

**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
LANCE HIMES, et al.)	
)	
Defendants.)	

DEFENDANTS’ MOTION TO STAY DISCOVERY

Defendants 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 (collectively “Defendants”), move to stay all discovery in this action until the Court rules on Defendants’ pending Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6). The grounds for this motion are fully set forth in the accompanying memorandum.

Dated: July 20, 2018

Respectfully submitted,

/s/ Kimberly Moses

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**DEFENDANTS’ MEMORANDUM IN SUPPORT OF
THEIR MOTION TO STAY DISCOVERY**

I. INTRODUCTION

Discovery should be stayed until the Court rules on Defendants’ pending 12(b)(6) Motion to Dismiss because that decision will determine which—if any—part of this action will survive.¹ Briefly staying discovery limits potentially needless discovery and serves the dual interests of judicial economy and the preservation of taxpayer funds (since the citizens of Ohio are funding the defense of this litigation).

Plaintiffs will not be prejudiced by the requested stay of discovery. Because Plaintiffs’ claims are primarily legal in nature (and because the Motion to Dismiss focuses on purely legal issues), staying discovery will not impact Plaintiffs’ ability to either oppose the Motion to Dismiss, or, if the Motion to Dismiss is denied, ready the case for trial.

Accordingly, this Court should grant Defendants’ motion to stay during the pendency of the Motion to Dismiss.

¹ Plaintiffs have indicated that they are unwilling to enter a voluntary stay of discovery and have already commenced extensive and overbroad fact discovery.

II. BACKGROUND

Plaintiffs challenge the constitutionality of two Ohio statutes that dictate the circumstances under which an individual can correct certain information recorded on his or her birth record. Specifically, Plaintiffs seek to alter the designation of their “sex” as it was reported and recorded at the time of birth. Ohio law allows a person to correct *inaccurate* information in a birth record; but Plaintiffs do not argue that their “sex” was inaccurately recorded at birth. Rather, Plaintiffs contend that Ohio law is unconstitutional on First Amendment, due process, and equal protection grounds because it does not permit transgender people to alter the “sex” designation on their birth certificates to “accurately reflect their gender identity,” which “does not match their sex assigned at birth.” Doc. 1 at ¶¶ 1, 5.

As is set forth more fully in Defendants’ Motion to Dismiss, Plaintiffs’ Complaint is legally deficient for multiple reasons, including: (1) birth certificates are governmental speech and do not violate the First Amendment; (2) Ohio’s birth certificates are public records and do not violate Plaintiffs’ due process right to informational privacy; and (3) Ohio law is facially neutral and Plaintiffs have not alleged the discriminatory intent necessary to support an equal protection claim. *See* Doc. 18. Plaintiffs have not yet responded to that Motion.

Ultimately, the Court may dismiss all, some, or none of the claims set forth in the Complaint. Until the parties know what claims, if any, will survive the Motion to Dismiss, discovery would be premature.

III. ARGUMENT

This Court should exercise its broad discretion to stay discovery pending the resolution of Defendants’ Motion to Dismiss pursuant to Rule 12(b)(6). “Trial courts have broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined.” *Hahn v. Star Bank*, 190 F.3d 708, 719 (6th Cir. 1999) (*citing Landis v. North Am.*

Co., 299 U.S. 248, 254–55 (1936)). “In assessing a motion to stay discovery, the Court must weigh the burden of proceeding with discovery upon the party from whom discovery is sought against the hardship which would be worked by a denial of discovery.” *Brown v. Danson Inc.*, 2012 U.S. Dist. LEXIS 117631, at *4 (S.D. Ohio Aug. 21, 2012). Importantly, “limitations on pretrial discovery are appropriate where claims may be dismissed based on legal determinations that could not have been altered by any further discovery.” *Gettings v. Bldg. Laborers Local 310 Fringe Benefits Fund*, 349 F.3d 300, 304 (6th Cir. 2003) (quotations omitted).

A. Judicial Economy Weighs in Favor of Granting the Motion to Stay

This Court should exercise its broad discretion to stay discovery during the pendency of Defendants’ Motion to Dismiss. As an initial matter, Defendants have moved to dismiss Plaintiffs’ Complaint in its entirety. *See generally* Doc. 18. It is very possible that the case will be dismissed, and any discovery sought or taken will unnecessarily expend time and money for all parties. It is also possible that one or more claims survive the Motion; but it is unclear which, if any, would. Until these uncertainties are resolved, discovery would be premature and a needless expenditure of limited resources. Therefore, this Court should grant the motion to stay to promote judicial economy and protect the limited resources of the parties. *See, e.g., Sims v. First Horizon Nat’l Corp.*, 2009 U.S. Dist. LEXIS 53481, at *19 (W.D. Tenn. June 23, 2009) (“To avoid needless discovery as to issues which may not survive Defendants’ Motion to Dismiss, the Court will grant a stay of discovery until the Court rules on the Motion to Dismiss.”); *Mathis v. Quicken Loans, Inc.*, 2007 U.S. Dist. LEXIS 82923, at *39 (E.D. Mich. Sep. 7, 2007) (“a stay in the present case is appropriate for discovery into the merits of the case to promote judicial economy” and “save party resources”).

The costs of unnecessary discovery are even more critical in this case because Defendants are representatives of the Ohio Department of Health and public officials, and any

time and money spent responding to Plaintiffs' discovery necessarily will come directly from public funds. Staying discovery during the pendency of the Motion to Dismiss avoids the unnecessary use of such funds.

B. Plaintiffs Will Not be Prejudiced by a Stay to Discovery

Plaintiffs will not be prejudiced by a stay during the pendency of the Motion to Dismiss because the legal issues in this case are unlikely to be altered by fact discovery. In such cases, staying discovery is warranted. *See Muzquiz v. W.A. Foote Mem. Hosp.*, 70 F.3d 422, 430 (6th Cir. 1995) (upholding the district court's limitations on discovery because dismissal of the plaintiff's claims was based on "legal determinations that could not have been altered by any further discovery"); *MacConnell v. Plummer*, 2013 U.S. Dist. LEXIS 96388, at *4 (S.D. Ohio July 10, 2013) (finding stay warranted where motion to dismiss hinges on legal issues); *Brown*, 2012 U.S. Dist. LEXIS 117631, at *5 (finding pure legal issue in motion to dismiss warranted issuing stay of discovery).

Like the cases cited in the preceding paragraph, Defendants' Motion to Dismiss is based on pure legal issues. As this Court is aware, Plaintiffs' Complaint raises three constitutional challenges to Ohio's birth record laws. *See generally* Doc. 1. These constitutional challenges are not based on intricate factual claims, but are based exclusively on a facial challenge to Ohio law. And Defendants' Motion to Dismiss is a pure legal challenge to the sufficiency of Plaintiffs' Complaint. *Id.* *See generally* Doc. 18. No amount of fact discovery will change that legal conclusion. Thus, staying discovery is warranted during the pendency of the Motion to Dismiss, which hinges on legal questions, which will not be significantly altered by fact discovery.

Nor can Plaintiffs claim prejudice based on a risk of spoliation or deterioration of evidence during the pendency of the Motion to Dismiss. If any portion of Plaintiffs' Complaint survives (which it should not), the factual records maintained by Defendants will be exactly the

same as they are today. After all, Defendants are representatives of the Ohio Department of Health, so the threat of spoliation is virtually non-existent. And many of the documents which may become relevant in this case are generally already a matter of public record and are subject to public records requests.

Finally, Defendants have filed their motion to stay early in this case, which weighs in favor of granting the stay and against prejudice. See *Victoria's Secret Stores Brand Mgmt., Inc. v. Bob's Stores LLC*, 2014 U.S. Dist. LEXIS 34503, at *2–3 (S.D. Ohio Mar. 17, 2014). Indeed, in this case, like in *Victoria's Secret*, Defendants have moved to stay discovery soon after the parties filed their Rule 26(f) Report. *Id.* at *2.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully submit that their Motion to Stay Discovery should be granted.

Dated: July 20, 2018

Respectfully submitted,

/s/ Kimberly Moses

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2018, 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/ Kimberly. Moses _____
One of the Attorneys for Defendants