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' MOTION FOR SUMMARY JUDGMENT

Pursuant to Fed. R. Civ. P. 56, 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"), request this Court grant summary judgment in favor of Defendants and against Plaintiffs Stacie Ray, Basil Argento, Jane Doe, and Ashley Breda (collectively "Plaintiffs").

Plaintiffs are four transgender individuals. Plaintiffs allege that Defendants are violating the U.S. Constitution because Defendants will not change the sex identifier included on their Ohio birth certificates. None of Plaintiffs' claims have merit. Ohio law does not permit the type of change requested by Plaintiffs. And nothing in the U.S. Constitution requires a state to change its records to reflect an individual's transgender status. For these reasons, and as explained in greater detail in the supporting memorandum filed herewith, the Court should enter summary judgment in favor of Defendants.

Dated: January 16, 2020

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter arises out of a constitutional challenge to Ohio's birth record laws. Plaintiffs are four transgendered individuals who maintain that they should be permitted to have their gender identity reflected on their birth certificates. Ohio birth records do not reflect or track gender identity. Nevertheless, Plaintiffs allege that Defendants' refusal to make the requested modification is a violation of the First Amendment, the Due Process Clause, and the Equal Protection Clause of the U.S. Constitution. None of Plaintiffs' claims have merit.

As this Court is well aware, Defendants previously moved to dismiss each of Plaintiffs' claims. Without examining the sufficiency of Plaintiffs' First Amendment or Equal Protection Clause claims, this Court denied the motion to dismiss finding that Plaintiffs had raised a cognizable Due Process claim. Doc. 47 at 32. In reaching that conclusion, this Court assumed for the purposes of Defendants' motion to dismiss that Plaintiffs' allegations regarding the "perceived likely threat" of serious harm from the disclosure of their birth records were true. *Id.* at 19. This Court also assumed for the purposes of the motion to dismiss that "gender identity is the critical determinant of sex." *Id.* at 11. Now that discovery is over, there is no genuine issue of material fact that both of those assumptions were incorrect.

As to Plaintiffs' alleged harm, each of the Plaintiffs admitted during deposition that they did not fear harm when they disclosed their birth records. Indeed, in one instance the disclosure of a birth record actually prevented a Plaintiff from undergoing an invasive strip search. In other instances, the Plaintiffs proudly, publicly announced their transgendered status to literally hundreds of people. None of the Plaintiffs are ashamed or embarrassed of their status as a transgender individual. And as for any supposed linkage between sex and gender, Plaintiffs' own expert admitted, unequivocally, that sex and gender are distinct. Unlike sex, there is no test, medical or otherwise, which can determine a person's gender identity. And, unlike sex, there is no way to identify a person's gender at the time of birth.

Ohio birth certificates record the sex of a child as reported at birth, not gender. The circumstances under which a person can correct the sex marker on his or her birth certificate, or update other information reported and recorded on Ohio-issued birth certificates, is governed by a detailed statutory regime set forth in Ohio Rev. Code § 3705.01 et seq. Specifically, Ohio law allows a person to correct inaccurately reported information in a birth record, including inaccurate information regarding a person's sex. Ohio law does not permit updates to sex based on gender identity. Ohio's legislature was well within its authority when it defined the contours of Ohio's birth-record laws. Birth certificates serve an important purpose and Ohio has a substantial interest in ensuring their accuracy, including an accurate record of a person's sex as reported at birth.

As described in further detail below, Plaintiffs have no constitutional right to change their birth certificates in the manner they request. This Court should grant Defendants' motion for summary judgment.

II. SUMMARY OF THE ARGUMENT

Plaintiffs desire to change the sex identifier on their birth certificates because their gender identity does not match the sex that was accurately recorded by Defendants at the time of birth.

Ohio law prohibits such modifications to birth records. Nevertheless, Plaintiffs claim that Defendants' refusal to make the requested change violates the First Amendment, the Due Process Clause, and the Equal Protection Clause of the United States Constitution. Plaintiffs' constitutional claims seek to overturn Ohio law regarding maintenance of Ohio birth records. Accordingly, Plaintiffs' claims constitute a facial challenge to Ohio law. The United States Supreme Court places a high burden on parties seeking to establish a facial challenge. Each of Plaintiffs' constitutional claims fail to meet that heightened standard and should be denied.

First, Ohio's recording of a child's sex at birth on the birth certificate does not constitute government-compelled speech and therefore cannot support a First Amendment challenge. Indeed, the birth certificate is government speech that is a historical reflection of what was reported at the time of a child's birth, not an opinion, objectionable viewpoint, or ideology.

Second, Plaintiffs' Due Process claim, based on "informational privacy," also fails. Ohio's birth certificates are public records, and public records cannot form the basis for an informational privacy claim. Moreover, Plaintiffs have failed to allege a recognized fundamental right that would entitle them to relief under the Due Process Clause. Finally, Plaintiffs' informational privacy claim does not fit within the exceedingly narrow parameters set out by the Sixth Circuit.

Third, Plaintiffs' Equal Protection claim fails because the challenged law is facially neutral—that is, Plaintiffs have failed to identify disparate treatment—and Plaintiffs have admitted that they have no evidence that the State's birth record laws were enacted with the discriminatory intent necessary for a disparate-impact claim. Also, because Plaintiffs are not part of a protected class, Ohio's birth-record laws must be analyzed under rational basis review—a threshold that the law easily exceeds. Even if transgender people are treated as a protected class subjected to heightened scrutiny, Ohio has a substantial interest in ensuring the accuracy of its birth records, so any equal protection claim must fail.

The statutory scheme enacted by Ohio's legislature regarding birth certificates is, like the laws in all 50 states, a result of careful state-specific policy considerations. The proper forum for Plaintiffs to address this issue is in the state legislature, where competing state interests and policies can be fully vetted and tailored to best serve the needs of all Ohioans. As discussed more fully below, the Court should grant Defendants' motion for summary judgment.

III. UNDISPUTED FACTS

A. Ohio Statutes Allow Corrections to Birth Records Only in Limited Circumstances.

Two Ohio statutes allow birth-record errors to be corrected. Ohio Rev. Code § 3705.15 allows probate courts to issue an order directing the Ohio Department of Health to correct birth record information that "has not been properly and accurately recorded":

> Whoever claims to have been born in this state, and whose registration of birth is not recorded, or has been lost or destroyed, *or has not been properly and accurately recorded*, may file an application for registration of birth or correction of the birth record in the probate court of the county of the person's birth or residence or the county in which the person's mother resided at the time of the person's birth. If the person is a minor the application shall be signed by either parent or the person's guardian.
>
> An application to correct a birth record shall set forth all of the available facts required on a birth record and the reasons for making the application, and shall be verified by the applicant…. The application shall be supported by the affidavit of the physician or certified nurse-midwife in attendance. If an affidavit is not available, the application shall be supported by the affidavits of at least two persons having knowledge of the facts stated in the application, by documentary evidence, or by other evidence the court deems sufficient.

Ohio Rev. Code § 3705.15(A) (emphasis supplied).

Ohio Rev. Code § 3705.22 also authorizes the Ohio Department of Health to correct birth-certificate errors, where supported by appropriate evidence:

> *Whenever it is alleged that the facts* stated in any birth, fetal death, or death record filed in the department of health *are not true*, the director [of the Ohio Department of Health] may require satisfactory

> evidence to be presented in the form of affidavits, amended records, or certificates to establish the alleged facts. When established, the original record or certificate shall be supplemented by the affidavit or the amended certificate or record information.
>
> …
>
> A certified copy of a certificate or record issued by the department of health shall show the information as originally given and the corrected information, except that an electronically produced copy need indicate only that the certificate or record was corrected and the item that was corrected.

Ohio Rev. Code § 3705.22 (emphasis supplied).

Both statutes allow birth records to be corrected if information in them was incorrectly reported or mistakenly recorded at the time of birth. *Id.* Other Ohio laws specifically allow changes to a birth record to address an incorrect date of birth (§ 3505.15(D)(2)), a name change (§ 3705.13), or an adoption (§ 3705.124). Nothing in Ohio law explicitly authorizes a change to the sex reported on a birth certificate based on a later-announced gender identity that differs from the sex recorded at birth.

There is no evidence that Defendants mistakenly recorded Plaintiffs' "sex" at birth. Nevertheless, Plaintiffs allege that Ohio violates the constitution by maintaining a "categorical bar to changing gender markers on the birth certificates of transgender people…." Doc. 1 at ¶ 47. Plaintiffs admit that their birth certificates do not contain a "gender marker" and that Ohio does not record gender. *See, e.g.*, D.E. 65, Deposition of Ashley Breda ("Breda Depo.") at 99:6–8, 101:18–102:5; D.E. 64, Deposition of Basil Argento ("Argento Depo.") at 53:18–54:1, 61:6–17; D.E. 67, Deposition of Stacie Ray ("Ray Depo.") at 25:4–12; D.E. 66, Deposition of Jane Doe ("Doe Depo.") at 96:15–22, 100:1–7. And Plaintiffs' own expert admits that the medical providers present at the time of birth accurately identified and recorded each Plaintiffs' sex. D.E. 56, Deposition of Randi Ettner, Ph.D. ("Ettner Dep.") at 206:17–21.

B. Ohio's Birth Records Record the Sex Reported at Birth, and Do Not Contain a "Gender Marker" That Purports to Show Gender Identity.

An Ohio birth certificate is made shortly after birth, and records information and vital statistics reported to the Ohio Department of Health. Affidavit of Judith Nagy ("Nagy Aff.") at ¶ 3, attached hereto as Exhibit 1. Ohio is a passive gatherer of the birth record information and merely inputs the information that is reported to it. *Id.* at ¶ 4. The form used by the Ohio Department of Health to record birth record information contains over 300 topics, ranging from the date of birth to the educational background of the parents to the mother's smoking history. *Id.* at ¶ 5; Exhibit 2, Ohio Vital Statistics Birth Occurrence File Layout. That information then forms the basis of the historical birth record for the child, including the short and long form of birth records, as well as the more familiar Certification of Birth. Exh. 1, Nagy Aff. at ¶ 6; Exhibit 3, Certification of Birth Abstract. Ohio does not collect information related to a child's "gender marker" or "gender identity." Exh. 1, Nagy Aff. at ¶ 7. Nor do Ohio's birth records, including the Certification of Birth, reflect such information. *See* Exhs. 2 and 3. Instead, Ohio's birth certificates record the child's "sex" as reported at the time of birth. Exh. 1, Nagy Aff. at ¶ 8. The forms used by Ohio allow entries only for male, female, or undetermined. *Id.* at ¶ 9.[1]

The scientific community distinguishes biological sex from gender identity. *See F.V. v. Barron*, 286 F. Supp. 3d 1131, 1136–37 (D. Idaho 2018). "There is scientific consensus that biological sex is determined by numerous elements, which can include chromosomal composition, internal reproductive organs, external genitalia, hormone prevalence, and brain structure." *Id.* at 1136. This position is echoed by the American Psychology Association, which defines sex as "one's biological status as either male or female…." *See id.* at 1136, n.5 (citing Transgender

[1] "Undetermined" is used when a child's sex cannot be determined, such as when the child is born with intersex conditions. Exh. 1, Nagy Aff. at ¶ 10.

People, Gender Identity and Gender Expression, American Psychological Association (2018), http://www.apa.org/topics/lgbt/transgender.aspx).

Gender, on the other hand, "is the intrinsic sense of being male, female, or an alternative gender." *Id.* at 1136 (citing World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* at 96 (7th Version, 2011)) ("WPATH *Standards of Care*"). "[T]ransgender is an adjective used to describe a person who has a gender identity that differs, in varying degrees, from the sex observed and assigned at birth." *Id.* (citing WPATH *Standards of Care* at 97).

Plaintiffs also acknowledge the distinction between "gender" and "sex." *See, e.g.*, Doc. 1 at ¶ 22 (stating that Plaintiffs seek to bring their "gender identity" and "sex" into "alignment"); *id.* at ¶ 23 (distinguishing "gender identity" from "sex"); *id.* at ¶ 26 (noting the "discordance between [] gender identity and birth-assigned sex"). Indeed, there is no dispute that sex and gender are entirely different concepts. Plaintiffs' own expert, Dr. Randi Ettner, who opined on many topics including the distinction between sex and gender, testified:

> Q. And you agree that sex, what the APA says here is that "sex is assigned at birth and refers to one's biological status as either male or female." You agree with that?
>
> A. Yes.
>
> Q. You recognize the distinction between sex and gender, right?
>
> . . .
>
> A. I recognize a distinction between sex and gender identity.

D.E. 56, Ettner Dep. at 179:1–12. That sex and gender are distinct is echoed by Defendants' expert, Dr. Quentin Van Meter, who testified that:

> [W]e know that gender is a psychologically based concept. It has no biology. And that sex is biology. The American Psychological Association, the APA, DCM5, stated absolutely and utterly clearly

> gender identity is a very fluid thing. People go in and out of that, on and off, throughout their lives. People don't go in and out of a sex.

D.E. 57, Deposition of Quentin Van Meter, M.D. ("Van Meter Dep.") at 110:7–15. Thus, there is no dispute that sex and gender are distinct.

Moreover, all of the experts (including both of Plaintiffs' experts) agree that, unlike sex, there is no test that can be used to determine an individual's gender:

Dr. Ettner, Plaintiffs' psychologist expert, testified that there is in fact no way to determine an individual's gender at the time of birth:

> Q. Because there's no way to determine whether a person is transgender at the time birth, right?
>
> A. Correct.
>
> . . .
>
> Q. There's no test, medical or psychological, to diagnose transsexualism. Would you agree with that sentence?
>
> A. Yes.

D.E. 56, Ettner Depo. at 137:12–23. Dr. Ryan Gorton, Plaintiffs' medical rebuttal expert, concurred with Dr. Ettner's opinion that there was no test capable of determining a person's gender. As Dr. Gorton testified, you "can't figure that out with a blood test" and you "can't do an MRI on somebody and say your gender identity is male." D.E. 58, Ryan Gorton ("Gorton Depo.") at 96:21–97:6, 144:18–145:4.

Defendants' medical expert, Dr. Van Meter, agreed and testified that there is no genetic component to gender identity and that there is no relationship between gender and inherited traits. *See* D.E. 57, Van Meter Dep. at 228:7–13. Logically, if there is no test that can be used to determine an individual's gender, then what the medical providers report at birth, and what Defendants record on the birth record, is sex and not gender.

Nonetheless, Plaintiffs ask this Court to conflate gender and sex and treat the sex designation recorded by Defendants at the time of birth as a "gender identity" marker. Ohio's birth records indicate a baby's "sex" at the time of birth. Exh. 1, Nagy Aff. at ¶ 8. The State of Ohio does not ask for, nor does the birth certificate record, a gender identity marker. *Id*. at ¶ 7. 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. *Id*. at ¶ 11.

C. Plaintiffs Only Disclosed Their Birth Certificates in Limited Circumstances Where There Was No Legitimate Fear or Threat of Bodily Harm.

Plaintiffs in this case have only disclosed their birth certificates in limited circumstances related to employment or interaction with governmental agencies. In each of these instances, Plaintiffs acknowledge that they either did not fear the disclosure, or that their apprehension over disclosure was unfounded.

1. Ashley Breda

Defendant Ashley Breda ("Breda") testified that the only times she had to disclose her birth certificate was when she had to apply for a job or when she sporadically interacted with certain government agencies. D.E. 65, Breda Depo. at 117:3–11. She also testified that the only time she felt fear of harm was when the individuals she had to disclose her birth certificate were wearing President Trump campaign paraphernalia. *Id.* 118:25–120:4. However, Breda admitted that those individuals never did anything to confirm her fear and ultimately testified that she had never received bodily harm from the disclosure of her birth certificate:

> Q. Okay. And have you ever been or received bodily harm or anything like bodily harm based on the disclosure of your birth certificate?
>
> A. No.

Id. 120:5–13.

2. Basil Argento

Defendant Basil Argento ("Argento") testified that he was only required to disclose his birth certificate to one employer and a few government agencies. *See* D.E. 64, Argento Depo. at 89:14–90:2 (Colorado Bureau of Motor Vehicles); 98:5–12 (Italian Consulate); 116:16–19 (Social Security Administration); 120:22–121:2 (Marriage license official); 122:21–123:1 (U.S. Passport Agency); 124:23–25 (Kroger). Argento admitted that he never feared harm during any of those encounters. *Id.* In fact, Argento testified that he never feared disclosing his birth certificate to any government official:

> Q. And when you presented the birth certificate to the folks in connection with obtaining your U.S. passport, you did not fear bodily harm, did you?
>
> A. Like I said, I don't fear bodily harm from government officials.

Id. at 122:21–123:1.

3. Stacie Ray

Defendant Stacie Ray ("Ray"), although offering somewhat conflicting testimony, eventually admitted that she did not fear harm from disclosing her birth certificate to her employer. D.E. 67, Ray Depo. at 117:14–24. And Ray had no concerns or issues with the other, limited, instances where she disclosed her birth certificate. *Id.* 130:25–131:10 (Transportation Security Administration); 146:25–147:4 (car dealership). In fact, in at least one instance the presence of the "M" designation on Ray's birth certificate prevented her from undergoing a strip search, which Ray testified would have been harmful. *Id.* at 147:16–23. The incident occurred when she was travelling thorough airport security. *Id.* at 147:5–15. [redacted] Ray was able to produce a copy of her

birth certificate, which identified her sex as male, and she was let through security without a strip search. D.E. 67, Ray Depo. at 157:11–21.

4. Jane Doe

Defendant Jane Doe ("Doe") unequivocally testified that she has never experienced bodily harm as a result of disclosing her birth certificate:

> Q. Has your disclosure of your birth certificate ever led to bodily harm?
>
> A. No.

D.E. 66, Doe Depo. 88:19–21. And Doe could only recall three instances when she had to disclose her birth certificate, none of which caused her to fear bodily harm. *Id.* at 125:17–25 (Social Security Administration); 128:5–11 (U.S. Passport Agency); D.E. 62, Sealed Deposition of Jane Doe at 128:22–129:3 ([redacted] court). Indeed, Doe admitted that having the sex identifier changed on her birth certificate would not have prevented any harassment that she receives as a transgender individual.

> Q. So having the sex identifier changed on your birth certificate would not have prevented the harassment that you're currently experience in your workplace, right?
>
> . . .
>
> A. I doubt it. I think they would have harassed me anyway.

Id. at 121:16–24.

Thus, Plaintiffs have only been required to disclose their birth certificates in limited circumstances (either to employers or government officials) and none of the Plaintiffs have held any legitimate, particularized fear of harm in those instances.

D. Plaintiffs Admit That They Are Proud of Their Transgender Status.

Each of the Plaintiffs admitted during deposition that they were not humiliated by their status as a transgender individual. In fact, Plaintiffs are proud of their transgender status.

Breda testified that she was not ashamed of her transgender status:

> Q. It's not something you're ashamed of, right?
>
> A. No.

D.E. 65, Breda Dep. at 84:7–11. Indeed, Breda takes little or no measures to conceal her transgender status from the public. She came out to her Facebook friends, which measure in the hundreds. *Id.* at 30:13–31:9. Additionally, Breda's Facebook account is public, which means anyone can view the information on it, including her status as "trans." *Id.* at 33:22–34:19. The same is true for Breda's Twitter account, which also advertises her status as a transgender individual. *Id.* at 36:1–25. Breda has no idea how many people have viewed her Twitter account:

> Q. And like your Facebook page, this Twitter page is available for anyone, including me, to go and see right?
>
> A. That's correct.
>
> Q. Do you have any idea how many people have gone onto your Twitter page and seen that you are a—identified as a trans [individual]?
>
> . . .
>
> A. I have absolutely no idea.

Id. at 39:11–21.

Ultimately, Breda concluded that the number of people who know about her being transgendered is in the hundreds, if not more:

> Q. So I guess with regards to a question I asked previously, you know, the number—trying to put a finger on the number of people you've told that you're transgendered. You can't really be certain but if you include Facebook friends and potential people who viewed your Twitter page, that could be in the hundreds, if not higher, is that fair to say?
>
> . . .
>
> A. I would speculate that's true.

Id. at 41:18–42:5.

Similarly, Argento admitted that being transgender was not humiliating. D.E. 64 Argento Dep. at 40:4–13. As Argento testified:

> Q. Okay. And being transgendered isn't something that you're ashamed about, right?
>
> A. No.
>
> . . .
>
> Q. You're proud of your status as a transgendered person, right?
>
> A. Yes.

Id. at 40:14–22. And Argento also testified that "he had no idea" how many people that he has told about his status as a transgender individual, but he estimates that it is somewhere between 50 and 100. *Id.* at 37:13–38:6.

Likewise, Ray also admitted that she was proud of her transgender status. As she testified:

> Q. Well, do you—are you ashamed of being a member of the transgender community?
>
> . . .
>
> A. No.
>
> . . .
>
> Q. Right. Okay. And that was going to be my next question, right. It's a point—it's not something that you particularly feel ashamed or humiliated about despite what other people may try to project on you, but you yourself feel proud, right?
>
> . . .
>
> A. I am proud of the choices that I am currently making in my life and who I am.

D.E. 67, Ray Depo. at 61:3–62:10.

Even Doe, who opted to keep her identity anonymous for this litigation, testified that she was neither humiliated nor ashamed of her status as a transgender person:

> Q. You are a transgender individual, correct?
>
> A. Correct.
>
> Q. Does that fact humiliate you?
>
> . . .
>
> A. If you mean on an everyday basis do I get up in the morning and say I'm transgender and I feel humiliated, no.
>
> Q. The fact that you're a transgender individual does not []shame you, correct?
>
> A. Correct.

D.E. 66, Doe Depo. at 89:20–90:7.

Thus, none of the Plaintiffs find their transgender status humiliating or shameful.

IV. ARGUMENT

Summary judgment should be awarded in favor of Defendants 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 must 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). The moving party need not negate the non-moving party's claim, but can succeed by pointing out that "there is an absence of evidence to support the nonmoving party's case." *Moore v. Philip Morris Cos.*, 8 F.3d 335, 340 (6th Cir. 1993) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Once the moving party has met its burden, the nonmoving party must "do more than show that there is some metaphysical doubt as to the material facts. It must present significant probative evidence in support of its complaint to defeat the motion for

summary judgment." *Id.* (internal citations omitted). Importantly, "conclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment." *See, e.g.*, *Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009).

A. Plaintiffs' Constitutional Challenges Constitute a Facial Challenge to Ohio's Birth Record Laws.

Plaintiffs seek an order from this Court that the United States Constitution requires Defendants to change the sex identifier on Ohio's birth records based on Plaintiffs' gender identity. Such modification to Ohio's birth records is prohibited by Ohio Rev. Code §§ 3705.15 and 3705.22. *See Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Suppl. 3d 850, 866 n.3 (S.D. Ohio 2016 (citing Ohio Rev. Code §§ 3705.15 and 3705.22); *In re Declaratory Relief for Ladrach*, 513 N.E.2d 828, 831 (Ohio Ct. Com. Pl. 1987) (holding that the birth record statute is a "correction" only statute and cannot be used to modify the sex designation on a person's birth certificate except where the sex marker was inaccurately reported or recorded).

In its Order denying Defendants' motion to dismiss, this Court expressly declined to decide whether Plaintiffs' constitutional challenges to Ohio law constituted a facial challenge, or an "as applied" challenge. Doc. 47 at 11–12. Plaintiffs' constitutional claims attempt to upend the entire statutory scheme put in place by Ohio regarding Defendants' maintenance of Ohio's birth records. *See* Rev. Code §§ 3705.15 and 3705.22. Accordingly, this Court should find that Plaintiffs are raising a facial challenge to Ohio law. Defendants recognize that this Court was hesitant in its prior Order to find that Ohio law prohibits Plaintiffs' requested modification to their birth records. Doc. 47 at 12. The Court expressed its doubts in part based on the construction of Tennessee and Idaho statutes. *Id.* at 11–12. However, the Court need not refer to out-of-state case law and statutes to decide this issue as every Court interpreting sections 3705.15 and 3705.22 has found that "[u]nder Ohio law, a person may not change the sex recorded on his or her birth certificate, and therefore, a birth certificate reflects the sex a person has been assigned at birth." *Bd. of Educ. of*

the Highland Local Sch. Dist., 208 F. Supp. 3d, 866 n. 3; *In re Declaratory Relief for Ladrach*, 513 N.E.2d at 831. Thus, to grant the relief requested by Plaintiff (*i.e.*, changing the sex marker on Ohio's birth certificates to reflect gender identity), this Court would need to invalidate existing Ohio law.

As this Court is well-aware, facial challenges carry greater consequences than as-applied challenges, *i.e.*, invalidating an entire law, and the Supreme Court places a high burden on parties seeking to establish a facial challenge. *See United States v. Stevens*, 559 U.S. 460, 472 (2010). To prevail, Plaintiffs must establish either "that no set of circumstances exists under which [Ohio's birth-record laws] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the statutes are devoid of any "legitimate sweep." *Washington v. Glucksberg*, 521 U.S. 702, 740, n. 7 (1997) (Stevens, J., concurring) (internal quotation marks omitted). As shown below, Plaintiffs cannot meet this high burden, so all of Plaintiffs' claims should be dismissed.

But even if this Court construes Plaintiffs' constitutional attack on Ohio law as an as-applied challenge, Plaintiffs' claims still fail since, as detailed below, the undisputed facts demonstrate that summary judgment for Defendants is appropriate in this case.

B. Plaintiffs' First Amendment Claim Is Legally Deficient And Should Be Dismissed.

Plaintiffs' First Amendment claim is predicated on their assertion that Ohio's birth certificate statutes "prevent[] [them] from accurately expressing their gender," and "force them … to endorse the government's position as to their gender," and therefore violate the First Amendment. Doc. 1 at ¶¶ 127–28. Plaintiffs' First Amendment claim fails because Ohio birth certificates are government speech and are not subject to analysis under the First Amendment as a matter of law. Moreover, Ohio's birth certificates do not express a viewpoint or ideology about Plaintiffs' gender. There is no evidence to the contrary. Accordingly, Plaintiffs' First Amendment claim should be dismissed.

1. The information contained in Ohio's birth records constitutes government speech, and such government speech is not subject to challenge under the First Amendment.

Plaintiffs' First Amendment claim fails because the information contained in Ohio's birth records constitutes governmental speech. "When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245 (2015) (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* Doc. 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. Exh. 1, Nagy Aff. at ¶ 12; Exh. 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. Exh. 1, Nagy Aff. at ¶ 13. Accordingly, under the analysis set forth in *Walker*, Ohio's birth certificates constitute government speech and cannot support a First Amendment claim.

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.

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. *Id.* 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.

Nevertheless, Plaintiffs contend that Ohio's birth certificates prevent them from "accurately expressing their gender" and "convey[] the state's ideological message that gender is determined solely by the appearance of external genitals . . . ." Doc. 1 at ¶¶ 127–28. Not so. Ohio's birth records do not include a marker for "gender" or "gender identity." *See* Exh. 3, Certification of Birth Abstract. Indeed, Defendants do not collect information about a person's gender. Exh. 1, Nagy Aff. at ¶ 7. Defendants only record the sex of an individual. *Id.* 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. If any Plaintiffs' sex was mistakenly identified at birth, *e.g.*, in the case of a disorder of sex differentiation or chromosomal disorder, then Defendants would change the sex identifier on the birth record under one of the correction statutes contained in Revised Code §§ 3705.15 or 3705.22. Exh. 1, Nagy Aff. at ¶ 15. However, there is no evidence any of the Plaintiffs has a disorder of sex differentiation or a chromosomal abnormality.

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. *Id.* at ¶ 16. Plaintiffs are free to choose how, what, when, and whether to express their gender identity. *Id.* at Aff. at ¶ 17.

For these reasons, there is an utter lack of evidence to support Plaintiffs' First Amendment claim. Ohio's birth records do not make any statement as to Plaintiffs' gender identity, much less prove, under any set of facts, that Ohio birth records inaccurately express such gender identity. This Court should grant Defendants' motion for summary judgment and dismiss Plaintiffs' First Amendment claim.

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

Ohio's birth-record laws are consistent with the Due Process Clause of the Fourteenth Amendment. Plaintiffs allege that Defendants violated the Due Process Clause by causing "transgender people to involuntarily disclose their transgender identity" and that such activity constitutes a violation of "the right to live in accordance with one's gender identity." *See* Doc. 1 at ¶¶ 120, 122. This claim fails as a matter of law and fact.

1. Plaintiffs cannot maintain an informational right to privacy over public records.

Plaintiffs' claim sounds in what the Sixth Circuit has described as an "informational right to privacy." *See Bloch v. Ribar*, 156 F.3d 673, 683 (6th Cir. 1998). The informational right to privacy "protects an individual's right to control the nature and extent of information released about that individual." *Id.* (citing *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)). It is well established that an informational right to privacy does not exist over information that is already in the public record, and for that reason alone, Plaintiffs' due process claim must fail. *See 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). Under Ohio law, and as this Court has already held, birth certificates are public records. *See* D.E. 47 at 24 (citing *State ex rel. Hammons v. Chisholm* , 792 N.E.2d 1120 (Ohio 2003)); Ohio Rev. Code § 3705.23(A)(1). Plaintiffs' sex designation on their birth certificates has been available for public view since birth, so changing the birth record neither claws back nor updates information that may have already been accessed and aggregated by others, such as those who gather such data for online databases. Thus, even if Plaintiffs were permitted to change their birth records to reflect their gender identity, Plaintiffs' information privacy objectives would still be unachievable.

2. Plaintiffs' informational privacy claim fails because it does not fit into the Sixth Circuit's narrow construction of informational privacy rights.

Plaintiffs' claim also fails as a matter of law because the Sixth Circuit narrowly construes informational privacy rights "to interests that implicate a fundamental liberty interest." *Bloch*, 156 F.3d. at 684 (citing *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981)). The Sixth Circuit applies a two-part test to determine whether the disclosure of private information warrants constitutional protection: "(1) the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and (2) the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private." *Id.* (citation omitted). The "balancing test should be employed only if fundamental or traditional rights are implicated." *Id.* As the Sixth Circuit has recognized, "identifying a new fundamental right subject to the protections of substantive due process is often an uphill battle, as the list of fundamental rights is short." *Munoz*, 507 F.3d at 965.

The Sixth Circuit has recognized a constitutional right to informational privacy only in two circumstances: "(1) where the *release* of personal information could lead to bodily harm [], and (2) where the information *released* was of a sexual, personal, and humiliating nature []." *Lambert*, 517 F.3d at 440 (citations omitted) (emphasis added). In both circumstances, it is the government that releases the private information. *See id.* at 440–41; *see also Beck v. Muskingum County*, 2012 U.S. Dist. LEXIS 146014, at *12–13 (S.D. Ohio Oct. 10, 2012) (dismissing informational privacy claim because there was no evidence detailing the information allegedly disclosed by the government). Moreover, courts in the Sixth Circuit further narrow the right to privacy in the context of bodily harm "to circumstances 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).

None of the circumstances described in *Bloch* are present here.

i. Plaintiffs have failed to identity a fundamental right and Defendants are not responsible for the release of private information.

Plaintiffs have failed to identify a fundamental right that is being violated. The gravamen of Plaintiffs' due process claim is that they have a fundamental right to change the sex accurately recorded on their birth certificate based on their gender identity. Defendants do not track or record gender identity. Exh. 1, Nagy Aff. at ¶ 8. As testified by Plaintiffs' own expert, gender identity and sex are distinct categories. D.E. 56, Ettner Dep. at 179:1–12. And it is undisputed that there is no test to determine gender either at birth or later in life. *Id.* at 137:12–23; D.E. 58, Gorton Dep. at 96:21–97:6, 144:18–145:4. Neither the Sixth Circuit nor the Supreme Court recognizes a fundamental right in this context. Maintaining secrecy over basic vital statistics maintained by the state, and already in the public domain for decades, does not implicate a "fundamental right" or "the concept of ordered liberty." *See Bloch*, 156 F.3d. at 684.

Moreover, the Sixth Circuit recognizes a right to informational privacy only when the government is responsible for releasing the protected information. *See Lambert*, 517 F.3d at 440. Plaintiffs have only disclosed their birth certificates in limited circumstances, none of which involved Defendants prompting or requiring the disclosure. And there is no evidence that Defendants have taken affirmative steps to publish or advertise Plaintiffs' birth certificates or their status as transgendered individuals. To the contrary, it was Plaintiffs, not Defendants, who have disclosed this information to third parties. *See supra* Section III.C. Moreover, at least one of the Plaintiffs, Breda, has told hundreds of people about her transgender status by posting that information on her public Facebook and Twitter accounts. D.E. 65, Breda Dep. at 41:18–42:5. And another Plaintiff, Argento, admitted that he has told somewhere between 50 and 100 people about being a transgender individual. D.E. 64, Argento Dep. at 37:13–38:6.

ii. Plaintiffs' gender identity is not the type of information protected from disclosure and such information was not disclosed to dangerous individuals.

Even if Plaintiffs have a fundamental liberty interest in concealing their sex at birth (which they do not) and even if Defendants were responsible for disclosing Plaintiffs' gender identity (which they are not) Plaintiffs' informational privacy claim still fails because, under Sixth Circuit law, the private information disclosed must be of a "sexual, personal, and humiliating nature," and specifically disclosed to "particularly dangerous" individuals. *Compare Lambert*, 517 F.3d at 440; *with Barber*, 496 F.3d at 456. Neither circumstance is present in this case.

Plaintiffs readily admit that they are not ashamed or humiliated by their transgender status. *See supra* Section III.D. And, as pointed out by Plaintiffs' expert, Dr. Ettner, gender identity has nothing to do with sexuality. D.E. 56, Ettner Dep. at 55:12–24 (explaining transgender and sexuality are often conflated). As detailed by Plaintiffs' expert while distinguishing sexuality and gender:

> [T]ranssexualism was no longer a term that was in common parlance because it conflated sex which for lay people means sexual orientation, sexual behavior with gender.

Id. at 188:8–11. Dr. Ettner further testified that:

> Transsexualism conflates sex, be it sexual orientation, sexual behaviors or sexual activity with gender, and lay people in particular confuse sexuality with gender leading to some serious negative connotations for people who are transgender.

Id. at 227:12–17. Thus, even Plaintiffs admit that information about a person's gender does not convey information that is sexual in nature.

Nor is there any record evidence that information about Plaintiffs' gender identity was conveyed to "particularly dangerous" individuals. The only time Plaintiffs disclosed their birth certificates was to employers or government agencies. *See supra* Section III.C. Plaintiffs admit that they were never harmed and, in fact, did not fear harm when they disclosed their birth certificates. *Id.* In fact, in the case of one Plaintiff, disclosure of her birth certificate actually prevented a harmful and invasive strip search by the TSA. D.E. 67, Ray Dep. at 157:11–21. Another Plaintiff testified that he never feared harm from disclosing his birth certificate. D.E. 64, Argento Dep. at 122:21–123:1. And Doe testified that disclosure of her birth certificate was not the cause of her harassment. D.E. 66, Doe Dep. at 121:16–24.

Plaintiffs testified at length regarding the harassment they have endured from various employers and other agencies due to their gender identity. To be clear, Defendants do not condone the discriminatory conduct by third parties against Plaintiffs. However, workplace harassment and administrative delay do not give rise to the exceedingly narrow right of informational privacy under the Due Process Clause of the U.S. Constitution.

The Sixth Circuit's holding in *Barber* is instructive. In *Barber*, the social security numbers and birth dates of correctional officers were released to several prisoners who had a history of violence towards other prisoners and staff. 496 F.3d at 450. Despite the release of that sensitive

information to clearly dangerous people, the court in *Barber* rejected the informational privacy claim in that case. *Id.* at 456. Analyzing and distinguishing the ground-breaking decision in *Kallstrom v. City of Columbus*, the Sixth Circuit noted that in that case:

> [T]he officers' privacy interest implicated an important liberty interest; to wit, an interest in preserving their and their families' personal security and bodily integrity. That is, it held that the released information was sensitive enough to put their lives at risk. This liberty interest was implicated for two reasons: (1) the gang member had a propensity for violence and intimidation and (2) those members were likely to seek revenge.

Id. at 455. The Sixth Circuit went on to describe what the decision in *Kallstrom* did not do:

> It 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 (italics in original). The Sixth Circuit held that the 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. The court concluded its analysis by stating that "the right we created in *Kallstrom* was exceeding[ly] narrow." *Id.*

If *Barber* did not implicate the right to information privacy, where correctional officers' sensitive information was provided to dangerous prisoners, then Plaintiffs' claims certainly fall outside the exceedingly narrow exception created by *Kallstrom*. Whatever the relationship between Plaintiffs, their employers, and various government agencies, it is not defined by the "clear animosity" at issue in *Kallstrom—i.e.*, violent gangs and the undercover police charged with infiltrating them. It strains credulity to equate the violent Short North Posse with the HR

department at Zulily.[2] Similarly, one cannot ascribe "particularly dangerous" tendencies to the Social Security Administration, or the TSA, or the U.S. Passport Agency. *See supra* Section III.C.

It is undisputed that Defendants neither record nor disclose Plaintiffs' gender identity. And Plaintiffs admit that such information, even if released, is neither harmful, nor humiliating, nor sexual in nature. Plaintiffs' sex is accurately recorded and already part of the public record. None of Plaintiffs' information is disclosed to individuals who are "particularly dangerous" and there is no record evidence to support that contention. The Sixth Circuit's narrow application of the informational right to privacy does not apply. Accordingly, this Court should dismiss the Due Process claim.

D. 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, and Ohio has a legitimate interest in maintaining the accuracy of its birth records. 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. 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.

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[2] The Short North Posse was the gang at issue in *Kallstrom*. *See Barber*, 496 F.3d at 454. Zulily is an e-commerce company that sells clothing, footwear, toys and home products and is one of the employers Plaintiff Ray showed her birth certificate to. *See* D.E. 67, Ray Dep. at 117:14–24. Ray ultimately admitted that she did not fear harm from Zulily. *Id.*

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. Exh. 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. However, there is no record evidence indicating that any Plaintiffs' sex was inaccurately recorded. Indeed, Plaintiffs' own expert testified that the birth certificates were accurately recorded. D.E. 56, Ettner Dep. at 206:17–21. Because Plaintiffs' birth certificates accurately recorded their sex at birth, Plaintiffs are not permitted to retroactively change that fact. Exh. 1, Nagy Aff. at ¶ 20. Thus, Ohio's laws governing the issuance and correction of its birth records are facially neutral and do not discriminate against any class of people, including transgender people. In other words, no one born in Ohio has an open-ended right to amend the sex accurately recorded at birth on a birth certificate. *Id*.

Plaintiffs nonetheless argue that this equal treatment affects them unequally, because only transgender individuals would want to change their sex based on their gender identity. Aside from the fact that there is no evidence to support that speculative argument, Plaintiffs' claim is one of disparate *impact*, not disparate *treatment*. Plaintiffs' disparate impact claim fails as a matter of law and fact.

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 disparate impact 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 Davis*, 426 U.S. at 241 ("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).

There is no 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' 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).

Accordingly, this Court should dismiss the equal protection claim in Count I of Plaintiffs' Complaint.

2. Transgender people are not a protected class entitled to heightened scrutiny and, in any event, Ohio has a substantial interest in enforcing its birth-record laws.

This Court should also dismiss Plaintiffs' claim under the Equal Protection Clause because Plaintiffs are not a protected class and because Defendants have a rational basis to enforce Ohio's

birth-record laws. Neither the Supreme Court nor the Sixth Circuit have added transgender status to the suspect classifications entitled to heightened scrutiny under the Equal Protection Clause. 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).

The only cases in either the Supreme Court or Sixth Circuit addressing special legal protections for transgender people have done so within the context of Title VII. *See EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). But the *statutory* standard of Title VII does not apply to this Court's equal-protection analysis. *See Davis*, 426 U.S. at 239 (1976). 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)). And 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). In any event, as set forth below, whether transgender people constitute a protected class is not dispositive in this case because Plaintiffs cannot allege a viable equal protection claim under either circumstance.

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. The face of the Complaint shows that, as a matter of law, Plaintiffs cannot survive application of a rational basis review to their Equal Protection claim. Ohio can show an irrebuttable rational basis to enforce its birth record statutes. Moreover, Ohio's interest in enforcing such statutes is so substantial that even if this Court were to find that transgender people are a protected class, requiring the application of heightened scrutiny (which this Court should not do) Plaintiffs' equal protection claim still fails.

In Ohio, birth records are historical records used not only to record a person's birth, but also to verify a person's death. As set forth in Ohio Rev. Code § 3705.27:

> The director of health may match birth records and death records in accordance with written standards which he shall promulgate in order *to protect the integrity of vital records and prevent the fraudulent use of birth records of deceased person, to prove beyond a reasonable doubt the fact of death,* and to post the facts of death

> to the appropriate birth record. Copies made of birth records marked "deceased" shall be similarly marked "deceased."

Ohio Rev Code § 3705.27 (emphasis added). Thus, Ohio law recognizes not only a rational basis, but also several substantial interests in maintaining the accuracy of Ohio's birth records, including proving the fact of death and preventing fraud. Ohio's substantial interest in the accuracy of its records is echoed by numerous courts across the country. *See, e.g.*, *In re Michaela R.*, 253 Conn. 570, 602, n.30 (2000) ("The state, therefore, has a substantial interest in limiting alterations and amendments [to birth certificates] that potentially may jeopardize the accuracy of the records."); *United States v. Machinski*, 2017 U.S. Dist. LEXIS 93286, at *16 (N.D. Cal. June 16, 2017) (finding that the Department of Education had a substantial interest in the accuracy of student-loan documents); *State v. Schaefer*, 239 Mont. 437, 441 (1989) (finding the state had a substantial interest in maintaining accurate records of certain sales transactions).

Indeed, Ohio's interest in maintaining the accuracy of its birth records is heightened because, unlike nearly every other state, Ohio is an open-records state. Exh. 1, Nagy Aff. at ¶ 21. As an open records state, any individual can go to any county health department and request the birth record for any person with or without justification. *Id.* at ¶ 22. The requesting person does not need precise details on the person's name, place of birth, or date of birth. *Id.* So long as the health department official has enough information to identify a small set of records, some or all of those records can be retrieved and provided to the requesting person. *Id.*

Unsurprisingly, given the ease at which Ohio birth records can be obtained, Ohio birth certificates are commonly used by criminals to fabricate or steal identities. *Id.* at ¶ 23. For this reason, birth certificates are known as "breeder documents" because, unlike other records, birth records are used to apply for and create other forms of state identification. *Id.* Defendants routinely cooperate with other agencies (both state and federal) in verifying the accuracy of birth records as part of criminal investigations. *Id.* at ¶ 24. Maintaining the accuracy of Ohio's birth

records is a critical part of Defendants' responsibilities. *Id.* at ¶ 25. This is why even when a name change is approved, the birth certificate prominently states, "Legal name change on file" and provides a file reference number. *Id.* Recording and tracking these fundamental changes to the biographical information on the birth record is a paramount state interest. *Id.* Judicially creating additional ways in which Ohio's birth records can be modified, particularly without a statutory scheme in place to regulate and track such modifications, heightens the potential for fraud and illegality. *Id.* at ¶ 26.

Even Plaintiffs' expert, Dr. Ettner, testified that the State has an important interest in recording a child's sex at birth. D.E. 56, Ettner Dep. at 127:5–21. Specifically, Dr. Ettner stated "that it's important to have some vital statistics on our citizens." *Id.* at 127:15–17. And Dr. Ettner acknowledged that compiling this information was useful for gathering statistical data about each sex. *Id.* at 127:18–21. Defendants' expert, Dr. Van Meter, amplified this point:

> Q. So on like identity documents and forms, just to be clear, you think that the sex marked on a birth certificate, the original birth certificate, should be what's on those documents?
>
> A. The purpose is to collect data on births to look at population, okay, to establish and anchor of identity, but more important to look at sex. Say percentage of males, percentage of females. Accidents involving—epidemiologist studies involving males and females. If that's changed, then you skew the data, and you all the sudden lose the biologic proportion of male-to-females, and if you're looking at laws and discrimination, et cetera, et cetera, you're going to lose all the benefit of being able to quantify your population. And this is a government document establishing biologic population.

D.E. 57, Van Meter Dep. at 217:10–218:3. So, experts for Plaintiffs and Defendants recognize the unique and important interest states have in maintaining accurate records of an individual's sex.

For these reasons, the accuracy of Ohio's birth records is paramount in the well-ordered operation of the state's vital recordkeeping and the prevention of fraud. Because Ohio is uniquely an open-records state, the correction-only statutes are narrowly tailored to serve the State's vital

interests. 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.

E. Other Compelling Reasons Exist To Grant Summary Judgment in Favor of Defendants.

Plaintiffs ask this Court to strike at least two (and potentially more) statutes contained in Ohio's vital statistics laws. As the Supreme Court has previously held, a facial attack on the law is "strong medicine." *See Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). Judicial restraint is cautioned in facial challenges "because such efforts do not seek to invalidate laws in concrete, factual settings but to 'leave nothing standing.'" *Fieger v. Michigan Supreme Court*, 553 F.3d 955, 960 (6th Cir. 2009) (citing *Warshak v. United States*, 532 F.3d 521, 528 (6th Cir. 2008) (en banc)). Indeed "[c]laims of facial invalidity often rest on speculation[,] . . . raise the risk of premature interpretation[,] . . . run contrary to the fundamental principle of judicial restraint[,] . . . [and] threaten to short-circuit the democratic process." *Id.* (citing *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008)) (internal quotes and citations omitted). Plaintiffs' facial challenge to Ohio's birth-record laws "is a remedy that courts employ 'sparingly and only as a last resort.'" *Id.* (citing *Broadrick*, 413 U.S. at 613).

Invalidating Ohio's law would not only violate traditional judicial-restraint principles but would also upend a comprehensive legislative scheme with many intertwined parts. Various aspects of numerous statutes would also be jeopardized if, as Plaintiffs seek to do here, reference to a person's sex as reported at birth could be indelibly altered. *See, e.g.*, Ohio Rev. Code § 3109.19, et seq. (parentage determinations); Ohio Rev. Code § 3345.32 (selective service requirements); Ohio Rev. Code § 5123.01 (residency definitions under the Department of Developmental Disabilities); Ohio Rev. Code § 5147.18 (regulating the use of prisoners for hard

labor); Ohio Rev. Code § 125.65 (incentivizing female entrepreneurs); Ohio Rev. Code § 2151.16 (appointing female referees for trials of females); Ohio Rev. Code § 341.05 (employing females at prisons).

In light of the many statutes that would be immediately affected by striking Ohio's birth-record laws, Plaintiffs' Complaint implicates core federalism concerns. When considering remedial measures, the Supreme Court has warned that courts "must take into account the interest of state and local authorities in managing their own affairs, consistent with the Constitution." *Milliken v. Bradley*, 433 U.S. 267, 280–81 (1977). Overriding validly enacted state law usurps Ohio's legislative prerogative in an area of governance that is reserved to the states.

Moreover, Plaintiffs not only seek to strike Ohio law, but also seek affirmative relief from this Court to allow Plaintiffs the ability to update their sex designation based solely on gender identity. To provide Plaintiffs the remedy they seek, this Court would have to create detailed rules outlining the circumstances under which a transgender person would be entitled to change the sex marker on his or her birth certificate. Among other things, the Court would need to consider whether the applicant needed to have sex-change surgery before a birth certificate change could occur. If so, how much surgery would be required? Would hormone therapy be needed? If so, for how long? Would a doctor's affidavit be required to prove that a person had transitioned? Would a psychological exam be needed to confirm whether a person's gender identity conflicts with his or her sex reported at birth? Despite Plaintiffs' attempt to color Ohio's as an outlier as it relates to birth record changes, no national consensus exists on these issues, as states have varied approaches to these questions. *See, e.g.*, State-by-State Overview, available at https://transgenderlawcenter.org/resources/id/state-by-state-overview-changing-gender-markers-on-birth-certificates (last visited January 15, 2020). Indeed, these are complicated policy choices

that implicate numerous state and individual interests. Federalism principles dictate that this Court leave this task to the reasoned consideration of Ohio's legislature.

Finally, Ohio's laws regarding the ability to update a sex marker on a birth certificate are narrowly tailored. Birth certificates are historical records of a child's birth and contain certain immutable facts such as the date, time, location, and child's sex as reported at birth. On the other hand, Ohio law does allow Plaintiffs to change other public records to correspond with their gender identity. For example, as Plaintiffs allege, the Ohio Bureau of Motor Vehicles already allows transgender people to change the sex designation on their driver's license or state identification card to match their gender identity. Doc. 1 at ¶ 47. Driver's licenses and state issued identification cards are reflections of the present. They are renewed periodically and updates to name, address, weight, and even sex, are allowed. Accordingly, rather than serving as a reason to find Ohio's birth-record laws unconstitutional, those examples show the ease with which transgender people can update their "sex" on their other state-issued forms of identification, rendering implausible Plaintiffs' allegations regarding Ohio's supposed animus towards transgender people.

In sum, Plaintiffs' complaint is with legislative policy choices in a controversial area, and that is a matter for state legislatures, not for federal courts to impose a one-size-fits-all policy mandate.

V. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment should be granted. Plaintiffs' First Amendment, Due Process Clause, and Equal Protection Clause claims should be dismissed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 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