UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

STACIE RAY, *et al.*, Plaintiffs, v. AMY ACTON, *et al.*, Defendants.	)	Case No. 2:18-cv-00272 Judge: Michael Watson Magistrate Judge: Chelsey Vascura

PLAINTIFFS' REPLY IN SUPPORT OF
THEIR MOTION FOR SUMMARY JUDGMENT

At this stage in the briefing, it is clear there is no genuine dispute of material fact. While Defendants' Opposition treads precious little new ground, Plaintiffs write briefly to distill and address five points of contention the briefing has crystalized. The Court should reject Defendants' attempts to distort the clear meaning of the undisputed factual record, apply law to fact using the framework outlined below, and enter final judgment for the Plaintiffs.

A. Plaintiffs challenge an ODH Policy.

Plaintiffs are challenging an ODH Policy, but they should prevail even if they were challenging Ohio's statutes. ODH maintains that it is bound by a neutral, correction-only statute, which it concedes is silent on any issue related to sex marker changes on birth certificates. Defs' Br. 5, ECF No. 71; Defs' Opp'n Br. 3-4, ECF No. 73. ODH ignores the record evidence showing that a prior administration did allow changes to sex markers for transgender people under the exact same statutory scheme. *See, e.g.* ODH Dep. 138:25-139:13. ODH also concedes that today it still makes sex marker changes for cisgender people under the authority of those same statutes. *See, e.g.* ODH Dep. 65:22-66:20. This case is about a state executive agency's decision to interpret a state law in a way that violates Plaintiffs' constitutional rights. But even if ODH were bound by Ohio's birth certificate statutes, this Court has authority to evaluate their

constitutionality and provide the relief Plaintiffs seek.

B. Plaintiffs fear bodily harm, but even if they did not, they are entitled to the relief they seek.

The undisputed evidence shows that Plaintiffs have experienced and will continue to experience fear and harm due to the ODH Policy, but they are not required to demonstrate either injury to make out their claims or to obtain the prospective relief they seek. ODH ignores the undisputed evidence that Plaintiffs have feared, and still fear, for their safety as a result of the Policy. *Compare* Defs' Opp'n Br. 4-5 *with* Ray Dep. 108:10-109:7; 115:9-16; 119:3-120:20; Argento Dep. 125:21-126:15; Breda Dep. 118:7-120:4; Doe Dep. 124:4-125:25. But Defendants' dismissal of Plaintiffs' injuries misses the point. Plaintiffs' subjective fear of assault is not the only basis for their claims; their experiences must be taken together with the undisputed evidence that continued forced disclosure of their transgender status (disclosure to strangers, against their will) *objectively* puts them at serious risk of harm. *See, e.g.* Ettner Dep. 205:20-206:7, 151:12-21, 189:16-192:10; Ettner Report 43-45, ECF No. 69-6; Gorton Dep. 206:21-207:4. This objective showing is all the Constitution requires to demonstrate a privacy violation touching on the fundamental right to bodily integrity. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064 (6th Cir. 1998). There is no question that Plaintiffs demonstrate injury and risk of continued injury in multiple ways.

C. Plaintiffs have not waived their privacy interest in their transgender status by having voluntarily disclosed it to *some* people.

Plaintiffs have a privacy interest in preventing unwanted disclosure of their transgender status whether or not they have made the personal decision to reveal it to certain people. ODH makes an unsupported argument that if Plaintiffs voluntarily disclose that they are transgender to certain people, they waive their right to keep this intimate personal information private in every other circumstance. Defs' Opp'n Br. 5. But how many disclosures must occur, and under what

circumstances, before a court can strip Plaintiffs of the constitutional right to control their most intimate information? It is undisputed that Plaintiffs and other transgender people face serious harm when forced to out themselves in unsafe situations. *See, e.g.* Gorton Dep. 206:21-207:4. This Court should reject ODH's dangerous argument that voluntary self-disclosure of privacy-protected information to chosen people in *some* circumstances waives the privacy right in *all* circumstances. *Cf. Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998); *Kallstrom*, 136 F.3d at 1060.

D. Plaintiffs' birth certificates are identity documents.

Plaintiffs' birth certificates are contemporary identity documents, not inviolate historical records. ODH inappropriately conflates the State's purported interest in recording someone's perceived genital presentation at birth for statistical purposes with an interest in conveying that information on a person's otherwise-contemporaneous identity document for all time. Defs' Opp'n. Br. 9-10. Plaintiffs have no quarrel with the "over 300 topics" that ODH collects at birth as a vital statistics matter, and if external genitals at birth is one of these, Plaintiffs do not challenge that data collection practice. Defs' Br. 6. Plaintiffs do challenge the Policy banning them from having sex-accurate identity documents for use throughout their lifetimes.[1]

In other instances, the State of Ohio already recognizes that the sex marker on identity documents should reflect who a person really is: Plaintiffs may change the sex on their state ID cards and on their driver's licenses, not to mention federal IDs. *See e.g.* Ohio Department of Public Safety, Bureau of Motor Vehicles, Declaration of Gender Change, (2019) (Ohio driver's

[1] ODH also uses the erroneous notion that birth certificates reflect only "historical facts" to support the proposition that the State may compel fact-based speech, just not ideological speech. Defs' Opp'n Br. 9-10. The First Amendment draws no such distinction. *See, e.g. Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 797 (1988). In any event, Plaintiffs demonstrate both types of speech injury here. *See* Pl. Br. 14-15, ECF No. 69.

license); Foreign Affairs Manual 1300 Appendix M (March 31, 2016), https://fam.state.gov//FAM/07FAM/07FAM1300apM.html (passports); 32 C.F.R. § 161.23(d)(Table 33) (military records); Program Operations Manual System, Soc. Sec. Admin.10212.200 (2013), https://secure.ssa.gov/poms.nsf/lnx/0110212200 (Social Security records). Similarly, ODH admits it allows changes of other fields on the birth certificate, including the sex field for cisgender people, so that people have accurate documents. ODH Dep. 42:8-46:1, 60:7-61:11; 65:22-66:20. It is disingenuous for ODH to assert that only for *this* identity document, on *this* field, and for *this* group of persons, there is some risk to the historic record.

E. The nature of any distinction between sex and gender is immaterial in this case.

Parsing the colloquially interchangeable words "sex" and "gender" is not necessary in this lawsuit. ODH belabors a purported technical distinction between sex and gender (one which, scientifically, it gets wrong, *see* Ettner Report 18-21; Gorton Report 22, 25-6, ECF No. 69-7). Defs' Opp'n Br. 3. This distinction has no bearing on what Plaintiffs need from an identity document in their daily lives. Functionally, Ohio birth certificates bearing the word "sex" indicate a person's sex or gender to others. *See* ODH Dep. 114:2-12. For Plaintiffs, the M or F designation next to this word is incorrect, because their true sex differs from the one assigned to them at birth. *See* Ettner Report 18-21. ODH argues that in Ohio's view, sex equates simply to one's genital presentation at birth. ODH also argues that its current chosen definition is not a viewpoint, but a fact. At the same time, ODH objects to Plaintiffs'—and the scientific community's—definition of the term "sex." Convoluted as all this is, the difference of viewpoint does not need to be resolved. What is material is only whether the label on the birth certificate accurately reflects who Plaintiffs are when they must prove their identity to others.

In its Opposition brief, ODH introduces two new arguments that further expose its

sex/gender distinction as spurious. First, ODH claims that Ohio birth certificates reflect chromosomal makeup. Def. Opp'n Br. 9. But it is undisputed that neither Plaintiffs themselves, nor ODH, have actual knowledge of their chromosomal makeup. Breda Dep. 97:14-15; Ray Dep. 88:7-20; Argento 65:15-18; Doe Dep. 47:16-18; ODH Dep. 58:28-29. And as ODH concedes, the term "sex," in both its technical and colloquial meanings, at minimum refers to far more than chromosomes alone. Def. Opp'n Br. 6; ODH Dep. 114:2-16; Van Meter Dep. 255:2-12. Second, ODH claims that the existence of gender fluidity undermines the need for transgender people to have conforming identity documents. Def. Opp'n Br. 9-10. It is true that some sex-related characteristics, for some people, can change; other sex characteristics do not. According to the undisputed evidence, Plaintiffs have had consistent gender identities throughout their lives (as most people do). Doe Dep. 101:2-9; Argento Dep. 76:5-23; Ray Dep. 46:15-47:13; Breda Dep. 105:11-25. They need documents that conform to who they are.

Ultimately, no fact that goes to the sex/gender construct is material in this case. Plaintiffs, transgender people whose sex differs from the one assigned to them at birth, need access to documents that do not endanger them, humiliate them, or force them to endorse a message that contradicts their very sense of self—something every cisgender person born in Ohio already has.

Because ODH cannot dispute the actions it took or the harm Plaintiffs continue to experience as a result, it instead tries distraction. But the ODH Policy plainly violates the Constitution and ODH has not justified its violation under any standard of scrutiny.[2] Plaintiffs are entitled to summary judgement.

[2] In its Motion and Opposition, ODH never once addresses the strict scrutiny standard that inarguably applies to Plaintiffs' privacy and speech claims. Under strict scrutiny, it is ODH's burden to adduce evidence proving it meets that high standard. *See McCullen v. Coakley*, 573 U.S. 464, 493-494 (2014). ODH not only shirked this burden, it failed to address the standard altogether, thus conceding the point. *See Humphrey v. U.S. Attorney Gen.'s Office*, 279 F. App'x 328, 331 (6th Cir. 2008)

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2020, I electronically filed the foregoing with the Clerk of the Court for the for the U.S. District Court for the Southern District of Ohio using the CM/ECF system and a copy was made available electronically to all electronic filing participants.

Respectfully submitted,

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