

# The legal argument against your transitioned status

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## Abstract

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## Article

The following is the argument against YOUR transitioned status being recognized, currently sitting in the Texas 13th District Court of Appeals, and soon to be making its way to the US Supreme Court. This Texas case may very well define how US courts views the transitioned status of trans people. For the uninitiated, here's how we got here and why this case will likely affect YOU. Keep a close eye on this case.

The TransAdvocate obtained an audio recording of the September 18, 2013 13th District Court of Appeals proceedings that our nation's first out trans judge, Phyllis Frye and I attended. Since it was an appeal of Judge Randy Clapp's (R) decision that sex is assigned at birth, no new evidence could be added. The appeals court was made up of Chief Justice Valdez (D) and Justices Rodriguez (D) and Longoria (D). The panel consisted of 2 women and 1 man.

You are about to hear Lawrence P. Wilson of Christian College present the argument for why the government should not recognize the transitioned status of a trans person:

## Transcript

Wilson: The question that I would say to you, that's really being presented by the appellate is two-fold: That is, #1, how do we determine when a person is a man; #2, how do we determine when a person is a woman. What I would like the court to consider though, is the reality of what we are sitting here doing. The questions that are presented here, about when is a person a man and when is a person a woman are questions which have been deemed answered appropriately for virtually the entirety of human existence. We can go back in history and be searching the records and we will not find people questioning, who is a man and who is a woman. They were decisions what were made at the time of birth. They were decisions that worked in societies. They were decisions that worked in America up until relatively recently. They were decisions that worked in Texas, up until recently.

One of the phrases in our brief that I actually would take issue with at this point, having read it and

studied it, in our on brief, we said that the law was, for basically 10 years, as the Littleton court set it out. In fact, I would submit to the court that the law about this has existed for as long as we have been a state, as long as America has been a nation. It has existed in the civilized world...

Chief Justice Valdez: Well, what effect do we give to the amendment that now, you know, the State of Texas allows for a sex change applicant to get a license and get married? What effect do we give it? You know, obviously the Littleton case said, 'You know, this is an issue for the legislature and not for the courts, so that we will not be called activists,' and so the argument on the other side is, 'You know, the legislature has acted and they said that we are now going to recognise transsexual people and allow them the opportunity to get a license and get married.' So, what effect do we give it?

Wilson: Well, I think that what we have to do is ask ourselves what was the legislature intending to do with that amendment? And, I do, while looking at that, keep in mind that council for the appellate stated that the judges all agreed in the Littleton that we needed court guidance. More specifically, what they were saying was this, and this is in the concurring opinion by Justice Angelina, she says: "We lack statutory guidance at this time, and because of that we must instead be guided by biological factors." So, what she said we lacked, and I want to emphasize this, what we lack was statutory guidance on how to make the determination of whether somebody's a man or a woman. Okay?

Chief Justice Valdez: One of the problems I have is that, the argument is being advanced that, full faith and credit applies to this state. And the State of California, where she was born, there is a judgement that declares her a woman, under the State of California, you know, law. And if we are to accept the law full faith and credit and apply it here, do we not give that recognition, that she is a woman?

Wilson: No, I don't believe, your honor, that we'd need to, and I'm sorry, let me interrupt here for a moment, out of courtesy to Miss Araguz I am going to be referring to her as she and her in my oral arguments for the majority of time. But with respect to that birth certificate, I wanted to point out and just remind the court that was something that she applied for after the death...

Chief Justice Valdez: Sure.

Wilson: ... of Thomas Araguz. It was something that she applied for after these proceedings. The question still remains, will we have to give it full faith and credit? Ultimately, the appellate is argued that because it was a status determination that we ought to be bound by it. One of the things we pointed out was that in the Restatements Seconded of Judgements, Section 31 of Sub 2 in comment B, it says preclusive effect wanes when another state has correlative authority to adjudicate the status or incidents. In this instance, Texas absolutely has a tremendous interest in protecting...

Chief Justice Valdez: But we do it in the family law, in divorces, in adoptions and all of that.

Wilson: ... Right.

Chief Justice Valdez: So, are we going to cherry pick or what?

Wilson: ... Right. In-in-in the, uh...

Justice Longoria: Doesn't that California say that, when they get the new birth certificate, all

references to old birth certificates should be null and void, to respect the privacy of the person at issue. And if we're going to give that statute full faith and credit, then how do we get there?

Wilson: That's one of the points that the courts point out is, it's not their statutes that we have to give full faith and credit to. In other words, we don't go to California and say, 'What are California's laws on their books and how are we gonna apply it here?' It would be a judgment or some type of an order and this case, there is no judgement relative to allowing that amendment to that birth certificate. Now, they have other statutes about the implications of that. In California there would be repercussions of that amendment. But, one of the things that the Supreme Court has talked about is the fact that we are not obliged to give the exact same status the same effects to those orders in other states that we would in that issuing state. One of the things that I think the court needs to recognize is that, what you are being asked to do today is to literally go out there and make a rule for determining who is a man and who is a woman that is completely unworkable...

Chief Justice Valdez: That's what Littleton did. [laughs]

Wilson: They say Littleton made an unworkable rule but, your honor, I would submit to the court that, in fact, Littleton, all it did was recognize what has been done in every society in all of recorded history. And that is that Littleton simply recognized that you determine whether or not somebody's a male or a female based upon, how you determine that at birth. And that's what Littleton did and I would submit to the court, that's the way it has always been...

Justice Rodriguez: Was there any expert testimony in the Littleton case that you know of?

Wilson: With regard to expert testimony? There was expert testimony in the Littleton case. They did have a physician come in, and I think talk about the fact that there had been thoughts of, by, in that case of Christi Littleton, having thoughts of being a different gender at an earlier age and things of that nature. I do not believe that there was anything about the WPATH we talked about in this case. But, but...

Justice Rodriguez: Because that's what I see as a problem here, in your case is that, this is a summary judgement case. That means that there are no issues of fact involved and the way I look at it, you have an expert here who is saying that she was a female and I haven't noticed that you've mentioned this expert and I'd like for you to address that because, it looks to me that's creating a question of fact...

Wilson: Right, and I think the court...

Justice Rodriguez: And that expert testimony was uncontroverted, was it not?

Wilson: Uh, we have not had an expert of our own to try to refute that or attempt to refute it. Your Honor, we think it would fall on its own foundation. Now, Your Honor, I don't mean to be flippant with this, but to me that would be somewhat like an expert coming in and saying 'This table is a chair.' And that is my expert opinion. And we have an ability to either say that makes sense or that does not make sense. That is credible evidence or that is not credible evidence. You know, Genesis 1:27 and Matthew 19:4, when they talk about God created them male and female, what we are introducing today is the idea - this is what their expert says, it's what they cite in their brief - they say, 'No, Nikki Araguz was neither male nor female, she was neither completely male nor completely female.' They are introducing, I

don't know what this would be, but it would be something that is unprecedented in the history of Texas, something we've never recognized before. Littleton was extremely workable. Littleton simply recognized what we have always recognized and that is that gender is determined when you are born. People would call up mom and say, 'Mom, I just had a baby boy.' We knew, based on anatomy. In this instance, there is no allegation that Miss Araguz had any hormonal issues that were incompatible, that she was unable to process her hormones or anything like that. There's no suggestion that her chromosomes are different than her anatomy, There;s no suggestion that she had ambiguous anatomy. She didn't have any of that.

Chief Justice Valdez: Let me ask you this. Again, this is comes to us in the context of a summary judgement. Don't you have the burden of proof?

Wilson: Uh.

Chief Justice Valdez: Don't you have to come forward with evidence to disprove that she is not a man, but rather... That she is not a woman, but rather a man? You see what I mean? Who has the burden of proof? You do. You are the one that's moving for us to set aside her identity as a woman.

Wilson: Your Honor, here's the proof. Here's the evidence and it is undisputed evidence. And that is that Nikki Araguz was born as a baby boy. And they have brought in a doctor to say, 'If you want badly enough to be somebody of another gender, if you think enough that you are somebody of another gender, if you dress like the other gender, then you are the other gender. And I would submit to the court that that is no credible evidence at all. What we have in Texas and what Littleton established - and it wasn't new precedence - what Littleton simply acknowledged was, that we determine sex at the time of birth .



*Figure 1. Me & Judge Frye, 13th District Court of Appeals*

How many facepalms did you pull while listening to Wilson? How many strawmen, appeals to history, appeals to tradition, arguments from ignorance and circular reasonings did you hear? Behold the argument that is very likely headed for the US Supreme Court!

The Nikki Araguz case is often wrongly framed as a marriage equality case, and it is... sort of. What this case is mostly about is determining if courts will recognize the transitioned status of transgender people.

Consider this exchange between Chief Justice Valdez and Nikki's attorney:

Chief Justice Valdez: I guess, one of the main questions I had as I was reading the brief was that, what definition do we give and where do we get the definition. Do we allow modern science to assist us or do we take the Biblical definition of what a man and woman is. Can you help us out in that respect, in defining some of those terms?

Nikki's attorney: I hope so, I think, and I understand your question and I understand that that is a

question that is at the very heart of a lot of the discussion.

Chief Justice Valdez: And I guess at the end of the day, is what rule - evidentiary rule are we going to adopt?

The appellees - the side trying to define sex as being permanently fixed at birth - have said numerous times that they will take this case to the supreme court. Should that happen, no matter the outcome, this case will affect all US trans people. Should SCOTUS decide that sex is fixed at birth, untold lives will be ruined. Alternatively, should SCOTUS decide that trans people exist, it will clear up a lot of legal baggage for everyone.

At the same time, all of this might remain in Texas. I believe that we will win in the 13th District Court of Appeals. The appellees will appeal it to the Texas Supreme court and I believe that we will lose because Texas has a right-wing fundamentalist governor who has stacked that court with right-wing fundamentalists. If the case is appealed to the SCOTUS and they send it back to Texas, the Texas Supreme ruling will stand.

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### **Suggested citation**

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