IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STACIE RAY, et al.	)	CASE NO.: 2:18-cv-00272-MHW-CMV
	)	
Plaintiffs,	)	JUDGE MICHAEL WATSON
	)	
vs.	)	MAGISTRATE JUDGE CHELSEY VASCURA
	)	
AMY ACTON, et al.	)	
	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants Amy Acton, in her official capacity as Director of the Ohio Department of Health, Karen Sorrell, in her official capacity as Chief of the Office of Vital Statistics, and Judith Nagy, in her official capacity as State Registrar of the Office of Vital Statistics (collectively "Defendants") hereby oppose the Motion for Summary Judgment (the "Plaintiffs' Motion") filed by Plaintiffs Stacie Ray, Basil Argento, Jane Doe, and Ashley Breda (collectively "Plaintiffs").

I. INTRODUCTION

In this extraordinary action, Plaintiffs seek to employ three provisions from the U.S. Constitution to force Defendants and the State of Ohio to engage in a revision of a historical fact. What Plaintiffs hope to achieve through Constitutional fiat is to have the sex marker on their birth certificates changed based on their gender identity. There is no legitimate dispute that Plaintiffs' biological sex was accurately recorded at birth. There is no legitimate dispute that sex and gender identity are different. And there is no legitimate dispute that what Defendants record and reflect on Ohio birth certificates is sex, not gender.

Plaintiffs' Motion contorts the U.S. Constitution beyond any recognized constitutional law. Neither the U.S. Constitution, the facts, nor Plaintiffs' own experts support Plaintiffs' Motion. Quite to the contrary, summary judgment should be entered *against* Plaintiffs.

As to Plaintiffs' First Amendment challenge, Plaintiffs entirely ignore well-established U.S. Supreme Court precedent that utterly defeats Plaintiffs' claim. Ohio birth certificates are quintessentially governmental speech and therefore are not subject to challenge under the First Amendment. Moreover, even if Ohio's birth certificates were not governmental speech (which they are), such records do not convey an ideology or viewpoint regarding Plaintiffs' gender. Indeed, Ohio birth certificates do not record gender at all. Instead, Ohio birth certificates record a person's sex. And Plaintiffs' own experts admit that sex and gender are different and that the birth certificates at issue here accurately recorded Plaintiffs' sex.

Plaintiffs' Due Process claim fares no better. Plaintiffs' claim is based solely on informational privacy. As a general matter, informational privacy claims fail if the information is already contained in the public record. There is no dispute, and this Court has already held, that Ohio's birth certificates are public record. Moreover, for Plaintiffs' claim to succeed, they must prove that the disclosure of their personal information is directly linked to a threat of extreme and specific physical harm. Under Sixth Circuit precedent that is a very high threshold that Plaintiffs fail to cross. Indeed, Plaintiffs have no evidence to support their claim. Instead, Plaintiffs generally complain of workplace harassment, various difficulties receiving other identification documents, and threats unrelated to the disclosure of their birth certificates. Plaintiffs also admit that they did not fear harm when they disclosed their birth records. And in many instances Plaintiffs proudly and publicly disclosed their transgender status. While Defendants do not condone the behavior of third parties towards Plaintiffs, such actions do not trigger a claim under the Due Process Clause in this circumstance.

Finally, Plaintiffs' equal protection claim fails for numerous reasons. As an initial matter, Ohio's birth certificate law is facially neutral. Accordingly, Plaintiffs' equal protection claim is one for disparate impact not disparate treatment, and Plaintiffs must show that the law was enacted

for a discriminatory purpose to succeed on their claim. There is no evidence that Ohio's birth certificate law was enacted for a discriminatory purpose. That alone is enough to deny Plaintiffs' equal protection claim. But Plaintiffs' claim also fails because Plaintiffs are not a protected class entitled to heightened scrutiny and, even if they were, Defendants have a substantial interest in accurately recording a person's sex on their birth certificate.

For all of these reasons, Plaintiffs' Motion should be denied.

II. RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED FACTS

Defendants set forth a full statement of the undisputed facts in their Motion for Summary Judgment ("Defendants' Motion"). D.E. 70 at 6–16. To avoid repetition, Defendants incorporate those facts herein. Nevertheless, a short statement of facts is necessary to clarify certain omitted or misstated facts contained in Plaintiffs' Motion.

A. Clarification No. 1: Sex and Gender are Different.

The undisputed facts establish that Ohio law only allows corrections to birth certificates in limited circumstances, none of which are present in this case. *Id.* at 6–7. According to Plaintiffs' own expert, Plaintiffs' sex was accurately identified and recorded at the time of birth. D.E. 56 Deposition of Randi Ettner, Ph.D. ("Ettner Dep.") at 206:17–21. Plaintiffs' expert also acknowledged the "distinction between sex and gender identity." *Id.* at 179:1–12. And all of the experts in this case recognized that, unlike sex, there is no test to determine a person's gender. *Id.* at 137:12–23; D.E. 58, Deposition of Ryan Gorton, M.D. ("Gorton Dep.") at 96:21–97:6, 144:18–145:4; D.E. 57, Deposition of Quentin Van Meter, M.D. ("Van Meter Dep.") at 228:7–13. Thus, it is undisputed that sex and gender are different. Of course, Ohio birth certificates record sex, not gender identity. D.E. 71-1 at ¶¶ 7–8. Nevertheless, Plaintiffs seek to force Defendants to substitute gender identity for the historical record of sex as indicated on their birth certificates.

B. Clarification No. 2: Defendants Follow the Law and Ohio Law is a Correction-Only Statute.

Throughout Plaintiffs' Motion, Plaintiffs repeatedly refer to a so-called "policy" related to correcting birth certificates. *See generally* D.E. 69. However, as Defendants' made abundantly clear at deposition:

> We don't form policy. We review the law reflected as to whether or not this change could be processed and that was the decision.

D.E. 55, Deposition of Judith Nagy ("ODH Dep.") at 179:10–12. Instead of a policy, Defendants are prohibited by Ohio law from changing the sex designation on a person's birth certificate except where the sex marker was inaccurately reported or recorded. *See Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 866 n.3 (S.D. Ohio 2016); *In re Declaratory Relief for Ladrach*, 513 N.E.2d 828, 831 (Ohio Ct. Com. Pl. 1987). Defendants do not "selectively prohibit[] changes on the basis that the requester is transgender" as maintained by Plaintiffs. D.E. 69 at 7. Rather, Ohio's correction-only statutes apply equally to all people, regardless of their gender identity. D.E. 71-1 at ¶ 18.

C. Clarification No. 3: Defendants Have Not Caused Plaintiffs Harm and Plaintiffs are Proud of their Transgender Status.

As to the harm alleged by Plaintiffs and recounted in Plaintiffs' Motion, Plaintiffs admit that they did not fear the disclosure of their birth certificates, or that their fear was unrelated to the disclosure of their birth records. D.E. 70 at 11–13. One of the Plaintiffs admitted that the harassment she received would have happened regardless of what was printed on her birth certificate. D.E. 66, Deposition of Jane Doe ("Doe Dep.") at 121:16–24. Another Plaintiff testified at length about harassment that occurred despite the fact that she had not disclosed her birth certificate. D.E. 63, Deposition of Stacie Ray ("Ray Dep.") at 103:25–104:21, 153:9–19.

Additionally, at least one of the Plaintiffs has taken little or no measures to conceal her transgender status from the public. D.E. 65, Deposition of Ashley Breda ("Breda Dep.") at 30:13–31:9, 33:22–24:19, 39:11–21 (describing how she publicized her transgender status on her public

Facebook and Twitter accounts). And Plaintiffs Ashely Breda and Basil Argento admitted that they had voluntarily told so many people about their transgender status that they could not reliably estimate the number of people who knew. *Id.* at 41:18–42:5; D.E. 64, Deposition of Basil Argento ("Argento Dep.") at 40:4–13. Ultimately, Plaintiffs admitted that they were not ashamed or humiliated by their transgender status. D.E. 65, Breda Dep. at 85:7–11; D.E. 64, Argento Dep. at 40:14–22; D.E. 63, Ray Dep. at 61:3–62:10; D.E. 66, Doe Dep. at 89:20–90:7.

III. ARGUMENT

This Court should deny Plaintiffs' Motion because Plaintiffs' challenges to Ohio's birth record laws under the First Amendment, the Due Process Clause, and the Equal Protection Clause of the U.S. Constitution are legally invalid and unsupported by the undisputed facts. Summary judgment can only be granted where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Plaintiffs' Motion fails on both the law and the facts. Indeed, for the reasons stated in Defendants' Motion, this Court should grant summary judgment *against* Plaintiffs.

A. Plaintiffs' First Amendment Claim is Legally Deficient and should be Dismissed.

Plaintiffs' contend that their birth certificates violate their rights under the First Amendment. In so arguing, Plaintiffs ignore that Ohio birth certificates are created and issued solely by the government and record nothing more than historical facts. Plaintiffs' First Amendment claim fails because under clear U.S. Supreme Court precedent Ohio's birth certificates are quintessential government speech and are not subject to analysis under the First Amendment. *See Walker v. Texas Div. Sons of Confederate Veterans*, 135 S.Ct. 2239 (2015). Under the Supreme Court's analysis in *Walker*, Plaintiffs' First Amendment claim must be rejected. Plaintiffs' claim also fails because Ohio birth certificates do not express any ideology or viewpoint about Plaintiffs' gender.

1. The U.S. Supreme Court's decision in *Walker* requires this Court to reject Plaintiffs' First Amendment claim because Ohio's birth certificates are government speech.

"When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker*, 135 S.Ct. at 2245 (citation omitted). "[G]overnment actions and programs that take the form of speech [] do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." *Id.* at 2245–46 (citation omitted). As the Supreme Court reasoned in *Walker*, "it is not easy to imagine how government could function if it lacked th[e] freedom to select the messages it wishes to convey." *Id.* at 2246 (citation and quotations omitted). In general, "when the government speaks it is entitled to promote a program, to espouse a policy, or to take a position. In doing so, it represents its citizens and it carries out its duties on their behalf." *Id.*

The *Walker* Court went to great lengths analyzing whether the speech was likely to be associated with the state or the private individual. *Walker*, 135 S.Ct. at 2249–52. As the Supreme Court held:

> Texas license plates are, essentially, government IDs. And issuers of ID "typically do not permit" the placement on their IDs of "message[s] with which they do not wish to be associated." Consequently, "persons who observe" designs on IDs "routinely—and reasonably—interpret them as conveying some message on the [issuer's] behalf."

Id. at 2249 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 471 (2009)).

Using that analysis, the Supreme Court in *Walker* easily concluded that the specialty license plates issued by Texas constituted governmental speech and that the censorship of potentially offensive content on them did not violate First Amendment rights. *Id.* at 2253. In finding that the content of the license plates was governmental speech not subject to First Amendment scrutiny, the Supreme Court recognized that license plates served a vital governmental purpose as identification, that the license plates had "TEXAS" written on them, that

every license plate was issued by the state, that the license plates were designed by the state, and that the state maintained control over what could be written on the license plates. *Id.* at 2248–50.

Applying the factors laid out in *Walker*, the Ohio birth certificates indisputably constitute government speech. First, as Plaintiffs admit, birth certificates in Ohio serve a vital governmental purpose as a form of identification. *See* D.E. 64, Argento Dep. at 30:2–4; D.E. 65, Breda Dep. at 22:5–10; D.E. 67, Ray Dep. at 18:3–20; *see also* D.E. 47 at 5–6. Second, Ohio birth records reflect a host of objective and demographic data that existed at the time of birth, including the child's name, date of birth, the name of the child's mother and father, a state file number, place of birth, and sex. D.E. 71-1, Affidavit of Judith Nagy ("Nagy Aff.") at ¶ 12; D.E. 71-3, Certification of Birth Abstract. Third, the state is speaking through the birth record. All birth certificates include, in large letters, the following caption "STATE OF OHIO OFFICE OF VITAL STATISTICS." *See* Ex. 3, Certification of Birth Abstract. The birth certificates also include the Ohio Department of Health seal, and the word "OHIO" is written approximately 70 times on the document. *Id.* Further, the signature of the State Registrar of Vital Statistics appears on the face of the document, together with her certification that the information on the birth certificate is true. *Id.* Finally, the State maintains absolute control over what information can be displayed on birth certificates, as Defendants are the only ones who can create, issue, and correct the Certifications of Birth. D.E. 71-1, Nagy Aff. at ¶ 13. Accordingly, under the analysis set forth in *Walker*, Ohio's birth certificates constitute government speech and Plaintiffs' First Amendment claim must be denied.

Instead of attempting to distinguish *Walker*, Plaintiffs' Motion largely ignores the seminal Supreme Court case. Indeed, Plaintiffs' glib analysis of *Walker* is limited to admitting that Ohio is entitled to have its own viewpoint. D.E. 69 at 14–15. Plaintiffs' Motion, perhaps intentionally, misses the point. Where the government, as opposed to the individual, is speaking through the form of identification, the First Amendment does not apply. *Walker*, 135 S.Ct. at 2251–52. There

can be no confusion or legitimate dispute regarding who is speaking on Ohio's birth certificates—Ohio. Plaintiffs' First Amendment claim fails.

The cases cited by Plaintiffs are all readily distinguishable and do not limit the application of *Walker* to this case. First, unlike this case, the cases cited in Plaintiffs' Motion all involve private speech instead of government speech. *See, e.g.*, *Nat'l Inst. Of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2367 (2018) (finding that requiring pregnancy centers to provide specific "government-scripted, speaker-based" disclosures was unconstitutional); *Agency for Intern. Dev. v. Alliance for Open Socy. Intern., Inc.*, 570 U.S. 205 (2013) (involving a requirement that organizations adopt a policy expressly opposing prostitution as a condition for federal funding); *Janus v. American Fed'n of State*, 138 S.Ct. 2448 (2018) (analyzing law that forced public employees to subsidize a union); *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 430 U.S. 705 (1977) (striking a law that compelled professional fundraisers to disclose the percentage of contributions turned over to charity). All of these cases involve circumstances where the government required the individual to speak. Notably, in *Riley*, the Supreme Court stated that one way a state can avoid violating the Constitution is by publishing the information itself. 430 U.S. at 782. That is exactly the case here, where Defendants, not Plaintiffs, publish and issue the birth certificates.[1]

Nor do any of the cases cited by Plaintiffs involve purely factual information contained on a government identification. Indeed, the only case cited by Plaintiffs involving a government identification is *Wooley v. Maynard*, 430 U.S. 705 (1977). That case involved individuals who were covering up the "Live Free or Die" motto on their license plates. *Id.* at 717. Unlike the sex recorded on Ohio's birth certificates, "Live Free or Die" is a slogan, not an objective fact. And

[1] Plaintiffs also cited *Doe v. Bell*, 754 N.Y.S.2d 846 (Sup. Ct. 2003). *Doe* is a state case, does not involve private speech, and does not relate to the First Amendment.

the Supreme Court explicitly distinguished the circumstances in *Wooley* when it rendered its decision in *Walker*. *Walker*, 135 S.Ct. at 2253.

Accordingly, the birth certificates at issue here are government speech. Plaintiffs' First Amendment claim fails.

2. Ohio's birth records reflect a child's sex as reported by the medical provider at the time of birth and such records are not a viewpoint or ideology.

Even if Ohio's birth certificates were not government speech (which they are), Plaintiffs' First Amendment claim would still fail because the information recorded on the birth certificates does not convey an ideology or viewpoint. Plaintiffs' First Amendment claim is predicated on their assertion that Defendants have "taken the ideological position that transgender people should be forever designated the sex assigned to them" at birth. D.E. 69 at 14. Plaintiffs' sex is not an "ideology." It is an immutable fact. But this Court need not take Defendants' word for it because Plaintiffs' own expert unequivocally agreed:

> Q. Do you agree that there are no procedures, medical or otherwise, by which an individual can change chromosomes that determine sex?
>
> A. I agree. Chromosomes cannot be changed.

D.E. 56, Ettner Dep. at 225:1–5. Thus, Plaintiffs' own expert admits that a person's biological sex is immutable.

Conversely, according to Plaintiffs' expert, gender identity is fluid at various points in a person's life:

> Q. Is there a difference between desistance and detransition?
>
> A. Yes. Desistance is what you talk about in preadolescent children who their gender identity is fluid, it changes, and as adults, they don't identify in a way that we would consider transgender. And detransitioning is something—phenomenon you think about with adults where they've done something, they've done social,

> medical or surgical transition, and then they want to reverse part of that.

D.E. 58, Gorton Dep. at 204:21–205:7. Thus, Plaintiffs' own experts agree that while sex is static, an individual's gender identity can change during the course of his or her life.

Plaintiffs' First Amendment claim also fails because Ohio's birth records do not reflect a viewpoint or ideology which Plaintiffs are forced to adopt regarding their gender identity. Ohio's birth certificates are records made by the State soon after the time of birth based on certain vital and biographical information reported to officials at the Ohio Department of Health. D.E. 71-1, Nagy Aff. at ¶ 3. While more information is reported to and maintained by Defendants, only a limited subset is recorded on the Certification of Birth. *See id.* at ¶¶ 5–6. The limited information contained on the birth certificate, *i.e.* the child's name, the date of birth, the place of birth, the parents' names and birth places, and the sex of the child, are objective and historical facts that are reported *to* Defendants. *Id*. at ¶¶ 3, 12. In recording that data, Defendants have no room for interpretation, no opportunity to express a viewpoint, and no reason (or ability) to color that information with an ideological stance. *Id*. at ¶ 14.

Plaintiffs' argument fails to contend with the fact that Ohio's birth certificates do not include a marker for "gender" or "gender identity." *See* D.E. 71-3, Certification of Birth Abstract. Defendants only record the sex of an individual. D.E. 71-1, Nagy Aff. at ¶ 8. Plaintiffs' own expert admits that sex and gender are not the same thing. D.E. 56, Ettner Dep. at 179:1–12. Plaintiffs' expert also admits that Ohio's birth records accurately recorded each Plaintiffs' sex. *Id*. at 206:17–21. And although Plaintiffs unpersuasively attempt to blur the line between "sex" and "gender," Defendants are clear that there is no "gender field to change" on Ohio birth certificates. D.E. 55, ODH Dep. at 43:6–8.

Moreover, Defendants' accurate recording of the sex of a child on a birth record does not affect a transgender person's ability to express his or her gender identity, or force them to identify

with a gender, or require them to espouse some ideological viewpoint about gender identity. D.E. 71-1, Nagy Aff. at ¶ 16. Plaintiffs are free to choose how, what, when, and whether to express their gender identity. *Id.* at ¶ 17.

For these reasons, Plaintiffs' First Amendment claim is without merit. Ohio's birth records are government speech and are not subject to analysis under the First Amendment. Nor do Ohio's birth records express any viewpoint or ideology about Plaintiffs' gender identity. This Court should deny Plaintiffs' Motion and grant Defendants' Motion.

B. Ohio's Birth-Record Laws Fully Comply with the Due Process Clause of the U.S. Constitution.

Ohio's birth-record laws are completely consistent with the Due Process Clause of the Fourteenth Amendment. There is no dispute that Plaintiffs' Due Process claim is based on an "informational right to privacy" as that right is described in *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998). There is also no dispute that the information Plaintiffs seek to protect (the sex designation on their birth certificates) is already in the public record. Informational privacy is a very narrow right. *Id.* at 684. The right is further restricted, and generally does not exist, when applied to public records. *See, e.g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975); *Lambert v. Hartman*, 517 F.3d 433, 442–46 (6th Cir. 2008); *Does v. Munoz*, 507 F.3d 961, 965 (6th Cir. 2007); *G.B. v. Rogers*, 2009 U.S. Dist. LEXIS 44055, at *29–30 (S.D. Ohio May 11, 2009). This Court should follow those decisions and reject Plaintiffs' Due Process claim based on informational privacy.

Plaintiffs' attempt to rely on the Sixth Circuit opinion in *Kallstrom v. City of Columbus*, which is one of the only cases to ever find a right to informational privacy over public records. D.E. 69 at 8. That reliance is misplaced. In *Kallstrom*, the Sixth Circuit found a privacy interest was violated when the police department released the personnel files of three police officers who went undercover as part of the investigation into the violent Short North Posse gang. *Kallstrom*,

136 F.3d 1055, 1059 (6th Cir. 1998). The personnel files included information on the officers' addresses, families' names, phone numbers, and other information that would allow the Short North Posse to locate and harm the officers and their families. *Id.* at 1067. The Sixth Circuit recognized that "[a]nonymity is essential to the safety of undercover police officers investigating a gang-related drug conspiracy, especially where the gang has demonstrated a propensity for violence." *Id.* The disclosure "created a very real threat to the officers' and their family members' personal security and bodily integrity and possibly their lives." *Id.* at 1063.

Kallstrom defines the outermost reaches of the informational privacy right. Indeed, the only circumstance where the right to informational privacy over a public record applies is "where the information disclosed was particularly sensitive and the persons to whom it was disclosed were particularly dangerous . . . ." *Barber v. Overton*, 496 F.3d 449, 456 (6th Cir. 2007). As explained by *Barber*, this exception is "exceeding[ly] narrow." *Id.* at 457. The Sixth Circuit went on to hold that:

> [*Kallstrom*] did not create a broad right protecting plaintiffs' personal information. Rather, *Kallstrom* created a narrowly tailored right, limited to circumstances where the information disclosed was particularly sensitive and the persons to whom it was disclosed were particularly dangerous *vis-à-vis the plaintiffs.*

Id. at 456. In fact, for the analysis in *Kallstrom* to apply, the relationship between the plaintiffs and the individuals receiving the sensitive information must be "defined by [] clear animosity . . . ." *Id.* at 457. Nonetheless, and despite the Sixth Circuit's unequivocal limitation of *Kallstrom* to those highly specific facts, Plaintiffs attempt to expand the doctrine even further.

Nothing in Plaintiffs' Motion comes close to meeting the exceedingly narrow exception described by *Barber*. Plaintiffs spend several pages chronicling the discrimination and harassment they have received due to their transgender status. D.E. 69 at 8–11. Plaintiffs cite to the "general hostility" towards transgender people. *Id.* at 8. Plaintiffs reference heightened anxiety, name

calling, difficulties registering for government services, and anecdotes about others who had been discriminated against. *Id.* at 9–11. While Defendants do not condone the actions of third parties towards Plaintiffs, those actions do not mean that Defendants violate the Due Process Clause of the U.S. Constitution by merely recording and issuing accurate birth records. Workplace harassment, officious bureaucrats, and even the emotional toll associated with being transgender do not trigger the extremely narrow informational privacy rights described in *Barber*. *Kallstrom*, which was decided in the context of a violent drug gang, does not apply to human resource representatives, co-workers, and clerks at the Social Security Agency.

In any event, there is no record evidence that Plaintiffs ever disclosed their birth certificates in any circumstance that compares to the extreme danger the Short North Posse posed to the undercover police that had infiltrated the gang. Plaintiffs testified that they only disclosed their birth certificates in limited circumstances, mainly to employers or government agencies. D.E. 70 at 11–13. Plaintiffs acknowledge that they were never harmed and were not afraid when they disclosed their birth certificates. *Id.* One Plaintiff even testified that her birth certificate helped to avoid a harmful strip search. *Id.* at 10. And another Plaintiff acknowledged that changing her birth certificate would not prevent the harassment she receives as a transgender individual. *Id.* at 11. This circumstance plainly falls outside of *Kallstrom's* narrow reach.

The Sixth Circuit's narrow application of the informational right to privacy does not apply. Accordingly, this Court should deny Plaintiffs' Due Process claim. Indeed, because Plaintiffs' Due Process claim is supported by neither the law nor the facts, this Court should grant Defendants' Motion and dismiss Plaintiffs' claims.

C. Plaintiffs Have No Evidence to Support Their Equal Protection Claim, Which Fails as a Matter of Law.

Ohio's birth-record laws fully comply with the Equal Protection Clause of the U.S. Constitution. This is true for at least two reasons: (1) the laws governing the issuance of birth

certificates in Ohio are facially neutral, so the claim is based on disparate impact rather than disparate treatment, and Plaintiffs have no evidence that Ohio's birth record laws are enacted or enforced with discriminatory intent; and (2) transgender people are not a protected class. Plaintiffs' equal protection claim must be dismissed.

1. Ohio's birth-record laws are facially neutral, and Plaintiffs have no evidence of discriminatory intent which is required to support a claim for disparate impact.

Ohio's birth record laws are facially neutral and Plaintiffs have presented no evidence that Ohio's birth record laws were adopted out of animus towards transgender people. Ohio's laws do not mention gender identity or record any other information related to gender. *See* Ohio Rev. Code §§ 3705.15 and 3705.22. No person, regardless of his or her gender identity, is permitted to change the "sex" on their birth certificate for any reason other than to correct a mistake made at the child's birth. D.E. 71-1, Nagy Aff. at ¶ 18. Plaintiffs' transgender status does not limit their ability to take advantage of the correction statutes, nor does their status confer upon them rights or obligations that other Ohio-born people do not also have. *Id*. at ¶ 19. If there was a mistake made recording any Plaintiffs' sex at the time of birth, then the correction statutes are available to remedy the error—regardless of their gender identity. *Id*. at ¶ 15.

Plaintiffs argue that even though Ohio's birth record laws do not refer to transgender people (or any other classification for that matter) Ohio's law "categorically denies sex marker corrections to transgender people, and it was adopted directly in response to such requests." D.E. 69 at 12. Tellingly, Plaintiffs neither cite to nor quote from Ohio's birth record laws or their legislative history. *Id.* All Ohio-born people may obtain a birth certificate that accurately identifies their sex *at birth*, and no one born in Ohio has an open-ended right to amend the sex accurately recorded *at birth*. D.E. 71-1, Nagy Aff. at ¶¶ 15, 18. Thus, Ohio's laws governing the issuance and correction of its birth records are facially neutral.

It is well-established that "[t]he Equal Protection Clause forbids only intentional discrimination." *Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 276 (6th Cir. 1994) (citing *Washington v. Davis*, 426 U.S. 229 (1976)). "When a facially neutral rule is challenged on equal protection grounds, the plaintiff must show that the rule was promulgated or reaffirmed *because of*, not merely in spite of, its adverse impact on persons in the plaintiff's class. *Id.* (citing *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)) (emphasis in original).

Thus, for Plaintiffs to succeed on their equal protection claim, Plaintiffs must prove not only that the facially neutral laws have a disparate impact on Plaintiffs' class, but also that the law's intended purpose was to discriminate against such class. *See Washington v. Davis*, 426 U.S. 229, 241 (1976) ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate...."). Put another way, mere disproportionate impact is not enough. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977). "Proof of [] discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at 265. The kind of impact necessary to show "intentional discrimination is that which is significant, stark, and unexplainable on other grounds." *Horner*, 43 F.3d at 276 (citing *Arlington*, 429 U.S. at 279).

Plaintiffs have not presented any evidence that Ohio's birth record laws were enacted with discriminatory purpose. Indeed, Plaintiffs admit that they have no evidence regarding the enactment of the very laws they challenge. D.E. 64, Argento Dep. at 49:19–50:11; D.E. 65, Breda Dep. at 89:5–18; D.E. 66, Doe Dep. at 91:1–93:19; D.E. 67, Ray Dep. at 72:21–73:18. Plaintiffs claim that Ohio's birth record laws offer transgendered individuals the choice to either forgo use of their birth certificate or use a birth certificate that reveals their transgender status and puts them in danger of bodily harm. Doc. 69 at 12. Plaintiffs' oversimplification attempts to hold Defendants

secondarily liable for the bad acts of others without any evidence that Ohio's birth record laws were enacted for any purpose other than to record individuals' sex at birth.

Plaintiffs' failure to identify any discriminatory purpose in enacting Ohio's facially neutral birth record is fatal to their Equal Protection Clause claim. *See Bailey v. Carter*, 15 Fed. Appx 245, 251 (6th Cir. 2001) (dismissing equal protection claim because there was no allegation that the agency had a discriminatory purpose in enacting a facially neutral rule). Having failed to identify or articulate any animus of the Ohio legislature in enacting Ohio's birth record laws, Plaintiffs' equal protection challenge to such laws fails.

2. Transgender people are not a protected class entitled to heightened scrutiny.

Because Ohio law is facially neutral, and because Plaintiffs have not presented evidence that Ohio's birth record laws were enacted for a discriminatory purpose, this Court need not reach the question of what level of scrutiny applies. Nevertheless, Plaintiffs' claim would fail even if the Court reached the next step in the analysis, as identifying as transgender does not trigger heightened scrutiny, and Defendants have a substantial interest in enforcing Ohio's birth-record laws. D.E. 23 at 17–19.

As an initial matter, Plaintiffs' argument that heightened scrutiny is appropriate in this case is a non-starter. Neither the Supreme Court nor the Sixth Circuit has ever applied heightened scrutiny to laws in the transgender context. Indeed, many courts have found that transgender people are not a protected class, so no heightened scrutiny applies. *See, e.g., Johnston v. Univ. of Pittsburgh of the Commonwealth Sys. of Higher Educ.*, 97 F.Supp.3d 657, 668 (W.D. Pa. 2015) (noting that transgender status has not been recognized as a suspect classification and applying rational-basis review); *Braninburg v. Coalinga State Hosp.*, 2012 U.S. Dist. LEXIS 127769, at *22 (E.D. Cal. 2012) ("[I]t is not apparent that transgender individuals constitute a 'suspect' class."); *Jamison v. Davue*, 2012 U.S. Dist. LEXIS 40266, at *10 (E.D. Cal. 2012) ("[T]ransgender

individuals do not constitute a 'suspect' class, so allegations that defendants discriminated against him based on his transgender status are subject to a mere rational basis review."); *Kaeo-Tomaselli v. Butts*, 2013 U.S. Dist. LEXIS 13280, at *13 (D. Haw. 2013) (finding that the plaintiff's status as a transgender female did not qualify her as a member of a protected class and explaining the court could find no "cases in which transgender individuals constitute a 'suspect' class"); *Lopez v. City of New York*, 2009 U.S. Dist. LEXIS 7645, at *13 (S.D.N.Y. 2009) (explaining that transgender individuals are not a protected class for the purpose of Fourteenth Amendment analysis, and claims that a plaintiff was subjected to discrimination based on her status as transgender are subject to rational basis review).

In support of their argument to apply heightened scrutiny, Plaintiffs incorrectly rely on several cases that were decided under the context of Title VII. *See, e.g., EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018); *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 573–75 (6th Cir. 2004). Further, the analysis in those cases is not that "transgender" is the named protected class in Title VII, but that a transgender individual who does not conform to the expectations of his or her sex as recorded at birth is subjected to sex stereotyping, and is thus subject to sex discrimination. See EEOC, 884 F.3d at 573–74 (citing Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)). That analysis is inapplicable to this case.

The few out-of-circuit and district courts that have addressed the issue under the Equal Protection Clause are not binding on this Court. *See H.R. v. Medtronic, Inc.*, 996 F. Supp. 2d 671, 678 n.5 (S.D. Ohio 2014) ("In matters concerning federal law a District Court is bound only by the decisions of the Court of Appeals for the Circuit in which it sits and by the decisions of the United States Supreme Court...not...fellow district court judges.") (citation omitted). Nevertheless, Plaintiff relies on a four-factor analysis from an out-of-circuit court in their attempt to establish that transgender individuals are entitled to heightened scrutiny. *See Windsor v. United States*, 699

F.3d 169, 181 (2d Cir. 2012), aff'd on other grounds, 133 S. Ct. 2676 (2013). Neither the Supreme Court nor the Sixth Circuit has adopted the Second Circuit's analysis in *Windsor*. Tellingly, the Southern District of New York declined to extend the *Windsor* analysis to a case involving discrimination against transgender individuals. *See White v. City of New York*, 206 F. Supp. 3d 920, 933 (S.D.N.Y. 2016). Plaintiffs attempt to apply the *Windsor* analysis here is dubious at best.

Accordingly, Plaintiffs' equal protection claim fails. Plaintiffs have failed to show Ohio's facially neutral law was enacted for a discriminatory purpose. And, though the Court need not reach this question to dispose of Plaintiffs' claim, transgender individuals are not a protected class entitled to heightened scrutiny. This Court should deny Plaintiffs' Motion and grant Defendants' Motion.

D. Defendants Have a Substantial Interest in the Enforcement of Ohio's Birth Certificate Law.

Even if this Court finds that Ohio's law is not facially neutral (which it is), and even if this Court finds that Plaintiffs' are a protected class (which they are not), Plaintiffs' equal protection claim still fails because Defendants have a substantial interest in the enforcement of Ohio's birth certificate laws. Inexplicably, Plaintiffs argue that Defendants have not offered any evidence of a compelling interest or even a rational basis supporting Ohio's birth record law. D.E. 69 at 16–19. Plaintiffs' argument is not only incorrect, but it assumes numerous facts that are directly contradicted by the record.

As discussed above, Plaintiffs' are not a protected class. When the state action does not impact a protected class, Equal Protection Clause claims are reviewed under a rational basis standard. *See Heller v. Doe*, 509 U.S. 312, 319 (1993). Under this standard, "[a] classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller*, 509 U.S. at 320. Plaintiffs cannot survive application of a rational basis review to their equal protection claim.

In any event, Ohio's interest is so substantial that Ohio's birth certificate laws survive even the application of heightened scrutiny. As set forth in Defendants' Motion, the accuracy of Ohio's birth records is a substantial interest of the State. D.E. 70 at 32–35. As held by numerous courts, the accuracy of state records is in and of itself a substantial interest. *Id.* at 33 (citing cases). Accurate birth certificates are also required in connection with recording a person's death record and in preventing the fraudulent use of a deceased person's birth certificate. *Id.* at 32–33. Moreover, because Ohio is an open records state, Ohio's strict maintenance of its birth records is even more important. *Id.* at 33–34. It is well-known that criminals routinely use Ohio birth certificates to perpetrate frauds, and Defendants are in constant contact with other agencies to verify the accuracy of a birth record as part of a criminal investigation. *Id.* Even Plaintiffs cannot seriously contend that Defendants do not have a substantial interest in the accuracy of birth certificates as Plaintiffs' own expert conceded that Ohio's birth records are important and that compiling information on sex is useful. *Id.* at 34.

Unable to prevail on the facts, Plaintiffs switch to the law. But Plaintiffs' reliance on out-of-state cases is also unavailing. Two of those cases deal with changes to the sex on a driver's license, which does not involve the same historical recordkeeping interests at issue in this case. *See generally Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015); *K.L. v. State, Dep't of Admin. Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL 2685183 (Alaska Super. Mar. 12, 2012). The fact that Ohio *allows* changes to sex listed on a driver's license shows that Ohio distinguishes the current-identification nature of a license from the historic-record nature of a birth certificate as to sex. *See* Doc. 1 at ¶ 47. Further, neither of the cited cases conducted an equal protection analysis. Nor did those cases invalidate a state law, as both dealt with various agency policies that restricted the requested change. *Id.* Indeed, *K.L.*, a state court case, did not even

involve analysis of the U.S. Constitution, and instead decided the issue under Alaska's Constitution, which contains an explicit right to privacy. *See K.L.*, 2012 WL 2685183, at *4.

The other cases cited by Plaintiffs are just as unconvincing and should not be relied upon by this Court. *See F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018); *Arroyo Gonzales v. Rossello Nevares*, 305 F. Supp. 3d 327 (D.P.R. 2018). In *F.V.*, yet another case that involved a policy instead of state law, the State of Idaho stipulated that it did not have a rational basis for its rule, so the state did not develop or assert its interests. 286 F. Supp. 3d at 1134. And *Arroyo*, was decided (incorrectly) on Due Process grounds, not equal protection grounds. 305 F. Supp. 3d at 333. Neither case is of precedential value.

Accordingly, Ohio's statutes survive regardless of whether this Court applies rational basis review or heightened scrutiny. Nothing in Plaintiffs' pleadings overcomes that finding. Because Plaintiffs' equal protection claim fails under either analysis, this Court should grant Defendants' motion for summary judgment and dismiss Plaintiffs' Equal Protection Clause claim.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be denied. Plaintiffs' First Amendment claim, Due Process Clause claim, and Equal Protection Clause claim are without merit. Indeed, for the reasons set forth in Defendants' Motion and this opposition, this Court should grant summary judgment against Plaintiffs.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2020, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/ Albert J. Lucas
One of the Attorneys for Defendants