No. _____

In The
Supreme Court of the United States

JOHN DOE, formerly known as Jane Doe,

Petitioner,

v.

ERIC HOLCOMB, in his official capacity as Governor of the State of Indiana, CURTIS T. HILL, JR., in his official capacity as Attorney General for the State of Indiana, MYLA ELDRIDGE, in her official capacity as Marion County Clerk of the Court, and JANE SIEGEL, in her official capacity as Chief Administrative Officer of the Indiana Supreme Court,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment prevents the entry of injunctive and declaratory relief in federal court against a governor, attorney general, and state court administrator to prevent the continued enforcement of a categorical and non-waivable state ban against granting a legal change of name to any person who is not a United States citizen.

2. Whether Article III standing doctrines of causation and redressability bar the entry of injunctive and declaratory relief in federal court against a county clerk of court to prevent the continued enforcement of a categorical and non-waivable state ban on granting a legal change of name to any person who is not a United States citizen.

PARTIES

Petitioner, who was plaintiff and appellant in the prior court proceedings, is John Doe, an Indiana resident who proceeds by way of fictitious name with permission granted by the district court.

Respondents, who were defendants and appellees in the prior court proceedings, are Eric Holcomb, the current governor of the State of Indiana; Curtis T. Hill, Jr., the current attorney general of the State of Indiana; Jane Siegel, the current Chief Administrative Officer of the Indiana Supreme Court's Office of Judicial Administration;[1] and Myla Eldridge, the current county clerk of the court for Marion County, Indiana.

[1] In the Seventh Circuit, Mary Willis was the defendant, and in the district court, it was Lilia G. Judson. Jane Siegel is substituted here under Supreme Court Rule 35(3). In addition, the position was previously described in court proceedings as Executive Director of the Indiana Supreme Court Division of State Court Administration. John Doe believes that the two positions are the same, and uses "state court administrator" to describe the position more generically in this Petition.

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OPINIONS BELOW

The opinions of the divided panel of the United States Court of Appeals for the Seventh Circuit in this case are reported at 883 F.3d 971 (7th Cir. 2018) and are reproduced in the Appendix at App. 1-21. The decision of the district court granting dismissal to the defendants is reported at 2017 WL 956365 (S.D. Ind. Mar. 30, 2017) and is reproduced in the Appendix at App. 24-44.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered its decision in this case on March 2, 2018. This Court has jurisdiction to review the decision of the Court of Appeals by writ of certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Indiana Code § 34-28-2-2.5 is reproduced in the Appendix at App. 45-46.

STATEMENT OF THE CASE

1. Indiana Law Denies Plaintiff a Legal Change of Name.

Plaintiff John Doe is an Indiana resident who seeks to change his legal name from Jane Doe to John Doe. App. 24-25. John Doe is a transgender man, meaning that while female is the sex he was assigned at birth, his gender identity indicates that he is in fact a man. *See* App. 26. Treatment of gender dysphoria – the significant psychological distress that can result when a person's gender identity differs from assigned gender at birth – includes "transitioning" to living, and being accepted by others, as the sex corresponding to gender identity. A change of name is in most cases a necessary part of treatment for gender dysphoria. *See* Plaintiff's First Amended Complaint at 18, *Doe v. Pence*, No. 1:16-cv-02431-JMS-DML (S.D. Ind. Mar. 13, 2017), 2017 WL 956365.

John Doe, who is not a United States citizen, has been and continues to be prevented from fully transitioning because of a singular Indiana state law, Ind. Code § 34-28-2-2.5(a)(5), that requires proof of United States citizenship in order to obtain a legal change of name. App. 27. This categorical exclusion of non-citizens from obtaining a legal change of name means that John Doe must carry identification documents that indicate his gender as male, but continue to include his birth name, Jane. App. 26-27. John Doe, who proceeds by fictitious name in order to be protected from additional threats to reveal his transgender

status, has a birth name that is a traditionally female name. *Id.*

John Doe immigrated in 1990, at a very young age, with his family from Mexico to Indiana; he has resided in Indiana ever since. App. 26. In August 2015, the United States granted John Doe asylum as a result of the risk of persecution he would face in Mexico because he is a transgender man. *Id.* He has since adjusted his status to lawful permanent resident, but he remains ineligible to apply for naturalization because he has not held lawful permanent resident status for the required number of years. *See* Plaintiff's First Amended Complaint at 29, *Doe v. Pence*, No. 1:16-cv-02431-JMS-DML.

As a result of his inability to obtain a legal change of name, John Doe has faced the threat of having to reveal that he is transgender, a fact that he does not ordinarily share because of a fear that "outing" himself could result in discrimination, persecution, and even violence, a significant risk faced by all transgender people. Plaintiff's First Amended Complaint at 38-44, *Doe v. Pence*, No. 1:16-cv-02431-JMS-DML. The discordant name on his identification has resulted in distressing experiences with police officers, emergency room personnel, and restaurant servers, among others. *See* App. 27; *see also* Plaintiff's First Amended Complaint at 45-48, *Doe v. Pence*, No. 1:16-cv-02431-JMS-DML. For example, in one interaction following a minor traffic stop, a police officer repeatedly threatened to take John Doe to jail because the officer did not believe

that John Doe's identification, with his female birth name, was his true identification card. App. 27.

In December 2013, John Doe went to the Marion County Clerk's Office to inquire about petitioning for a legal change of name. App. 27-28. Two employees, including one who appeared to be a supervisor, accurately advised John Doe that lack of United Sates citizenship would prevent him from successfully petitioning for a legal change of name. *Id.*; *see also* Plaintiff's First Amended Complaint at 59-62*, Doe v. Pence*, No. 1:16-cv-02431-JMS-DML. In fact, filing a petition would be futile because the requirement of United States citizenship is mandatory and non-waivable.

2. Plaintiff Challenges Law in District Court.

In order to secure a legal change of name that is necessary to treat his gender dysphoria, and to avoid potentially dangerous encounters in which he is required to reveal that he is transgender, John Doe filed a challenge to the constitutionality of the 2010 Indiana law restricting the right to obtain a legal change of name to United States citizens. App. 26-28. He named the governor, attorney general, state court administrator, and Marion County clerk as defendants. App. 25. The suit sought a declaration that the Indiana statute requiring United States citizenship is unconstitutional, and an injunction against enforcing the statute. App. 3.

John Doe alleged claims under the Fourteenth Amendment, including denial of equal protection,

deprivation of substantive due process, and violation of First Amendment free speech protections. App. 25. The district court therefore had federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1343.

The three state defendants moved to dismiss the action under Federal Rule of Civil Procedure 12(b)(1), arguing that John Doe lacks Article III standing to pursue his claims. The county clerk also filed a motion to dismiss under Rule 12(b)(1), similarly contending that John Doe lacks standing. After briefing, the district court entered an order on March 13, 2017 granting the motions to dismiss, concluding that John Doe could not satisfy the causation and redressability elements of standing under Article III of the United States Constitution. App. 24-44. On April 11, 2017, John Doe filed a notice of appeal.

3. Divided Seventh Circuit Panel Affirms Dismissal.

After briefing and argument, a three-judge panel of the United States Court of Appeals for the Seventh Circuit issued its decision on March 2, 2018. App. 1-21. Although the district court, acting on the contentions raised by defendants, grounded dismissal on a lack of standing, the appeals panel majority held that the Eleventh Amendment immunizes the three state defendants – Indiana's governor, attorney general, and state court administrator – from John Doe's demands for declaratory and injunctive relief against the discriminatory Indiana statute. App. 5. With respect to

the county clerk, the panel majority held that John Doe could not demonstrate causation and redressability to establish standing under Article III. App. 9.

Chief Judge Wood dissented from the panel majority. App. 13-21. Chief Judge Wood agreed that the governor was not an appropriate defendant, but disagreed that the other three defendants were immune or inappropriately sued. *Id.* Chief Judge Wood opined that the attorney general, state court administrator, and county clerk each bear enough of a connection to enforcement of the discriminatory statute to allow the federal district court to address the merits of John Doe's challenge and to require the named officials to defend the constitutionality of the Indiana law. *Id.*

ARGUMENT

Plaintiff John Doe, a transgender immigrant resident of Indiana, faces a continuing and insurmountable obstacle to obtaining an essential state service – a legal change of his name – because the state maintains a unique, categorical discrimination against non-citizens. App. 10 ("[T]he barrier Doe faces . . . makes it impossible – not just difficult – for people in his class to obtain the desired state benefit, and that benefit is freely available to persons in the favored class (U.S. citizens)."). Since 2010, Indiana requires proof that any applicant for a legal change of name is a United States citizen. *See* App. 45-46. The requirement is unconditional and not waivable by anyone

involved in processing and determining requests for a legal change of name.

Since at least the mid-twentieth century civil rights era, and perhaps from a century or more earlier, the constitutionality and legality of this kind of categorical discrimination against a class of persons has been a quintessential part of federal court jurisdiction. *See, e.g.*, *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) ("The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law. . . ."); c*f. McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668, 672 (1963) ("The First Congress created federal courts as the chief – though not always the exclusive – tribunals for enforcement of federal rights.").

This Court has historically recognized that challenging a statewide law that incorporates a categorical and discriminatory exclusion before state-court judges in the very state that enacted and maintains the exclusion could be daunting and even prohibitive to potential challengers who are part of the excluded class. *See Mitchum*, 407 U.S. at 242 ("[Congress] was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts.").

Nonetheless, a divided panel of the Seventh Circuit Court of Appeals held that Indiana's categorical exclusion of non-citizens from obtaining a legal change of name cannot be challenged in federal court. App. 1-21. Erroneously interpreting the Eleventh Amendment and the causation and redressability prongs of Article III standing, the majority held, with respect to John Doe's challenge to Indiana's denial of legal name changes to all non-citizens, that "[t]he federal courts are not the proper forum for his claims." App. 12.

The implication of this ultimate sentence in the Seventh Circuit majority opinion is that John Doe and others affected by the discriminatory law may only seek redress before Indiana state-court judges, including judges who adjudicate name changes but who do not ordinarily evaluate or determine constitutional questions, such as the permissibility of a categorical exclusion of all non-citizens from a state service. In the current national climate, John Doe, as both transgender and non-citizen, understandably would prefer to have his claims of unconstitutional discrimination determined by life-tenured federal court judges. The Seventh Circuit majority opinion denies John Doe his well-established right to choose a federal forum to challenge an openly discriminatory state law.

The danger in the Seventh Circuit's majority decision is that Indiana and other states may conclude that assigning state-court judges, clothed with judicial immunity, to enforce categorical and discriminatory exclusions in statute – without any discretion to waive the exclusion – is a surefire mechanism to avoid

federal-court evaluation and adjudication of the constitutionality and legality of the enacted discrimination. As the dissenting appeals court judge stated, "[t]he expedient of placing final authority for name changes in the state court system cannot operate to avoid accountability for potential violations of the federal constitution by other state officials." App. 18 (Wood, C.J., dissenting).

Of course, those who enact such discriminatory exclusions would generally prefer to insulate their enactments from meaningful judicial review, and avoiding accountability through legislative legerdemain in the strategic use-of-state-court judges to perform ministerial enforcement of discriminatory exclusions is precisely what the Seventh Circuit decision here invites and encourages.

Plaintiff John Doe therefore requests that the Court grant this petition to review the Seventh Circuit decision and to ensure that federal courts remain an available forum for challenges to the constitutionality and legality of categorical, discriminatory exclusions from key services in state law.

I. *Ex parte Young* Permits Injunctive and Declaratory Relief Against the Named State Defendants.

In order to reach its final conclusion that Plaintiff's claims against a facial, categorical exclusion of non-citizens cannot be heard in federal court, the panel majority expanded the protections of the Eleventh

Amendment well beyond the limits established in this Court's decision in *Ex parte Young* over 110 years ago. 209 U.S. 123 (1908). Why the panel majority chose, in reviewing a district court decision grounded in Article III standing, to rely upon the Eleventh Amendment is unexplained in the panel majority opinion. Indeed, none of the defendants urged the court to conclude that they enjoy Eleventh Amendment immunity in the context of Plaintiff's claims.[2]

Nonetheless, the panel majority's decision to apply Eleventh Amendment standards entails some divergence, at least linguistically, from the standards of Article III.[3] The standard, as established in *Ex parte Young*, is whether the named state defendant has "some connection" to the enforcement of the state law challenged as unconstitutional. 209 U.S. at 157 ("[I]t is plain that such officer must have some connection with the enforcement of the act. . . ."); *see also id.* ("The fact that the state officer, by virtue of his office, has

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[2] The Eleventh Amendment and *Ex parte Young* only came up in briefing because Plaintiff sought to explain why he could not name the state itself as a defendant, but could name responsible state officials.

[3] Whether the causation and redressability requirements under Article III are more or less stringent than the Eleventh Amendment standard for courts of equity is largely an academic question. Here, Plaintiff John Doe, who falls within the specific and limited class that is formally and completely excluded from receiving a critical state service under the challenged Indiana law, is plainly harmed by the statute and would be relieved by declaratory and injunctive relief directed at state officials with a connection to the law. As explained below, the causation and redressability standards under Article III are not unduly difficult.

some connection with the enforcement of the act, is the important and material fact. . . ."). The Court further determined that there need not be a "special relation" to the challenged statute, *id.*; indeed, the Court held that a "general duty . . . which includes the right and the power to enforce the statutes of the state" could suffice to make a state officer an appropriate defendant. *Id.* at 160. "His power by virtue of his office sufficiently connected him with the duty of enforcement to make him a proper party to a suit of the nature of the one now before the United States circuit court." *Id.* at 161 (concluding that the attorney general was a proper defendant).

The panel majority, however, in blocking any federal-court challenge to Indiana's discriminatory name-change law, seems to have effectively removed the modifier "some" from the *Ex parte Young* standard, and substituted "substantial" or "heightened." This significant modification has the effect of preventing plaintiffs from choosing a federal-court forum to challenge a facial and categorical exclusion of a particular class of persons from a state service. In fact, each of the state defendants here has a clear connection to enforcement of the challenged Indiana law.

A. The Governor Operates the Identification-Issuing Bureau of Motor Vehicles.

The panel itself noted the governor's own clear connection to the challenged name-change law. It is the Indiana Bureau of Motor Vehicles (BMV) that issues state identification cards and driver's licenses. App. 5.

The governor appoints a board, *see* Ind. Code § 9-14-9-2, and a commissioner who run the BMV. *See id.* § 9-14-7-2. The BMV requires a court-ordered name change in order to use anything other the name appearing on an individual's other legal documents, such as John Doe's birth certificate. *See* App. 5 (citing 140 Ind. Admin. Code 7-1.1-3(b)(1)(K)). "Together, Indiana's name-change statute and the BMV's requirements deny non-citizens the privilege of a full-name change on their identification." App. 5.

This alone provides "some connection" between the governor, in his administration of the BMV, and the discriminatory name-change statute. The panel majority seems to implicitly concede that connection, but faults John Doe for seeking an injunction against the name-change statute, rather than against the BMV requirements. App. 6. The panel majority then concludes that the governor "was not specifically charged with a duty to enforce the name-change statute," *id.*, a consideration that this Court expressly deemed irrelevant in *Ex parte Young*. 209 U.S. at 157 ("[W]hether [some connection to enforcement] arises out of the general law, or is specially created by the act itself, is not material so long as it exists.").

Through this odd elision, the appellate opinion discounts the governor's clear BMV-associated connection with the enforcement of Indiana's discriminatory name-change statute. In doing so, the court cut off Plaintiff's access to his chosen federal-court forum to challenge a class-wide exclusion from a key state service.

B. The Attorney General Enforces and Defends the Discriminatory Exclusion.

The attorney general has a duty to see that the laws of Indiana are uniformly and adequately enforced, *see* Ind. Code § 4-6-3-2, and the power to pursue any matters within the office's authority. *See id.* § 4-6-1-6. The panel majority acknowledged, at least partially, the role that Indiana's attorney general could play in assisting a prosecution if a non-citizen were to commit perjury by falsely claiming citizenship in the very process of seeking a name change in Indiana. App. 7. That alone would seem to be "some connection" to enforcement as to satisfy the *Ex parte Young* standard. However, the panel majority found that connection "too attenuated." *Id.* In this way, the panel majority added a component of substantiality to the requisite "connection"; this is not consistent with this Court's holdings.

Indiana's ban on non-citizen name changes causes a class of individuals to become targets of Indiana's criminal laws due to the complications that lack of a legal change of name imposes on the lives of many, and on transgender persons in particular. As the dissent acknowledged, "if [Doe] presents himself in a manner that accords with his gender identity," he risks prosecution under various Indiana laws. App. 16 (citing Ind. Code §§ 35-44.1-2-4(a) (false identity statement) and 9-24-9-6 (violations in connection with applications for a permit or driver's license)); *see also* Ind. Code §§ 35-44.1-2-1 (perjury) and 35-44.1-2-2 (obstruction of justice). These additional enforcement dangers, in which the attorney general plays a key role, further

demonstrate the connection necessary to render the attorney general an appropriate defendant.

Further support lies in the attorney general's statement, during the course of these proceedings, that "[t]he Attorney General would properly participate in his statutory role as intervenor to defend [the] challenged state statute. . . ." Brief of State Appellees at 7, *Doe v. Holcomb*, 883 F.3d 971 (7th Cir. 2018) (No. 17-1756). Indeed, Indiana's attorneys general have some history of acting, consistent with their authority, in response to challenges of Indiana's name change statutes. *See In re Resnover*, 979 N.E.2d 668 (Ind. Ct. App. 2012) (attorney general briefed court as to its interpretation of Ind. Code § 34-28-2-2.5); *see also Petition of Hauptly*, 312 N.E.2d 857 (Ind. 1974) (attorney general defended trial court's denial of a married woman's petition to change her name where petitioner had also challenged statute).

These connections demonstrate why the panel majority was wrong to close the federal courts to Plaintiff's challenge of a facially discriminatory state law, and should have permitted the challenge to proceed in federal court against the attorney general and the other defendants.

C. The State Court Administrator Issues and Distributes Forms and Advice that Reinforce the Mandatory Discrimination.

The panel majority acknowledges that the defendant state court administrator generates and distributes a form that states that petitioners for a legal change of name must provide proof of United States citizenship, and creates a form order for use by state courts that also incorporates the discriminatory exclusion of non-citizens. App. 8-9.

This connection, acknowledged by the panel majority, would also seem to satisfy the *Ex parte Young* standard, but the judges conclude that "generation and publication of non-mandatory forms are not connected to enforcement of the name-change statute." App. 9. Yet, these are official, state-published forms; they are the only state-government forms related to petitions for legal changes of name, and they are widely available. Such forms have heightened influence over potential petitioners, and the inclusion of the citizenship-proof requirement on the forms is, like the other required information in the form, designed to inform and influence the actions of the public.

In the case of a discriminatory exclusion, such as that created by the Indiana law challenged in this case, the distribution of state forms reinforces the statutory discrimination and deters non-citizen potential petitioners. State-issued communications have been used throughout history to enforce discriminatory laws. In

the Jim Crow south, state-generated signs indicating that certain bathrooms were limited to whites only played an important role in enforcing state-mandated segregation, perhaps more important than any police arrest or district attorney prosecution.

The panel majority, by ignoring this connection of the state court administrator to the challenged discrimination, further closes the federal courts to a challenge to the quintessential type of discriminatory enactment the federal courts were designed and established to address.

II. Causation and Redressability as to Each Defendant Suffices to Keep the Federal Courts Open to this Challenge to a Facially Discriminatory State Law.

The panel majority recognizes that John Doe has a concrete and particularized injury from the challenged Indiana statute, which is the first and perhaps most important element of standing, namely "that the statute denies him the benefit of obtaining a name change simply because he is not a U.S. citizen." App. 10. Yet, the denial of a legal change of name is not the only cognizable injury. As the Seventh Circuit majority opinion notes, *see* App. 10, this Court has held that "[w]hen the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, . . . [t]he 'injury in fact' . . . is the denial of equal treatment resulting from the imposition of the barrier, not the

ultimate inability to obtain the benefit." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

This Court has also stated that when a challenged state action relates directly to the Plaintiff, as it does here, rather than to someone else, "there is ordinarily little question that the action or inaction has *caused* him injury, and that a judgment preventing or requiring the action will *redress* it." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992) (emphasis added) ("[E]stablish[ing] standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue."). Here, John Doe is directly and personally injured; he is not asserting a right to defend the environment, the economy, or even property. This alone suggests that the panel majority's determination as to John Doe's injury – "mak[ing] it impossible – not just difficult – for people in his class to obtain the desired state benefit," App. 10 – should have sufficed to satisfy causation and redressability at the pleading stage.

In addition, while the panel majority recites this Court's holding that the causation element of standing does not require that a defendant's actions be "the very last step in the chain of causation," App. 11 (citing *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997)), the Seventh Circuit's conclusion that not a single one of the named defendants could be required to defend the discriminatory Indiana statute in federal court seems to rest heavily on the involvement of unnamed state circuit judges in enforcing the exclusion of non-citizens. In

effect, the panel majority imposed a requirement that only the last involved official could be an appropriate defendant.

This Court has held that such a conclusion is faulty. The causation element of Article III standing does not require that defendant be the final or proximate cause, but that the case not involve "injury that results from the *independent* action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (emphasis added); *see also Bennett*, 520 U.S. at 168-69; *and Lujan*, 504 U.S. at 560-61. Here, the final actor in denying a change of name is a circuit judge, but such a judge does not undertake any "independent" action with respect to the exclusion of non-citizens. Unlike his or her judgment with respect to the overall propriety of a legal change of name, an Indiana circuit judge has no choice but to deny every non-citizen a name change. The challenged law provides no discretion, but renders a legal change of name "impossible" for non-citizens, as the panel majority concludes. App. 10.

Moreover, if the injury is denial of fair process or equal treatment, rather than solely the denial of a name change, then all of the named defendants, as well as the unnamed judges required to enforce the challenged statute, participate directly in causing that injury – an injury that is complete with each instance of unfairness. In other words, there is no later, more proximate cause; all wrongdoers are on equal footing.

A. State Defendants' Connections to Enforcement Satisfy Article III.

As explained above, each of the state defendants has a connection to the enforcement of the challenged, discriminatory Indiana state law. Just as that suffices for the application of *Ex parte Young* with respect to Eleventh Amendment immunity, it also suffices to demonstrate causation for purposes of Article III standing. However, there is the additional injury in the denial of a fair process to consider under Article III.

The governor, through his operation of the BMV, participates in the denial of a fair process to non-citizens by denying an accurate identification card absent a court-ordered name change that is wholly unavailable to non-citizens. *See* App. 5 (citing 140 Ind. Admin. Code 7-1.1-3(b)(1)(K)). In addition, the governor, as state executive, has a constitutional duty to ensure that all Indiana laws are faithfully executed. *See* Ind. Const. Art. 5, §§ 1, 16. While such a general executive duty might not suffice in other circumstances, here it means that the governor participates in the denial of a fair process that is dictated by the challenged statute. As executive, he participates not only in the denial of equal treatment by BMV, but by any other administrative departments as well. "We recognize that the executive power of the government is vested not in the various departments and agencies, but in the Governor alone." *State ex rel. Sendak v. Marion Cty. Super. Ct.*, 373 N.E.2d 145, 149 (Ind. 1978).

The attorney general also participates in the denial of fair process mandated by the challenged statute. As explained above, the attorney general has extensive authority and responsibility to defend Indiana law, including past participation in name-change matters on appeal. *See Petition of Hauptly*, 312 N.E.2d 857; *see also In re Resnover*, 979 N.E.2d 668. This satisfies the necessary causation inquiry under Article III for both an injury in the discriminatory denial of a legal change of name and an injury in the ongoing denial of equal treatment to all non-citizens. By Indiana law, the attorney general must "represent the state in any matter involving the rights or interests of the state," *see* Ind. Code § 4-6-1-6, and "direct the prosecution of all civil actions that are brought in the name of the state of Indiana." *See id.* § 4-6-3-2. The attorney general also has the right to receive notice and to intervene to defend the constitutionality of state statues. *See id.* § 34-33.1-1-1. All of this further demonstrates the inappropriateness of the panel majority's decision to close the federal courts to John Doe's challenge to a facially discriminatory Indiana state law.

The Indiana state court administrator creates and distributes forms that incorporate and reinforce the exclusion of all non-citizens from receipt of a legal change of name. *See* App. 8-9. As explained above, this suffices for purposes of Eleventh Amendment immunity under *Ex parte Young*; it even more strongly demonstrates the administrator's participation in denying a fair process to the class of persons facing discrimination under the challenged Indiana name-change statute.

Reinforcing that non-citizens are wholly ineligible and then working to disseminate the forms certainly contributes to the denial of equal treatment that this Court has recognized as an injury. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. at 666. In another context, the university admissions officer who informs an applicant that he will not be admitted because of a written and non-waivable discriminatory bar participates in the denial of equal treatment, just as much as the faculty committee that makes admissions decisions.

B. The County Clerk's Gatekeeping Function Satisfies Article III.

Like the state court administrator, the county clerk plays an informal gatekeeper role, by providing written and oral information about the process and substance of obtaining a legal change of name in Marion County. *See* App. 11. The panel majority focuses on the fact that the clerk does not make the ultimate decision on a name change. *Id.* As noted above, this Court does not require that a defendant be the ultimate authority or last step to satisfy Article III. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. at 41-42. Here, the purpose of the clerk's activities – "educating and informing the public about the name-change statute's requirements," App. 12 – is plainly to influence potential petitioners in order to improve court efficiency. The efforts are designed to deter those unlikely to obtain name changes and to influence the content of petitions by those likely to receive their requested name change.

With this obvious purpose, the county clerk participates sufficiently in both the discriminatory denial of a name change and, even more patently, in the denial of a fair process to non-citizens.

Even if the clerk lacks authority to deny a name change, the clerk's front-line administration and informal gatekeeping – accomplished through education and advice – suffice to make the clerk an appropriate defendant in a challenge to Indiana's statutory exclusion of non-citizens from obtaining a legal change of name. *See* App. 14 ("[O]ne can see that [the Clerk's] authority to create forms, issue guidance, and move along the petitions, enables them to exert substantial influence on the name-change process."). The Seventh Circuit should not have shut the federal courts to such a challenge.

C. Declaratory or Injunctive Relief Will Redress John Doe's Injury.

This Court has held that, to satisfy the redressability standard under Article III, a plaintiff need only show that a favorable ruling is "likely" – as opposed to merely "speculative" – to resolve the controversy and prevent continued injury. *See Lujan*, 504 U.S. at 561. Here, it seems indisputable that the entry of forward-looking declaratory relief, with or without injunction, would result in the challenged exclusion of non-citizens from name changes being fully abandoned in Indiana. Name changes are not adversarial proceedings; there is no contesting private party whose

behavior must be altered or constrained. Only government officials, including unnamed state judges, are involved. Government officials are expected – and generally sworn by oath – to follow federal court rulings as to the effect of the U.S. Constitution. This also applies to the circuit judges. "Indeed, it is ordinarily presumed that judges will comply with a declaration of a statute's unconstitutionality without further compulsion." *In re Justices of Sup. Ct. of P. R.*, 695 F.2d 17, 23 (1st Cir. 1982). Thus, redress would result from a declaration in John Doe's favor, whether or not supplemented by the governor or attorney general issuing additional directive or advice.

III. Plaintiff John Doe Should Have the Right to Choose a Federal Forum to Challenge the Discriminatory Exclusion of Non-Citizens From Legal Changes of Name.

Plaintiff John Doe seeks to challenge a state law that explicitly, and on its face, distinguishes non-citizens from U.S. citizens, and intentionally deprives the former of the right to be considered for a legal change of name. *See* App. 45-46. This type of categorical, non-discretionary, class-based discrimination is precisely the kind of state law whose constitutionality has traditionally been determined in the federal court system. *See, e.g.*, *Mitchum*, 407 U.S. at 242.

If the federal court system is rendered unavailable, as is the result of the panel majority's decision here, the only available mechanism to challenge the

statutory discrimination lies in the state-court system. This includes appealing any adverse determinations and awaiting consideration by the various levels of the state appellate court. If the state courts uphold the challenged law, John Doe's only resort to the federal court would come after an adverse Indiana Supreme Court decision, and only if this Court grants rare review of a state high court decision. It is very possible that John Doe could be denied full consideration of his claims by any federal court, and still be barred the right to raise any future challenge.

This is the very outcome urged by the state defendants in the Seventh Circuit. "[I]f there are no suitable defendants for a challenge to the citizenship requirement of Indiana's name change statute, Mr. Doe may bring his challenge in the course of petitioning for a name change in a circuit court." Brief of State Appellees at 20, *Doe v. Holcomb*, 883 F.3d 971 (No. 17-1756). It is also the outcome endorsed by the Seventh Circuit panel majority. App. 12 ("The federal courts are not the proper forum for his claims."). That is an extraordinary and improper outcome for a challenge grounded in the United States Constitution to a facially discriminatory state law.

In briefing the appeal, the state defendants also asserted that John Doe has no more right to a federal forum than any litigant raising common-law claims. "Mr. Doe mistakenly believes he has a generalized right to bring him [sic] claims in federal court." Brief of State Appellees at 17, *Doe v. Holcomb*, 883 F.3d 971 (No. 17-1756). John Doe seeks no generalized privilege,

but the legitimate right to challenge a discriminatory, state-wide ban that he believes is inconsistent with constitutional protections in federal court.

This Court has recognized the right John Doe claims. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Mitchum*, 407 U.S. at 242 (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)). "Those who opposed the Act of 1871 clearly recognized that the proponents were extending federal power in an attempt to remedy the state courts' failure to secure federal rights." *Id.* at 241. "Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights." *Id.* at 240; *cf. McNeese*, 373 U.S. at 672 ("The First Congress created federal courts as the chief – though not always the exclusive – tribunals for enforcement of federal rights.").

Thus, since at least half a century ago, and by the Court's rendering a century and half ago, deprivation of federal constitutional rights have had a particular, even privileged place in federal court adjudication. In these circumstances, the federal courts are to be available as a first recourse for plaintiffs. "The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe v. Pape*, 365 U.S. 167,

183 (1961); *see also McNeese*, 373 U.S. at 672 ("We would defeat those purposes if we held that assertion of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court."). The courts should respect the choice of forum exercised by a challenger of discrimination that may violate federal rights. "In thus expanding federal judicial power, Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." *Zwickler v. Koota*, 389 U.S. 241, 248 (1967).

It is this traditional respect for the choice of a federal forum in raising claims of unconstitutional discrimination against a state statute that the Seventh Circuit panel majority failed to accord, and in so doing shunted John Doe off to a forum he has not chosen and that he has reason to eschew.

A. John Doe Experiences Real and Significant Harms from the Discriminatory Indiana Law.

As explained above, John Doe faces very real dangers and harms stemming from the denial of a legal name change. *See* App. 26-28. Each time he is required to present identification that includes his female birth name, he runs the risk of being required to reveal that he is transgender, a fact that he ordinarily chooses to reveal in his own way and after careful consideration of the possible consequences. *See* Plaintiff's First

Amended Complaint at 38-44, *Doe v. Pence*, No. 1:16-cv-02431-JMS-DML.

In addition to delaying the complete and successful transition requisite to treatment of gender dysphoria, John Doe faces other significant harms from the enforcement of the exclusionary Indiana statute. Involuntary "outing" as transgender subjects John Doe to serious and rational distress and anxiety about the distinct possibility that he will be subjected to discrimination, disrespect, ridicule, verbal abuse, and even violence. These are dangers that those identified as transgender face in the United States, even in 2018.

"There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity." *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (detailing "alarming" data on high levels of harassment and assault of transgender students), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260 (2018); *see also M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 720 (D. Md. 2018) ("recent reports found that transgender individuals suffer very high rates of violence due to their transgender status"); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) ("There is not much doubt that transgender people have historically been subject to discrimination including in education, employment, housing, and access to healthcare."); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139

(S.D.N.Y. 2015). "[F]orced disclosure of a transgender person's most private information . . . exposes transgender individuals to a substantial risk of stigma, discrimination, intimidation, violence, and danger." *Arroyo Gonzalez v. Rossello Nevare*s, No. CV 17-1457CCC, 2018 WL 1896341, at *6 (D.P.R. Apr. 20, 2018).

John Doe faces serious, concrete, and indisputable harms from the ongoing implementation of a facially discriminatory Indiana state law. In such a context, the federal courts have been available for at least half a century, and in theory much longer, to address in the first instance whether such harmful, class-wide state exclusions are constitutional.

B. John Doe Has Reason to Prefer Federal-Court Adjudication.

Indiana circuit judges, who are the judges assigned to determine whether to grant legal changes of name, are elected in partisan elections. Ind. Const. Art. 7, § 7; *see also* Indiana Judicial Branch, https://www.in.gov/judiciary/2681.htm. They are elected by the same voters who elected the legislators who enacted the challenged law, and who have left it in place since its enactment. As elected officials, Indiana circuit judges are therefore, unlike life-tenured federal judges, likely to be particularly concerned with the current political views of Indiana voters. In light of the contemporary political context surrounding the rights of immigrants and transgender persons, John Doe has a strong preference to have his challenge, raising claims

under federal constitutional law, adjudicated in federal court.

Indiana Code § 34-28-2-2.5(a)(5), the challenged statute requiring proof of United States citizenship for a legal change of name, *see* App. 45-46, is a relatively recent enactment. The law was enacted in 2010, and a goal of the author of the bill was to make it "more difficult for illegal immigrants to create new identities." *See* Plaintiff's First Amended Complaint at 52, *Doe v. Pence*, No. 1:16-cv-02431-JMS-DML. The law preceded by one year the Indiana legislature's enactment of a broader law, following Arizona's S.B. 1070, to encourage local law enforcement cooperation in immigration enforcement. *See* S. Guyett, *Judge Blocks Parts of Indiana Immigration Law*, Reuters, June 24, 2011 (reporting, "[a] state law signed in May and scheduled to take effect July 1 that allows state and local police to arrest anyone ordered deported. . . ."); *see also* S. Guyett, *Indiana Immigration Law Sections Rule Unconstitutional by Federal Judge*, Huffington Post, May 29, 2013 ("It was inspired by Arizona's law, known as S.B. 1070, that took over some aspects of immigration enforcement from the U.S. government.").

More recently, the Indiana legislature has considered other measures that focus on the immigrant population, particularly the undocumented. *See* D. Carden, *Immigration May Be Next Hot Button Statehouse Issue – Again*, Nw. Ind. Times, Feb. 12, 2016. At the national level, immigration regulation has also become a major and divisive political issue. *See, e.g.*, P. Bump, *Trump Says Immigration Laws Were Written by People Who*

'Could Not Love Our Country,' Wash. Post, May 4, 2018; A. Fram, *Immigration a Fraught Issue for GOP as Midterms Approach*, Wash. Post, May 19, 2018.

While John Doe is not undocumented, he has reason to be concerned about how the politicization and strong feelings in the public about immigration might affect consideration of his case by elected Indiana state-court judges.

The Indiana legislature has also been the locus of recent and contested consideration of the rights of transgender persons. *See, e.g.*, *Indiana Bill Targets Bathroom Use by Transgender People*, Chicago Trib., Dec. 24, 2015; K. Brekke, *New Indiana Bill Aims To Fine Trans People For Using The 'Wrong' Bathroom*, Huffington Post, Jan. 5, 2016. This, of course, also occurs in a national context of increasing political debate and controversy around the rights of transgender persons. *See, e.g.*, G. Lopez, *The Trump Administration Just Rescinded Obama-era Protections for Transgender Prisoners*, Vox, May 14, 2018; R. Pear, *Trump Plan Would Cut Back Health Care Protections for Transgender People*, N.Y. Times, Apr. 21, 2018; H. Cooper & T. Gibbons-Neff, *Trump Approves New Limits on Transgender Troops in the Military*, N.Y. Times, Mar. 24, 2018; S. Somashekhar, E. Brown & M. Balingit, *Trump Administration Rolls Back Protections for Transgender Students*, N.Y. Times, Feb. 22, 2017.

Although the rights of transgender persons are not inherently part of the consideration of the

constitutionality of the challenged Indiana statute, John Doe's case necessarily will arise in the context of the necessity of a legal name change because he is transgender. He understandably and reasonably then would prefer a judicial forum that is not affected by the politics of Indiana. *See Mitchum*, 407 U.S. at 242 ("[Congress] was concerned that state instrumentalities could not protect those rights; it realized that state officers might, in fact, be antipathetic to the vindication of those rights; and it believed that these failings extended to the state courts."). John Doe cannot achieve that goal if he is required to present his federal constitutional claims before an elected state judge.

Given the current national and state context around issues of non-citizen rights and the rights of transgender persons, John Doe reasonably concludes that federal courts would provide a more fair and evenhanded adjudication of his constitutional challenge to an Indiana law that facially discriminates against him as an immigrant, transgender man. His reasonable judgment deserves respect and protection, which were denied him by the Seventh Circuit panel majority.

IV. The Assignment of Awarding Legal Name Changes to State Courts Should Not Foreclose Plaintiff's Access to Federal Court.

In her dissent, Chief Judge Wood asked to "[c]onsider the consequences if any state function entrusted to the state-court system were placed beyond the

power of the federal courts to address." App. 18. The dissent further noted:

> The expedient of placing final authority for name-changes in the state court system cannot operate to avoid accountability for potential violations of the federal constitution by other state officials. Nor can it have the effect of negating the right of any person to bring an action under 42 U.S.C. § 1983, which lies within the subject-matter jurisdiction of the federal courts, see 28 U.S.C. §§ 1331, 1343(a).

App. 18-19.

Yet, these are precisely the effects of the panel majority decision. This is, of course, an unusual case. Name changes in most states lie in the hands of judges, and they are expected to exercise discretion and judgment in determining, on a case-by-case basis, the advisability of granting a requested change. Such judicial discretion is eliminated in Indiana, however, with respect to the eligibility of non-citizens. Judges are directed to deny such requests (if they make it to the judges despite efforts at deterrence), and they are granted no discretion to waive that exclusion in any individual case.

This admixture of judicial discretion in evaluating requested changes of name and absolute non-discretion with respect to non-citizens is what creates the pernicious prospect that Indiana's legislation might be duplicated in other states and in other legislation. State judges are clothed with judicial immunity. While a

plaintiff might contend that immunity does not cloak non-discretionary mandates, the effort might fail, particularly since many would deem the prospect of state judges as frequent federal-court defendants to be particularly noxious in our federal system. By concluding that other state and local officials, who play a role in denying a fair process and in denying name changes to an entire class of persons, are not appropriately defendants in federal court, the Seventh Circuit panel majority effectively permitted the state to avoid federal review through the expedient assignment of final enforcement of the challenged exclusion to state-court judges.

In effect, Indiana's legislature made circuit judges unwittingly complicit in the discriminatory exclusion it sought to enforce. The Seventh Circuit would now require those same judges to be the first and perhaps only adjudicators of the constitutionality of the discrimination they must enforce. With one eye on the surmised views of voters who determine whether they retain their position and the other on the federal Constitution and its mandates, state-court judges are inappropriate adjudicators of such matters, particularly where there is no clear, controlling precedent. The federal courts are far better situated. "'These courts . . . became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States.'" *Zwickler*, 389 U.S. at 247 (quoting Frankfurter & Landis, The Business of the Supreme Court: A Study in the Federal Judicial System, 65).

It is a dangerous expedient – disrespectful of both federal and state judicial officers – that the Seventh Circuit panel majority endorsed in this case.

V. Conclusion: The Court Should Grant Certiorari to Avoid States Immunizing Discrimination from Federal-Court Challenge.

Here, the effect of the Seventh Circuit panel majority's decision in this case is to close the federal courts to John Doe, a longtime resident of Indiana, who falls within a class of persons – non-citizens – that is disfavored in Indiana through a singular exclusion from being considered for a legal change of name. Instead, John Doe is relegated to a forum he does not prefer – an elected state-court judge and the Indiana state-court system – as the adjudicators of his claims that the statutory exclusion violates the U.S. Constitution.

In addition, the Seventh Circuit decision has the further impact of permitting, and perhaps even encouraging, state legislators who wish to insulate their class-wide exclusionary enactments from federal review. The panel majority provides a mechanism – assigning mandatory, non-waivable exclusions to state judges clothed with judicial immunity – to achieve that pernicious end.

This Court should grant certiorari to review the Seventh Circuit decision and to preserve the federal courts as a primary and available forum for

constitutional challenges to class-wide discrimination in state statutes.

Respectfully submitted,

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