

**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.)	

**REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS
PURSUANT TO FED. R. CIV. P. 12(b)(6)**

I. INTRODUCTION

Plaintiffs' entire argument in their opposition to the Motion to Dismiss is based on a fundamental misunderstanding of what an Ohio birth certificate is. Ohio's birth certificates are historical documents that record basic, historical facts about a child's birth. They are not, as Plaintiffs contend, current identity records. All three of Plaintiffs' claims, and their arguments in opposition to Defendants' Motion to Dismiss, are rooted in that basic misunderstanding. Indeed, Ohio's birth-record laws fully comply with the U.S. Constitution, and none of Plaintiffs' constitutional claims have merit as a matter of law.

Plaintiffs' First Amendment claim fails because birth certificates in Ohio record basic biographical and vital information related to the birth of every child born in the state. These documents are quintessentially government speech, reflecting objective, historical facts as reported and recorded at the time of birth. Defendants do not collect any information regarding a person's gender identity. And no ideological message is conveyed by Defendants' ministerial recording of a newborn's sex, just as there is no ideological message conveyed when Defendants record that same child's height, weight, or name at birth. These are facts, not viewpoints.

Consequently, Plaintiffs have no basis, as a matter of law, for stating a claim that Defendants' actions constitute government compelled speech in violation of the First Amendment.

Similarly, Plaintiffs' Due Process claim also fails. Ohio is an open records state, which means that its birth certificates may be requested by virtually anyone willing to pay a nominal fee and equipped with some rudimentary biographical information (such as the person's name and approximate year-of-birth). Plaintiffs misunderstand both the openness of those records and the implications of that openness. Additionally, no informational privacy claim arises when, as is the case here, a state agency gives a person a copy of their own records and that person discloses those records to a third party. Consequently, Plaintiffs' assertions that Defendants' actions violate the Due Process Clause by infringing on Plaintiffs' informational right to privacy cannot be sustained as a matter of law.

Plaintiffs' Equal Protection claim fails, too. Ohio law specifically limits the corrections that can be made to the historical data on a birth certificate. In general, Ohio's laws are correction-only statutes, which only allow changes to correct mistaken entries. Apart from authorizing such corrections, Ohio's state legislature has enacted specific laws allowing a person to update information that reflects legal identity, such as name and, in cases of adoption, parental information. But Ohio has no similar law allowing a person to change their sex as recorded on a birth certificate. Thus, Ohio does not purport that a child's sex as reported at birth represents any current identity, but merely the historic fact. Additionally, Ohio's birth record laws apply equally to all Ohioans. Ohio's birth record laws do not mention transgender, male, female, or any other category that could be construed as relating to a person's sex or gender identity. Ohio law is facially neutral in all respects. Nevertheless, and despite failing to allege *any* discriminatory intent, Plaintiffs contend that Ohio's birth record laws violate the Equal Protection Clause. Nothing could be further from the truth.

Whatever *policy* reasons may exist in support of Plaintiffs' arguments, of which Plaintiffs have offered many, *policy* does not compel relief under the U.S. Constitution. Nor does *policy* warrant upending a validly enacted state law, particularly when Plaintiffs have failed to articulate exactly what relief they seek.

For the reasons set forth below and in the Motion to Dismiss, this Court should dismiss Plaintiffs' entire Complaint as a matter of law.

II. ARGUMENT

A. **Ohio's Birth Certificates are a Historical Public Record of a Person's Sex as Recorded at Birth, and Do Not Purport to Reflect Current Gender Identity.**

Ohio's birth certificates are historical public records that reflect information as reported to Defendants soon after an individual's birth. Nothing on the face of Ohio's birth certificates indicate that it is, or is intended to be, a current document. *See* Doc. 18-2. Unlike other forms of identification issued by the state—such as driver's licenses—birth certificates do not expire. Nor are many aspects of the birth certificate updateable (even if such information may no longer be accurate). For example, birth weight is one of the vital records collected by Defendants at the time of birth. And although a person's weight changes, that information is never updated on the birth certificate. The same goes for an individual's place of birth, time of birth, and numerous other data related to the birth. *See* Doc. 18-1. Those are historical facts which are never modified, just like an individual's birth sex.

Contrasted with the information recorded on a driver's license, it is apparent that birth certificates are historical records, not current identity documents. Unlike birth certificates, individuals routinely update their driver's licenses with information related to their address, weight, height, and even sex. And while limited aspects of a birth certificate are changeable, such as parentage information in the case of adoption, *see* Ohio Rev. Code § 3705.12, that is not the case with the sex recorded on Ohio's birth certificates, which merely records historical data.

As one court in this district has noted, “[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. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 866 n.3 (S.D. Ohio 2016) (citing Ohio Rev. Code §§ 3705.15 and 3705.22) (emphasis added). Birth certificates *do not* contemporaneously reflect “gender identity.”

Plaintiffs’ characterization of the sex recorded on Ohio’s birth certificates as a current reflection of “gender identity” is the flawed premise at the root of all three flawed claims. Plaintiffs’ misapprehension leads them to the incorrect conclusion that Defendants’ express a viewpoint about gender identity. But historical facts are not viewpoints, and Ohio’s birth certificates do not record information about a person’s gender identity. Similarly, Plaintiffs’ claim that Defendants’ refusal to update the sex on the birth certificates is a violation of Plaintiffs’ informational right to privacy. But once again, Plaintiffs gloss over the fact that Ohio’s birth records say *nothing* about gender identity and, in any event, are public records that are not subject to informational privacy analysis. Finally, because Ohio’s birth record laws say nothing about gender identity or sex, they are facially neutral and do not discriminate against transgender people.

For those reasons, and as more fully explained below, Plaintiffs’ claims should be dismissed.

B. The Birth Certificates Issued by Defendants Do Not Violate the First Amendment.

1. The birth certificates issued by Defendants constitute governmental speech that is not subject to scrutiny under the First Amendment.

Plaintiffs’ First Amendment arguments are fundamentally flawed. “When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says.”

Walker v. Texas Div. Sons of Confederate Veterans, 135 S. Ct. 2239, 2245 (2015) In arguing that Ohio’s government issued birth certificates do not constitute government speech, Plaintiffs grossly misconstrue the holding in *Walker*. See Doc. 23 at 16-17. In *Walker*, the Supreme Court held that “government actions and programs that take the form of speech []do not normally trigger the First Amendment rules” *Walker*, 135 S. Ct. at 2245-46. The Supreme Court noted that exempting most forms of governmental speech from the First Amendment was necessary for government to function. *Id.* at 2246. The Supreme Court analyzed numerous factors that led it to the conclusion that the license plates at issue in *Walker* constituted government speech. *Id.* at 2249-52. As the Motion to Dismiss explained, all of those factors apply to Ohio’s birth certificates. Doc. 18 at 10-11. Indeed, if anything the birth certificates at issue here have even more characteristics of government speech because, unlike the license plates at issue in *Walker*, people cannot personalize the designs or mottos on their birth certificates. See *Walker*, 135 S. Ct. at 2244.

Importantly, 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)). Here, the birth certificates are a form of “government IDs,” albeit IDs as of a certain point in time, and not current-identity records like driver’s licenses. Anyone looking at a birth certificate easily understands that it is the state, not the individual, who is conveying the message. Aside from the obvious physical marks on the records (the word “Ohio” emblazoned on the document, the

Department of Health seals, and certification of the State Registrar of Vital Statistics), they are generated within days or weeks of the child's birth by individuals acting on behalf of Ohio. *See* Doc. 18-2. No reasonable observer would look at a person's birth certificate, with its Ohio insignia and created when such person was just days old, and conclude that it must be the individual's speech as opposed to the government's. Ohio's birth certificates are quintessential government speech under *Walker*.

Unable to distinguish the birth certificates at issue here from the governmental speech defined in *Walker*, Plaintiffs cite several cases that they assert limit *Walker's* reach. Doc. 23 at 16. None of those cases does so. First, Plaintiffs cite the Supreme Court's holding in *Matal v. Tam*, 137 S. Ct. 1744 (2017), a trademark case where the government denied a band's trademark registration for the name "The Slants," under the disparagement clause of 15 U.S.C. § 1052(a). *Id.* at 1751. The Supreme Court struck the disparagement clause, finding that banning speech because it was offensive violated the Free Speech Clause of the First Amendment. *Id.* In reaching that conclusion, the Supreme Court noted that "[t]he Free Speech Clause... does not regulate government speech" and "[t]he Government's own speech... is exempt from First Amendment scrutiny...." *Id.* at 1759 (citing cases). Instead of limiting *Walker*, as Plaintiffs argue, the Supreme Court in *Matal* applied *Walker*, and found that the trademark registration process did not contain any of the indicia of the governmental speech outlined in *Walker*. *Id.* at 1760. As set forth above, and in the Motion to Dismiss, all of the *Walker* factors apply in this case (if not more so). Doc. 18 at 9-11. *Tam* does not apply.

Nor do the out-of-circuit cases that Plaintiffs cite help their cause in purportedly limiting *Walker's* holding. Doc. 18 at 16. Like *Tam*, none are governmental speech cases or involve items like the license plates at issue in *Walker* or the government-issued birth certificates at issue here. *See Wandering Dago, Inc. v. Desito*, 879 F.3d 20, 35-36 (2d Cir. 2018) (involving speech

by a food truck vendor concerning an offensive slogan); *Higher Society of Indiana v. Tippacano* *Cty. Indiana*, 858 F.3d 1113, 1117-18 (7th Cir. 2017) (involving speech by a pro-marijuana group on public grounds); *Knight First Am. Inst. At Columbia University v. Trump*, 302 F. Supp. 3d 541, 572 (S.D.N.Y. 2018) (involving replies to President Trump's tweets). The cases cited by Plaintiffs are inapposite. The birth certificates issued by Defendants constitute government speech, which cannot serve as the basis of a valid First Amendment claim as a matter of law.

2. The birth certificates issued by Defendants record historical facts and do not require Plaintiffs to adopt a viewpoint or ideology.

Defendants' ministerial role in recording and maintaining birth records is not a violation of Plaintiffs' First Amendment rights. Birth certificates are records made by the State of Ohio soon after the time of birth based on certain vital and biographical information reported to officials at the Ohio Department of Health. *See* Doc. 18-1. While more information is reported to and maintained by the Ohio Department of Health in some form, only a limited subset is recorded on the Certification of Birth. *See* Doc. 18-2. 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* the Ohio Department of Health. *See* Doc. 18-2. In recording that data, the Defendants have no room for interpretation, no opportunity to express a viewpoint, and no reason to color that information with an ideological stance.

In their opposition, Plaintiffs argue that Defendants specifically force transgendered people to "maintain and produce birth certificates containing the state's ideological message about their gender, rather than their own truthful message...." Doc. 23 at 15. As an initial matter, the birth certificates are maintained by Defendants, not Plaintiffs. And, whatever the circumstances surrounding Plaintiffs' production of birth certificates to third parties, Defendants, as officials at the Ohio Department of Health, have nothing to do with that production.

Importantly, Ohio's birth certificates *do not say anything* about Plaintiffs' "gender identity." The identifier on Ohio's birth certificate is for the child's "sex" as reported at birth (and Plaintiffs do not allege or argue that their "sex" was incorrectly recorded). *See* Doc. 18-2; *see generally* Doc. 1; Doc. 23. The word gender does not appear in any of the birth records generated by Defendants. *See* Docs. 18-1 and 18-2. Simply put, Defendants do not maintain any records that reflect gender identity. Plaintiffs now claim that a person's biological "sex" and "gender identity" are the same, and that Defendants' arguments to the contrary are further evidence of the state's ideological viewpoint. Doc. 23 at 17. But Plaintiffs' position is belied by the allegations in their Complaint where they repeatedly contrast their gender identity and their biological sex. *See* Doc. 1 at ¶¶ 22, 23, 26; *see also* *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1136-37 (D. Idaho 2018) (noting difference between biological sex at birth and gender identity); *see also* Doc. 18 at 7-8. The birth certificates issued by Defendants do not convey any viewpoint, ideological or otherwise, regarding Plaintiffs' gender identity. And not only is the "sex" listed limited to sex and not gender identity, it is also by definition limited to the sex *reported at birth*. The State makes no claims about current status of sex or gender identity.

While Plaintiffs cite Supreme Court cases to purportedly support their argument that they should not have to express a viewpoint with which they disagree, none of those cases involved governmental speech, so none apply here. Doc. 23 at 17-18; *see, e.g., Janus v. Am. Fed'n of State, City, and Mun. Empls.*, 138 S. Ct. 2448 (2018) (striking a law that required public employees to subsidize a union); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (finding that the First Amendment protects the disclosure of illegally intercepted communications); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (finding that requiring pregnancy centers to provide certain notices was unconstitutional); *NAACP v. Ala. ex rel. Patterson*, 357

U.S. 449 (1958) (invalidating state's attempt to discover membership list of NAACP). Instead, each of the cases cited by Plaintiffs involves the speech of private individuals or groups.

Unlike the situations in the cases cited by Plaintiffs, the speech at issue here does not involve private speech. Nor do Defendants compel Plaintiffs to make any statement about their gender identity. The mere act of recording a child's sex at birth does not, as a matter of law, equate to an ideological viewpoint. And a child's sex at birth is an historical fact. In such circumstances, no valid First Amendment claim exists.

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

As the Motion to Dismiss explained, Plaintiffs' due process claim sounds in what the Sixth Circuit has described as an "informational right to privacy." *See Bloch v. Ribar*, 156 F.3d 673, 683-84 (6th Cir. 1998); *see also* Doc. 18 at 12. Supreme Court and Sixth Circuit law is clear—public records are not subject to due process claims based on the informational right to privacy. *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). Accordingly, because Ohio's birth certificates are public records, Plaintiffs' Due Process claim fails as a matter of law.

Plaintiffs do not challenge the fact that their Due Process claim is based on their assertion of an informational right to privacy, but they do ignore the requirements to state an informational privacy claim under binding Sixth Circuit precedent. Instead, Plaintiffs state that "[n]o court has held that government entities may force disclosure of *any* private information so long as the information is contained in a document they label as a 'public record.'" *Id.* at 14 (emphasis in original). That statement, which Plaintiffs notably fail to support with any authority, has nothing to do with this case and is at odds with the law. The information recorded on birth certificates is

not private information—it is a matter of public record by operation of Ohio law. Ohio Rev. Code § 3705.23(A)(1). And whatever the circumstances of Plaintiffs’ disclosure of their birth records, it cannot plausibly be said that it is the Defendants who “force” such disclosure. Indeed, no court in the Sixth Circuit has ever held that when a state statute specifically designates information as a public record, the release of such information would constitute a violation of informational privacy. Accordingly, Plaintiffs’ informational privacy claim fails.

Nor do Plaintiffs explain how Defendants’ refusal to change the sex designation on their birth certificates “implicate[s] a fundamental liberty interest.” *Bloch*, 156 F.3d at 684 (citing *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981)). Plaintiffs fail to identify a single case in either the Sixth Circuit or Supreme Court standing for the proposition that they have a fundamental right to keep secret how their sex was reported and recorded at birth. Thus, 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.

Again, Ohio’s birth certificates do not disclose information about gender identity. *See* Doc. 18-2. Birth certificates in Ohio identify a child’s sex reported at the time of birth. Even Plaintiffs do not assert that the information was inaccurately recorded, and recording the data provided to the government by private witnesses does not violate the Due Process Clause. Nor does maintaining that data for years as a public record under Ohio law. Plaintiffs’ substantial reliance on *Kallstrom* is misplaced. *See Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998). *Kallstrom* involved the release of the personnel files of undercover police officers testifying in the drug conspiracy trial of several members of the Short North Posse, a violent gang in Columbus, Ohio. *Id.* at 1059. The personnel files were provided by the City of Columbus to the gang members’ attorney, who then provided the information to his clients. *Id.*

The personal information provided by the City included, among other things, the names, addresses, and phone numbers of the officers' immediate family members. *Id.* In that extreme circumstance, the Sixth Circuit found that the officer's right to informational privacy had been violated. *Id.*

Relying on *Kallstrom*, Plaintiffs omit the fact that the Sixth Circuit has repeatedly limited the application of the informational right to privacy. *See, e.g., Lee v. City of Columbus*, 636 F.3d 245, 261 (6th Cir. 2011) (finding that city employees returning from sick leave must disclose the nature of their illness); *Summe v. Kenton Cnty. Clerk's Office*, 604 F.3d 257, 270-71 (6th Cir. 2010) (finding county's release of medical records of county employees pursuant to an open records request did not violate the Due Process Clause); *Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 591 (6th Cir. 2008) (finding a school's disclosure of private information to Children's Services did not violate constitutional rights); *Barber v. Overton*, 496 F.3d 449, 454-57 (6th Cir. 2007) (finding the release of guards' personal information to prisoners was not a violation of informational privacy); *Coleman v. Martin*, 63 F. App'x 791, 793 (6th Cir. 2003) (holding that the provision of a prisoner's mental health records to the parole board did not violate the constitution).

The Sixth Circuit's holding in *Barber* illustrates *Kallstrom*'s narrow reach. In *Barber*, the Sixth Circuit rejected an informational privacy claim asserted by correctional officers whose personal information was provided to prisoners during an investigation into allegations of prisoner abuse. 496 F.3d at 450. As noted by the Sixth Circuit in *Barber*, *Kallstrom* "did not create a broad right protecting [] 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 found that the relationship between the corrections

officers and the prisoners was “not defined by the clear animosity apparent in *Kallstrom*”—*i.e.*, key witnesses testifying against violent gang members. *Id.* at 457. Even though both cases involved the disclosure of the personnel files of law enforcement officers who were investigating dangerous, violent criminals, the court in *Barber* found as a matter of law that the situation in *Barber* was not “sufficiently analogous” to the circumstances in *Kallstrom*. *Id.* If the corrections officers whose information was disclosed to violent prisoners in *Barber* is not analogous to the circumstances in *Kallstrom*, then Defendants’ records of Plaintiffs’ sex at birth must, as a matter of law, fall outside the ambit of *Kallstrom*’s narrow application.

Further, Plaintiffs mischaracterize the requirements for obtaining birth records in Ohio. *See* Doc. 23 at 13, n. 6. According to Plaintiffs’ “an applicant must pay a fee and supply significant personal information about the person, including date and place of birth and the names of the person’s parents before marriage.” *Id.* Plaintiffs omit that the instructions for the application specifically state that birth records are public records and that if an individual does not have complete information, a search can be performed. *See* Ohio Admin. Code § 3701-5-02(A)(20)(Appendix T), attached as Exhibit A. In any event, Plaintiffs’ argument is a red herring. No matter the information required to obtain birth records, they are public record as a matter of law. *See, e.g.*, Ohio Rev. Code. §§ 3705.23(A)(1) and 3705.231.

And Plaintiffs’ own statement—namely, that unlike Ohio, “[m]ost states do not permit one to obtain a copy of another persons’ birth certificate,” Doc. 23 at 6—simply confirms that Ohio’s birth certificates are public records. Thus, the due process concerns that might apply in a closed-records jurisdiction—where *disclosure* of private information is at issue—do not apply here. Ohio’s open-records law is in stark contrast to jurisdictions like Puerto Rico, whose closed-record laws significantly limit access to birth certificates. Under Puerto Rican Law 191, only the individual, family members, guardians, or others appointed by the court, may obtain a

copy of the birth certificate. See <https://www2.pr.gov/prgovEN/Pages/BirthCertificateInfo.aspx> (last visited August 5, 2018). The fact that Puerto Rico is a closed-records jurisdiction is the very reason why Plaintiffs' reliance on *Arroyo Gonzales v. Rossello Nevares*, 305 F. Supp. 3d 327 (D.P.R. 2018) is improper. Whatever conclusions the court reached regarding the Due Process Clause in *Arroyo*, that court did so without being bound by the Sixth Circuit's public records analysis or the Sixth Circuit's narrow application of the informational privacy right, both of which this Court must apply here.

Accordingly, this Court should dismiss the Due Process claim.

D. Plaintiffs Fail to State a Valid Equal Protection Claim

1. Ohio's Birth-Record Laws Are Facially Neutral and Plaintiffs Have Not Adequately Pleaded Discriminatory Intent.

Plaintiffs are wrong in claiming that Ohio law, by not allowing amendments to the sex recorded at birth on a birth certificate, other than ministerial corrections, violates federal rights. Plaintiffs also detour into suggesting that perhaps Ohio law does not actually bar such amendments. Doc. 18 at 5-6. Any such suggestion is mistaken. First, Plaintiffs cannot cite any Ohio law authorizing such changes. And Ohio's specific correction-only statutes, by providing for fixing mistakes only where the sex was inaccurately reported or recorded at the time of birth, confirm that no mechanism exists for any other modification of the sex designation on a person's birth certificate. See *In re Declaratory Relief for Ladrach*, 513 N.E.2d 828, 831 (Ohio Ct. Com. Pl. 1987). And *Ladrach* remains good law on that state-law issue about how Ohio birth certificates work, contrary to Plaintiffs' suggestion otherwise. See Doc. 18 at 2 n. 1. *Ladrach*'s authority is not affected by the fact that *Ladrach* involved a marriage application as the factual background for why someone sought to amend a birth certificate. See *Ladrach*, 513 N.E.2d at 831. Indeed, after *Ladrach*, at least one court in this district has acknowledged 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.*, 208 F. Supp. 3d at 866 n.3 (citing Ohio Rev. Code §§ 3705.15 and 3705.22). Thus, Ohio’s statutes do not allow for the changes Plaintiffs seek (other than correcting clerical errors), so any suggestion otherwise is mistaken.

And in recording only sex at birth with no broad allowance for later amendments to the certificate, Ohio’s birth-record laws are facially neutral. Under Ohio law *no one*, regardless of his or her gender identity, may change the sex designation on their birth certificate absent a mistake when the birth record was made. *See* Ohio Rev. Code §§ 3705.15 and 3705.22. Plaintiffs, like all Ohioans, may take equal advantage of this corrective statute. Because Ohio’s law is facially neutral, Plaintiffs cannot succeed on an Equal Protection Clause claim unless they show not only disparate impact, but also that the law’s intended purpose was to discriminate against transgendered people. *See Washington v. Davis*, 426 U.S. 229, 265 (1976). Plaintiffs’ opposition, like their Complaint, makes no effort whatsoever to allege—let alone demonstrate—that Ohio’s legislature had a discriminatory purpose in enacting Ohio’s facially neutral laws, and as a result, Plaintiffs’ Equal Protection Clause claim must be dismissed. *See Bailey v. Carter*, 15 Fed. Appx 245, 251 (6th Cir. 2001).

Instead of alleging discriminatory intent, Plaintiffs raise two theories in defense of their Equal Protection Clause claim, neither of which have any merit. First, Plaintiffs’ appear to argue without explanation that the Supreme Court’s holding in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), limits or overrules the longstanding discriminatory purpose requirement set forth in *Washington*. *See* Doc. 23 at 4. Notably, Plaintiffs cite the *Obergefell* syllabus, not the majority opinion, which says nothing about disparate impact analysis. *See generally* 135 S. Ct. 2584. Moreover, and in stark contrast to Ohio’s birth record laws, the law challenged in *Obergefell* was not facially neutral, as it expressly provided that a couple’s right to marry was based on being

opposite-sex rather than same-sex. *See* Ohio Rev. Code § 3101.01(A) (“A marriage may only be entered into by one man and one woman.”). *Obergefell* does not apply here, where nothing in the challenged statute sets out categories of who may (or may not) do something.

Second, Plaintiffs argue that even though Ohio’s birth record laws do not refer to transgender people (or any other classification for that matter) Ohio’s law “inherently discriminates against transgender people” and is “facially discriminatory.” Doc. 23 at 4. In making that argument, Plaintiffs neither cite to nor quote from Ohio’s birth record laws or their legislative history. The plain text of the statutes at issue do not mention gender, much less transgender people. *See* Ohio Rev. Code §§ 3705.15 and 3705.22.

Having failed to identify or articulate any discriminatory intent of the Ohio legislature in enacting Ohio’s birth record laws, Plaintiffs’ equal protection challenge to such laws fails.

2. Plaintiffs Are Not Entitled to Heightened Scrutiny of Laws in this Context and, in any Event, Ohio has a Substantial Interest in Enforcing its Birth-Record Laws.

Because Ohio law is facially neutral, and because Plaintiffs have not alleged (nor argued) that Ohio’s birth record laws were enacted for a discriminatory purpose, this Court need not reach the question of what level of scrutiny applies. Nevertheless, as the Motion to Dismiss explained, Plaintiffs’ claim would fail even if the court reached the next steps in the analysis, as identifying as transgender does not trigger heightened scrutiny, and Defendants have a substantial interest in enforcing Ohio’s birth-record laws. Doc. 23 at 17-19.

As an initial matter, Plaintiffs’ argument that strict scrutiny is appropriate in this case is a non-starter. *Neither the Supreme Court nor the Sixth Circuit has ever applied strict scrutiny to laws in the transgender context.* And the lone case Plaintiffs cite from this district, *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016), applied intermediate scrutiny. *Id.* at 872.

Plaintiffs' alternative argument, urging intermediate scrutiny, fares no better than their strict-scrutiny argument. *See* Doc. 23 at 6-7. In support of that argument, Plaintiffs incorrectly rely on several cases that were decided under the context of Title VII. *See, e.g., EEOC v. R.G.*, 884 F.3d 560 (6th Cir. 2018); *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004). As the Motion to Dismiss explained, the *statutory* standard of Title VII does not apply to this Court's equal-protection analysis. Doc. 18 at 18 (citing *Davis*, 426 U.S. at 239 (1976)). Far more persuasive are the cases cited in the Motion to Dismiss where courts in numerous districts have declined to apply heightened-scrutiny analysis in this context. *See id.* at 17.

In any event, at the motion to dismiss stage the Court need not, and should not, conduct the highly factual inquiry necessary to determine whether Plaintiffs are entitled to heightened scrutiny or rational basis review. Regardless of which level of scrutiny this Court ultimately applies, that determination is not dispositive because Plaintiffs' equal protection claim fails under either analysis, as the state has a substantial interest in, among other things, the accuracy of its records and the prevention of fraud. *See* Doc. 18 at 18-19. (And again, as explained above, the Court need not reach any stage of requiring the state to justify its laws, as the laws do not involve disparate treatment at all, and Plaintiffs have not shown intentional discrimination.)

Despite the numerous substantial interests identified in the Motion to Dismiss (and without addressing the cases Defendants' cite in support), Plaintiffs claim that "Defendants have not identified... *any* legitimate government interest...." Doc. 23 at 7. Plaintiff then cites four out-of-circuit cases for the proposition that laws restricting transgender people from changing the sex on their birth certificates are unjustified. *Id.* But those cases do not support Plaintiffs' position. Two of those cases deal with changes to the sex on a driver's license, which does not involve the same historical recordkeeping interests at issue in this case. *See generally Love v.*

Johnson, 146 F. Supp. 3d 848 (E.D. Mich. 2015); *K.L. v. State, Dep't of Admin. Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL 2685183 (Alaska Super. Mar. 12, 2012). Indeed, the fact that Ohio *allows* changes to sex listed on a driver's license shows that Ohio distinguishes the current-identification nature of a license from the historic-record nature of a birth certificate as to sex. *See* Doc. 1 at ¶ 47. Further, neither of the cited cases conducted an equal protection analysis. *Id.* Nor did those cases invalidate a state law, as both dealt with various agency policies that restricted the requested change. *Id.* Indeed, *K.L.*, a state court case, did not even involve analysis of the U.S. Constitution, and instead decided the issue under Alaska's Constitution, which contains an explicit right to privacy. *See K.L.*, 2012 WL 2685183, at *4.

The other cases cited by Plaintiffs are just as unconvincing and should not be relied upon by this Court. *See F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018); *Arroyo Gonzales v. Rossello Nevares*, 305 F. Supp. 3d 327 (D.P.R. 2018). In *F.V.*, yet another case that involved a policy instead of state law, the State of Idaho stipulated that it did not have a rational basis for its rule, so the state did not develop or assert its interests. 286 F. Supp. 3d at 1134. And *Arroyo*, discussed *supra*, was decided (incorrectly) on Due Process grounds, not Equal Protection grounds. 305 F. Supp. 3d at 333. Neither case is of precedential value.

Thus, Plaintiffs' attempt to discount the substantial interests Ohio has in enforcing its birth record laws is not based in law or fact. Accuracy in state records *is* a substantial interest. *See* Doc. 18 at 19 (citing cases). And fraud prevention, whether Plaintiffs want to acknowledge it or not, *is* of paramount importance as several provisions in Ohio's birth record laws directly address fraud concerns. *See* Ohio Rev. Code §§ 3705.23(C) and 3705.29. Even Puerto Rico, a jurisdiction touted by Plaintiffs after the decision in *Arroyo*, notes that birth certificates are used in a variety of situations involving fraud, identity theft, illegal immigration, and Social Security

fraud. *See* <https://www2.pr.gov/prgovEN/Pages/BirthCertificateInfo.aspx> (last visited August 5, 2018). As an open-records state, Ohio's interest in fraud prevention is even more compelling.

Accordingly, Defendants' have a substantial interest in their birth-record laws and Plaintiffs' Equal Protection Clause claim must fail.

E. Ohio's Birth Record Laws Are Not an Outlier, and Plaintiffs Have Not Specified the Relief Sought in Their Complaint.

In the Motion to Dismiss, Defendants asserted several other compelling reasons that this Court should grant the Motion and dismiss all of Plaintiffs' claims. Doc. 18 at 19-23. These included the fact that Plaintiffs' facial challenge to Ohio's birth record laws runs contrary to the principle of judicial restraint, implicates core federal concerns, potentially upends a complicated and intertwined legislative scheme, and calls for a complicated remedy best left to Ohio's legislative branch, not the federal courts. Plaintiffs largely ignored those arguments, save for in one minor footnote, which simply reiterated an allegation from their Complaint that "47 states provide procedures for transgender people to obtain accurate birth certificates." Doc. 23 at 3 n. 3; Doc. 1 at ¶ 45. This assertion is misleading because state law is far from unified on the issue.

Within the Sixth Circuit, Tennessee, like Ohio, also has a statute that specifically forbids changes to the sex on birth certificates. *See* Tenn. Code Ann. § 68-3-203(d). Kentucky, on the other hand, requires "a sworn statement by a licensed physician that the gender... has been changed by surgical procedure." *See* Ky. Rev. Stat. Ann. § 213.121. Michigan similarly requires "sex-reassignment surgery." *See* Public Health Code Section 333.2831-2832. And while some states theoretically allow for the change, in practice such alterations to the birth certificate establish requirements to obtain such a change, and are not simply provided upon demand. *See generally* <https://transgenderlawcenter.org/resources/id/state-by-state-overview-changing-gender-markers-on-birth-certificates> (last visited August 5, 2018). Thus, Ohio is not an outlier, but instead one of many states that enforces its own birth-record laws based on the

unique interests of the individual state. Plaintiffs' attempt to oversimplify the spectrum of state law on the issue does not fairly reflect the status of the law.

Finally, on a more basic level, Plaintiffs have failed “to state a claim upon which relief can be granted” under Fed. R. Civ. P. 12(b)(6) because their Complaint does not specify the relief they seek. *See* Doc. 1 at 27. To be sure, Plaintiffs generally ask this Court to strike a “policy” purportedly enforced by Defendants (which is really a state statute). *Id.* But other than asking this Court to enjoin Defendants “from refusing to provide birth certificates to transgender people... that accurately reflect their sex consistent with their gender identity,” Plaintiffs have not itemized how to implement their demand. *See id.* After all, and as discussed above and in the Motion to Dismiss, numerous elements must be considered in determining when, if ever, a sex marker on a birth certificate should be changed. *See* Doc. 18 at 21. By failing to provide any specifics, Plaintiffs leave it up to this Court to wade through the morass and make complicated choices best left to the state legislature. The only way that the Court could avoid having to create detailed requirements would be to impose an extreme remedy of requiring Ohio to change a person's birth certificate simply upon demand and without any requirements. And perhaps that is what Plaintiffs seek here. But creating a constitutional right to change-upon-demand would invalidate the laws of all States in this circuit and of dozens of States nationwide. So, either way—whether Plaintiffs seek a remedy requiring the court to establish a detailed regulatory scheme, or whether Plaintiffs seek a simple but more extreme remedy—they do not seek a claim for relief that the Court can or should impose.

III. CONCLUSION

None of Plaintiffs' claims state a plausible or colorable violation of the U.S. Constitution. Plaintiffs' Complaint should be dismissed in its entirety.

Dated: August 10, 2018

Respectfully submitted,

/s/ Kimberly Moses

KIMBERLY MOSES (0029601)

ALBERT J. LUCAS (0007676)

JASON J. BLAKE (0087692)

CALFEE, HALTER & GRISWOLD LLP

1200 Huntington Center

41 S. High Street

Columbus, Ohio 43215

Telephone: (614) 621-1500

Fax: (614) 621-0100

kmoses@calfee.com

alucas@calfee.com

jblake@calfee.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 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

Exhibit A

Ohio Department of Health • Office of Vital Statistics

Application For Certified Copies

Reason for order

Driver's License	Passport	
Insurance	Genealogy	
School	International Use	
Marriage License	Other	

Mail-in order

Send completed application with required fee to:
Ohio Department of Health,
Vital Statistics
P.O. Box 15098
Columbus, Ohio 43215-0098
(614) 466-2531

This space for office use only

Order Number (AFS)
Service
Certificate Number

Certificate Requested: *(What type of certificate is being ordered)*

Birth Certificate \$21.50 per certificate	Heirloom Birth Certificate \$25.00 per commemorative certificate	Paternity Affidavit \$7.00 per certified copy
Death Certificate \$21.50 per certified copy	Fetal Death Certificate \$21.50 per certified copy	Stillbirth Commemorative Abstract Free to birth parents for stillbirth events taking place after September 26, 2003

Registrant Information: *(Information about the person on the requested record)*

Full name <i>(for birth, indicate child's full name as shown on original birth record):</i>		Date of birth:
Place of birth/death <i>(City/County in Ohio):</i>	Date of death:	CPR stamp number <i>(Paternity only):</i>
Full name of father:		Full name of mother <i>(maiden name prior to first marriage):</i>
Have there been any corrections or legal changes made to the information on this certificate? <input type="checkbox"/> Yes <input type="checkbox"/> No	If name was changed since birth, indicate new name:	Did the stillbirth event occur after 20 weeks or less gestation? <i>(Fetal Death/Stillbirth only)</i> <input type="checkbox"/> Yes <input type="checkbox"/> No

Charges: *Please include check or money order (do not send cash) made payable to "TREASURER, STATE OF OHIO"*

Total number of standard copies or abstracts (birth, death, fetal death):	X \$21.50 =	\$
Total number of heirloom commemorative birth certificates:	X \$25.00 =	\$
Total number of paternity affidavits:	X \$7.00 =	\$
Refunds will be issued only for orders where a certified document cannot be issued, and may be subject to search fees. Overpayment of \$2.00 or less will not be refunded.	TOTAL AMOUNT DUE:	\$

Applicant Information: *(Information about the person requesting the record)*

Please print clearly as this will be used for your receipt, mailing address, and/or for future contact to complete your record request.

Applicant Name:	Email:
Street Address:	Phone Number:
City, State, & ZIP:	Signature of Applicant:



Ohio Department of Health

Office of Vital Statistics

Records Request Instructions

**Notice to All
Vital Statistics
Customers:**

Pursuant to Ohio Revised Code 3705.29, it is unlawful to purposely obtain, possess, use, sell, furnish, or attempt to obtain, possess, use, sell, or furnish to another for the purpose of deception any certificate, record, or certified copy of it that relates to the birth of another person, whether living or dead.

What Records We Have On File:

The state Office of Vital Statistics has all births that occurred in Ohio between December 20, 1908 – present and all deaths occurring in Ohio that occurred from January 1, 1954 to the present. The state Office of Vital Statistics also has indexes for marriages and divorces from January 1, 1954 to the present. For requests of recent vital events, please note it can take up to three months for a record to be registered and available from the Office of Vital Statistics.

Who Can Order A Record:

Vital records (records of births, deaths, marriages and terminations of marriage) are public records in Ohio. This means that anyone who can submit the basic facts of a certificate may request a copy. If you do not have sufficient information to request a copy of the certificate, you may request a search be performed.

Fees:

In accordance with section 3705.24 of the Ohio Revised Code, we are required by law to charge a fee for each special search and each certified copy of a vital record issued. Effective July 1, 2003, we can no longer issue uncertified copies of vital records. Each certified birth, fetal death or death certificate costs \$21.50, and each certified commemorative heirloom birth certificate costs \$25.00. Searching fees are \$3.00 per ten-year period for each record searched.

How to Order A Record:

There are five (5) ways in which to obtain a vital record in Ohio:

1. Through a local registrar/local health department
2. Walk-in service at the main Vital Statistics office at 225 Neilston Street in Columbus
3. Direct online ordering through the Vital Statistics website
4. Through the mail at P.O. Box 118, Columbus OH, 43216
5. Through a third party (VitalChek) using a credit or debit card

For further explanation of these options, with detailed directions, visit our website, www.odh.ohio.gov/vitalstatistics/vitalstats.aspx, or call our customer service hotline at (614) 466-2531.

For the fastest response, we recommend placing your order in person at a local health department office, in person with our main office, or online through our website.

There are now two applications for mailed records requests: one application for certificates, and one application for records searches. A copy of both of these applications is included in this document. Please select the appropriate application for your request, and please fill in legibly with pen or electronically. These applications may be photocopied for additional copies.

PLEASE SUBMIT YOUR APPLICATIONS WITH ALL IDENTIFYING INFORMATION FOR THE EVENT. IF NOT ALL INFORMATION IS KNOWN, PROVIDE AS MUCH AS POSSIBLE.