No. 17-1637

In The Supreme Court of the United States

JOHN DOE, formerly known as Jane Doe,

Petitioner,

v.

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

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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"The federal courts are not the proper forum for his claims." App. 12. Instead of attending to this final sentence of the Seventh Circuit panel majority opinion, state defendants, in their brief in opposition, are at pains to repeatedly characterize this matter as one of naming the "wrong defendants," State Resp't's Br. in Opp'n ("State Opp.") 5, 7, 9, 12, rather than accurately characterizing the circuit decision as a conclusion about the "wrong forum" or "wrong court system." Defendants' careful wordsmithing vainly aims to convince the Court that this case involves a run-of-the-mill matter of standing or immunity.

However, careful avoidance of the circuit majority's own express words betrays defendants' implicit understanding that closing the federal courts to the kind of claim involved here is highly unusual and ultimately dangerous to one of the longstanding purposes of the federal courts. Repeated use of the term "wrong defendants" of course implies that Plaintiff John Doe could pursue his federal court claims if only he named the "right defendants." State defendants' brief identifies no such correct defendant because the Seventh Circuit decision leaves no such hypothetical possibility, closing the federal courthouse entirely to the claims being asserted.

More directly refusing to take the panel majority at its word that federal courts are not available to Plaintiff John Doe's challenge, county defendant Marion County Clerk Eldridge ("county defendant") expressly argues that Doe may pursue his suit against

another defendant in federal court, the director of the Indiana Bureau of Motor Vehicles (BMV). County Resp't's Br. in Opp'n ("County Opp.") 19. This unsupported assertion – contradicted by the panel majority opinion's own words – also demonstrates an acknowledgement that closing off the federal courts to the types of claims Doe alleges – as the Seventh Circuit decision actually does – is an extraordinary and ominous outcome.

In the end, this case remains a challenge by a transgender, non-United States citizen Indiana resident – who has very reasonable trepidation in the mid-2010s about pursuing his case before elected state judges – to a categorically discriminatory statute that he believes unconstitutionally forecloses his access to the vital state service of changing his legal name. The Seventh Circuit has barred Doe from pursuing his challenge to a law that facially discriminates against all non-citizens in the federal court system.

I. The Circuit Majority Opinion Forecloses Access to the Federal Courts.

County defendant, seeking to deflect the clear and dangerous closing of the federal courthouse doors in the Seventh Circuit decision, seems to assert disagreement with the court's conclusions as to certain named state defendants, State Opp. 19–20, but also suggests that the panel majority "details how Doe could" successfully sue the BMV director. State Opp. 19. Of course, county defendant's assertion directly contradicts the panel majority's own characterization of its

decision as concluding that "federal courts are not the proper forum" for Doe's claims. App. 12.

There are several additional problems with the proposed suit against the BMV director. As the Seventh Circuit panel majority notes, such a lawsuit, whether against the governor or the BMV director, would have to challenge the "enforcement of the BMV's requirements" rather than the discriminatory name-change statute itself. *See* App. 6. This would provide incomplete relief at best; Doe would potentially obtain a driver's license with his correct name, but would not obtain a legal name-change necessary for use in accessing other government services that require a legal name – including, for example, changing the name listed on immigration documents. Nor would he obtain the complete and formal name-change often necessary to treat gender dysphoria. In addition, whether Doe could successfully challenge the BMV requirements is open to substantial question. The BMV requirement of a legal name change to use a name other than that on one's birth certificate, *see* App. 5, is not facially discriminatory and is backed by persuasive rationale, including the reasonable determination that state court judges are better situated than the BMV to determine whether a name change is needed for a genuine and legitimate purpose.

Finally, and most important, if Doe were to pursue the lawsuit suggested by the panel majority and county defendant, he would face overcoming the federal REAL ID Act, which requires a driver's license to contain "[t]he person's full legal name," REAL ID Act

of 2005, Pub. L. No. 109–13, § 202(b)(1). Indiana, a REAL ID Act-compliant state, would almost certainly assert that the federal law forecloses any relief sought from the BMV requirements. In effect, the asserted alternative federal suit against governor or BMV director to challenge BMV requirements is woefully incomplete and likely wholly illusory. The BMV's enforcement of the discriminatory name-change statute can only be effectively remedied by a challenge to that statute itself, not by collaterally attacking one method of enforcement – the BMV's demand for a court-ordered name change.

As much as all defendants would apparently wish it were otherwise, the Seventh Circuit did foreclose access to the federal courts for Doe's challenge to a facially discriminatory state law. Neither state defendants' repeated implication that there are correct defendants, nor county defendant's direct assertion of an alternative suit and defendant, can change that outcome.

II. County Defendant's Wished-For Decision Does Not Warrant Denial of Review.

In a separate and more sweeping refusal to take the Seventh Circuit panel majority at its word, county defendant asserts at length that Doe failed to meet his burden of contradicting evidence the clerk put forward, and that this is the basis for denying him relief. While county defendant plainly wishes that the Seventh Circuit had relied on such a conclusion and on the case of

Apex Digital, Inc. v. Sears, Roebuck & Co., 572 F.3d 440 (7th Cir. 2009), the panel majority did not. Therefore, county defendant's argument bears no relation to the decision, opinion, and precedent that Doe seeks to have this Court review.

Indeed, Doe did not and could not contradict county defendant's assertion that she does not have the authority to refuse a name-change petition, even on the mandatorily disqualifying grounds that the petitioner is not a citizen. County defendant Eldridge seems to believe that this immunizes her from defending the discriminatory name-change statute. *See* County Opp. 14. As Doe explains in his Petition, county defendant places too much confidence in that shield. *See* Pet. 15, 21.

Government officials are frequently required to defend in court policies that they did not adopt and with which they may even disagree; their official positions nonetheless require them to bear the burden and costs of defense. Moreover, government officials may be required to defend even if they are not the "most culpable" of parties. As Doe explains in his Petition, the injury from a facial discrimination against an entire category of persons can be characterized in more than one way. The first injury is in the denial of a fair process – the denial of treatment equal to that of others. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). As a participant in the unfair name-change process created by the challenged Indiana statute, the Marion County Clerk causes in part that "unfair process" injury, even

if she does so without desiring to do so and under compulsion of state law.

With respect to the challenged Indiana name-change law, the Marion County Clerk is not the same as anyone else who informs the public about what the law says – including Indiana's Legislative Services Agency, *see* County Opp. 13 – precisely because her job requires her to accept and process name-change petitions. A non-citizen like Doe who is advised by the Marion County Clerk that non-citizens are wholly ineligible for a legal change of name, receives treatment unequal to that received by a citizen. The non-citizen must decide whether and how to challenge the discriminatory exclusion, including whether to undergo the expense of submitting a name-change petition to the court that will undoubtedly be denied in compliance with the discriminatory statute. The injury of unequal treatment begins with differential advice based on the discriminatory statute, even if the County Clerk ultimately would accept and process a petition that violates state law.

III. State Defendants' Assertions of the Unimportance of this Case Are Too Stingy With Respect to the Traditional Role of the Federal Courts in Adjudicating Class-Wide Discrimination.

Aside from asserting that the Seventh Circuit panel was correct on the law, state defendants proffer little to support the unprecedented refusal to permit a

plaintiff challenging a facially discriminatory law to pursue his claims in the federal court system. With respect to the state court administrator, state defendants pull out the same type of "straw person" as county defendant – the Indiana Legislative Council, *see* State Opp. 16 – to argue that the administrator simply publishes the law. As with the county clerk, the state court administrator's specific role in state-court processing of name changes renders her different than others who publish the law, and make her a participant in the unequal treatment afforded non-citizens.

In addition, state defendants make several attempts to diminish the importance of federal-court adjudication of a categorical disqualification of all non-citizens from receiving a change of legal name. That is a difficult task for state defendants to bear in light of the singular historical importance of the federal courts in resolving questions around categorical statutory discriminations. Nonetheless, state defendants start by asserting that Doe will at some point be eligible for naturalization "at which point he will have no trouble obtaining a name change." State Opp. 2. Their facile assertion ignores the costs and other demands of naturalization. There are many reasons eligible non-citizens may choose or be forced to delay naturalizing, including the significant application fee. The point is that the discrimination in the Indiana statute should not force anyone to naturalize, including the financial and other demands it imposes, in order to obtain a change of legal name.

Second, state defendants assert that this case presents questions that "very likely are significant to no one other than Doe himself." State Opp. 17. Emphasizing how unusual they believe Doe's situation to be, without any evidence to cite for the conclusion, state defendants ignore that a categorical exclusion of all non-citizens has a potential effect on every non-citizen in Indiana. Whatever the reason for seeking a change of legal name, whether the same or different from Doe's reasons, every non-citizen is potentially affected by the direct questions raised in Doe's case.

Moreover, the importance of the case to this Court is that the expedient blessed by the Seventh Circuit decision could and would be repeated in other circumstances to protect discrimination in other subject areas and other states. It is certainly not unusual to assign the determination of name-change petitions to judges, who regularly assess credibility and reach discretionary conclusions; what is unusual is to take away the judges' discretion with respect to one discriminatory disqualification and to require judges, without any option to waive or override, to enforce that exclusion. Under the Seventh Circuit decision, making such an unusual assignment to judges has allowed Indiana to take away a plaintiff's usual prerogative to choose a federal forum and allowed Indiana to confine challenges to its discriminatory law to elected state-court judges. There lies the importance and the danger of the precedent set by the Seventh Circuit in this case.

State defendants themselves reinforce how exceptional this case is by citing two limited instances

where Congress has effectively foreclosed federal review in the narrow areas of state taxation and public utility rates. *See* State Opp. 20 (citing 28 U.S.C. §§ 1341 and 1342). In this case, however, the Seventh Circuit has created another exception to federal-court review – an amorphous exception that could expand substantially to foreclose federal-court review more broadly – something Congress has been reluctant to do, providing exceptions in a handful of narrowly-defined areas.

CONCLUSION

None of the defendants has been able to cite a single precedent in which this Court has foreclosed all federal-court review with respect to a state's categorical discrimination against a significant class in accessing a necessary government service. The state of Indiana has enacted a unique law requiring state judges, cloaked with judicial immunity, to enforce a mandatory, discriminatory exclusion of all non-citizens. The Seventh Circuit's approval of this legislative expedient as a means to avoid judicial review in the federal court system should not be allowed to stand.

Plaintiff John Doe urges this Court to grant certiorari.

Respectfully submitted,

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