VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF WASHINGTON

IN RE: LEIGH ANNE RUTH HUNTER,	)	
	)	
	)	Case No. CL10001060-00
Applicant.	)	
	)	
	)	

MOTION TO RECONSIDER AND MEMORANDUM IN SUPPORT

Comes now applicant Leigh Anne Ruth Hunter, by counsel, and respectfully requests the Court to reconsider its October 20, 2010 order in this matter and to enter an order granting her request to change her name to Leigh Anne Hunter Surber.

BACKGROUND

Applicant Leigh Anne Ruth Hunter ("Ms. Hunter") and Jennifer Beth Surber ("Ms. Surber") have been in a committed relationship for 8 years. They live together in Washington County along with Lillian Alize Hunter Surber, the four-month-old biological daughter of Ms. Surber, who was conceived through in vitro fertilization using an anonymous donor.

As an expression of their love and commitment, Ms. Hunter and Ms. Surber[1] both applied to this Court to change their names. Ms. Hunter sought to change her name to Leigh Anne Hunter Surber, and Ms. Surber sought to change her name to Jennifer Elizabeth Hunter Surber. These changes were sought solely to reflect the couple's understanding of themselves as members of the same family and household.

[1] Ms. Surber's name change application is Case No. CL 10000969-00.

The Court convened separate, in-chambers hearings on each of the name change applications. On October 19, 2010, the Court issued letter opinions to both applicants. Regarding Ms. Hunter's request, the Court wrote:

> At the hearing in this matter, Ms Hunter testified candidly, under oath, that she would be sharing her name with her partner so that everyone in the household would have the same last name. The Court has struggled with this issue, but must find that the purpose for this change is for the petitioner and her partner to hold themselves out as a married couple. The Code of Virginia at § 20-45.2 prohibits marriage between persons of the same sex and § 20-45.3 indicates a civil union between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited.
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> Therefore, the Court finds to allow this application would be in contravention of the statues of the Commonwealth of Virginia, and therefore, requested for a fraudulent purpose. The Court must deny the request for change of name on that basis.

Regarding Ms. Surber's request, the Court wrote:

> At the hearing in this matter, Ms. Surber testified, under oath, that she would be using Hunter as her middle name and would not be hyphenating her middle and last names in order to join the name of her partner. Therefore, the Court finds that to allow this application would not be in contravention of the statutes of the Commonwealth of Virginia. The Court will grant the request for change of name.

Accordingly, on October 20, 2010, the Court issued orders granting Ms. Surber's application and denying Ms. Hunter's application. On November 3, 2010, at Ms. Hunter's request, the Court vacated the order denying her application pending consideration of this Motion.

ARGUMENT

I. VIRGINIA STATUTE REQUIRES THE COURT TO GRANT MS. HUNTER'S APPLICATION FOR NAME CHANGE.

A. Virginia Code § 8.01-217 Requires That The Name Change Be Granted Because There Is No Showing of Fraudulent Purpose Or Infringement On The Rights Of Others.

Virginia Code § 8.01-217 provides that any person may apply for a name change to the circuit court where she resides, and that the court "*shall*, unless the evidence shows that the change of name is sought for a fraudulent purpose or would otherwise infringe upon the rights of

others . . . order a change of name." Va. Code § 8.01-217(C) (emphasis added). Thus, in the absence of fraud or infringement on the rights of others, the Court has no discretion to deny an application.

The sole purpose of Ms. Hunter's name change request -- to reflect her familial relationship with Ms. Surber -- is not "fraudulent." In general, statutes that forbid a name change with a "fraudulent purpose" are intended to prevent fraud on creditors. *See, e.g., Matter of McIntyre*, 715 A.2d 400 (Pa. 1998) ("the primary purpose of the Judicial Change of Name Statute, other than with regard to minor children, is to prohibit fraud by those attempting to avoid financial obligations."); *In re Hall*, 732 N.E.2d 1004 (Ohio App. 1999) ("So long as there is no intent to defraud creditors or deceive others and the applicant has acted in good faith, then the [name change] petition should be granted.") (citation omitted; alteration in original). There is no showing of such an intent here, nor can such an intent be inferred from Ms. Hunter's desire to take the name of her partner.

In other states where persons of the same sex are not permitted to marry or form civil unions, every court to consider the issue has held that a person seeking to change his name to that of his partner of the same sex must be allowed to do so. *In re Bicknell*, 771 N.E.2d 846 (Ohio 2002); *In re Miller*, 824 A.2d 1207 (Pa. Super.2003); *In re Daniels*, 773 N.Y.S.2d 220 (N.Y. City Civ. Ct., 2003); *In re Application for Change of Name by Bacharach*, 780 A.2d 579 (N.J. Super. A.D.2001)[2]; *In Matter of Marley*, 1996 WL 280890 (Del. Super.1996).[3] In each of these cases, the courts recognized that such name changes do not imply state endorsement of same-sex marriage and are not fraudulent or misleading to the public. As the court explained in *Bicknell*:

[2] Decided before civil unions were permitted in New Jersey.

> In the case at bar, appellants' only stated purpose for changing their names is to carry the same surname to demonstrate their level of commitment to each other and to the children that they planned to have. Both acknowledge that same-sex marriages are illegal in Ohio, and it is not their intention to have this court validate a same-sex union by virtue of granting the name-change applications. Any discussion, then, on the sanctity of marriage, the well-being of society, or the state's endorsement of nonmarital cohabitation is wholly inappropriate and without any basis in law or fact.

771 N.E.2d at 849. *See, also Marley* at *3 (noting that "because 'it is common knowledge that members of the same sex cannot marry ... no one would be defrauded if the name were changed'" (quoting lower court opinion); *Bacharach*, 780 A.2d at 585 ("[S]ame-sex marriage is not an issue in this case. The arguments equating it with the proposed name change are specious"); *Miller*, 824 A.2d at 1214 (finding "no evidence on the record" to support the trial court's conclusion that name change "would have held them out to society as folks that were legally married.")

Although no Virginia case has addressed the precise issue of name changes for same-sex couples, the Virginia Supreme Court has narrowly interpreted what qualifies as a "fraudulent" purpose under Virginia Code § 8.01-217. In *In re Miller*, 218 Va. 939, 243 S.E.2d 464 (1978), the Virginia Supreme Court held that a circuit court erred in refusing to allow a married woman to resume the use of her maiden name because there was no fraudulent purpose. The circuit court had suggested that "[t]he proposed name change contravenes society's substantial interest in the easy identification of married persons," 218 Va. at 941, 243 S.E.2d at 467, but the Supreme Court rejected that rationale, finding inconsistent with the established principle that "absent an unlawful purpose, a married woman may resume her maiden name." *Id.* at 943, 468. This Court's justification for denying Ms. Hunter's name change, as set forth in its prior opinion

[3] These out-of-state cases, as well as the Attorney General opinion cited *infra*, are attached hereto for the Court's convenience.

letter, is similar to the one disallowed in *Miller*: to allow for an overly simplified determination of whether two people are married by reference to their last names.[4]

Because the requested name change was not made for a fraudulent purpose, Virginia Code § 8.01-217 requires that the application be granted.

B. Virginia Code §§ 20-45.2 and 20-45.3 Do Not Prohibit The Requested Name Change Because Changing One's Name Is Not A "Privilege Or Obligation Of Marriage."

Virginia Code § 20-45.2 prohibits marriage between persons of the same sex, and Virginia Code § 20-45.3 prohibits civil unions "or other arrangement[s] between persons of the same sex purporting to bestow the privileges or obligations of marriage." Neither statute has any bearing here because by changing her name, Ms. Hunter is not effectuating any kind of marriage or civil union, nor is a name change a "privilege or obligation of marriage."

In Virginia, there have been no cases interpreting the "privileges or obligations of marriage" language in § 20-45.3. However, a 2006 legal opinion by Attorney General Robert McDonnell addresses the then-pending constitutional amendment on marriage, which similarly prohibits recognition of any relationship that "intends to approximate the design, qualities, significance, or effects of marriage," or "to which is assigned the rights, benefits, obligations, qualities, or effects of marriage." Va. Const. Art. 1, § 15-A. The opinion asserts that the amendment does not affect "the current legal rights of unmarried individuals to execute contracts, wills, advance medical directives, or shared equity agreements. . ." Op. Att'y Gen. 06-003 at 1, and contrasts such rights to "legal benefits *unique* to marriage" such a "a spouse's share of a decedent's estate, the right to hold real property as tenants by the entireties, the authority to act as a 'spouse' to make medical decisions in the absence of a medical directive, the right as a

[4] Notably, *Miller* rejected the circuit court's rationales for denying the name change even though, at the time, Section 8.01-217 provided that "the court, *in its discretion, may* order a change of name . . . ." *See Miller*, 218 Va.

couple to adopt children, and the enumerated rights and obligations in Title 20 of the Code of Virginia, regarding marriage, divorce, and custody matters." *Id.* at 3 (emphasis added).

The example of advanced medical directives is instructive. The opinion notes that "While a lawful marriage creates in one spouse the legal right by default to make medical decision without a written instrument for the other spouse, an unmarried individual may, by executing an advance medical directive, affirmatively grant the same right to any person of his choosing." *Id.* at 5. Thus, the opinion concludes that an advance health care directive is not a privilege or obligation of marriage, and the marriage amendment does not affect the right to designate the person of one's choice in an advance health care directive. Similarly, while a person may, without court order, adopt one's spouse's name upon marriage, this does not diminish the right of any person to change one's name for any other (non-fraudulent) purpose. It is not a right exclusive to marriage, nor is it a requirement or obligation of marriage.

Ohio courts interpreting a similar state constitutional provision[5] have construed it narrowly to mean "that the state cannot create or recognize a legal status for unmarried persons that bears *all* of the attributes of marriage-a marriage substitute." *State v. Carswell*, 871 N.E.2d 547 (2007) (emphasis added). Thus, a Cleveland ordinance creating a domestic partnership registry did not violate the Ohio constitution, because registered domestic partners were entitled to almost none of the rights and obligations of marriage. *Cleveland Taxpayers for Ohio Constitution v. Cleveland*, 2010 WL 3816393 (Ohio App. 8 Dist. Sept. 30, 2010). The court explained:

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at 940, 243 S.E.2d at 466 n.1. Now, of course, the statute *requires* the court to grant the name change when there is no fraudulent purpose or infringement on the rights of others.

[5] Ohio Const. § 11, Art. XV provides: "Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."

> Although the domestic partner registry places upon domestic partners, if they wish to continue the relationship, the marital duties to "share a common residence," to maintain a "committed relationship," and to "share responsibility for each other's common welfare," unlike a marriage, there is no method of enforcement for these provisions. Domestic partners who separate cannot take advantage of the domestic relations laws that govern divorce, alimony, child support, child custody, and equitable distribution.

Id. at *3. Nor were domestic partners entitled to myriad other benefits provided to married spouses. *Id.* at *4. Instead, "[t]he domestic partner registry bestows upon domestic partners, like married persons, the legal right of being registered and recognized as a domestic unit. This legal recognition, in and of itself, is meaningful to the domestic partners." *Id.*

Ms. Hunter and Ms. Surber, however, are not seeking "legal recognition" of their domestic unit. Their request is much more modest: the right to *self*-identify as a single family and household. Granting the name change does not entitle them to any of the privileges or obligations of marriage identified in the Virginia attorney general opinion, such as the right to a spousal share of an estate or the right to equitable distribution of property in the event of a separation. Nor does it place a judicial imprimatur on their relationship. The name change *only* provides a way for Ms. Hunter to identify herself as a household member with Ms. Surber.

C. The Court Should Interpret The Virginia Statutes to Avoid Constitutional Problems

As described above, in Ms. Hunter's view, the Virginia statutes are clear: Section 8.01-217 requires the Court to grant the name change, and nothing in Section 20-45.2 or 20-45.3 prohibits it. However, if there is any doubt as to the interpretation of those statutes, the Court should construe them to avoid constitutional issues. "In construing a statute, it is the duty of the courts so to construe its language as to avoid a conflict with the constitution." *Kolpalchick v. Catholic Diocese of Richmond*, 274 Va. 332, 340, 645 S.E.2d 439, 443 (2007) (citing *Jeffress v. Stith*, 241 Va. 313, 317, 402 S.E.2d 14, 16 (1991)). As described below, denying Ms. Hunter's name change would raise serious problems under the First and Fourteenth Amendments, and

their Virginia counterparts. Accordingly, the Court should construe the statues to permit the name change.

II. DENYING MS. HUNTER'S NAME CHANGE BASED ON HER RELATIONSHIP WITH MS. SURBER WOULD BE UNCONSTITUTIONAL.

A. Denying the Name Change Would Violate Ms. Hunter's Rights Under the Due Process Clause.

The United States Supreme Court has long recognized that the Due Process Clause of the Fourteenth Amendment protects personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.[6] *See Pierce v. Society of Sisters*, 268 U.S. 510, 45 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973). This kind of "liberty" includes the right to define one's own family relationships. Thus, for example, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Supreme Court invalidated a restrictive definition of "family" in a residency ordinance that prohibited a grandmother and grandson from living together, rejecting the city's contention that "any constitutional right to live together as a family extends only to the nuclear family."

In *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court recognized that this understanding of liberty extends to gay couples. In striking down a state sodomy statute, the Court was careful to explain that its ruling was not just about the right to have sexual relations, but about the right to form intimate, private relationships:

[6] The Virginia Constitution goes even further in protecting individual liberty. In addition to providing that "no person shall be deprived of his life, liberty, or property without due process of law," Va. Const. Art. 1, § 11, the Constitution also provides that "all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety." Va. Const. Art. 1 § 1.

> The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

539 U.S. at 567.

In this case, Ms. Hunter and Ms. Surber have a constitutionally protected right to live together in the same household as a family. Ms. Hunter seeks to change her last name in furtherance of this right. "[W]hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore*, 431 U.S. at 499. No government interest is advanced through denial of this name change. Indeed, the Virginia Supreme Court has recognized that "the easy identification of married persons" is not sufficient justification for denying a name change. The name change should therefore be granted.

B. Denying The Name Change Would Violate Ms. Hunter's Free Speech Rights.

Changing one's name is an expressive act protected by the First Amendment and its Virginia counterpart, Va. Const. Art. 1, § 12. By changing her name, an individual means to communicate something about herself and her understanding of her place in the world. In this case, Ms. Hunter wants to express her position as a member of a household. The statutory process for name changes is a limited public forum in which the government may not unreasonably restrict speech or discriminate based on viewpoint.

A limited public forum is government property or a channel of communication "which the government has opened for use as a place for expressive activity for a limited amount of time, or for a limited class of speakers, or for a limited number of topics." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 817 (1985) (internal citations omitted). Limited public forums do not necessarily have to be tangible spaces and "may be created by government designation of a … channel of communication for use by the public." *Cornelius,* 473 U.S. at 802; *See, e.g. Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); Sons *of Confederate Veterans v. Comm'r of Va. Dep't of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002). For example, the *Rosenberger* Court held that a university's student assembly funding scheme was "a forum more in a metaphysical than in a spatial or geographic sense," because the funding of student organizations opened a forum for speech. *Rosenberg*, 515 U.S. at 830. The name change process provides a similar non-tangible forum, in which the government provides access to a particular means of expression.

When government creates a limited public forum, the exclusion of an individual who belongs to a "class to which a designated limited public forum is made generally available, its action is subject to strict scrutiny." *Warren v. Fairfax County*, 196 F.3d 186, 193 (4th Cir. 1999). Moreover, any restrictions on the content of speech must be "reasonable and viewpoint-neutral." *Christian Legal Society v. Martinez*, 130 S.Ct. 2971, 2984 n. 7 (2010). In this case, denying Ms. Hunter's name change based on the content of her expression – that is, the expression of a loving, committed relationship with another woman – is not reasonable because denying the name change does not serve any legitimate governmental purpose. Moreover, it is not viewpoint neutral, because it discriminates against Ms. Hunter's the view expressed by the name change that such an affiliation constitutes a familial relationship.

CONCLUSION

For the foregoing reasons, Ms. Hunter respectfully requests that her application for a name change be granted.

Respectfully submitted,

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Rebecca K. Glenberg (VSB No. 44099)
American Civil Liberties Union
of Virginia Foundation, Inc.
530 E. Main Street, Suite 310
Richmond, Virginia 23219
(804) 644-8080
Fax: (804) 649-2733

Counsel for Leigh Anne Ruth Hunter