
In the Court of Appeals of Maryland

No. 79 September Term, 2015

Michelle L. Conover,

Petitioner,

v.

Brittany D. Conover,

Respondent.

On Writ of Certiorari to the Court of Special Appeals

Brief of Transgender Law Center, the National Center for Transgender Equality, Our
Family Coalition, PFLAG, Inc., COLAGE, and FORGE,
as *Amici Curiae*

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I. STATEMENT OF THE CASE

Amici adopt Petitioner’s statement of the case. This brief seeks to provide the Court with further information about transgender people like Michael Conover, the Petitioner in this case, and to resolve any questions regarding his¹ identity or fitness to parent that Respondent’s Brief in Opposition to the Petition for Certiorari (“Brief in Opposition”) has attempted to insert into this appeal.

II. QUESTIONS PRESENTED AND STANDARD OF REVIEW

Amici adopt Petitioner’s questions presented and standard of review.

III. STATEMENT OF INTEREST OF AMICI CURIAE

Transgender Law Center is the largest national legal organization dedicated to advancing the rights of transgender and gender nonconforming people. The organization works to change law, policy, and attitudes so that all people can live safely, authentically, and free from discrimination regardless of their gender identity or expression.

The National Center for Transgender Equality (“NCTE”), founded in 2003, is dedicated to improving the lives of transgender people and ending discrimination and violence through advocacy, education, and collaboration. NCTE works with Congress, federal agencies, and state and local advocates and stakeholders to advance public

¹ Because Petitioner identifies as male, Amici refer to him with the masculine pronoun. *See* Associated Press, *AP editors’ note on Manning* (Aug. 26, 2013) (clarifying that style guide for the Associated Press “calls for using the pronoun preferred by the individuals who have acquired the physical characteristics of the opposite sex or present themselves in a way that does not correspond with their sex at birth”), <https://blog.ap.org/announcements/ap-editors-note-on-manning>; Sylvia Rivera Law Project, *Transgender 101: Terms and Considerations for Officers of the Court*, available at <https://www.nycourts.gov/ip/judicialinstitute/transgender/220B.pdf>.

policies that will improve transgender people's lives in areas including employment, health care, housing, and education.

Our Family Coalition (“OFC”) is at the forefront of work with lesbian, gay, bisexual, and transgender (LGBT) people and advances equity for LGBT families with children through support, education, and advocacy. Based in San Francisco, California, OFC is the nation’s largest regional organization for families with LGBT parents, directly serving more than 3,500 people each year. OFC provides support for transgender headed families through a unique monthly support group for transgender parents and their spouses. Given its extensive first-hand knowledge and experiences of families with transgender parents, OFC has unique experience working with transgender parents to foster the well-being of their children, build healthy parent-child relationships and foster strong family ties.

PFLAG, Inc. is the nation’s largest LGBTQ family and ally nonprofit organization, with more than 200,000 members and supporters and 400 affiliates, including seven chapters with 1,890 members in Maryland. PFLAG’s members are parents, children, grandparents, siblings and friends of lesbian, gay, bisexual, transgender and queer individuals. Founded in 1972, PFLAG is committed to advancing equality and full societal affirmation of LGBTQ people through its threefold mission of support, education, and advocacy.

COLAGE unites people with lesbian, gay, bisexual, transgender, and/or queer parents into a network of peers and supports them as they nurture and empower each other to be skilled, self-confident, and just leaders in our collective communities. For the

past 25 years COLAGE has served as the only National organization dedicated to creating empowering spaces for the youth of LGBTQ families, to grow our leadership, and share our unique and powerful experiences. Through resources like our Kids of Trans* resource guide and flourishing People of Trans* Parents National Community, COLAGE has affirmed the value of family. We are invested in supporting these issues because we are in the unique position, as the children of LGBTQ families, to speak to the importance of being recognized, accepted and celebrated not despite the families we come from but because of them. We affirm with 25 years of experience in being and working directly with the children of LGBTQ families, that to deny or break apart family because of a parent's Trans* Identity is inhumane, unfair and isolating to the child.

FORGE is a 22-year-old national transgender organization headquartered in Milwaukee, Wisconsin. FORGE focuses on addressing violence and discrimination against transgender people through direct services and by training service providers. FORGE also runs a support group of Milwaukee-area parents who are raising transgender children and youth, and several FORGE staffpeople have been raised by transgender parents.

IV. STATEMENT OF FACTS MATERIAL TO THE INTEREST OF AMICI CURIAE

Amici adopt Petitioner's statement of facts. To assist the Court in understanding that element of Michael's identity as a transgender man, Amici add the following background facts regarding the nature of gender identity and gender transition.

Gender identity is a person’s deeply-held sense of their own gender.² Everyone has a gender identity. For most people, their gender identity aligns with the sex they were designated at birth. While the formation of gender identity is not yet fully understood, it is often established as early as two to three years of age.³ There is broad scientific consensus that gender identity is not the result of conscious choice and cannot be changed.⁴

A transgender person is a person whose gender identity does not align with their sex assigned at birth—generally determined solely by examination of a baby’s external genitalia.⁵ By the beginning of the twentieth century, however, researchers started to establish that external genitalia were unreliable indicia of a person’s sex.⁶ Instead, the scientific community has begun to recognize that a person’s gender identity may indeed be considered the primary indicator of one’s sex, with other factors including internal reproductive organs, external genitalia, chromosomes, hormones, and secondary sex

² American Psychological Association, *Answers to your questions about transgender people, gender identity, and gender expression* (2011) (“APA Answers”), <http://www.apa.org/topics/sexuality/transgender.pdf>.

³ *Id.* at 2; Peggy T. Cohen-Kettenis et al., *The Treatment of Adolescent Transsexuals: Changing Insights*, 5 *J. of Sexual Med.* 1892 (2008).

⁴ Kimberly Stieglitz, *Development, risk, and resilience of transgender youth*, 21(3) *J. Ass’n Nurses in AIDS Care* 192–206 (2010); Peggy T. Cohen-Kettenis & Louis Gooren, *Transsexualism: A Review of Etiology, Diagnosis and Treatment*, 46 *J. of Psychosomatic Res.* 315 (1999).

⁵ *See, e.g.*, World Professional Ass’n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7*, *Int’l J. Transgenderism* 165, 222 (2011) (“Standards of Care”), http://www.wpath.org/uploaded_files/140/files/IJT%20SOC,%20V7.pdf.

⁶ Cohen-Kettenis & Gooren, *supra* note 4, at 318.

characteristics playing a secondary role.⁷ In line with this established science, Maryland and other jurisdictions have recognized that gender is “not determined by any single criterion,” but rather that a variety of factors are relevant to determining one’s sex. *In re Heilig*, 372 Md. 692, 699-706 (2003); *see, e.g., Schroer v. Billington*, 577 F.Supp.2d 293, 305 (D.D.C. 2008) (crediting testimony that “it has long been accepted in the relevant scientific community that there are nine factors that constitute a person’s sex”); *Rentos v. Oce-Office Sys.*, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. 1996) (recognizing the “multitude of factors that the medical community has deemed to be relevant in identifying an individual’s gender”); *see also In re Lovo-Lara*, 23 I&N Dec. 746, 753 (BIA 2005) (recognizing eight factors that make up a person’s sex).

The incongruence between a transgender person’s gender identity and their sex assigned at birth can cause serious distress, the medical term for which is Gender Dysphoria (or, formerly, Gender Identity Disorder).⁸ Gender Dysphoria is recognized by the American Psychiatric Association in its *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V), the standard text relied upon by clinicians, researchers, health insurers, and the legal community. It is a well-established condition that can cause devastating outcomes if untreated. *See, e.g., Standards of Care* at 207. The condition

⁷ *See* Norman P. Spack, *An Endocrine Perspective on the Care of Transgender Adolescents*, 13 J. of Gay & Lesbian Mental Health 309, 312- 13 (2009) (“In other words, how can [a transgender girl] be a male to female if you really always were a female in your brain?”); *see also* P.T. Cohen-Kettenis & L.J.G. Gooren, *supra* note 4 at 318.

⁸ *See* Am. Psych. Ass’n, *Diagnostic and Statistical Manual of Mental Disorders*, 451 (5th ed. 2013).

has long been recognized by the courts. For instance, the Seventh Circuit described the condition as follows:

Individuals with GID identify strongly with a gender that does not match their physical sex characteristics. The condition is associated with severe psychological distress. . . . GID can cause an acute sense that a person’s body does not match his or her gender identity. Even before seeking treatment and from an early age, patients will experience this dysphoria and may attempt to conform their appearance and behavior to the gender with which they identify.

Fields v. Smith, 653 F.3d 550, 554 (7th Cir. 2011). *See also De’lonta v. Angelone*, 330 F.3d 630, 631 (4th Cir. 2003).

The only recognized treatment for the distress associated with Gender Dysphoria is to undergo gender transition, aligning a transgender person’s lived gender or gender role with their gender identity.⁹ Gender transition is a very individualized process. For some transgender people, “social transition” is sufficient: the steps that a transgender person takes to live as a member of the gender with which the person identifies, which may include coming out to family and friends, wearing clothing and grooming associated with their gender identity, and adopting a name and gender pronouns commonly associated with their gender identity.¹⁰ Some, though not all, transgender people also

⁹ Am. Med. Ass’n, *Report of the Board of Trustees 26-A-14: Conforming Birth Certificate Policies to Current Medical Standards for Transgender Patients (Resolution 5-A-13)* 2 (2014).

¹⁰ *See* Standards of Care, *supra* note 5, at 171-72.

undergo “medical transition”: treatment that may include psychotherapy, hormones, surgery, or other treatments, as recommended by the individual’s healthcare providers.¹¹

Through these or other elements of transition appropriate for each individual, transgender people can increasingly live all aspects of their lives consistent with their gender identity. It is important to note that not all transgender people require any treatment other than social transition to resolve their Gender Dysphoria; therefore, no particular treatment or element of transition need be demonstrated before a transgender person’s gender is entitled to respect.

V. ARGUMENT

A. Federal and State Law Respects the Dignity of Transgender People.

Like many states in recent years, Maryland has enacted significant civil rights laws to protect the dignity of transgender people in many areas of life. The Fairness for All Marylanders Act, which took effect in October 2014, prohibits discrimination on the basis of gender identity across a wide range of settings including employment, housing, and public accommodations.¹² Prior to the passage of the Act, five major municipalities – Baltimore City, Baltimore County, Howard County, Hyattsville, and Montgomery

¹¹ *See id.* *See also* Md. Code Ann. Health – General, § 4-211 (West 2015) (gender marker on birth certificate may be changed by submission of proof that the person has received “surgical, hormonal, or other treatment appropriate for the individual”).

¹² *See generally* Fairness for All Marylanders Act of 2014, SB 212, Ch. 474 (2014) (enacted). *Codified at* Md. Code Ann., S.G. Art. §§ 20-101(e), 20-302, 20-303, 20-304, 20-401, 20-402, 20-501, 20-602, 20-603, 20-604, 20-605(a)(2), 20-606(a) through (e), 20-608, 20-702(a), 20-704(a)(2), 20-705, 20-707(b) and (c), and 20-1103(b) (West 2015); Md. Code Ann., St. Pers. & Pens. § 2-302 (West 2015).

County – had enacted antidiscrimination ordinances protecting transgender people.¹³ At least 18 other states have similarly adopted explicit nondiscrimination protections based on gender identity in employment, housing and public accommodations.¹⁴

In 2015, Maryland removed the requirement for proof of “sex reassignment surgery” before a transgender person could correct the gender on their birth certificate. Md. Code Health – General, sec. 4-211. Under the new simplified law, a transgender person needs only to provide a certified letter from a licensed medical provider confirming that “treatment appropriate for the individual” has been provided. *Id.* Maryland has now joined the growing consensus of at least seven states and the federal government¹⁵ in recognizing that one-size-fits-all medical standards should not define who a transgender person is. Similarly, Maryland, and approximately half of U.S. states do not require surgery to amend a person’s gender marker on their driver’s license.¹⁶

¹³ See Baltimore City, Maryland, Municipal Code Art. 4, §§ 3-1, through §3-5; Baltimore County, Maryland, Municipal Code, §§ 29-1-101, 29-2-101, 29-2-202, 29-2-302, 29-2-303, 29-2-402; Howard County, Maryland, Municipal Code, §§ 12.200, 12.207, 12.208, 12.209, 12.210, 12.211; Montgomery County, Maryland, Municipal Code, §§ 27-11, 27-12, 27-19, 27-23 (2013); Hyattsville Ordinance 2013-05, The Hyattsville Human Rights Act (Dec. 2, 2013) (enacted).

¹⁴ Movement Advancement Project, Non-Discrimination Laws, http://www.lgbtmap.org/equality-maps/non_discrimination_laws.

¹⁵ Movement Advancement Project, Birth Certificate Laws, http://www.lgbtmap.org/equality-maps/birth_certificate_laws. See U.S. Dep’t of State, Bureau of Consular Affairs, Identification Requirements for Gender Reassignment (standard is whether applicant has had “clinically appropriate treatment” for gender transition), <http://travel.state.gov/content/passports/en/passports/information/gender.html>. See also Social Security Administration, RM 10212.200 Changing Numident Data for Reasons other than Name Change (same), <https://secure.ssa.gov/poms.nsf/lnx/0110212200>.

¹⁶ See, e.g., Trans Legal Advocates of Washington, Maryland Name and Gender Change Guidance, <http://equalitymaryland.org/issues/markerchange/>.

Additionally, the last two decades has seen near-unanimity from the federal judiciary in construing federal civil rights laws to prohibit discrimination against transgender people. *See, e.g., Finkle v. Howard County*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) (“Plaintiff’s claim that she was discriminated against “because of her obvious transgendered status” is a cognizable claim of sex discrimination under Title VII”); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (transgender employee stated claim for discrimination under Title VII and Equal Protection Clause based on her suspension from job because of transgender status); *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) (upholding claim brought by transgender prisoner under Violence Against Women Act); *Schroer v. Billington*, 577 F.Supp.2d 293, 308 (D.D.C. 2008) (discrimination against transgender woman was “literally discrimination ‘because of ... sex’” prohibited under Title VII); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011) (harassment based on nonconformity to sex stereotypes is legally cognizable claim under Title IX).¹⁷

¹⁷ Federal agencies similarly have interpreted virtually all federal civil rights laws to prohibit discrimination or harassment of transgender people. *See Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *7-9 (Apr. 20, 2012) (“[I]ntentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex.’”); U.S. Department of Education Office for Civil Rights, Title IX Resource Guide 1 (April 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf> (“Title IX protects students, employees, applicants for admission and employment, and other persons from all forms of sex discrimination, including discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity”); *see also* “Non-Discrimination in Health Programs and Activities,” U.S. Dep’t of Health & Human Services, 45 C.F.R. 92, (Sept. 8, 2015) (proposed rule on Section 1557 of the Affordable Care Act is clear that sex discrimination includes discrimination based on gender identity).

More fundamentally, the Equal Protection Clause of the United States Constitution protects transgender people from disfavored treatment that does not substantially advance an important government interest. This protection from discrimination can be understood as included within the protections the Constitution offers against discrimination based on sex, or more specifically, as a protection extended *per se* to transgender people as a class. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (“discrimination against a transgender individual because of her gender-nonconformity is sex discrimination” under the Equal Protection Clause); *Adkins v. City of New York*, -- F.Supp.3d --, No. 14-CV-7519 (JSR), 2015 WL 7352192 (S.D.N.Y. Nov. 16, 2015) (transgender people are a protected class under Equal Protection Clause); *Norsworthy v. Beard*, 87 F.Supp.3d 1104 (N.D. Cal. 2015) (same). In sum, whether under specific laws or regulations or the broad values that our Constitution reflects, it is indisputable today that transgender people are entitled to equal dignity and respect.

B. Respondent’s Attack on Michael as a Transgender Man Should Have No Bearing on Whether or Not Michael Should Have Access to Jaxon.

1. This Court Should Affirm that Gender Identity Is Not a Permissible Basis to Deny a Parent Custody or Visitation of His Child.

“He’s an awesome papa and a really good friend. . . . We are family and bonded for life through thick and thin. We are bonded by our shared history and our fierce love for and pride in our daughter.”

Celestina Pearl, co-parent with a transgender parent, member of Our Family Coalition’s Trans Parent Support Group.

Respondent's Brief in Opposition goes to great lengths to suggest that Michael's gender identity is *per se* harmful to Jaxon. (Opp. at * 2-3.) Contrary to the apocalyptic picture painted by Respondent, many transgender people are parents and have children. Research consistently shows that there is no nexus between a parent's transgender identity and their ability to successfully parent a child.¹⁸ Research has also shown there is no direct adverse impact from a parent's transgender status on their children.¹⁹ Research further demonstrates that children, particularly preadolescent children, generally adjust well to the gender transition of a transgender parent.²⁰

Transgender parents and children in Our Family Coalition's monthly Trans Parent Support Group reflect the extent to which children accept, and even celebrate, a parent's gender transition:

"Our own story has been joyous and amazingly fortunate. Ask my son to point me out in old photos and he has no trouble. Nor is it any kind of problem for his young mind."

Vivienne Ming, transgender parent.

"To me, she's still the same person, the only real difference being that she's allowed herself to come out of her shell and into herself, and I am so, so proud of her for doing that. It

¹⁸Richard Green, *Transsexuals' Children*, 2 Int'l J. Transgenderism 4 (1998), available at http://www.glad.org/uploads/docs/publications/i_i_Green_Transsexuals_Children_.pdf ; Tonya White & Randi Ettner, *Disclosure, Risks, and Protective Factors for Children Whose Parents Are Undergoing a Gender Transition*, 8 J. Gay & Lesbian Psychotherapy 129, 131 (2004), available at http://www.glad.org/uploads/docs/publications/i_ii_WhiteEttner_Disclosure,_Risks,_and_Protective_Factors_for_Children_Whose_Parents_are_Undergoing_a_Gender_Transition_.pdf.

¹⁹*Id.*

²⁰ Tonya White & Randi Ettner, *Adaptation and adjustment in children of transsexual parents*, 16 Eur. Child & Adolescent Psychiatry 215, 215-221 (2007).

takes a hell of a lot of courage and I much benefited from her example.”

Sam McEntee, child of a transgender parent.

Transgender parents regularly face allegations that their transgender status inherently makes them an unfit parent or that their children should be shielded from the significant social stigma that transgender people face. Many transgender parents experience attempts by their ex-partner to limit access to their children upon divorce or dissolution of the relationship. For example, the National Transgender Discrimination Survey, the largest study of the experiences of transgender people to date, documents that 29% of transgender parents surveyed experienced an ex-partner limiting their contact with their children. Jamie M. Grant, *et al.*, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 98 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf

Maryland, however, recognizes that custody and visitation determinations must be based on actual evidence, rather than improper and speculative assumptions of harm. *See, e.g., Boswell v. Boswell*, 352 Md. 204, 236 (1998) (requiring “an evidence-based finding of adverse impact on the child caused by a parent’s non-marital relationship to justify restrictions or limitations on custody or visitation”); *Robinson v. Robinson*, 328 Md. 507, 519 (1992) (mere existence of mother’s adulterous relationship insufficient to bar custody award when no evidence established that “adulterous conduct had any adverse effect on [the child]”); *North v. North*, 102 Md. App. 1, 12, n.2 (1994) (cautioning that father’s HIV-positive status could not be used as a factor to restrict

overnight visitation “unless the court finds that visitation without that restriction might endanger the child's physical health or impair his or her emotional development”).

And while custody and visitation are not directly at issue in the present appeal, if the case is remanded for consideration of visitation, Respondent will likely continue her attacks on Michael’s gender identity. Thus, this Court should take this opportunity to guide the trial court in any best interest of the child analysis it may have to conduct on remand. *See Walsh v. Walsh*, 333 Md. 492, 503 (1994) (providing guidance to trial court on how to evaluate evidence that would be before it on remand for determination of modification of child support); *see also North*, 102 Md. App. at 12, n.2 (cautioning that to the extent the issue resurfaced on remand, Court of Special Appeals would hold that mere HIV-positive status, without more, was insufficient basis to restrict visitation to non-custodial parent).

For instance, both this Court and the Supreme Court of the United States have firmly established that social bias and any resulting impact of such bias on a child are not permissible considerations in a child custody determination. *See Palmore v. Sidoti*, 466 U.S. 429 (1984) (barring consideration of race in child custody decisionmaking); *Boswell v. Boswell*, 352 Md. 204 (Md. 1998) (barring consideration of sexual orientation in child custody decisionmaking).

In *Palmore v. Sidoti*, the U.S. Supreme Court expressly rejected arguments regarding “peer pressures” and “the social stigmatization” that a child might suffer from her mother’s interracial relationship as grounds for denial of custody. 462 U.S. at 433. In *Palmore*, the trial court had granted custody of a former couple’s four-year-old daughter

to her father because her mother had a romantic partner of a different race. *Id.* at 431. The trial court justified its determination as follows:

This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that [the child] will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come.

Id.

In reversing the lower court, the Court acknowledged that “[t]he State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years,” and that “[t]he goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause.” *Id.* at 433. The Court also conceded that a child living with a parent in an unconventional relationship would undoubtedly be subject to a “variety of pressures and stresses,” that would not otherwise be present. *Id.* Nevertheless, the Court held that the effects of racial prejudice, however real, could not justify giving them legal force. *Id.* The Court held that while “[t]he Constitution cannot control such prejudices, . . . neither can it tolerate them.” *Id.*

Similarly, in *Boswell v. Boswell*, this Court overturned an order of visitation that prevented Boswell’s children from visiting him in the presence of his same-sex live-in partner or “anyone having homosexual tendencies or such persuasions, male or female, or with anyone that the father may be living with in a non-marital relationship.” *Boswell*, 352 Md. at 211. The Court noted that there was no evidence in the record of any actual harm to Boswell’s children from the relationship. *Id.* at 238. Rather, “the trial court

acted on its own initiative, seemingly influenced by its own biases and belief that Mr. Boswell's relationship with [his partner] was ‘inappropriate.’” *Id.*

In overturning the trial court, the Court explained that as with any visitation dispute, the best interests of Boswell’s children were the paramount consideration. *See id.* at 219.²¹ Moreover, the Court emphasized that it was improper for a court to base a custody or visitation determination exclusively on a parent’s sexual orientation. *See id.* at 224. Only “where there is evidence that visitation may be harmful to the child the presumption that liberal unrestricted visitation with a non-custodial parent is in the best interests of the child may be overcome[.]”²² *Id.* at 221.

Here, Respondent’s baseless allegations of potential harm to Jaxon based solely on Michael’s gender identity, as articulated in the Brief in Opposition, have no place in a best interest analysis.²³ In language Respondent should heed, the *Boswell* Court cautions:

The need for a factual finding of harm to the child requires that the court focus on evidence-based factors and not on stereotypical presumptions of future harm. **Therefore, before a trial court restricts the non-custodial parent's visitation, it must make specific factual findings based on sound evidence in the record.**

²¹ The “best interest of the child” refers to a multifactorial analysis the trial court undertakes in child custody or visitation decisions. *Hild v. Hild*, 221 Md., 349, 357 (1960).

²² For instance, Maryland courts have found restriction or denial of visitation warranted when the child was subject to sexual, physical, and/or emotional abuse by the parent. *Boswell*, 352 Md. at 221.

²³ In her merits brief, Respondent improperly suggests that this Court should undertake a best interest analysis as part of its decision on the legal issues *sub judice*. Respondent has not raised Michael’s transgender identity in that paper. However, given the allegations in the Brief in Opposition and the custody battles transgender parents regularly face from their ex-partners, this Court’s guidance will not only serve the parties, but future courts as well.

If the trial court does not make these factual findings, instead basing its ruling on personal bias or stereotypical beliefs, then such findings may be clearly erroneous and the order may be reversed. In addition, if a trial court relies on abstract presumptions, rather than sound principles of law, an abuse of discretion may be found.

Id. at 237 (emphasis added).

Moreover, the actual experiences of transgender parents from the OFC Trans Parent Support Group further confirm that assumptions about social stigma that will attach to children of transgender parents are purely speculative:

“Fears of school discrimination or bullying we have spoken of at the Trans Parent Support Group have never come to pass. In fact other parents have expressed their gratitude at the diversity we bring to the community.”

Vivienne Ming, transgender parent

“Some of the kids would greet me excitedly from across the playground, calling out to me, identifying me as my son’s dad. Most important, my son didn’t experience any negativity... The parents in my son’s class—those I disclosed to—have embraced me and rolled with it.”

Willy Wilkinson, transgender parent²⁴

In line with these principles, this Court can and should make clear that a parent’s transgender status is not a permissible basis to deny the parent custody or visitation of their child. *See, e.g., Christian v. Randall*, 516 P.2d 132, 133-34 (Colo. App. 1973) (parent’s sex change, name change and marriage did not provide grounds for changing custody of children where there was no evidence the children were adversely affected.);

²⁴ Willy Wilkinson, *Born on the Edge of Race and Gender: A Voice for Cultural Competency* (2015).

Tipsword v. Tipsword, No. 1 CA–CV 12–0066, 2013 WL 1320444 at * 2 (Ariz. Ct. App. Div. 1 Apr. 2, 2013) (citing *Palmore v. Sidoti*, 466, U.S. at 434) (holding that “[t]he bare fact that a parent is transgender is not relevant to his or her ability to parent effectively”); *Magnuson v. Magnuson*, 170 P.3d 65, 67 (Wash. App. 2007) (residential placement must be determined according to the needs of the child rather than a parent’s transgender status).

2. This Court Should Reject Respondent’s Transphobic Rhetoric and Make Clear that Transphobic Slurs Are Not a Legitimate Litigation Tactic.

Finally, this Court should rebuke Respondent for the Brief in Opposition’s offensive attacks on Michael based on his transgender identity. This Court has long exercised its discretion to respond to “improper, irrelevant, and unwarranted[]” statements before it. *Steinpreis v. Leet*, 240 Md. 212, 216 (1965) (granting motion to strike certain portions of appellant’s brief containing “scurrilous and scandalous matter[s]”); *see also* Md. Rule 16-813, CJCR 2.3(b) (directing judges to require lawyers in judicial proceedings “to refrain from exhibiting words or conduct, manifest bias, prejudice, or harassment based upon race, sex, gender” and other specified groups).

Here, Respondent, through counsel, dedicates almost half of her “counterstatement of facts argument” to attacking Michael’s fitness for parenthood due to his transgender status, in outrageous and offensive language (such as “she/he”), and to disparagingly rejecting Michael’s male gender. (Opp. at *1, 2-3.) There are no “facts” present in the Brief in Opposition. Rather, the Brief in Opposition seems to relish the vivid picture it

pains of Michael/Jaxon's imagined humiliation, using outright slurs at times, and inviting the reader to come up with hypothetical slurs of her own:

Other parents will be going home and having discussions behind closed doors. "Little pitchers have big ears." Other five year old children in his class are going to be picking up terms easier for them to say in the colloquial vernacular. The term "transvestite" may be too long for them to say. We can almost guess at the other terms they'll hear their father or mother say.

Children can be cruel (they are not politically correct) and on the playground and on the school bus they are going to taunt him "Your father's a _____. Ha Ha Ha." They'll sing it with a sing-song ring as children do. They will bully him. Little children will think if his father is thus and so, he must be one to [sic] . . . They will shun him.

(Opp. at *2-3.)

And on the other side of the scales, as Respondent would have it, is not Michael, a human being seeking a legal relationship with his child, but rather the furthering of an ominous platform of "those running point for political correctness": "all in the name of 'equality.'" (Opp. at * 2, 3.) None of this is relevant to anything before this Court on appeal.²⁵ (Opp. at * 1, 2.)

Nor are such tactics acceptable in civilized litigation. As Judge Adkins, writing for the Court of Special Appeals, recognized, "[W]e have long passed the era when bias relating to sex, race, religion, or other specified groups is considered acceptable as a

²⁵ Indeed, in quoting Petitioner's petition for certiorari, Respondent omits the significant last line of the quote: "Petitioner does not contend that his identity as a transgender man is material to any legal issue on appeal in this case, including whether he qualifies as a legal parent of Jaxon under E.T. § 1-208(b)(4)." (*Compare* Opp. at * 1 *with* Pet. for Cert. at * 2, n.3.)

litigation strategy.”²⁶ *Mullaney v. Aude*, 126 Md. App. 639, 659 (1999) (affirming the authority of the trial court to impose discovery sanctions on counsel for his use of gender-based insults towards litigant and opposing counsel).

As Judge Adkins explained, “These actions . . . have no place in our system of justice and when attorneys engage in such actions they do not merely reflect on their own lack of professionalism but they disgrace the entire legal profession and the system of justice that provides a stage for such oppressive actors.” *Id.* at 655; *cf. Johnson v. Baker*, 84 Md. App. 521, 531 (1990) (“a trial court has inherent power to impose sanctions for continuing an action vexatiously, wantonly, or for oppressive reasons”).

VI. CONCLUSION

For all these reasons, Amici urge this Court to make clear that Respondent’s offensive attack on Michael’s gender identity has no place in this appeal or in any aspect of the parties’ custody dispute.

Respectfully Submitted,

Ilona Turner, Esq. (*pro hac vice*)
Alison Pennington, Esq. (*pro hac vice*)

²⁶ Even if counsel believes he is zealously advocating on respondent’s behalf, Maryland Lawyers’ Rule of Professional Conduct 8.4(e) prohibits an attorney from “knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this paragraph[.]” MLRPC Rule 8.4(e). As noted above, discrimination against transgender people is a form of sex discrimination. *See, e.g., Finkle*, 12 F. Supp. 3d at 788 (recognizing that sex discrimination prohibition under Title VII prohibits discrimination against transgender people).

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Dated: February 25, 2016

APPENDIX OF PERTINENT RULES

Md. Rule 16-813, CJCR 2.3

RULE 2.3. BIAS, PREJUDICE, AND HARASSMENT

(a) A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

(b) A judge shall not, in the performance of judicial duties, by words or conduct, manifest bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation. A judge shall require lawyers in proceedings before the court, court staff, court officials, and others subject to the judge's direction and control to refrain from similar conduct.

(c) The restrictions of paragraph (b) do not preclude judges or lawyers from making legitimate references to the listed factors, or similar factors, when they are relevant to an issue in a proceeding.

COMMENT

[1] A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.

[2] A judge must avoid conduct that may reasonably be perceived as prejudiced or biased. Examples of manifestations of bias or prejudice include epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice.

[3] Harassment, as referred to in paragraph (b), is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[4] Sexual harassment includes sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

Source: This Rule is derived from Rule 2.3 of the 2007 ABA Code with certain style changes. The Comments are derived from the ABA Comments to that Rule with certain style changes.

Md. Rule 16-812, MRPC 8.4

RULE 8.4. MISCONDUCT

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Maryland Lawyers' Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) knowingly manifest by words or conduct when acting in a professional capacity bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such action is prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation of this paragraph;
- (f) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Maryland Lawyers' Rules of Professional Conduct or other law; or
- (g) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Maryland Lawyers' Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those

characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Sexual misconduct or sexual harassment involving colleagues, clients, or co-workers may violate paragraph (d) or (e). This could occur, for example, where coercion or undue influence is used to obtain sexual favor in exploitation of these relationships. See *Attorney Grievance Commission v. Goldsborough*, 330 Md. 342 (1993). See also Rule 1.7.

[4] Paragraph (e) reflects the premise that a commitment to equal justice under the law lies at the very heart of the legal system. As a result, even when not otherwise unlawful, a lawyer who, while acting in a professional capacity, engages in the conduct described in paragraph (e) and by so doing prejudices the administration of justice commits a particularly egregious type of discrimination. Such conduct manifests a lack of character required of members of the legal profession. A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule. A judge, however, must require lawyers to refrain from the conduct described in paragraph (e). See Md. Rule 16-813, Maryland Code of Judicial Conduct, Rule 2.3.

[5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 1.2(d) concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges of legal regulation of the practice of law.

[6] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of attorney. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

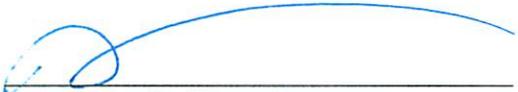
Model Rules Comparison.- Rule 8.4 is substantially similar to the language of the Ethics 2000 Amendments to the ABA Model Rules of Professional Conduct, with the exception of adding Rule 8.4(e) and redesignating the subsections of Rule 8.4 as appropriate, adding Comment [4] above, and retaining Comment [3] above from existing Maryland language.

STATEMENT OF FONT & TYPE SIZE

This brief is printed in Times New Roman font, with 13-point type.

CERTIFICATION OF WORD COUNT & COMPLIANCE WITH RULE 8-112

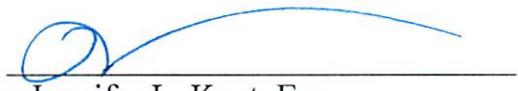
This brief contains 5,524 words, excluding the parts of the brief exempted from the word count by Rule 8-503. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.



Jennifer L. Kent, Esq.

CERTIFICATE OF SERVICE

Pursuant to Md. Rules 1-321 and 8-502(c), I hereby certify that, on this 25th day of February, 2016, **two copies** of the Brief of Transgender Law Center, The National Center for Transgender Equality, PFLAG, Inc., COLAGE, Our Family Coalition, FORGE, as Amici Curiae were served on Petitioner via hand-delivery to his counsel of record at the following address: Jer Welter, Deputy Director & Managing Attorney FreeState Legal Project, Inc., 231 East Baltimore Street, Suite 1100 Baltimore, MD 21202 and on Respondent by first-class mail, postage prepaid, to her counsel of record at the following address: R. Martin Palmer, Law Offices of Martin Palmer & Associates, 21 Summit Avenue, Hagerstown, MD 21740.



Jennifer L. Kent, Esq.