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STATE OF WISCONSIN
IN SUPREME COURT

Case No. 2018AP002205

*In the interest of C.G.,
a person under the age of 18:*
STATE OF WISCONSIN,

Petitioner-Respondent,

v.

C.G.,

Respondent-Appellant-Petitioner.

PETITION FOR REVIEW AND APPENDIX

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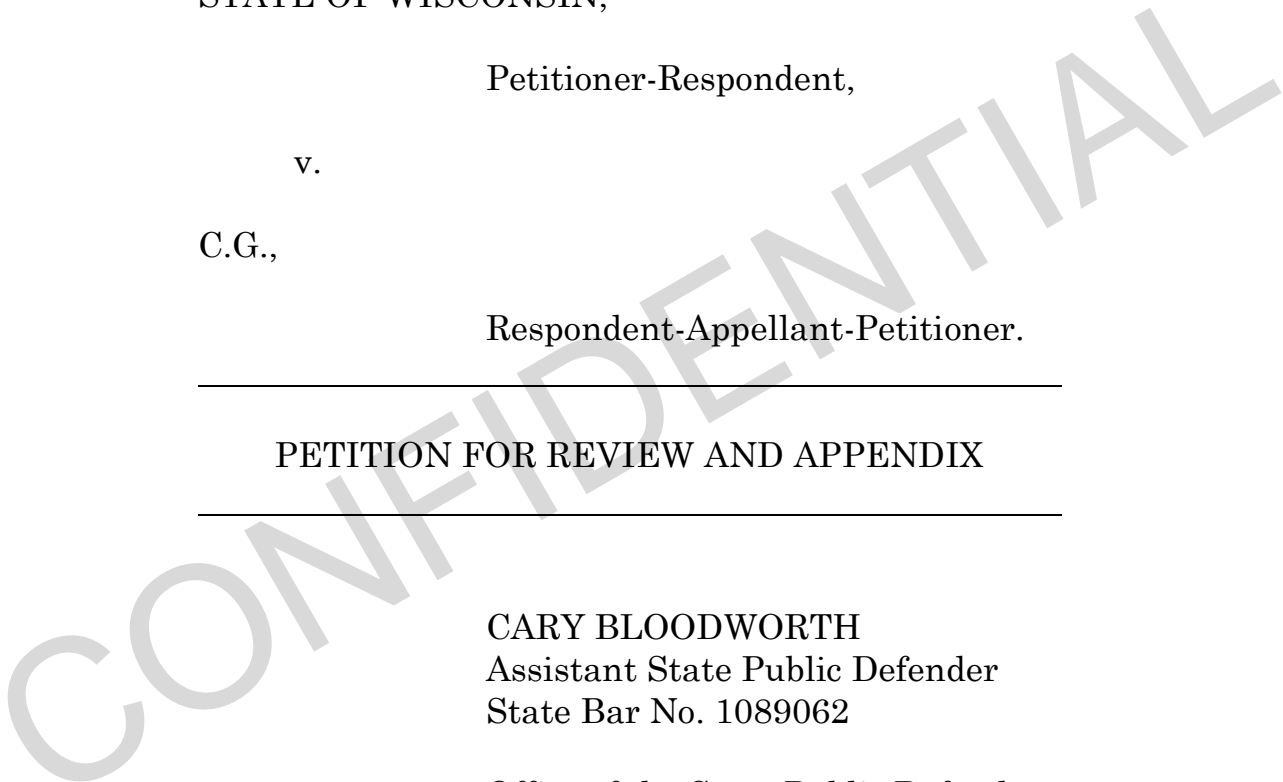


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CONFIDENTIAL

ISSUES PRESENTED

1. Does Wis. Stat. § 301.45, the statute governing juvenile sex offender registration, unconstitutionally infringe on Ella's¹ First Amendment right to freedom of speech by preventing her from legally changing her name to reflect her gender identity?

The circuit court concluded that requiring Ella to register did not violate her First Amendment rights and denied the postdisposition motion.

The court of appeals affirmed, concluding that the First Amendment is not implicated by a legal name change.

2. Does requiring Ella to register under Wis. Stat. § 301.45 amount to cruel and unusual punishment in violation of the Eighth Amendment?

The circuit court concluded that requiring Ella to register does not violate her Eighth Amendment rights and denied the postdisposition motion.

¹ Ella is a pseudonym pursuant to Wis. Stat. § 809.19(1)(g). Ella is a transgender female and, therefore, will be referred to using female pronouns.

The court of appeals affirmed, concluding that sex offender registration does not constitute punishment, citing *State v. Bollig*, 2000 WI 6, 232 Wis. 2d 561, 605 N.W.2d 199.

CRITERIA FOR REVIEW

This case presents two significant questions of federal constitutional law: whether requiring Ella to register as a sex offender violates her First and Eighth Amendment rights.² See Wis. Stat. Rule § 809.62(1r)(c)1. Constitutional questions are subject to de novo review, rendering them appropriate for this Court to review. See Wis. Stat. Rule § 809.62(1r)(c)3.

Further, as will be discussed below, the court of appeals' decision, which is recommended for publication, is in conflict with and improperly applies federal case law. See Wis. Stat. Rule § 809.62(1r)(d). In the First Amendment context, the court of appeals' decision is in direct conflict with federal case law holding that name-change restrictions can implicate the First Amendment. *Malik v. Brown*, 71 F.3d 724 (9th Cir. 1995); *Salaam v. Lockhart*, 905 F.2d 1168 (8th Cir. 1990). In the Eighth Amendment context, the

² Because this petition raises as-applied constitutional challenges to a statute, Ella has served copies of this petition on the attorney general, the speaker of the assembly, the president of the senate, and the senate majority leader pursuant to Wis. Stat. § 893.825. See attached cover letter.

court of appeals' decision incorrectly applies United States Supreme Court and Wisconsin Supreme Court case law to conclude that all as-applied challenges to sex offender registration in Wisconsin are barred. *Seling v. Young*, 531 U.S. 250 (2001); *Bollig*, 232 Wis. 2d 561.

Given the court of appeals' erroneous decision, this Court should grant review in order to clarify the law regarding as-applied challenges grounded in the First and Eighth Amendments. *See* Wis. Stat. Rule § 809.62(1r)(c).

STATEMENT OF FACTS

Despite her young age, Ella has overcome many challenges in her life. She has a long history of diagnosed mental health issues, including depression, mood disorder, and ADHD as well as a history of self-harm and suicidal ideation. (120:34, 56; 45:2; 122:50; 123:42-44). Ella has attempted suicide multiple times, the first time at 13 years old. (95:5). Her mental health struggles are exacerbated by the fact that she has been bullied because of her sexual orientation and gender identity. (95:2-3). Ella identifies as transgender.³

³ "Transgender" is a term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. Gay & Lesbian Alliance Against Defamation, *GLAAD Media Reference Guide* 10 (10th ed., Oct. 2016).

When Ella was 15 years old, she briefly had oral contact with a male friend's penis against his wishes. (1:3-4). The victim did not report the incident, but his parents learned of it when they searched his phone four months later. (120:45-46). The state filed a delinquency petition charging Ella with one count of sexual assault of a child under 16, party to a crime, contrary to Wis. Stat. § 948.02(2), and one count of disorderly conduct, party to a crime, contrary to Wis. Stat. § 947.01(1). (1:3). Ella entered an admission and was adjudicated delinquent of second-degree sexual assault of a child, party to a crime. (1:8; 119:10). This was her first and only delinquency adjudication. (120:39).

Prior to the dispositional hearing, Mark Reich, a psychologist who specializes in working with sex offenders, (21:4), conducted a risk assessment to determine appropriate placement. Dr. Reich found "a notable lack of any history of conduct disorder or behavior problems either in school or community" and no "underlying signs of a characterological or personality disorder that would indicate any increased risk." (21:3). He concluded that Ella did "not present with any type of significant risk." (21:3). He explained that Ella's behavior was likely more a result of age and immature impulse control, stating, "the adolescent [] brain does not typically mature until age 25 and there is often impulsivity and risk taking behaviors as a hallmark of that developmental stage." (21:3). He opined that Ella could be successfully treated in the community. (21:3; 22; 120:75).

The circuit court entered a one-year dispositional order. (120:82). Despite Dr. Reich's recommendation, it ordered placement at Lincoln Hills School, a secure juvenile detention facility for boys. (120:93).

Ella requested a stay of sex offender registration. (25). The circuit court denied the stay, concluding that Ella was "high risk" based on COMPAS⁴. (121:70). It ordered Ella to register for 15 years, beginning to date of the amended dispositional order. (46:5; App. 127).

On July 19, 2017, Ella filed a change of placement motion, citing two primary reasons: (1) Lincoln Hills was an unsafe placement for her given her transgender status; and (2) she exhibited good behavior and progress in treatment. (49:2, 8). On July 22, 2017, Ella's safety concerns were confirmed. Another youth punched Ella in the head, unprovoked. (122:11-12). Lincoln Hills staff suggested Ella was to blame for the assault because she "tends

⁴ "COMPAS" stands for "Correctional Offender Management Profiling for Alternative Sanctions." *State v. Loomis*, 2016 WI 68, ¶4, n.10, 371 Wis. 2d 235, 881 N.W.2d 749. The use of COMPAS in this case was inappropriate because: (1) it was not designed to be used for juveniles and (2) it does not purport to predict sexual recidivism risk. Northpointe, *Compas Risk & Need Assessment System: Selected Questions Posed by Inquiring Agencies* (2012), http://www.northpointeinc.com/files/downloads/FAQ_Document.pdf.

not to hide [her] sexuality at all. [S]he makes it very well known that [s]he would like to dress up like a girl and I think that may be hard for some people to accept.” (122:18). Staff told Ella that she made people “uncomfortable” and that if she chose to express her gender identity, “[s]he would probably target h[er]self.” (122:18).

Despite the unsafe conditions, Ella demonstrated positive adjustment at Lincoln Hills. (49:2, 8). She successfully completed Lincoln Hills’ two-part, intensive, juvenile cognitive intervention program (JCIP), which helps juveniles manage their thoughts and feelings and better handle risky situations. (122:9-10, 14). She met overall expectations and made significant progress towards her HSED. (122:10-11, 15). However, the court refused to change her placement. (122:109).

On September 24, 2017, Ella was the victim of a second unprovoked assault at Lincoln Hills. (66:1; 70). Ella was sent to the hospital for treatment for a significant head wound, which required sutures. (81:6). The attacker was able to land “20-24” punches “including downward elbow strikes and knee strikes” before staff intervened. (81:6; 123:43-44).

Following this second assault, DOC transferred Ella from Lincoln Hills to the Mendota Juvenile Treatment Center (“MJTC”). “It was determined that Lincoln Hills could not . . . sustain safety for h[er]. (81:7). Ella was “brutalized by other youth” and “[t]he

report from LHS said that it was because of h[er] sexuality.” (81:7).

At MJTC, Ella positively adjusted. She “obtained near perfect scores on the behavioral program and [] maintained the highest privilege level throughout most of [her] stay.” (93:2). In sex offender treatment, she “participated fully, and h[ad] been described as highly motivated and forthcoming and open when discussing [her] offense and sexual behaviors.” (93:2).

As part of the release process, MJTC psychologist Michael Caldwell conducted a Chapter 980 evaluation⁵ of Ella, which revealed that she was low risk to reoffend. (93:2). Dr. Caldwell described Ella as “highly motivated and forthcoming and open when discussing h[er] offense and sexual behaviors,” and noted that Ella had “made good progress on life issues” during her time at MJTC. (93:2). He also saw no signs of “a disorder of sexual interest or desire” and “no indications of personality disturbance that would predispose [her] to acts of sexual violence.” (93:2). Based on this and the fact that Ella had only one adjudicated sexual offense, Dr. Caldwell opined that Ella is “in a relatively low risk category for sexual violence.” (93:2). Dr. Caldwell recommended against sex offender registration. (93:2-

⁵ Chapter 980 deals with Sexually Violent Person Commitments and requires an expert to evaluate certain individuals who are nearing release from confinement to determine whether they meet the criteria for commitment.

4). This assessment was made based on his individualized assessment of Ella as well as his extensive research into the efficacy of juvenile sex offender registration. (93:3-4).

Ella's dispositional order terminated on March 16, 2018. On the same date, Ella filed a postdisposition motion asking the circuit court to stay sex offender registration or, alternatively, to declare Wis. Stat. § 301.45 unconstitutional. (81). Ella also filed a supplemental postdisposition motion, (83), which included a psychosexual evaluation completed by Dr. Nick Yackovich, a psychologist who specializes in sex offender treatment. (94:1).

Dr. Yackovich concluded that Ella "does not evidence sexually deviant interests; has not exhibited pro-offending attitudes," and "presents as 'low risk' for future sexual offending." (95:7). He noted that Ella "is aware of [her] wrongdoing," shows remorse, initiated community treatment on her own, "appears to have benefited from [her] involvement in the offense-specific treatment," and is "capable of prosocial decision-making." (95:9-10). He explained that "[t]he sexual behavior involved in this case appears to be the result of immature decision-making and poor boundary setting, but does not evidence criminogenic factors or a deviant sexual interest." (95:8). Dr. Yackovich also opined that the public would not be protected by having Ella register as a sex offender, and, in fact, it was possible that registering would harm to Ella. (123:49).

After a hearing, the circuit court issued a written decision denying Ella's motion. (107; App. 134-150). Ella appealed her as-applied First and Eighth Amendment claims.⁶ After converting the case to a three-judge panel and requesting supplemental briefing from the Wisconsin Department of Justice, the court of appeals affirmed in an opinion recommended for publication.

ARGUMENT

I. This Court should accept review and hold that requiring Ella to register as a sex offender violates her First Amendment rights.

The First Amendment protects self-expression from government censorship except under extreme and limited circumstances. *See West Virginia State Board of Education v. Barnette*, 319 U.S. 619, 633 (1943) (“[I]t is now commonplace that censorship or suppression of expression . . . is tolerated by our Constitution only when the expression presents a clear and present danger of action of the kind the [s]tate is empowered to prevent and punish.”). Wisconsin's constitution provides equivalent protections. *Madison Teachers, Inc. v. Walker*, 2014 WI 99, ¶23 n.9, 358 Wis. 2d 1, 851 N.W.2d 337 (2014). “The First Amendment serves not only the needs of the polity but also those of the human

⁶ Ella also raised an erroneous use of discretion claim in the court of appeals, which she does not renew in this petition.

spirit—a spirit that demands self-expression. To suppress expression is to reject the basic human desire for recognition and affront the individual’s worth and dignity.” *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

When evaluating whether a statute violates the First Amendment, the court first considers whether the speech or expression at issue is protected by the First Amendment. *Wooley v. Maynard*, 430 U.S. 705, 716-18 (1977). If the First Amendment is implicated, the court then considers whether the state has a compelling interest in restricting the protected speech and, if so, “whether the [s]tate’s countervailing interest is sufficiently compelling to justify” the restriction on constitutionally protected speech. *Id.*

A. The First Amendment protects Ella’s right to express her gender identity.

The First Amendment protects speech as well as expressive conduct. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). Conduct is expressive if it “possesses sufficient communicative elements to bring the First Amendment into play.” *Id.* at 404. Conduct done with an intent to convey a particular message is protected conduct. *Id.*

The court of appeals concluded that Ella has “no positive right to a name change.” *In the Interest of C.G.*, No. 2018AP002205, Jan. 20, 2021 slip op., ¶30. (App. 115). It stated that because “Ella has the right to use whatever name she chooses, provided she

includes it in the sex offender registry[,] . . . [h]er freedom of expression is [] not implicated.” *Id.*, ¶32. (App. 116).

This is in direct conflict with federal law. Federal courts have concluded that when a name change conveys a message, it does implicate the First Amendment. “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*, 905 F.2d at 1170. Accordingly, it is well-established, for example, that changing one’s name for religious purposes is expressive conduct protected by the First Amendment, regardless of informal name use. *Id.* See also *Malik*, 71 F.3d at 727-29 (collecting cases and concluding the issue is clearly established). This is true despite the ability to informally identify by a different name. *Id.* This court should accept review to correct this erroneous and troubling holding.

Just as changing one’s name for religious purposes conveys a message, so does changing one’s name to express gender identity. Ella’s desire to change her name is not “capricious, incessant, casual, sudden, or harassing.” *Azeez v. Fairman*, 795 F.2d 1296, 1299 (7th Cir. 1986). Rather, she wishes to express her true gender identity. Gender identity is “immutable; [it is] so fundamental to one’s identity that a person should not be required to abandon [it].” *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084, 1093 (9th Cir. 2000). See also *Doe ex rel. Doe v. Yunits*,

No. 001060A, 2000 WL 33162199, (Mass. Super. Ct. Oct. 11, 2000), *aff'd sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000) (unpublished) (concluding that a transgender woman's dressing in feminine clothing is expressive conduct protected by the First Amendment). (App. 151-157). Ella's name change "is not merely a personal preference but a necessary symbol of her very identity." *Id.* at *3. (App. 153). As such, it is protected by the First Amendment.

B. Registration impermissibly infringes on Ella's right of expression.

When speech or conduct is protected by the First Amendment, the state may only prohibit it when the governmental interest is "sufficiently important" to justify the limitation. *Johnson*, 491 U.S. at 407. In determining whether the state's interest in regulating protected speech outweighs the harm to the speaker, the court must balance the nature of the expression with the governmental interest in determining whether a restriction of that expression is valid. *Id.* at 406-07. Different types of restrictions trigger different levels of scrutiny. *Cf. State v. Oatman*, 2015 WI App 76, ¶12, 365 Wis. 2d 242, 871 N.W.2d 513 (applying strict scrutiny to a content-based restriction), *with Johnson*, 491 U.S. at 407 (1989) (applying a more lenient standard to a content-neutral restriction). However, under any First Amendment analysis, there must be a government interest in limiting the expression, and

that interest must outweigh the burden on expression that it creates. *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

1. Requiring Ella to register does not protect the public.

The court of appeals concluded that even if the First Amendment applies, the government's interest in protecting the public outweighs any burden it imposes on Ella. *In the Interest of C.G.*, No. 2018AP002205, Jan. 20, 2021 slip op., ¶¶37-39. (App. 118-119). The court, however, failed to engage in an analysis of how requiring Ella to register furthers the goal of public protection, simply stating that “[t]he name-change ban is sufficiently narrow in scope because it does not burden substantially more speech than is necessary to further the government's legitimate interests.” *Id.* ¶39 (internal quotations and citation omitted). (App. 118-119). This type of conclusory recitation of the legal standard, especially in an as-applied challenge, is not a sufficient analysis of whether the statute furthers the government's purported interest.

Although protection of the public can be a legitimate government interest, requiring Ella to register does nothing to further this goal. A growing body of research shows that sex offender registries do nothing to protect the public, particularly when it comes to juvenile registrants. “[E]very published study evaluating the effects of state and federal juvenile registration polices have failed to find any

evidence that these policies exert any public safety effects.” Elizabeth J. Letourneau, *Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Evaluation*, 24 Psychol. Pub. Pol’y & Law 105, 115 (Feb. 2018). Youth who commit sexual offenses are typically motivated by impulsivity and sexual curiosity, not the predatory, paraphilic, or psychopathic characteristics that make one more prone to reoffend. Michael J. Caldwell, *Quantifying the Decline in Juvenile Sexual Recidivism Rates*, 22 Psychol. Pub. Pol’y & Law 414, 420 (Nov. 2016). With maturation, a better understanding of sexuality, and decreased impulsivity, most of these behaviors stop, and only a small fraction of juvenile offenders will maintain sexually deviant behavior in adulthood. *Id.* Thus, the recidivism rate among juvenile offenders is very low. (93:3; 123:18).

When Ella’s individual circumstances are taken into consideration, it becomes clear that requiring her to register does nothing to promote public safety. Already in a low risk category as a juvenile offender, Ella’s individualized risk is in the low end of even that category. Three separate risk assessments concluded that she is very low risk to reoffend. (21:3; 93:2; 95:7). None of the psychologists found any evidence of a conduct disorder or personality disorder that would increase the likelihood of re-offense. (21:3; 93:2; 95:7). None found any evidence of sexual deviancy. (21:3; 93:2; 95:7). Rather, all of the psychologists concluded that Ella’s offense was the result of immaturity and impulsive decision-making

characteristic of a developing adolescent. (21:3; 93:2; 95:8).

“Limitations of First Amendment freedoms must be no greater than is necessary or essential” to further the governmental interest involved. *Martinez*, 416 U.S. at 413. However, the registry’s prohibition on legal name changes is not narrowly tailored because it does nothing to further public safety. The sex offender registration statute already has mechanisms in place to efficiently identify and track registrants who go by multiple names—mechanisms which do not infringe on a registrant’s First Amendment rights. A registrant is required to report both their legal name *and* any aliases to the registry. Wis. Stat. § 301.45(2)(a)1. So, if a registrant legally changed her name, she would still be required to report her former legal name as an alias, allowing law enforcement to efficiently track her. Failure to do so is a felony offense. Wis. Stat. § 301.45(6)(a)1. Prohibiting legal name-changes adds nothing to this scheme except an added burden on the registrant.

2. The burden on Ella is significant.

The court concluded that requiring Ella to maintain a male legal name does not harm her because she presents as female. (107:12-13; App. 145-146). This misses the point. Ella identifies herself to the world as female. But being forced to present a male-sounding name along with her female identity

outs⁷ her as transgender, exposing her to discrimination and mistreatment.

To illustrate, consider the following hypothetical.⁸ Two women walk into the Department of Human Services to apply for FoodShare, Wisconsin's public benefits program aimed at helping those with limited money purchase healthy food. Mary is a cisgender⁹ woman, and Jane is a transgender woman. Each are asked to present their government-issued identification cards. The name on Mary's ID reads "Mary Smith," and there is a photo of a woman with long hair. Her application is processed and she is eventually granted FoodShare benefits.

Jane's ID also has a photo of a woman with long hair, which matches the woman sitting in front of the caseworker. However, the name reads "James Jones." The caseworker accuses Jane of identity theft. When Jane tries to explain that she is transgender, the caseworker proceeds to ask invasive questions about her genitalia, her identity, and her reasons for

⁷ "Outing" is the act of publicly revealing another person's sexual orientation or gender identity without that person's consent. GLAAD, *supra*, at 7.

⁸ This hypothetical is adapted from a law review article. See Lark Mulligan, *Dismantling Collateral Consequences: The Case for Abolishing Illinois' Criminal Name-Change Restrictions*, 66 DePaul L. Rev. 647, 647-49 (2016).

⁹ "Cisgender" refers to someone who is not transgender; their gender identity matches their sex assigned at birth. GLAAD, *supra*, at 8.

seeking FoodShare benefits. The caseworker refuses to process her application until Jane produces her “real” ID.

For transgender individuals unable to legally change their name, this scene plays out in every situation which requires government identification: driving, renting an apartment, enrolling in school, building credit, voting in elections, obtaining a job, obtaining medical insurance, applying for state benefits, visiting the doctor, traveling by plane, entering government buildings, exiting and re-entering the country, and more.

Contrary to the lower courts’ conclusions, the harm to Ella is significant. Not only does she struggle with the consequent mental health effects of being a juvenile on the registry, but Ella has the added circumstance of being transgender. Studies consistently find “dramatically elevated rates of anxiety, depression, and suicidality among transgender people” because of the unique challenges they face. Kristina R. Olson, et al., *Mental Health of Transgender Children Who Are Supported in Their Identities*, 137 *Pediatrics* 1, at 2 (Mar. 2016).

Ella’s inability to legally change her name further exacerbates this harm. The inability to obtain gender-affirming identity documentation is a “significant hardship” because it prevents an individual from fully expressing their inherent identity. See American Psychological Association, 70 *Am. Psychologist* 832, 841 (2015). Studies have

shown that individuals who are not able to fully express their gender identity suffer increased mental health consequences. For example, in a study involving transgender adolescents, those not permitted to fully express their gender identity were found to be “at later risk for developing a downward cascade of psychosocial adversities including depressive symptoms, low life satisfaction, self-harm, isolation, homelessness, incarceration, posttraumatic stress, and suicide ideation and attempts.” Hidalgo, *supra*, at 286. However, those adolescents who were allowed to fully express their gender identity showed “positive self-esteem, social support, and overall health.” *Id.* at 287. *See also* Olson, *supra*, at 5.

Requiring Ella to register and consequently maintain a male legal name also exposes her to increased discrimination and mistreatment. Seventy percent of transgender individuals report experiencing discrimination because of their transgender status. Lisa R. Miller & Eric Anthony Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, 30 *Sociological Forum* 809, 825 (Sept. 2015). Even after transitioning, transgender individuals experience “minority stressors, especially if their legal documents do not reflect their present gender identity.” *Id.* at 826. This is because being “read” as transgender by other members of society leads to increased discrimination. *Id.* at 813.

Ella's experience at Lincoln Hills is an example of such discriminatory treatment. Ella was targeted, harassed, and physically assaulted on multiple occasions because of her transgender status. Instead of protecting her, the DOC and the circuit court blamed her for the attack, stating that she made herself a target because she "dress[ed] up like a girl." (107:12; App. 145). If Ella had been a cisgender female, society would not blame her for provoking an assault by dressing a certain way. But because she is transgender, she was afforded no such sympathy, even from those with the responsibility to protect her. This is but one example of the mistreatment and systemic discrimination transgender individuals face on a regular basis.

Thus, no matter the level of scrutiny applied to the statute, it is unconstitutional as applied to Ella. On the one side is a statute that requires Ella to register, thereby preventing her from changing her name, purportedly to protect the public. But in reality, it does nothing to actually protect the public. As a low risk juvenile offender, the public does not need to be protected from Ella. Further, the name-change restriction is overly burdensome and not necessary to achieve the goal of protecting the public. The registry already has mechanisms for tracking aliases and for punishing registrants who fail to report them. Thus, the name-change ban adds no additional protection and merely serves to restrict Ella's First Amendment rights.

On the other side is an individual whose First Amendment right to fully express her gender identity is being substantially restricted. Being forced to maintain a male name is a hardship with significant consequences. Such a substantial infringement on Ella's protected expression cannot be permissible under the guise of "protection of the public" when, in fact, it does nothing to protect the public. This court should accept review to conduct a proper First Amendment analysis which takes into account the actual effect of the name-change ban on public safety and the significance of the burden that registration imposes on Ella.

II. This Court should accept review and hold that requiring Ella to register as a sex offender violates her Eighth Amendment rights.

The Eighth Amendment prohibits states from imposing "cruel and unusual punishments." U.S. Const. Amend. VIII. Wisconsin's constitution contains a similar provision, which is interpreted identically to the federal provision. *State v. Ninham*, 2011 WI 33, ¶44, 333 Wis. 2d 335, 797 N.W.2d 451. The ban on cruel and unusual punishment prohibits "not only barbaric punishments, but also punishment that is disproportionate to the crime committed." *Solem v. Helm*, 463 U.S. 277, 284 (1983).

An Eighth Amendment analysis is a two-step process. First, the court determines whether sex offender registration, as applied to Ella, amounts to

punishment. Because the purpose of the sex offender registration statute is civil and nonpunitive, *Bollig*, 232 Wis. 2d 561, this court must “examine whether the statutory scheme is so punitive either in purpose or effect as to negate the [s]tate’s intention to deem it civil.” *Smith v. Doe*, 538, U.S. 84, 92 (2003).¹⁰

If the statute has a punitive effect, then the court must determine whether the effect of registration is “so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Ninham*, 333 Wis. 2d 335, ¶85. A punishment is “cruel and unusual” if it is inconsistent with “evolving standards of decency that mark the progress of maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

A. Requiring Ella to register is punishment.

The court of appeals failed to conduct any analysis regarding whether registration is punitive as applied to Ella. Instead, it concluded that Ella’s Eighth Amendment claim fails “because our supreme court has held that Wisconsin’s sex offender registration requirement does not constitute punishment at all.” *In the Interest of C.G.*, No. 2018AP002205, Jan. 20, 2021 slip op., ¶42 (citing

¹⁰ This framework for determining whether a statute which purports to be civil has a punitive effect is commonly referred to as the intent-effects test.

Bollig, 232 Wis. 2d 561, ¶27). (App. 119-120). The court concluded that *Bollig*'s holding that "Wisconsin's registration statute does not evince the intent to punish sex offenders" is binding in this case. *Id.* The court of appeals stated that because *Bollig* held the registration requirement to be facially constitutional, Ella cannot raise the issue in an as-applied challenge. *Id.* ¶¶44-46. (App. 120-121). It cited *Seling v. Young*, 531 U.S. 250, 263-65 (2001), for this proposition.

The court of appeals' application of *Young* is erroneous. *Young* held that the petitioner could not "obtain release through an 'as-applied' challenge to [a state statute] on double jeopardy and ex post facto grounds" where the state's supreme court had already concluded that the statute was civil rather than punitive in nature. *Id.* at 263. The Supreme Court explicitly limited its holding to the specific type of double jeopardy and ex post facto claims at issue in that case. *Id.* at 266.

This limitation was done with good reason. *Young* did not deal with a traditional as-applied claim. *Id.* at 271 (Thomas, J. concurring). In *Young*, the petitioner alleged that the conditions of his confinement under a civil sexually violent offender commitment statute amounted to cruel and unusual punishment. *Id.* at 259-60. The question was not whether the statutory restrictions themselves were punitive as applied to the petitioner; rather, the court was asked to determine whether the *implementation* of the restrictions was punitive as applied to the

petitioner. *Id.* at 263. The court concluded that an as-applied constitutional challenge was not the appropriate way to challenge the implementation of an otherwise civil statute because “[s]uch an analysis would never conclusively resolve” whether the statute was punitive as applied to the individual. *Id.* Conditions of confinement change; a confinement that is non-punitive today may become punitive tomorrow if the conditions change. *Id.*

Ella does not challenge the implementation of the sex offender registration requirement. She challenges the statutory restrictions themselves. The reasoning for denying *Young*'s implementation-based claim does not apply to traditional as-applied claims like Ella's. Unlike conditions of confinement, the terms of a statute are fixed. Thus, unlike an implementation-based challenge where the facts needed to determine whether or not the conditions are punitive are subject to change, the facts underlying the question of whether the statute is punitive do not change. Thus, whether or not the terms of the statute have a punitive effect on an individual is amenable to final resolution.

Even if *Young* does apply more broadly to traditional as-applied claims, this Court's decision in *Bollig* does not preclude Ella's as-applied challenge. First, *Bollig* held that requiring *adults* to register was not punitive. 232 Wis. 2d 561, ¶12. Ella was required to register as a juvenile, based off of an offense that occurred when she was 15 years old. The analysis of whether a facially civil statute is punitive

in effect is very different for juveniles than for adults. The United States Supreme Court has recognized that the difference between juveniles and adults—including juveniles' lack of maturity, underdeveloped sense of responsibility, vulnerability to negative influences, and still-developing personality—renders juveniles less culpable. *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005). See also *Graham v. Florida*, 560 U.S. 48, 68 (recognizing that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”). Further, as has been discussed, juvenile offenders are less likely to reoffend and more likely to be harmed by registration requirements. A decision that registration is not punitive for adults should not foreclose a claim that registration is punitive as applied to a juvenile.¹¹

Second, *Bollig's* was decided in the context of a plea withdrawal claim, not a constitutional challenge to the sex offender registration. 232 Wis. 2d 561, ¶12. The question the court was tasked with answering, therefore, was not whether registration amounted to punishment in the constitutional sense. Rather, it was asked whether registration was a direct or

¹¹ The court of appeals has concluded that requiring juveniles to register is not punishment, relying on *Bollig. In re Jeremy P.*, 2005 WI App 13, ¶10, 278 Wis. 2d 366, 692 N.W.2d 311. Since *Jeremy P.*, however, the United States Supreme Court has clarified that juveniles should be treated differently than adults, requiring a separate analysis of what constitutes cruel and unusual punishment. See *Graham*, 560 U.S. at 68-70; *Simmons*, 543 U.S. at 569-70.

collateral consequence of conviction. *Id.*, ¶27. While the tests are similar, they are not identical.¹²

In concluding that *Bollig* and *Young* foreclosed Ella's Eighth Amendment claim, the court of appeals failed to address the substance of her claim. This Court should accept review to clarify that neither *Young* nor *Bollig* preclude Ella's as-applied challenge and to fully address the question of whether requiring Ella to register is punitive.

Although the intent of the sex offender registration statute is civil, its effect on Ella is punitive. To determine whether a civil statute has a punitive effect, several factors are relevant: (1) whether sex offender registration has historically been regarded as punishment; (2) whether registration imposes an affirmative disability or restraint; (3) whether registration promotes the traditional aims of punishment; (4) whether registration has a rational connection to a nonpunitive purpose; and (5) whether registration is excessive with respect to this purpose. *Smith v. Doe*, 538 U.S. at 97.

As applied to Ella, these factors support the conclusion that requiring her to register is punitive. First, sex offender registration affirmatively restrains

¹² Notably, *Bollig* did not fully apply the intent-effects test required for a constitutional analysis. See *State v. Muldrow*, 2018 WI 52, ¶15, 381 Wis. 2d 492, 912 N.W.2d 74 (admitting that the supreme court "applied a truncated version of the intent-effects test in *Bollig*").

her liberties by preventing her from changing her name, thereby preventing her from expressing her gender identity and exposing her to mistreatment and discrimination. Wis. Stat. § 301.47(2). Registration also restricts where she can reside, *see e.g.*, Greendale, Wis., General Code § 28.03 (2018); Waterford, Wis., Code of Ordinances § 174-7.2 (2017); Brookfield, Wis., General Ordinances § 9.34 (2019); Green Bay, Wis., Code of Ordinances § 27.622 (2018); and her ability to pursue higher education, *see* Wis. Stat. § 301.475.

Second, registration promotes traditional aims of punishment, including retribution and deterrence. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). One of the express aims of the registry is deterrence. *State v. Smith*, 2010 WI 16, ¶13, 323 Wis. 2d 377, 780 N.W.2d 90. And in Ella's case, registration invites retribution by exposing her to discrimination by labeling her a sex offender and outing her as transgender.

Third, requiring Ella to register bears minimal rational connection to the purposes of sex offender registration, protection of the public. Ella's risk to reoffend is very low, so registration will not provide heightened protection. And the name-change prohibition does nothing to protect the public, as Ella would be required to report both names to the registry regardless of which name is her legal name.

Finally, when the punitive effect on Ella is viewed in light of nonpunitive purpose, requiring her to register is excessive. On the one hand, registration brands Ella with stigma—sex offenders are considered “the worst of the worst” in our society. *Neal v. Shimoda*, 131 F.3d 818, 829 n.12 (9th Cir. 1997). While all sex offenders face more difficulty in obtaining housing, employment, education, and other services as a consequence of being a registered sex offender, Ella’s difficulties are exacerbated because registration will force her to disclose her transgender status in these contexts. She will face, in essence, double discrimination: as a sex offender and as transgender. The psychological, educational, and financial consequences will be significant.

On the other hand, the nonpunitive purpose of sex offender registration is not well-served by requiring her to register. Given Ella’s low risk to reoffend, the need to protect the public and assist law enforcement is diminished. Causing so much individual harm for what appears to be no public gain is excessive, rendering it punishment when applied to Ella.

B. Requiring Ella to register is cruel and unusual.

Not only does the sex offender registration requirement have a punitive effect on Ella, that punitive effect is cruel and unusual because it is “disproportionate to the offense.” *Ninham*, 333 Wis. 2d 335, ¶85. Ella’s offense did not involve

violence or threats. It was short in duration. It did not involve bodily harm or have an immediate or long-lasting impact on the victim. Since the offense, Ella has completed treatment, and three separate psychologists have determined that she is a low risk to reoffend.

For this, Ella is being forced to maintain a legal name that does not reflect her gender identity. Her educational and employment opportunities are being restricted. And she is being subjected to compounded discrimination and mistreatment because registration not only exposes her previous sex offense, it also outs her as transgender. If this Court does not act, this will have a significant impact on Ella for the rest of her life, one that is grossly disproportionate to a single mistake she made as a 15-year-old.

CONCLUSION

For the reasons stated above, Ella respectfully requests that this Court grant review and reverse the court of appeals.

Dated and filed this 19th day of February, 2021.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 6,129 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated and filed this 19th day of February, 2021.

Signed:

CARY BLOODWORTH
Assistant State Public Defender

APPENDIX

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