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' REPLY IN SUPPORT OF
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 file this reply in support of the Defendants' Motion for Summary Judgment (the "Defendants' Motion") and in response to the Opposition to Defendants' Motion for Summary Judgment (the "Plaintiffs' Opposition") filed by Plaintiffs Stacie Ray, Basil Argento, Jane Doe, and Ashley Breda (collectively "Plaintiffs").

I. INTRODUCTION

Summary judgment should be awarded in favor of Defendants because, as set forth in Defendants' Motion, 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. Nothing in Plaintiffs' Opposition should lead this Court to a contrary result. Plaintiffs' Opposition ignores the relevant cases, avoids grappling with the admissions by their own experts, and misconstrues the evidence. Finally, in several instances, Plaintiffs blatantly mischaracterize the Defendants' sworn testimony and arguments.

For all of these reasons, and as further described below, this Court should enter summary judgment in favor of Defendants and against Plaintiffs.

II. ARGUMENT

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

Plaintiffs' Due Process claim fails because the right to informational privacy does not exist with public records. *See, e.g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494–95 (1975) (stating that "the interests in privacy fade when the information involved already appears on the public record"). 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. Plaintiffs' Opposition fails to identify any record evidence that falls within the exceedingly narrow exception set forth by the Sixth Circuit and so this Court must reject Plaintiffs' due process claim. Indeed, as detailed in Defendants' Motion and in Defendants' Opposition to Plaintiffs' Motion ("Defendants' Opposition"), there is no comparison between the potential harm alleged by Plaintiffs' and the extreme circumstances required under Sixth Circuit precedent to trigger informational privacy rights in the public records setting. D.E. 71 at 27–30; D.E. 73 at 11–13.

In their Opposition, Plaintiffs attempt to analogize their circumstances to the circumstances in *Kallstrom v. City of Columbus*, which defines the limit of the informational privacy right over public records. That attempt fails. The circumstances in *Kallstrom* are easily distinguished from the instant matter.

In *Kallstrom*, the Sixth Circuit analyzed the release of the personnel files of three police officers who went undercover as part of their investigation into the violent Short North Posse gang.

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Kallstrom, 136 F.3d 1055, 1059 (6th Cir. 1998). The information released included 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 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. The court in *Kallstrom* was not concerned with hypothetical danger, or vague speculation that someone, somewhere might harm the plaintiffs if the private information was released. Instead, the court in *Kallstrom* was concerned that the information being released was going directly to the specific people who wanted to harm those police officers and their families.

Subsequent to *Kallstrom*, the Sixth Circuit expressly limited its application and clarified its reach:

> [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*.

Barber, 496 F.3d at 456 (italics in original). In so holding, the Sixth Circuit made clear that *Kallstrom's* narrow application is the exception, not the rule. Indeed, the Sixth Circuit declined to extend the right to prison guards whose information was released to violent prisoners who had a history of violence towards other guards. *Id.* at 450. Put another way, danger is not enough. Nor is danger against a class of people enough. Rather, the Sixth Circuit requires a showing that the specific relationship between the plaintiff and the individual receiving the sensitive information is defined by "clear animosity." *Id.* at 457. If, as in *Barber*, a prison guard and the violent prisoners being guarded do not cross that threshold, then Plaintiffs' limited disclosures to random employers and government agencies clearly do not rise to the level of a due process violation. There is simply

no comparison between the workplace harassment experienced by Plaintiffs and the type of real animosity discussed in *Kallstrom* and *Barber*. Plaintiffs' due process claim is without merit.

Ultimately, and perhaps in recognition that they cannot meet the standard set forth in *Kallstrom* and *Barber*, Plaintiffs' shift away from the analysis in *Kallstrom* and do not even bother to distinguish *Barber* on any legitimate grounds. D.E. 72 at 9–11. Instead, Plaintiffs incorrectly rely on several cases that have nothing to do with public records. *See, e.g.*, *In re Zuniga*, 714 F.2d 632, 636 (6th Cir. 1983) (finding psychotherapists could not raise the Fifth Amendment as a bar to production of their patients' information); *Whalen v. Roe*, 429 U.S. 589, 597 (1977) (finding that a law requiring that copies of certain prescription drugs be sent to the state is a reasonable exercise of the state's police powers).

Plaintiffs' reliance on those cases is misplaced. For example, *Nelson v. City of Madison Heights*, which Plaintiff relies on in support of its informational privacy argument, has nothing to do with the release of private information. *See* 845 F.3d 695, 700 (6th Cir. 2017). Instead, the plaintiff in *Nelson* brought a Due Process claim under the "state created danger" theory, one element of which is: "a special danger to the [decedent] wherein the state's actions placed the [decedent] specifically at risk, as distinguished from a risk that affects the public at large." *Id.* In that case, the representative of a confidential informant, who was abducted and murdered after her identity was revealed to the individuals on whom she was informing, brought a Due Process claim against the city, county, and police officers. *Id.* at 699. Even though *Nelson* is based on a completely different legal theory, "state created danger," it is still apparent that the "risk of danger," and the special relationship between the individuals (*i.e.*, a confidential informant whose identity was revealed to the drug dealer she was informing on) remains at the crux of a Due Process argument. Whether this Court analyzes Plaintiffs' due process claim under the "clear animosity" standard in *Barber*, or the "state created danger" in *Nelson*, the result is the same—Plaintiffs'

allegations of harassment, discomfort, and annoyance do not create an informational privacy right in public information.

If Plaintiffs' argument is taken to its logical conclusion, then any threat of harassment would be enough to satisfy a due process claim on an identity document, resulting in a massive expansion of *Kallstrom*. For example, an individual who wanted to mask his or her age to avoid potential discrimination could force Defendants to change the date of birth on the birth record. Or a person who wanted to hide the identity of an embarrassing parent could have that information changed or stricken. Plaintiffs' argument is no different and is unmoored from Sixth Circuit precedent.

Finally, Plaintiffs have provided no facts to support their erroneous claim that Defendants tangentially contribute to third party assumptions about healthcare, medical privilege, and personhood. D.E. 72 at 11–12. Plaintiffs' afterthought of an argument rests on confusion between gender dysphoria and transgender identity. However, Plaintiffs' own expert testified that not every transgender individual receives a diagnosis of gender dysphoria. D.E. 56, Deposition of Randi Ettner, Ph.D. ("Ettner Dep.") at 115:8–16:6. Thus, just because someone is transgender does not mean they automatically suffer from gender dysphoria. Furthermore, the same expert stresses that the degree to which transgendered individuals express their gender identity varies greatly and does not always rise to the level of medical interventions. *Id.* at 125:3–10. Whatever assumptions third parties make regarding Plaintiffs' healthcare and medical information, that information is not recorded or disclosed on Ohio's birth certificates.

This case does not present an opportunity for the Court to vastly expand the doctrine set out in *Kallstrom*. The Sixth Circuit's narrow application of the informational right to privacy does not apply. 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.

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

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.

Plaintiffs' Equal Protection argument is severely flawed. First, it assumes that a law that neither mentions a protected class nor individual characteristics is nonetheless discriminatory on its face. D.E. 72 at 13. However, as demonstrated in Defendants' Motion and Defendants' Opposition, Ohio law is facially neutral and Plaintiffs' claim is one of disparate impact, *not* disparate treatment. D.E. 71 at 28–30; D.E. 73 at 14–16. Plaintiffs compound this error by arguing that Ohio's facially neutral law forces people to have inaccurate sex markers. D.E. 72 at 13. In making that argument, Plaintiffs' ignore that their own expert admitted that Plaintiffs' birth certificates are an accurate representation of their sex. D.E. 56, Ettner Dep. at 206:17–21. Plaintiffs ignore their expert's admission that sex and gender are different. *Id*. at 129:18–23. And Plaintiffs ignore that Ohio's birth certificates do not record gender. D.E. 71 at 8; D.E. 71-3.

Defendants' Motion detailed the analysis that this Court must apply when analyzing a facially neutral law. D.E. 71 at 28–30. Plaintiffs' Opposition confirms what Defendants argued in their Motion—there is no evidence that Ohio's birth-record laws were enacted with discriminatory purpose. For this reason alone, this Court must grant Defendants' Motion and dismiss Plaintiffs' equal protection claim.

Nor does Plaintiffs' mischaracterization of Ohio's laws as a so-called "policy" salvage their equal protection claim. As Defendants made abundantly clear at deposition, Defendants "don't form policy." D.E. 55, Deposition of Judith Nagy at 179:10–12. Instead, Defendants simply follow the law. In any event, Plaintiffs' policy/law distinction is a red herring, because even if Defendants' decision to follow the law is a policy, it is a facially neutral one. Plaintiffs' failure to

identify any discriminatory purpose in enacting Ohio's facially neutral birth-record law is fatal to their Equal Protection Clause claim.

Instead of addressing this glaring weakness in their equal protection claim, Plaintiffs' argue, without explanation, that the Supreme Court's holding in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) limits or overrules the longstanding discriminatory purpose requirement set forth in *Washington*. *See* D.E. 72 at 14. Notably, Plaintiffs cite the *Obergefell* syllabus, not the majority opinion, which says nothing about disparate impact analysis. *See generally* 135 S. Ct. 2584. Moreover, and in stark contrast to Ohio's birth record laws, the law challenged in *Obergefell* was not facially neutral, as it expressly provided that a couple's right to marry was based on being opposite-sex rather than same-sex. *See* Ohio Rev. Code § 3101.01(A) ("A marriage may only be entered into by one man and one woman."). *Obergefell* does not apply here, where nothing in the challenged statute sets out categories of who may (or may not) do something.

Also notable is the fact that Plaintiffs do not even attempt to argue that they are a protected class in their Opposition papers. As set forth in Defendants' Motion and Defendants' Opposition, Plaintiffs are not a protected class. D.E. 71 at 30–32; D.E. 73 at 16–18. Plaintiffs failure to even challenge that argument, let alone establish their status as a protected class, is a tacit admission that their equal protection challenge is fatally flawed. Because Plaintiffs are not a protected class entitled to heightened scrutiny, Ohio's birth certificate law is analyzed under rational basis review. *See Heller v. Doe*, 509 U.S. 312, 319 (1993). Plaintiffs cannot survive application of rational basis review. After all, even Plaintiffs admit that the "accuracy of vital records and law enforcement may in some cases be legitimate interests . . . ." D.E. 72 at 19. And Plaintiffs' expert, Dr. Ettner, testified that Ohio's interest in maintaining accurate vital statistics is important. D.E. 56, Ettner Dep. at 127:15–17.

At its core, Plaintiffs' equal protection claim posits a false choice: Plaintiffs must either forgo the use of their birth certificate; or use a birth certificate that reveals their transgender status and puts them in danger of bodily harm. D.E. 69 at 12. Neither is true. And Plaintiffs' oversimplification attempts to hold Defendants secondarily liable for the questionable 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. Having failed to identify or articulate any animus involving Ohio's birth record laws, Plaintiffs' equal protection challenge to such laws fails.

2. 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. 72 at 17–19. The record is replete with evidence of the substantial interest the State and Defendants have in maintaining the birth record laws. D.E. 71 at 32–35; D.E. 73 at 16–19. Plaintiffs' argument is not only incorrect, but it assumes numerous facts that are directly contradicted by the record.

Plaintiffs next admonish Defendants for recording sex based on external genitalia. D.E. 72 at 5. Admittedly, that is the criteria used by medical providers to identify sex in most instances. However, it is not a violation of the U.S. Constitution if the State identifies people in this manner. Nor is it a violation of the U.S. Constitution for Defendants to record that information on Ohio's birth certificates. Even Plaintiffs acknowledge that Ohio law specifically directs Defendants to "adopt rules as necessary to ensure that this state shall have a complete and accurate registration of vital statistics." *Id.* at 2 (citing Ohio Rev. Code § 3705.02).

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.

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

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 *Walker*, the Supreme Court undertook a lengthy analysis on how to determine whether speech is attributable to the government or the private individual. *Id.* at 2249–52. Like in this case, the speech at issue in *Walker* was a form of government identification. And just like in *Walker*, this Court should find that the government identification here is not subject to analysis under the First Amendment.

In *Walker*, the Supreme Court considered whether the individual could customize the identification, whether the identification was designed by the state, whether the identification was issued by the state, and how closely the state regulated what could be displayed on the identification. *Id.* at 2248–50. All of those factors apply here.

Plaintiffs cannot customize the birth certificate. They all look the same. *See, e.g.*, D.E. 71-3. There is no dispute about who controls what can be displayed on Ohio's birth certificates. The birth certificates are designed by the State, include the Ohio Department of Health seal, and "OHIO" is emblazoned on the document approximately 70 times. *Id.* Nor is there any confusion about who issues the birth certificates—Defendants. No one could plausibly believe that newborns in Ohio are responsible for the information contained on the birth record. Plaintiffs do not

authenticate or endorse the birth certificate—the State Registrar of Vital Statistics does. *Id.* Finally, the State has adopted a carefully crafted set of laws designed to regulate the information contained on the birth record. *See, e.g.*, Revised Code §§ 3705.01 et seq. And while *Walker* may mark the "outer bounds" of the government speech doctrine, *see Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017), this case falls well within those boundaries.

In their Opposition, Plaintiffs do not attempt to distinguish this case from *Walker.* Instead, Plaintiffs ask this Court to reject *Walker* in favor of a line of cases that that have nothing to do with the facts at issue here. The majority of these cases have all already been distinguished in Defendants' Opposition on the grounds that those cases do not deal with government speech or government identification. D.E. 73 at 7–9. In fact, with the exception of *Wooley v. Maynard*, none of the cases cited by the Plaintiffs involve government identification. *See Wandering Dago, Inc. v. Desito*, 879 F.3d 20, 35–36 (2d Cir. 2018) (finding government officials violated a food truck operator's First Amendment rights by rejecting his lunch program application because he branded his food truck with ethnic slurs); *Higher Society of Indiana v. Tippacanoe Cty. Indiana*, 858 F.3d 1113, 1117–18 (7th Cir. 2017) (finding county violated the First Amendment when it denied a group advocating for the legalization of marijuana permission to hold a rally on the steps of the courthouse); *Knight First Am. Inst. at Columbia University v. Trump*, 302 F. Supp. 3d 541, 572 (SDNY 2018) (finding Twitter replies to Trump's tweets are not government speech). And *Wooley*, a case Plaintiffs do not even analyze, involves the slogan "LIVE FREE OR DIE" on New Hampshire's license plates. 430 U.S. 705, 717 (1977). Obviously, the ideological, revolutionary-era slogan on New Hampshire's license plates is not the same as the objective, historical fact of an individual's sex at birth as reported by a medical professional.

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.

D. In an Attempt to Avoid Summary Judgment, Plaintiffs have Dramatically Misstated the Record Evidence.

As demonstrated above, Plaintiffs have not analyzed the relevant case law and their Opposition fails to overcome the arguments presented in Defendants' Motion. Perhaps recognizing that their arguments have no legal basis, Plaintiffs instead build their Opposition upon a recitation of facts that warps the actual record in this case. D.E. 72 at 1–8. Over and over, Plaintiffs contort the testimony in an effort to avoid summary judgment. Those attempts fail.

For example, in what can only be described as a deliberate mischaracterization of Defendants' arguments in this case, Plaintiffs' quote Defendants' Motion claiming that Defendants previously held that "Ohio law . . . permits the birth certificate change that Plaintiffs seek." *Id.* at 5. The quote is heavily edited and replaces the words "does not" with ellipses. The full quote in context from Defendants' Motion is as follows:

> Absent a showing that an individual's "sex" was incorrectly recorded at birth, Ohio law does not permit the birth certificate change that Plaintiffs seek.

D.E. 71 at 11 (emphasis added). Obviously, that is starkly different than what Plaintiffs' argued in their Opposition.

Additionally, Plaintiffs repeatedly argue that Defendants use "sex" and "gender" interchangeably. D.E. 72 at 4. Not true. Defendants are very clear and consistent about the use of those terms. Defendants do not ask for or record information related to a child's gender. D.E. 71-1, Deposition of Judith Nagy ("Nagy Aff.") at ¶ 7. Ohio birth certificates do not contain the word gender. *See* D.E. 71-3. And Plaintiffs' own expert acknowledges that sex and gender are

different. D.E. 56, Ettner Dep. at 129:18–23. Indeed, Plaintiffs, not Defendants, confuse sex and gender and attempt to blur the lines between those distinct terms.

Plaintiffs distort the record again by claiming that Defendants changed administrations in conjunction with changing the sex marker "policy." D.E. 72 at 1. Not only is that irrelevant, but it is also false. There is no record evidence indicating a change in Defendants' administration.

Similarly, Plaintiffs' state that Defendants "decided to start denying transgender people the opportunity to obtain birth certificates that accurately reflect their sex, while allowing cisgender people to obtain birth certificates that accurately reflect theirs." *Id.* at 13. Once again, there is no record evidence to support that assertion. Instead, the unrebutted testimony is that no one, "regardless of his or her gender identity, is permitted to change the 'sex' on a 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. Defendants will change a person's sex reflected on a birth certificate if a mistake was made recording his or her sex at the time of birth—irrespective of a person's gender. *Id.* at ¶ 15.

Plaintiffs' revision of the facts and misleading arguments are unavailing. This Court should grant Defendants' Motion.

III. CONCLUSION

For the foregoing reasons, Defendants' Motion should be granted. 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 Reply, this Court should grant summary judgment against Plaintiffs.

Respectfully submitted,

/s/ Jason J. Blake

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 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