

August 29, 2024

David Nocenti, Esq., Counsel
Office of Court Administration
25 Beaver Street, 10th Floor
New York, NY 10004

RE: Proposal to amend 22 NYCRR §§ 202.5(e) & 208.4(b) in relation to the sealing of name and sex designation proceedings

Dear Mr. Nocenti,

The New York Civil Liberties Union (NYCLU) is grateful for the opportunity to submit the following comments supporting the proposal to amend 22 NYCRR §§ 202.5(e) and 208.4(b) in relation to the sealing of name and sex designation change proceedings.

The NYCLU advances civil rights and civil liberties so that all New Yorkers can live with dignity, liberty, justice, and equality. Founded in 1951 as the state affiliate of the national ACLU, we deploy an expert mix of litigation, policy advocacy, field organizing, and strategic communications. Informed by the insights of our communities and coalitions and powered by 90,000 member-donors, we work across complex issues to create more justice and liberty for more people. Relevant here, we were part of the coalition that advocated for passage the Gender Recognition Act in 2021, and we have worked, through both policy advocacy and litigation, to ensure that state agencies that collect sex or gender information offer an X option.¹ In addition, we have advocated to advance the safety of survivors of intimate partner violence such as through our work to combat nuisance ordinances that penalize people for calling emergency assistance even when they are a victim and need help.²

The vast majority of name changes – including those pursuant to marriage,³ divorce,⁴ adoption,⁵ and citizenship⁶ – are categorically private. Name and sex marker changes that proceed through the courts are a glaring – and dangerous –

¹ See generally Allie Bohm, *Why X Gender Markers Matter*, NYCLU COMMENTARY, Mar. 1, 2023, <https://www.nyclu.org/commentary/why-x-gender-markers-matter>.

² See generally Press release, NYCLU, State Senate approves nuisance ordinance reform, preserves right to call 911 without housing repercussions (May 14, 2019) (<https://www.nyclu.org/press-release/ny-state-passes-legislation-prevent-unwarranted-evictions-calling-911>).

³ See *Marriage Certificates*, NY DEPT OF HEALTH, Jan. 2023, https://www.health.ny.gov/vital_records/marriage.htm.

⁴ See *Divorce Certificates*, NY DEPT OF HEALTH, Jan. 2023, https://www.health.ny.gov/vital_records/divorce.htm.

⁵ N.Y. Fam. Ct. Act § 166 (McKinney).

⁶ See *Request Records through the Freedom of Information Act or Privacy Act*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, Aug. 16, 2024, <https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act>.



125 Broad Street
19th Floor
New York NY 10004
(212) 607-3300
nyclu.org

Donna Lieberman
Executive Director

Wendy Stryker
President

exception to this rule. What is more, those who must rely on the courts to change their names or sex markers are often the most in need of confidentiality to protect their safety⁷: namely transgender New Yorkers⁸ and survivors of intimate partner violence.⁹

According to the most recent U.S. Transgender Survey, more than one in ten transgender adults grew up in a household where family members were violent toward them because of their gender identity. Eight percent reported being kicked out of their family homes because they were transgender. Similarly, more than one in ten transgender people has been fired, laid off, forced to resign, or otherwise lost a job because of their gender identity or expression. Nearly one-third of transgender respondents reported verbal harassment within a year of the survey, and three percent reported physical violence.¹⁰

Meanwhile, New York City saw a ten percent increase in domestic violence at the height of the COVID-19 pandemic.¹¹ About one in five homicide victims is killed by an intimate partner, and over half of all female homicide victims are killed by a current or former male intimate partner.¹² Eighty-one percent of female and thirty-five percent of male survivors of sexual violence report significant ongoing impacts, such as post-traumatic stress disorder.¹³ Up to sixty percent of domestic violence survivors lose their jobs as a result of abuse.¹⁴

The architects of the Gender Recognition Act (GRA) had these grim facts in mind when they amended the name change statute and crafted the sex marker change



ACLU of New York

125 Broad Street
19th Floor
New York NY 10004
(212) 607-3300
nyclu.org

Donna Lieberman
Executive Director

Wendy Stryker
President

⁷ See generally Kristen Fermaglich, *To assume another name: Race, gender, family and name changing in New York City, 1887 – 2012*, 00 GENDER & HISTORY, 1 – 16 (2023), <https://onlinelibrary.wiley.com/action/showCitFormats?doi=10.1111%2F1468-0424.12763>.

⁸ “By 2012, transgender individuals submitted almost 9 *per cent* of all name-change petitions[]” in New York City, *id.* (emphasis original), when transgender people make up only 0.53% of New York’s adult population. Jody L. Herman, Andrew R. Flores, & Kathryn K. O’Neill, *How Many Adults and Youth Identify as Transgender in the United States*, UCLA School of Law Williams Institute, June 2022, <https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states/>.

⁹ See generally Kristen M. Driskell, *Identity Confidentiality for Women Fleeing Domestic Violence*, 20 Hastings Women’s L. J. 129 (2009).

¹⁰ SANDY E. JAMES, JODY L. HERMAN, LAURA E. DURSO, & RODRIGO HENG-LEHTINEN, NAT’L CENTER FOR TRANSGENDER EQUALITY, EARLY INSIGHTS: A REPORT OF THE 2022 U.S. TRANSGENDER SURVEY, (2024).

¹¹ *Alarming Trends in US domestic violence during the COVID-19 pandemic*, AM. J. OF EMERGENCY MEDICINE, 2020, available at [https://ajemjournal.com/article/S0735-6757\(20\)30307-7/fulltext](https://ajemjournal.com/article/S0735-6757(20)30307-7/fulltext).

¹² *Intimate Partner Violence Prevention*, CDC, May 16, 2024, <https://www.cdc.gov/intimate-partner-violence/about/index.html>.

¹³ *Statistics About Sexual Violence*, NAT’L SEXUAL VIOLENCE RESOURCE CTR, 2015, https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf.

¹⁴ *Domestic Violence Statistics*, NAT’L COALITION AGAINST DOMESTIC VIOLENCE, 2015, <https://zontadistrict12.org/wp-content/uploads/2016/09/Domestic-Violence-NCADV-Fact-Sheet.pdf>.



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19th Floor
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Donna Lieberman
Executive Director

Wendy Stryker
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statute to better protect privacy.¹⁵ Specifically, the GRA removed the name change statute’s publication requirement¹⁶ and created a presumption of sealing.¹⁷ Importantly, the GRA required the courts to “immediately order [an] applicant’s current name, proposed new name, residential and business addresses, telephone numbers, and any other information contained in any pleadings or papers submitted to the court to be safeguarded and sealed in order to prevent their inadvertent or unauthorized use or disclosure while the matter is pending.”¹⁸ It imposed the same presumptive sealing requirement on sex marker change filings.¹⁹

Since the GRA was enacted, mandatory electronic filing, or e-filing, has become standard, and when a person applies for a name or sex marker change through the courts, a clerk must put the file in a public database before a judge can see the papers and sign a sealing order. Because of e-filing, coupled with the advent of court data aggregation services, the intimate, legally sensitive information required as part of a name or sex marker change application is now available – and searchable – online.²⁰ In addition to name and sex marker change petitions themselves – which contain new names, old names, addresses, and other personally identifiable information – name and sex marker change practitioners have been able to find their clients’ birth certificates, driver’s licenses, immigration documents, medical records, orders of protection, and more in these public databases and on the open internet. These records can easily out a person as transgender or reveal an intimate partner violence survivor’s current address to their abuser, exposing these individuals to danger.

¹⁵ *See generally* New York Bill Jacket, 2021 S.B. 4402, Ch. 158.

¹⁶ 2021 New York Senate Bill No. 4402, New York Two Hundred Forty-Fourth Legislative Session.

¹⁷ *Id.*; N.Y. Civ. Rights Law § 64-a (McKinney) (“If the court shall find that open record of an applicant’s change of name would jeopardize such applicant’s personal safety, based on totality of the circumstances, the court shall, at the request of the applicant or sua sponte, order the records of such change of name proceeding be sealed, to be opened only by order of the court for good cause shown or at the request of the applicant. For the purposes of this section, ‘totality of the circumstances’ shall include, but not be limited to, a consideration of the risk of violence or discrimination against the applicant, including such applicant’s status as transgender or as the subject of domestic violence. The court shall not deny such sealing request solely on the basis that the applicant lacks specific instances of or a personal history of threat to personal safety.”); N.Y. Civil Rights Law § 67-b(1) (McKinney) (“Upon request of the applicant or sua sponte, the court shall order the records of such change of sex designation proceeding to be sealed, to be opened only by order of the court for good cause shown or at the request of the applicant.”); *see also Cody VV. v. Brandi VV.*, 226 A.D.3d 24 (2024).

¹⁸ N.Y. Civ. Rights Law § 64-a (McKinney).

¹⁹ N.Y. Civ. Rights Law § 67-b (McKinney) (“Notwithstanding any other provision of law, pending such a finding in subdivision one of this section where an applicant seeks relief under this section, the court shall immediately order the applicant’s current name, sex designation, proposed new sex designation, residential and business addresses, telephone numbers, and any other information contained in any pleadings or papers submitted to the court to be safeguarded and sealed in order to prevent their inadvertent or unauthorized use or disclosure while the matter is pending.”).

²⁰ Sanford F. Young, *Electronic Court Filings Are a Privacy Nightmare*, THE WALL STREET JOURNAL, Jan. 4, 2023, <https://www.wsj.com/articles/electroniccourt-filings-trial-privacy-records-motions-paper-trail-hippa-sensitive-personaldata-11672869403>.

Importantly, none of these records is generally available under the Freedom of Information Law,²¹ but rather these specific records are made available solely because the people to whom they pertain sought court assistance in changing their name or sex marker – often for their own protection and wellbeing.

For these reasons, the NYCLU strongly supports the proposal to amend 22 NYCRR §§ 202.5(e) and 208.4(b) in relation to the sealing of name and sex designation change proceedings. The proposal will actualize the GRA’s intention that individuals be able to protect their privacy when they petition the court for a name or sex marker change.

We make the following suggestions to support the rules in better meeting this goal:

First, the rules must be clear that all records will remain sealed upon disposition of a matter and that a court order will be required for unsealing. This is imperative, because the risks associated with public disclosure of private information do not abate simply because a name or sex marker change is granted or denied.

Second, the rules must apply retroactively to name and sex marker changes applications that were filed prior to the rules’ issuance. This is critical, because individuals who filed earlier in time have no less need for privacy and safety than those who file after the rules’ promulgation, and these individuals should not be arbitrarily deprived of the rules’ critical protections based on when they filed their petition.

Third, the Office of Court Administration should support legislation, currently S.9141, to require that, like other methods of changing one’s name, name and sex marker changes sought through the courts be categorically private. Doing so will relieve the burden on people, particularly *pro se* people – who are the vast majority of name change applicants – to monitor online court records and engage in complex and potentially fruitless efforts to undo disclosure. It also will result in consistent treatment of the privacy and safety interests of all name and sex marker change applicants and eliminate the disparate outcomes that arise from case-by-case sealing and unsealing.²² For these reasons, categorical privacy is the approach that our neighboring state, New Jersey, has already taken.²³

Finally, the Office of Court Administration should consult and involve the Richard C. Failla LGBTQ Commission, New York Courts’ inhouse experts on issues facing the LGBTQ community, when promulgating rules that impact members of the community. The current proposal is an important step in the right direction, and

²¹ See generally N.Y. Pub. Off. Law § Ch. 47, art. 6 (McKinney).

²² E.g. *Cody VV. v. Brandi VV.*, 226 A.D.3d 24 (2024).

²³ New Jersey Court Rule 1:38-3(f)(10).



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Donna Lieberman
Executive Director

Wendy Stryker
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involving the Failla Commission will help ensure that future rules and Office of Court Administration initiatives best serve the LGBTQ community.

The NYCLU is grateful to the Office of Court Administration for its proposal and urges the Office to expeditiously finalize the rules. If you have any questions or need more information, please contact NYCLU senior policy counsel, Allie Bohm, at abohm@nyclu.org.

Thank you.



Allie Bohm
Senior Policy Counsel
New York Civil Liberties Union



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19th Floor
New York NY 10004
(212) 607-3300
nyclu.org

Donna Lieberman
Executive Director

Wendy Stryker
President