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

KAYLA GORE; JAMIE COMBS; 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 (DOC. 102)

Defendants respectfully submit their response to Plaintiffs' Notice of Supplemental Authority (Doc. 102) regarding *Ray v. McCloud*, Case No. 2:18-cv-00272, Slip Op. (S.D. Ohio Dec. 16, 2020).

In *Ray*, the district court granted summary judgment to four transgender plaintiffs who had challenged on substantive due process and equal protection grounds Ohio's policy of not allowing transgender individuals to change the sex marker on their birth certificates—a policy that was a reversal of the State's previous policy of allowing such changes. *Id.* For several reasons, the *Ray* opinion does not help Plaintiffs in this case.

First, the *Ray* court's substantive due process ruling rested on the same legal errors as its earlier decision denying Ohio's motion to dismiss. As Defendants already explained in their Response to Plaintiffs' Motion for Summary Judgment (Doc. 85), the district court improperly

extended *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998), and *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), by applying them to factual circumstances that do not implicate the narrow fundamental liberty interests in bodily integrity and sexual privacy. The district court doubled down on that mistake in granting summary judgment.

Second, the *Ray* court concluded that the plaintiffs had established a violation of their substantive due process rights based in part on the specific factual record that existed in that case. But that factual record is materially distinguishable from the one here. In *Ray*, a co-worker of one of the plaintiffs "threatened to 'beat [her] ass] if she used a woman's restroom." *Ray*, Case No. 2:18-cv-00272, Slip Op., at 10 (S.D. Ohio Dec. 16, 2020). Here, by contrast, Plaintiffs have not shown that disclosure of their transgender status has caused or would cause any concrete and specific threats of bodily harm. *See* Doc. 85, Page ID # 980-81.

Third, the *Ray* court's conclusion that Ohio could not satisfy the applicable level of scrutiny turned on the fact that Ohio previously permitted the sex marker on Ohio birth certificates to be changed but then subsequently reversed course. The court found the "idea that the State of Ohio has a true interest in maintaining historically accurate records . . . undermined by the fact that Ohio permitted transgender people to change the sex marker on their birth certificates until 2016." *Ray*, Case No. 2:18-cv-00272, Slip Op., at 24 (S.D. Ohio Dec. 16, 2020). Unlike Ohio, Tennessee has never permitted changes to the sex marker on Tennessee birth certificates except in those rare instances in which a child's sex is initially unknown or undetermined. And the record in this case clearly establishes the important interests served by Tennessee's accurate recordation of a child's sex at the time of birth.

Fourth, the *Ray* court's ruling on the plaintiffs' equal protection claim was flawed in at least two respects. The court erroneously concluded that the threshold requirement of unequal

treatment was met by surmising that the plaintiffs were "similarly situated to people who are allowed to change their accurately recorded birth parents or name." *Ray*, Case No. 2:18-cv-00272, Slip Op., at 17 (S.D. Ohio Dec. 16, 2020). But persons who wish to change their *sex designation* are not similarly situated to persons who wish to change the parents or name listed on their birth certificates. And neither cisgender nor transgender persons are allowed to change the sex designation on a Tennessee birth certificate unless it was erroneously recorded at birth. Plaintiffs seek not equal treatment, but more favorable treatment.[1] The *Ray* court also erred in deeming transgender persons a quasi-suspect group. Here, Plaintiffs' own evidence demonstrates that gender identity is *not* an immutable characteristic: their expert, Dr. Randi C. Ettner, admitted that some persons have "detransitioned" by reverting back to living in the sex assigned to them at birth, and that some individuals "don't necessarily have a gender identity that they believe is entirely male or entirely female." *See* Doc. 87, Page ID # 1024-26 (referencing Ettner dep. 27, 116-118); Doc. 88-3, Page ID # 1047, 1164-66.

This Court should decline to follow the district court's non-binding opinion in *Ray* and grant summary judgment in favor of Defendants.

Respectfully Submitted,

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[1] Indeed, Plaintiffs seek to be treated more favorably even than individuals who are allowed to change the name on their birth certificates, in that they want to be relieved of the usual requirement that a line be drawn through the amended item. *See* Doc. 61, Page ID # 434.

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2021, I filed a true and correct copy of the foregoing *Defendants' Response to Plaintiffs' Notice of Supplemental Authority (Doc. 102)* using the Courts CM/ECF system and thereby served the following counsel of record:

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