

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

**STACIE RAY, BASIL ARGENTO,
JANE DOE, and ASHLEY BREDÁ,**

Plaintiffs,

v.

Civil Action No.:

**LANCE HIMES, in his 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,**

Defendants.

**PLAINTIFF JANE DOE’S MOTION FOR PROTECTIVE ORDER AND
LEAVE TO PROCEED ANONYMOUSLY AND BRIEF IN SUPPORT**

Plaintiff Jane Doe, through her undersigned counsel, respectfully moves this Court for an order permitting her to bring this action anonymously to protect her identity from public disclosure. Plaintiff submits the following brief in support of her motion.

BRIEF IN SUPPORT

Plaintiff Jane Doe is a transgender woman challenging the constitutionality of Ohio’s policy of barring transgender people from correcting the gender marker on their birth certificates to match their gender identity (the “Birth Certificate Policy.”) She seeks an order of protection and leave to proceed anonymously because disclosure of her identity, including her transgender identity, could put her at serious risk of harm.

As a transgender woman, Plaintiff is a member of a stigmatized group that frequently encounters discrimination, verbal abuse, and even violent physical assault including murder. Her transgender status is highly personal, private information that implicitly reveals sensitive medical information. As Plaintiff alleges in her complaint challenging the Birth Certificate Policy, any forced disclosure of her transgender status violates her constitutional right to privacy. Requiring Plaintiff to disclose her identity in court records to vindicate her constitutional rights including privacy could subject her to the very harm she seeks to prevent through this litigation.

Plaintiff does not object to providing her true name to the Defendants pursuant to a protective order barring further dissemination of that information and requiring that any documents containing her true name be filed under seal. Accordingly, granting Plaintiff's motion will not prejudice the Defendants' ability to defend this litigation. In addition, Plaintiff's substantial privacy interest outweighs the public interest in knowing her identity.

A proposed protective order is attached to this motion for the court's convenience.

ARGUMENT

Although a complaint must usually state the names of all parties, Fed. R. Civ. P. 10(a), "trial courts have always been afforded the power to seal their records when interests of privacy outweigh the public's right to know." *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 474 (6th Cir. 1983) (citations omitted). This Court may excuse Plaintiff from filing under her own name if it finds that her privacy interests outweigh the typical presumption of keeping judicial proceedings open. *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004). In addition, this Court may "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" upon Plaintiff's motion and for good cause shown. Fed. R. Civ. P. 26(c). Here, Plaintiff's substantial privacy interests provide good cause for the protective order

she seeks. Failure to enter such an order puts her at substantial risk of discrimination, harassment, and physical violence.

A. Disclosure of Plaintiff's identity would reveal sensitive information, putting her at risk, so under the factors relevant in this Circuit, this Court should grant her motion.

Plaintiff has a credible fear that she will come to harm if her identity, including her transgender status and related private medical information, becomes known to the public in connection with this litigation against Ohio. The Sixth Circuit has identified four factors this Court should consider in determining whether a plaintiff may proceed anonymously. *Porter*, 370 F.3d at 560. The two relevant factors here are (1) “whether the plaintiffs seeking anonymity are suing to challenge governmental activity,” and (2) “whether prosecution of the suit will compel the plaintiffs to disclose information ‘of the utmost intimacy.’” *Id.*¹ Both of these factors weigh in Plaintiff's favor.

First, Plaintiff is challenging a government policy, and Defendants are all government actors. The very injuries that Plaintiff alleges in her complaint, caused by the State Defendants' Birth Certificate Policy, is *based* on Ohio's forced disclosure of her transgender identity and assigned sex at birth, which puts her at risk. The remedy she seeks in her complaint is an order from this court requiring the state to correct the gender marker on her birth certificate so that her transgender identity is not revealed every time she produces her birth certificate, thus substantially lessening the risk of harm.

Second, Plaintiff's transgender status, which places her in a small and highly stigmatized social group that reliably experiences retaliation when their identity is disclosed, is information

¹ The other two *Porter* factors are whether the plaintiff is a child and whether the plaintiff's identity would put her at risk of criminal prosecution. Neither is relevant here.

“of the utmost intimacy.” *Id.* Plaintiff’s transgender status conveys sensitive information about her body, her medical history, her deeply felt identity, and the incongruity between her gender identity and her assigned sex at birth. As the Second Circuit has explained: “the excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.” *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999); *see also K.L. v. State*, No. 3AN-11-05431 CI, 2012 WL 2685183, at *6 (Alaska Super. Ct. Mar. 12, 2012) (“The Court agrees that one’s transgender[] status is private, sensitive personal information” and “is entitled to protection”); *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015) (finding that disclosure of transgender status “creates a very real threat to Plaintiffs’ personal security and bodily integrity”).

Persons publicly identified as transgender in any context are at risk of hostility, harassment, and injury. “[T]ranssexualism is the unusual condition that is likely to provoke both an intense desire to preserve one’s medical confidentiality, as well as hostility and intolerance from others.” *Powell*, 175 F.3d at 111; *see also Brocksmith v. United States*, 99 A.3d 690, 698 n. 8 (D.C. 2014) (“The hostility and discrimination that transgender individuals face in our society today is well documented”).

Because of the stigma that transgender people experience and the risks they face based on this status, courts regularly allow transgender plaintiffs to proceed under pseudonyms. *See, e.g., Bd. Of Educ. of the Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, No. 2:16-cv-524, 2016 WL 4269080, at *5 (S.D. Ohio, August 15, 2016) (Marbley, J.) (allowing minor transgender plaintiff to proceed as Jane Doe, recognizing “courts have allowed non-minor transgender plaintiffs to proceed anonymously due to the social stigma associated with their gender identity” and collecting cases).

In this case, Plaintiff is a member of an extremely vulnerable community, and if her identity (and thereby her transgender identity) is revealed, she may experience harm ranging from humiliation or other discrimination to physical violence. Plaintiff interacts with many members of the general public in the course of her work as a physician, and she fears that she may lose business or be physically attacked by an individual for being transgender.

Unfortunately, her fear is well founded, based on the widespread and well documented hostility towards transgender women, an animosity which Plaintiff has experienced herself. As one court recognized, “there exist numerous documented instances of those targeted for violence based on their...gender identity.” *In re E.P.L.*, 891 N.Y.S.2d 619, 921 (Sup. Ct. 2009); *see also Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (“There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity”); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017) (“transgender people as a class have historically been subject to discrimination”); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (same); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (same); *Doe 1 v. Trump*, No. CV 17-1597 (CKK), 2017 WL 4873042, at *27 (D.D.C. Oct. 30, 2017) (same). The risks are especially high for women who are transgender. In a recent large survey of transgender people, 18% of transgender women had lost a job because of their gender identity, 38% had been physically attacked and 31% sexually assaulted in school for being transgender, and 48% of transgender people had been subjected to unequal treatment, verbally harassed, and/or physically attacked in the past year. *See Sandy E. James et. al, The Report of the 2015 U.S. Transgender Survey*, 133, 134, 150, 198 (2016), <http://bit.ly/2BXZcma>. The disclosure that would result from denying Plaintiff’s motion would

place her at risk of serious harm. Her requested protective order is necessary not only to safeguard her privacy, but also her safety.

B. Granting Plaintiff's motion will not compromise Defendants' ability to present a full defense.

The Sixth Circuit also directs trial courts to consider whether defendants will have sufficient information to full defend the case if Plaintiff's requested protective order is issued. Where knowledge of the plaintiff's identifying information may be necessary to the defendant's ability to present their defense, the trial court may order that plaintiff's identity be disclosed to the defendant, but limit disclosure of the plaintiff's personal information to the public. *See Porter*, 370 F.3d at 560-61.

Here, Plaintiff merely seeks an order that would limit disclosure of her personal information to the public, but that would permit disclosure to the Defendants if necessary. Thus, the proposed protective order would not hamper the Defendants' ability to present a defense. Like the situation in *Porter*, "it is unclear how [the Court's grant of the protective order] would...hinder[] [the Defendant's] preparation" of the case, since the Defendants here would still be able "to obtain all the necessary information to address" the issues in this case without public disclosure of Plaintiff's identity. *Id.* at 561.

CONCLUSION

Plaintiff's mere status as a transgender person carries a real and substantial risk of harm. This Court should not exacerbate the very harms she is attempting to alleviate through this litigation by requiring that she proceed under her true name rather than anonymously. Plaintiff's privacy interests significantly outweigh any public interest in knowing her identity, and a protective order would not prejudice Defendants' ability to defend themselves. Jane Doe

therefore respectfully moves this Court to grant her motion and enter the Proposed Order provided as Exhibit A to Plaintiff's motion.

Dated March 29, 2018

Respectfully submitted,

/s/ Freda Levenson

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**Pro hac vice motion pending*

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2018, I filed the foregoing electronically through the Court's CM/ECF system. Parties may access this filing through the Court's system. Because counsel for defendants has not yet appeared, I further certify that I will personally serve the foregoing on all defendants along with the complaint and request for waiver of service, at the following addresses:

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**[PROPOSED] ORDER OF PROTECTION ALLOWING PLAINTIFF
JANE DOE TO PROCEED ANONYMOUSLY**

This matter having come before the Court on Plaintiff Jane Doe's motion to proceed anonymously and the Court having reviewed Plaintiff's motion and for good cause shown, it is hereby ORDERED:

1. Plaintiff Jane Doe is permitted to bring this action as Jane Doe to protect her identity from public disclosure;
2. In all publicly-filed documents, Plaintiff Jane Doe shall only be identified as Jane Doe;
3. All documents filed with this Court that contain the full name of Plaintiff Jane Doe or contain information that identifies her, directly or indirectly, shall be filed under seal;

4. Upon request, Plaintiff Jane Doe will disclose her identity to counsel for Defendants. In that event, Plaintiff need only disclose the minimum information necessary for Defendants to present their defense;
5. Counsel for Defendants may disclose Plaintiff Jane Doe's identity to the Defendants, their agents, and to any experts retained in this case, but only to the minimum extent necessary to litigate this action;
6. Every individual to whom disclosure of Plaintiff Jane Doe's identity is made shall read and be bound by this Order. Counsel for Defendants shall ensure that persons to whom disclosure is made under paragraphs 4 and 5 above are aware of this Order; and
7. Under no other circumstances shall any party or any other person intentionally disclose Plaintiff Jane Doe's identity without her counsel's written consent.

IT IS SO ORDERED.

U.S. District Judge

Dated March __, 2018