impact on First Amendment-protected rights to self-expression, self-determination, and personal autonomy and should be subject to First Amendment scrutiny. By failing to apply any level of First Amendment scrutiny, the district court avoided grappling with the troubling evidence that the Statute harshly burdens protected expression while undermining rather than advancing the government interests put forth to justify it.

The Name-Change Statute violates the First Amendment in four ways. First, because the Name-Change Statute inevitably forces Plaintiff to display and disclose a name to which she strongly objects, it intrudes upon the freedoms that the Supreme Court has sought to protect in its compelled speech jurisprudence. The Statute thus triggers strict scrutiny—a test it fails because its restrictions undermine rather than advance the State's interests in maintaining an accurate sex offender registry and preventing individuals from concealing their criminal backgrounds from the community.

Second, if analyzed as a regulation of "expressive conduct" under *United States v. O'Brien*, 391 U.S. 367 (1968), the Statute fails because the act of changing one's name is intimately intertwined with expression, and the evidence establishes that

the government purposes put forth to justify the Statute would be achieved just as efficiently and effectively (if not more so) absent the Name-Change Statute's restrictions.

Third, the Name-Change Statute can be viewed as an impermissible exclusion from a limited public forum—that is, the State has created a forum through which individuals may engage in the expressive act of changing their names. The Name-Change Statute fails under this analysis because it excludes Plaintiff from the limited public forum although her intended speech (*i.e.*, changing her name to "Karen") is perfectly compatible with the purpose for which the forum exists.

And finally, the Statute fails even if heightened scrutiny does not apply because it restricts expression in a manner that is not appropriately tailored to advance government objectives.

For all of these reasons, the district court's decision should be reversed and remanded with instructions to enter judgment for Plaintiff.

ARGUMENT

I. Standard of Review

This Court reviews *de novo* a district court's grant of summary judgment. *Pagel v. TIN Inc.*, 695 F.3d 622, 624 (7th Cir. 2012).

II. The District Court Erred in Concluding that the Name-Change Statute Does Not Implicate First Amendment Interests

As shown below, Plaintiff's testimony established the expressive significance of changing one's name and the burden the Name-Change Statute places on her freedom of expression, and Plaintiff provided ample authority and analysis in

support of her claim that being prohibited from changing her name implicates First Amendment interests.

A. The Name-Change Statute Impermissibly Compels Speech

Plaintiff's principal theory is that the Name-Change Statute violates the compelled speech doctrine. *See* ECF 22 at 10-15; ECF 34 at 7-12. As set forth in Plaintiff's briefing in the district court, the Supreme Court has repeatedly affirmed that the First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2463 (2018) (*quoting Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). In *Janus*, the Court explained that "measures compelling speech are at least as threatening" to core First Amendment values as "restrictions on what can be said." *Id.* at 2464. The Court wrote as follows:

> When speech is compelled, … individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning, and for this reason, one of our landmark free speech cases said that a law commanding 'involuntary affirmation' of objected-to beliefs would require 'even more immediate and urgent grounds' than a law demanding silence.

Id. (*citing W.Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 633 (1943)).

By forcing Plaintiff to display and disclose a name to which she strongly objects, the Name-Change Statute intrudes upon the freedoms that the Supreme Court has sought to protect in its compelled speech jurisprudence. The Statute fails strict scrutiny because it is not narrowly tailored to advance a compelling government interest.

1. Plaintiff's Testimony Establishes that the Name-Change Statute Compels her to Engage in Speech to Which She Strongly Objects

By prohibiting Plaintiff from legally changing her name, the government compels her to engage in speech to which she objects. In any situation where Karen must disclose her legal name and/or show government-issued identification—*e.g.*, voting,[6] applying for a job, filling out employment-related forms, paying bills, banking, obtaining medical care, travelling by train or plane, applying for government benefits, entering a building or facility where one must show a government ID, or buying cold medicine at a pharmacy—Plaintiff is forced to disclose and respond to a name that does not comport with who she is. ECF 23 at ¶¶ 28-30. Whenever Plaintiff shows her government ID, she is forced to communicate information about herself and her identity that is false and to which she strongly objects—*i.e.*, that she is male and that her name is Kenneth. *Id.* at ¶28. Relatedly, the Statute compels Plaintiff to disclose and explain that she is transgender whenever she shows her government-issued ID because the male name that appears on her ID does not comport with her presentation. *Id.* at ¶29. This has raised questions about the legitimacy of Plaintiff's identification and forced Plaintiff into embarrassing and uncomfortable conversations with strangers with whom she does not wish to discuss the fact that she is transgender. *Id.* at ¶30. Thus, the Name-Change Statute compels Plaintiff to engage in speech.

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[6] Wisconsin has one of the nation's strictest voter-ID laws. With very limited exceptions, it requires voters to display a government-issued photo ID in order to cast a ballot. *See Bring it to the* Ballot, Wisconsin Elections Commission, https://bringit.wi.gov/do-i-have-right-photo-id (last visited June 29, 2020).

2. The Compulsion at Issue Implicates Speech Interests the Supreme Court Has Sought to Protect in Its Compelled Speech Cases

The speech compulsion at issue here implicates the same speech interests that animated the Supreme Court's decisions in its seminal compelled-speech cases *W.Va. Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) and *Wooley v. Maynard,* 430 U.S. 705 (1977).[7] In both of these cases, the Court struck down government regulations that compelled individuals to make or display statements to which they objected on the basis that such compulsion "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Wooley*, 430 U.S. at 715 (*quoting Barnette* 319 U.S. at 642) (internal quotation marks omitted).[8] Elsewhere in its compelled speech cases, the Supreme Court has accepted the right to refuse to speak because of "fear of economic or

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[7] In *Wooley*, the Supreme Court found that a state law requiring vehicles to display license plates bearing the New Hampshire motto "Live Free or Die" violated the prohibition on compelled speech because it "in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message … [a]s a condition to driving an automobile—a virtual necessity for most Americans." 430 U.S. at 714. Similarly in *Barnette*, the Court struck down a statute requiring students to recite the pledge of allegiance and salute the flag, finding that such compulsion violated the "individual freedom of mind." 319 U.S. at 637.

[8] The fact that the compelled speech does not communicate an ideological message doesn't change the analysis. As the Supreme Court explained in *Riley v. Nat'l Fed'n of Blind,* 487 U.S. 781 (1988), "cases cannot be distinguished because they involve compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech." 487 U.S. 781, 797–98 (1988) (holding that professional fundraisers could not be forced to disclose to potential donors the percentage of donations that the fundraisers actually turned over to charity.); *see also*, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) ("[C]ompelled statements of fact . . ., like compelled statements of opinion, are subject to First Amendment scrutiny."); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (explaining that the compelled speech doctrine applies "to statements of fact the speaker would rather avoid").

official retaliation, … concern about social ostracism, or merely … a desire to preserve as much of one's privacy as possible" as an interest protected by the compelled speech doctrine. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 341-42 (1995). Professor Eugene Volokh has described the speech interest at stake in these cases as "speaker autonomy." Eugene Volokh, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 358 (2018).[9]

The Name-Change Statute intrudes on the same interests that were at stake in the Supreme Court's compelled-speech cases. The Statute robs Plaintiff of the autonomy to decide when, how, and whether to share sensitive, personal details about herself—such as her transgender identity and the masculine name she was given at birth—with third parties to whom she must show government identification. Such compelled disclosure of private facts exposes Plaintiff to

[9] In his law review article, Professor Volokh distinguishes compelled speech cases speech involving "compulsions that also restrict speech—for instance by compelling newspaper editors or parade organizers to include certain material, and thus restricting them from creating precisely the newspaper or parade that they want to create" from "'pure speech compulsions,' which do not restrict speech but which unduly intrude on the compelled person's autonomy" to refrain from speaking. *Id.* In the latter category of cases, Volokh describes "speaker autonomy" as the core interest underpinning the Court's decisions: "[C]ompulsions to make or display or create a stand-alone statement, … interfere with a speaker's autonomy and thus yield a rare opportunity for the Court to consider when speaker autonomy interests alone—apart from listener interests in hearing a rich debate—should suffice to invalidate government action. And the Court's answer here has been that speaker autonomy interests do so suffice, at least when they are sufficiently implicated. Government coercion is presumptively unconstitutional when it compels people to speak things they do not want to speak …" *Id.* at 368; *see also* Howard M. Wasserman, *Compelled Expression and the Public Forum Doctrine,* 77 TUL. L. REV. 163, 191–92 (2002) ("[S]uch compulsion interferes with an individual's ability to define the persona she presents to the world, depriving her of the opportunity to control . . . her public identity by choosing what to say or what not to say. The essence of the injury is the deprivation of the individual's freedom to decide how she will present herself to the world, by depriving her of the ability to control the messages she presents.")

discrimination, harassment and intrusive personal questions. As in *Wooley,* Plaintiff is personally required to communicate the objectionable name as a condition of routine activities that require the display of government-issued identification, such as voting, applying for jobs, banking, travelling and seeking healthcare.

Citing these commonalities, at least one federal court has found that a statute requiring certain individuals' government identification be branded with an objectionable message constituted impermissible compelled speech. In *Doe v. Marshall*, 367 F. Supp. 3d 1310 (M.D. Ala. 2019), the court ruled that a government regulation that required individuals who had been convicted of sex offenses to carry government-issued IDs identifying them as "criminal sex offenders" impermissibly compelled speech. *Id.* at 1324. Likening the statute to the license-plate law at issue in *Wooley*, the court noted that "[s]tate-issued photo ID is a virtual necessity these days. One must show ID to enter some businesses, to cash checks, to get a job, to buy certain items, and more." *Id.* at 1325.

Similarly here, Plaintiff, like any adult, must use government ID for many everyday endeavors such as picking up mail from the post office, buying cold medicine at the drug store, applying for a job, or opening a bank account. ECF 23 at ¶28-30. As in *Marshall*, Plaintiff is compelled to display a message with which she disagrees in all of these situations. Thus, this court should find that the Name-Change Statute compels speech.

3. A Regulation that Doesn't Directly Compel an Individual to Speak Is Actionable Where, as here, the Regulation Has the Inevitable Consequence of Compulsion to Speak

Plaintiff anticipates that Defendant will argue, as it did below, that the Name-Change Statute should not be seen as compelled speech because to the extent that Plaintiff is forced to disclose the name "Kenneth," that disclosure is not attributable to the Name-Change Statute but to the rules of entities that require one to show ID (ECF 27 at 9) and/or to Plaintiff's "choice" to engage in activities that require her to show a government ID (*id*. at 11) ("Krebs's use of the name 'Kenneth' is only 'compelled' *if she chooses* to apply for a bank loan, obtain a government issued ID, etc.") (emphasis in original).

There are several reasons this argument should be rejected. First, under Supreme Court case law, statutes that indirectly result in compelled expression are no less troubling than those that compel speech directly. In *Janus,* the Supreme Court's most recent pronouncement on compelled speech, the statute at issue (requiring public employees who chose not to join a union to pay a portion of union dues) didn't directly order individuals to say or express anything. Rather, the government objective for the statute was wholly divorced from speech or expression—*i.e*., it was meant "to prevent nonmembers from enjoying the benefits of union representation without shouldering the costs." *Janus*, 138 S. Ct. at 2466. But because the inevitable result of that compulsion was that the plaintiffs gave subsidy to the union's speech, the Court found that the statute impermissibly compelled expression. *Id*. at 2465; *see also id*. at 2494 (Kagan, J., dissenting) ("the government

is not compelling actual speech, but instead compelling a subsidy that others will use for expression.") Here too, although the Name-Change Statute doesn't directly order Plaintiff to disclose the name "Kenneth" or her gender identity, the Statute has the unavoidable consequence of compelling her to do so and is thus properly seen as compelling speech.[10]

Second, as to Defendant's argument that Plaintiff could avoid being compelled to use the name "Kenneth" if she "chooses" not to open a bank account or go anywhere that requires one to show a government-issued ID, the court in *Doe v. Marshall* offered a persuasive analysis of a similar argument and found it to be foreclosed by *Wooley*. In particular, *Doe* rejected Alabama's argument that the plaintiffs could avoid displaying the objectionable language that was emblazoned on their drivers' licenses by using an alternative form of ID such as a passport. The court cited *Wooley* and wrote that "Although New Hampshire did not force George Maynard to drive a car, driving was (and is) 'a virtual necessity for most Americans,' so the license plate message was compelled speech. Here, the State has similarly

[10] An analogy can be drawn to other constitutional cases where a statute or regulation that is not explicitly aimed at limiting constitutional freedoms is actionable because it has the indirect result of interference with constitutional rights. For example, in *Zablocki v. Redhail*, 434 U.S. 374 (1978), the Supreme Court struck down a Wisconsin statute that prohibited individuals with unpaid child support obligations from obtaining marriage licenses. 434 U.S. at 375. The State justified the statute as providing the state "an opportunity to counsel the applicant as to the necessity of fulfilling his prior support obligations" and means of protecting "the welfare of the out-of-custody children." *Id*. at 388. The Supreme Court accepted that such ends were "legitimate and substantial interests" but found that "the means selected by the State for achieving these interests unnecessarily impinge on the right to marry" and thus the statute could not be sustained. *Id*.

conditioned a virtual necessity of everyday life [*i.e.*, a government-issued ID] on displaying a message to others." 367 F. Supp. 3d at 1325 (*citing Wooley* at 714).

4. The Name-Change Statute Fails Strict Scrutiny Because It Undermines Rather than Advances the State's Interests

Because it compels speech, the Name-Change Statute is necessarily "a content-based regulation of speech." *NIFLA v. Becerra*, 138 S. Ct. 2361, 2371 (2018); *see also Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."). As a result, it can only be upheld if it satisfies strict scrutiny. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015). Under strict scrutiny, the State bears the burden of showing that a compelling government interest is at stake and that it adopted the least restrictive means of achieving that interest. *Id.*; *see also Riley*, 487 U.S. at 800 (government may "not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored.")

Here, the State's interests consist of making accurate information about criminal convictions available via its registry and preventing individuals who are required to register from concealing the fact that they have been convicted of sex offenses by assuming new names. ECF 23 at ¶¶37, 39. Assuming *arguendo* that such interests are properly seen as compelling, the Statute fails strict scrutiny because an absolute and permanent prohibition on name changes is not a narrowly tailored means of achieving those goals.

This is so because there are less burdensome ways the government could achieve its aims than permanently prohibiting Plaintiff from changing her name. In

particular, the government could require Plaintiff and others similarly situated to register both their new and old names so that a search for either the current or former name would return information concerning the person's criminal history and would direct the person who searches the registry to the relevant criminal records. Such a requirement is already enshrined in the Registration Statute itself, which requires registrants to disclose their names and any aliases and to provide the Department of Corrections with "updated information within ten days" whenever any of their information changes. ECF 23 at ¶¶1-4. Grace Knutson, the Wisconsin Department of Corrections' Director of Sex Offender Services, testified that prior to the passage of the Name-Change Statute, registrants were permitted to use new names or nicknames provided that they properly disclosed them to the Department of Corrections for inclusion on the registry within ten days. *Id*. at ¶20. If a registrant reported a new name, the Department would include the name as an alias on the registry and "it wasn't an issue." *Id*.

Indeed, Plaintiff has already registered both "Kenneth" and "Karen" with the State. *Id*. at ¶31, 32. Thus, searching the registry for "Karen Krebs," "Kenneth Krebs," or "Krebs" returns the same information about Plaintiff. *Id*. at ¶33. Knutson testified that if Plaintiff is permitted to legally change her name to "Karen," the exact same information would remain on the registry and the public would have access to precisely the same information about her criminal background. *Id*. at ¶¶35, 36.

Tellingly, Ms. Knutson testified that the goals of informing the public and preventing individuals from concealing their status as sex offenders would be accomplished just as effectively by requiring registrants to report any changes in names to the Department:

> Q: [C]an't the concern about someone trying to be anonymous in the community by changing their name be alleviated by requiring the person to register any changes in name with the Department?
>
> A: If the statute allowed a person to change their name legally, that's what we'd put in the registry.
>
> Q: And that would address the concerns about the person concealing information that they are a registrant by using a different name, true?
>
> A: Correct.

Id. at ¶40. In fact, Ms. Knutson admitted that the Name Change Statute has the potential to make the registry less accurate and less informative by excluding relevant information about names or nicknames others may call the registrant in the community. *Id.* at ¶41. For example, prior to the enactment of the Name-Change Statute, if a registrant reported that people were referring to him or her with a new name or nickname, the Department would add that information to the registry, which would allow members of the public to find the registrant if they searched for that nickname. *Id.* at ¶20. Since the passage of the Name-Change Statute, the Department now excludes from the registry information about new names or nicknames that registrants disclose, and Knutson admitted this has the potential to make the registry less complete and less accurate. *Id.* at ¶21, 41.[11]

[11] In addition to requiring a registrant who wishes to change his or her name to register both the new name and the previous name, there are other less restrictive alternatives

In briefing below, Defendant contended that the primary governmental purpose of the Name-Change Statute is to prevent individuals who have been convicted of sex offenses from "disappearing into society" by adopting new names. ECF 27 at 2, 14, 21, 25. But Defendant never explained how permitting Plaintiff to legally change her name would undermine that goal. The evidence demonstrates that there is no risk that Plaintiff will "disappear" or conceal her conviction if she is permitted to legally change her name to "Karen," because Plaintiff is a life registrant who has already registered both "Karen" and "Kenneth" with the Department of Corrections. Thus, her criminal record is linked to both names and will be for the rest of her life. ECF 23 at ¶¶31-36. While Defendant speculates generally that an individual

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available to advance the State's interests. For example, the State could do any of the following:

(1) enforce the existing sex offender registration statute which makes it a felony to fail to register changes to identifying information (*see* Wis. Stats. §301.45);

(2) permit a registrant who has lived in the community without committing a new offense for a specified period of time to petition for relief from the restriction set forth in the Name Change statute;

(3) enforce the existing law requiring prior publication of a name-change petition and giving interested members of the public an opportunity to object (*see* Wis. Stats. §786.36);

(4) adopt special procedures for name change requests by individuals who have been convicted of sex offenses *See In re Giishig*, No. A08-0010, 2008 Minn. App. Unpub. LEXIS 1391, at *6-9 (Dec. 2, 2008) (explaining that Minnesota's name change statute allows a prosecuting authority to object to a proposed name change by a person who has been convicted of a felony and then requires a hearing to determine "whether [the individual's] name change would compromise public safety" and "whether failure to allow the name change would infringe on a constitutional right of [the individual]."); or

(5) require individuals who wish to change their names to submit to a criminal background check in connection with any petition for a name change and require the court that authorizes the name change to inform the registration authorities when a registrant legally changes his or her name.

convicted of a sex offense may use a name change to conceal his criminal record or evade registration, wholly absent from Defendant's briefing is any evidence or argument that any public safety objective would be compromised by allowing Plaintiff to change her name.

A statute that restricts expression in a manner that undermines rather than advances the government interests it is meant to serve cannot be seen as narrowly tailored to serve a compelling government interest. Thus, the Name-Change Statute fails strict scrutiny.

B. The Name-Change Statute Fails Scrutiny Under *O'Brien*

For the reasons set forth in §II(A) above, it is Plaintiff's contention that the Name-Change Statute is properly viewed as a form of compelled speech that fails strict scrutiny. But even if this court accepts Defendant's contention that the Statute regulates "conduct" rather than pure speech, the district court erred in failing to apply any First Amendment analysis to the Statute because at a minimum, the analysis applicable to "expressive conduct" set forth in *United States v. O'Brien*, 391 U.S. 367 (1968) should apply.

In *O'Brien*, the Supreme Court set forth a test for evaluating regulations of "non-speech conduct" that impose an "incidental" burden on expression. *Id.* at 376. *O'Brien* requires an analysis of the following four factors when a regulation of conduct burdens expression: (1) whether the regulation is "within the constitutional power of the government"; (2) whether the regulation "furthers an important or substantial governmental interest"; (3) whether the interest is "unrelated to the

suppression of free expression"; and (4) whether the incidental restriction on expression is "no greater than is essential to the furtherance of that interest." *Id.* at 377. As set forth below, the Statute cannot be upheld under *O'Brien* because even if viewed as a regulation of "expressive conduct," the law burdens much more expression than necessary to promote government interests.

1. The Act of Changing One's Name Is Itself Expressive

The First Amendment forbids enactments "abridging the freedom of speech." The term "speech" is "not construed literally, or even limited to the use of words." *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 158 (3d Cir. 2002). Constitutional protection is afforded not only to speaking and writing, but also to "nonverbal acts of communication, viz., 'expressive conduct' (or 'symbolic speech')." *Id.* (*quoting Texas v. Johnson*, 491 U.S. 397 (1989)).

It is possible to view the act of changing one's name both as a direct act of speaking as well as a form of expressive conduct. Courts have long recognized that names carry a deeply personal expressive and communicative significance:

> A personal name is special. It may honor the memory of a loved one, reflect a deep personal commitment, show respect or admiration for someone famous and worthy, or, … reflect a reverence for God and God's teachings.

Salaam v. Lockhart, 905 F.2d 1168, 1170 (8th Cir. 1990). Thus, the decision to control the name by which one is identified is an inherently expressive act. To the extent that there's a distinction to be drawn between Plaintiff's freedom to call herself Karen among friends and her freedom to legally change her name to Karen, it would be an error to consider only the former a speech act. The act of determining

for oneself how one will be referred to on government documents and in the eyes of the law is itself an act of expression. *See* Julia Shear Kushner, *Comment: The Right to Control One's Name*, 57 UCLA L. REV. 313, 323 (2010) ("Names may be used as speech to express to the public who a person is."); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) ("[T]he constitutional guarantee of free speech ultimately serves only one true value ... 'individual self-realization.'")

Thus, even accepting that some form of "conduct" is being regulated here, the Statute at the same time implicates speech. The fact that a law prohibits a person from choosing to identify him or herself by a certain name, by its very nature, implicates one's expression in an intimate way. By analogy, a law that prohibits protestors from carrying signs certainly prohibits "conduct," but it also implicates the First Amendment because it also necessarily restricts expression. In such situations, the "conduct" and the expression are intertwined.

2. The Name-Change Statute Fails Scrutiny under *O'Brien*

The Name-Change Statute fails under the *O'Brien* test because the government interests put forth to justify it would be achieved just as efficiently and effectively without the prohibition. As explained in §II(A)(4) above, there is a troubling lack of evidence that the Statute serves any government ends. Indeed, the State's own top registration official testified that the State's interests in maintaining an accurate and useful sex offender registry and preventing individuals who have been convicted of sex offenses from concealing their criminal records by changing their legal names would be achieved just as efficiently and effectively by requiring

registration of both the old and new name and linking offense information to the individual's listing on the registry under the new name, which had been the practice prior to 2003.[12]

Accordingly, even if the Name-Change Statute is viewed as a regulation of expressive conduct to which *O'Brien* applies, the Statute fails and the district court's decision granting summary judgment to Defendant should be reversed.

C. The Statute Violates the First Amendment Because It Impermissibly Restricts Speech in a Limited Public Forum

When the government restricts private speech occurring on government property, the Supreme Court's "forum analysis" applies. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2242 (2015). Where the government gives subsidy to certain types of speech on government property other than a traditional public forum (such as a public park or sidewalk), it creates a so-called "limited public forum." *Id*. Under the limited public forum doctrine, the government may regulate speech as long as any restrictions on speech within the forum are "reasonable in light of the forum's purpose and [do] not constitute viewpoint discrimination." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

Wisconsin's Name-Change Statute fails under a limited public forum analysis because the State has created a limited public forum for self-expression through

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[12] Contrary to Defendant's argument below, it is not Plaintiff's claim that the Name-Change Statute should be found unconstitutional because there is an "imaginable alternative that might be less burdensome on speech." ECF 27 at 25 (*quoting United States v. Albertini*, 472 U.S. 675, 689-90 (1985)). Plaintiff's contention is that the Department can and should return to the practice of enforcing the requirement that all individuals register both their given names and any changes to their names; a process which the Department's own witness testified posed no problems. ECF 23 at ¶20.

government-authorized name changes, and the restrictions it imposes are not reasonable in light of the purpose of the forum it has created.

1. Wisconsin Has Created a Limited Public Forum by Establishing a Process through which One Can Change His or Her Name

Wisconsin has an established legal process through which one can petition the court to change his or her name. Wis. Stats. §786.36. Pursuant to this statute, "any resident of [Wisconsin], … upon petition to the circuit court of the county where he or she resides … may, if no sufficient cause is shown to the contrary, have his or her name changed or established by order of the court." *Id.* The statute provides that notice must be published of an intended name change in advance, and the court can deny a petition for a name change if "sufficient cause" is shown—for example, that the person seeks to change his name to unfairly compete with another practitioner in a licensed profession or to defraud the public. Wis. Stats. §786.36(3).

This statutory process can be seen as creating a limited public forum; and the Name-Change Statute as a restriction that bans certain speakers (*i.e.*, those who must register as sex offenders) from accessing that forum. The Supreme Court explained in *Rosenberger v. Rectors and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), that not all limited public forums are physical places. In *Rosenberger*, the Court applied the limited public forum doctrine to the university's student-activities fund, finding that "the [fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable." *Id.* at 830. The Court held that the University violated the First Amendment when it refused to provide funds dedicated to supporting student journalism to a Christian student newspaper

because this restriction was not reasonable in light of the forum's purpose—to facilitate student publications that addressed a variety of topics including "student news, information, opinion, entertainment, or academic communications." *Id.* at 824.[13]

Similarly here, Wisconsin's legal process for changing one's name has created a limited public forum for a particular form of expression from which it may not selectively ban certain speakers in the absence of a reasonable, neutral justification for doing so.

2. The Restriction Imposed on Plaintiff's Ability to Change Her Name Is Not Reasonable in Light of the Forum's Purpose

Having created a limited public forum through which citizens can engage in government-sanctioned expression, the State may not restrict certain speakers from participating in that forum unless the restriction imposed is reasonable in light of the forum's purpose.

The Name-Change Statute fails under this test because the speech in which Plaintiff seeks to engage—*i.e.*, changing her name to Karen Krebs—is perfectly

[13] Similarly, scholars have suggested that government programs such as charitable tax exemptions and legal protection for trademarks are also properly viewed as limited public fora. *See* John D. Inazu*, The First Amendment's Public Forum,* 56 WM. & MARY L. REV. 1159 (2015) ("The scheme of tax deductions is not formally recognized as a limited public forum, but like the metaphysical forum at issue in *Rosenberger*, its current function reflects similar goals and uses."); Eugene Volokh and Austin Bragg, *The First Amendment and Government Property: Free Speech Rules*, Reason (November 21, 2019) ("Similar [limited public forum] principles likely apply to government benefit programs, and not just to the provision of real estate or of money. … [T]he Supreme Court held that the government can't deny full trademark protection to trademarks that are seen as 'disparaging,' 'scandalous,' 'immoral,' or racist. Such restrictions, the Court said, were impermissibly viewpoint-based.")

compatible with the purpose for which the government established the legal process for changing one's name—*i.e.*, obtaining legal recognition for the name by which one prefers to be called absent "sufficient cause" for prohibiting the name change.

Here, there is no purpose served by prohibiting Plaintiff from accessing the State's process for legally changing one's name. As described above, Plaintiff is not seeking to evade her registration requirement or conceal her criminal history by changing her name. She would still register both her old and new names with the State, and anyone who seeks information concerning her offense, her registration history, and the information she reports to the registry would still be able to access the exact same information. Thus, her speech is perfectly compatible with the purposes for which the State has established its name-change process, and the absolute prohibition imposed on her access to this forum violates the First Amendment.

D. Even If Heightened Scrutiny Does Not Apply, the Statute Fails First Amendment Scrutiny

Finally, even if this Court does not apply any form of heightened scrutiny to the Name-Change Statute, the Statute violates the First Amendment as applied to Plaintiff because it is not appropriately tailored to meet any government objectives. In *McCutcheon v. FEC*, 572 U.S. 185 (2014), the Supreme Court observed that even when strict scrutiny is not applicable, government regulations that impact speech must be appropriately tailored to their desired ends. *Id*. at 218. The Court wrote as follows:

> In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served, … that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective.

Id. at 218 (internal quotations omitted) (*citing Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) and *In re R.M.J.*, 455 U.S. 191, 203 (1982)); *see also Iancu v. Brunetti,* 139 S. Ct. 2294, 2305 (2019) (Breyer, J., concurring in part) ("Rather than deducing the answers to First Amendment questions strictly from categories, as the Court often does, I would appeal more often and more directly to the values the First Amendment seeks to protect. As I have previously written, I would ask whether the regulation at issue 'works speech-related harm that is out of proportion to its justifications.'") (*quoting United States v. Alvarez*, 567 U. S. 709, 730 (2012) (opinion concurring in judgment)).

Here, as described above, the Name-Change Statute imposes a harsh burden on Plaintiff's right to self-expression and subjects her to a lifetime of embarrassment, discomfort, and distress that comes with being identified as Kenneth—a name she hasn't used for decades and that does not match her gender identity. Meanwhile, application of the Statute to Plaintiff has no meaningful relationship to any public safety goal. Ms. Knutson, the State's top registration official, testified that nothing at all about the information on the sex offender registry would change if Plaintiff were permitted to legally change her name. ECF 23 at ¶¶35, 36. More broadly, Ms. Knutson testified that the Name-Change Statute likely makes the State's sex offender registry less complete and less accurate than it would be if the Statute

were eliminated. *Id.* at ¶41. Finally, there are many less restrictive measures the State could pursue to achieve public safety goals without permanently prohibiting Plaintiff from changing her name. *See* discussion at §II(A)(4), *supra.*

A statute that harshly restricts expression and is far removed from achieving any legitimate government objective fails under the First Amendment no matter what level of scrutiny is applied.

CONCLUSION

For the foregoing reasons, Plaintiff requests that this Court reverse the district court's decision granting summary judgment to Defendant and remand this case to the district court with instructions to enter judgment for Plaintiff on her claim that the Name-Change Statute violates the First Amendment as applied to her.

Respectfully submitted,

/s/ Adele D. Nicholas
/s/ Mark G. Weinberg
Counsel for Plaintiffs-Appellants

Law Office of Adele D. Nicholas
5707 W. Goodman Street
Chicago, Illinois 60630
(847) 361-3869

Law Office of Mark G. Weinberg
3612 N. Tripp Ave.
Chicago, Illinois 60641
(773) 283-3913

CERTIFICATE OF COMPLIANCE WITH
F.R.A.P 32(a)(7), F.R.A.P. 32(g) and C.R. 32(c)

I certify that the foregoing Plaintiff-Appellant's Brief conforms to the rules contained in F.R.A.P 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 8,977 words.

/s/ Adele D. Nicholas
Counsel for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that on June 29, 2020, I electronically filed the **Brief and Short Appendix for Plaintiff-Appellant** with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Adele D. Nicholas
Counsel for Plaintiffs-Appellants

CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix

/s/ Adele D. Nicholas
Counsel for Plaintiffs-Appellants

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

KAREN KREBS,

Plaintiff,

v.

MICHAEL D. GRAVELEY,

Defendant.

Case No. 19-CV-634-JPS

ORDER

Plaintiff is a transgender woman, born as Kenneth, and has used the name Karen for more than twenty years. Though Plaintiff has not used her former name in decades, she is still legally "Kenneth," and all of her government-issued identification still carry that name. This causes disruption and embarrassment for Plaintiff in situations where she is required to identify herself, as her appearance and self-identification do not match her legal identification. Plaintiff wants to put an end to the issue by legally changing her name to Karen. The problem is that Plaintiff is also a convicted sex offender. In 2003, Wisconsin enacted Wis. Stat. § 301.47, which prohibits sex offenders from changing their names (the "Name-Change Statute"). Violation of the Name-Change Statute is a Class H felony, carrying maximum penalties of a $10,000 fine and nine months' imprisonment.

Plaintiff filed this lawsuit against the district attorney for Kenosha County, where she lives, seeking to enjoin him from prosecuting her for violating the Name-Change Statute. Plaintiff also requests that the Court declare the Name-Change Statute unconstitutional. She demands this relief because she claims that the statute violates her right of free speech under

the First Amendment. (Docket #1). The facts of the case are largely undisputed, and the parties have filed cross-motions for summary judgment asking the Court to decide the legal question of whether and how the Name-Change Statute may violate Plaintiff's constitutional rights. (Docket #25 and #26).

Plaintiff argues that the Name-Change Statute violates her First Amendment rights in four ways: 1) it compels Plaintiff to speak, and in so doing, would need to satisfy strict scrutiny, which it cannot; 2) it restricts speech in a limited public forum, namely the forum provided by Wisconsin for changing one's name, and the restriction is not reasonable in light of the purpose of that forum; 3) it regulates expressive conduct, and per the rule of *United States v. O'Brien*, 391 U.S. 367 (1968), it restricts that expression in a manner greater than is essential to an important government interest; and 4) even without application of a heightened level of scrutiny, the statute simply fails rational basis review. The parties have devoted much energy and many pages to discussing which level of scrutiny should apply and whether the statute passes muster under each level.

The Court will not engage in any such analysis in this case, owing to the fact that Plaintiff has failed to establish that Wisconsin's regulation of her ability to change her name implicates her First Amendment rights. The parties provide relatively scant attention to this matter. For his part, Defendant notes that the law does not prevent Plaintiff from going by Karen in her daily life or any other typical forum for speech.[1] Plaintiff counters

[1]The Name-Change Statute does prohibit sex offenders from identifying themselves by a name not registered with the state. Wis. Stat. § 301.47(2)(b). But Plaintiff long-ago registered Karen as an alias for Kenneth, the name that appears on her judgment of conviction. The Court has no occasion to address any hypothetical, and different, concerns presented by a sex offender who wishes to use an unregistered alias.

that "regulating a person's name certainly implicates the First Amendment by controlling how one expresses himself and presents his identity to the world." (Docket #33 at 4). Plaintiff chides Defendant for providing "no authority for its assertion that regulating a person's name does not implicate the First Amendment." *Id.* at 5.

Plaintiff forgets who bears the burden of proof and persuasion on her claim. It is she, not Defendant, who must establish that regulating a person's name implicates the First Amendment. *Doe v. City of Lafayette, Ind.*, 377 F.3d 757, 764 (7th Cir. 2004) (without speech or expressive conduct, "First Amendment doctrine simply has no application"); *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984) ("[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive. In the absence of a showing that such a rule is necessary to protect vital First Amendment interests, we decline to deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to it.").

Plaintiff's only support for her position is a decade-old, student-written law review article. *See* Julia Shear Kushner, The Right to Control One's Name, 57 UCLA L. Rev. 313 (2009). This is not legal precedent at all. It is a wholly insufficient legal basis for the Court to agree with Plaintiff's viewpoint.[2] This Court will not engage in the solemn task of evaluating the

[2]Moreover, as discussed by Defendant, the article does not actually support Plaintiff's approach. *See* (Docket #35 at 3–5). Ms. Kushner provides a thorough analysis of the First Amendment implications of name-changing regulations, concluding that they likely to do not impinge upon a person's speech. 57 UCLA L. Rev. at 336–42.

constitutionality of a state's enactment untethered from a legal footing, much less a solid one.

The Court must, therefore, find that Plaintiff has not met her burden to demonstrate that the Name-Change Statute implicates her speech rights. Without this foundation, Plaintiff cannot present a viable First Amendment claim at all, irrespective of the level of scrutiny to be applied. The Court stresses the limitations of this holding. It is based entirely upon the briefing presented in this case by these parties. The Court takes well the instruction from the Court of Appeals that it should not conduct a party's legal research or invent arguments on a party's behalf. *Nelson v. Napolitano*, 657 F.3d 586, 590 (7th Cir. 2011) ("Neither the district court nor this court are obliged to research and construct legal arguments for parties, especially when they are represented by counsel."); *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003) ("We have repeatedly warned that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues).") (quotation omitted). The Court thus does not comment upon whether any appropriate arguments and legal support *could* be found to support Plaintiff's position; it finds only that she has not provided as much to the Court.[3]

[3]Plaintiff's claim presents important and evolving issues for our society. To be unable to address the matter because of poorly constructed and researched arguments seems a waste of time for all involved. But as explained in *Kay v. Board of Education of City of Chicago*, 547 F.3d 736, 738 (7th Cir. 2008), when a "[district] judge [acts] *sua sponte*, the parties [are] unable to provide their views and supply legal authorities. The benefit of adversarial presentation is a major reason why judges should respond to the parties' arguments rather than going off independently." It is for the parties, not the Court, to carefully select and craft the arguments they will present to support their positions.

The parties seem to assume that even with this finding, the Court can and should analyze the Name-Change Statute under the auspices of rational basis review. (Docket #33 at 3–4; Docket #35 at 4–5). The Court cannot agree. Plaintiff's only claim in this case is for violation of her First Amendment rights. (Docket #1 at 4-5). Without her freedom of speech being implicated in the matter, she presents no claim at all. The Court has no authority to pass judgment upon the Name-Change Statute in the absence of a justiciable injury. In plainer terms, citizens cannot file lawsuits requesting a certain enactment be subject to rational basis review without an allegation that the enactment has harmed them. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).[4]

In light of the foregoing, the Court must grant Defendant's motion for summary judgment and dismiss this action with prejudice. The Court will also deny as moot a motion for an extension of time filed by Plaintiff during the course of summary judgment briefing. (Docket #31).

Accordingly,

IT IS ORDERED that Defendant's motion for summary judgment (Docket #26) be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment (Docket #25) be and the same is hereby **DENIED**;

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[4]On this point, Defendant quotes *Wisconsin Education Association Council v. Scott Walker*, 705 F.3d 640, 657 n.12 (7th Cir. 2013), which states that "[r]ational basis review . . . is not a level of scrutiny under the First Amendment but merely the residual level of scrutiny that courts apply to all laws not involving a suspect class or infringing a fundamental right." But even a "residual" level of scrutiny must be tied to an injury-in-fact. Plaintiff has no First Amendment claim, and she has not alleged an alternative constitutional basis for this action, such as the Equal Protection or Due Process clauses.

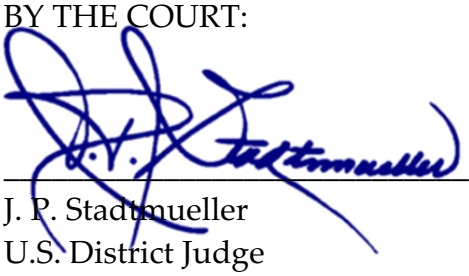
IT IS FURTHER ORDERED that Plaintiff's motion for an extension of time (Docket #31) be and the same is hereby **DENIED as moot**; and

IT IS FURTHER ORDERED that this action be and the same is hereby **DISMISSED with prejudice**.

The Clerk of the Court is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin, this 26th day of March, 2020.

BY THE COURT:



J. P. Stadtmueller
U.S. District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

KAREN KREBS,

Plaintiff,

v.

MICHAEL D. GRAVELEY,

Defendant.

Case No. 19-CV-634-JPS

JUDGMENT

Decision by Court. This action came on for consideration before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's motion for summary judgment (Docket #26) be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff's motion for summary judgment (Docket #25) be and the same is hereby **DENIED**; and

IT IS FURTHER ORDERED AND ADJUDGED that this action be and the same is hereby **DISMISSED with prejudice**.

APPROVED:

J.P. Stadtmueller
U.S. District Judge

March 26, 2020
Date

STEPHEN C. DRIES
Clerk of Court
s/ Jodi L. Malek
By: Deputy Clerk

301.47 Sex offender name changes prohibited.

(1) In this section, “sex offender" means a person who is subject to s. 301.45 (1g) but does not include a person who, as a result of a proceeding under s. 301.45 (1m), is not required to comply with the reporting requirements of s. 301.45.

(2) A sex offender may not do any of the following before he or she is released, under s. 301.45 (5) or (5m), from the reporting requirements of s. 301.45:

(a) Change his or her name.

(b) Identify himself or herself by a name unless the name is one by which the person is identified with the department.

(3) Whoever intentionally violates sub. (2) is subject to the following penalties:

(a) Except as provided in par. (b), the person is guilty of a Class H felony.

(b) The person may be fined not more than $10,000 or imprisoned for not more than 9 months or both if all of the following apply:

1. The person was ordered under s. 51.20 (13) (ct) 1m., 938.34 (15m) (am), 938.345 (3), 971.17 (1m) (b) 1m., or 973.048 (1m) to comply with the reporting requirements under s. 301.45based on a finding that he or she committed or solicited, conspired, or attempted to commit a misdemeanor.

2. The person was not convicted of another offense under this section before committing the present violation.

(4) The department shall make a reasonable attempt to notify each person required to comply with the reporting requirements under s. 301.45 of the prohibition in sub. (2), but neither the department's failure to make such an attempt nor the department's failure to notify a person of that prohibition is a defense to a prosecution under this section.

History: 2003 a. 52, 320.