

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE**

KAYLA GORE; JASON SCOTT; L.G.;
and K.N.,

Plaintiffs,

v.

WILLIAM BYRON LEE, in his official
capacity as Governor of the State of
Tennessee; and LISA PIERCEY, in her
official capacity as Commissioner of the
Tennessee Department of Health,

Defendants.

No. 3:19-cv-00328

Judge Eli J. Richardson
Magistrate Judge Barbara D. Holmes

**DEFENDANTS’ RESPONSE TO PLAINTIFFS’ NOTICE OF
SUPPLEMENTAL AUTHORITY**

Defendants respectfully submit their response to Plaintiffs’ Notice of Supplemental Authority about *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731 (2020).

In *Bostock*, the Supreme Court narrowly held that “an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex’” as that term—“discriminate against”—is used in a particular provision of Title VII. *Bostock* at 1753. In reaching that conclusion, the Court found that “discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.” *Id.* at 1747. Here, Plaintiffs urge this Court to extend *Bostock* to their Equal Protection claims. The *Bostock* decision, however, said nothing about the Equal Protection Clause of the Constitution. In fact, the Court expressly declined to extend its decision “beyond Title VII to other federal or state laws that

prohibit sex discrimination” and to “other policies and practices” *Id.* at 1753. Indeed, the Court specifically stated that the “only question” at issue was “whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex’ in violation of Title VII. *Id.* In other words, the *Bostock* decision does not alter the constitutional analysis that is required in this case.

In any event, even if *Bostock*’s reasoning extended to the Equal Protection Clause, that would not help Plaintiffs because they have failed to establish the threshold element of unequal treatment. As the State has explained in its previous briefing,¹ no one is allowed to change the sex designation on a Tennessee birth certificate unless it was recorded incorrectly at the time of birth. Plaintiffs are seeking preferential treatment, not equal treatment.

Plaintiffs’ reliance on Justice Alito’s dissenting opinion in *Bostock* is also misplaced. A dissenting opinion of course does not establish the holding of a case. Nor is it appropriate to rely on a dissenting opinion to determine the meaning of the majority opinion. *See, e.g., United States v. Travers*, 514 F.2d 1171, 1174 (2d Cir. 1974) (Friendly, J.) (cautioning that “Cassandra-like predictions in dissent are not a sure guide to the breadth of the majority’s ruling”).

¹ Defendants’ briefing includes their Motion to Dismiss Amended Complaint (Doc. 65), Memorandum of Law in Support of Defendants’ Motion to Dismiss Amended Complaint (Doc. 66), and their response to Plaintiffs’ Motion for Summary Judgment (Doc. 85). Defendants respectfully request that this Court treat their Motion to Dismiss Amended Complaint as a Motion for Summary Judgment pursuant to Fed. R. Civ P. 12(d). Specifically, Defendants ask that the Court consider their Response to Plaintiffs’ Statement of Material Facts (Doc. 86) and Statement of Additional Facts (Doc. 87)—“matters outside the pleadings”—in support of their Motion to Dismiss Amended Complaint to ensure that proper relief is granted to Defendants under Fed. R. Civ. P. 56. Defendants do not submit any additional legal authorities as matters of law have been fully briefed in the above filings.

Respectfully Submitted,

s/ Dianna Baker Shew

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2020 I served the foregoing *Response to Plaintiffs' Notice of Supplemental Authority* via email on the following:

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