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No. 2022-0934

In the Supreme Court of Ohio

APPEAL FROM THE COURT OF APPEALS
SECOND APPELLATE DISTRICT
CLARK COUNTY, OHIO
CASE NO. 2022-CA-1

IN RE: APPLICATION FOR CORRECTION OF BIRTH RECORD OF
HAILEY EMMELINE ADELAIDE,

Applicant / Plaintiff-Appellant.

MERITS BRIEF OF APPELLANT HAILEY EMMELINE ADELAIDE

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Blackless, et al., *How Sexually Dimorphic Are We? Review and Synthesis*, Am. J. of Human Biology, 12:151–166 (2000) 18

C. Chareonkul and R. Wijitsopon, *Patterns of the "Current Relevance" Meaning of the Present Perfect in Real Use and Textbooks: A Corpus-driven Perspective*, 12 LEARN Journal 55 (2019) 15

G. Kumar & J.J. Barboza-Meca, 5 Alpha Reductase Deficiency, in StatPearls (updated Oct. 21, 2021) 18

Hewings, Martin, Advanced Grammar in Use, 3rd Ed., p. 6, Cambridge University Press, 2013 15

Russo, *Is There Something Unique About the Transgender Brain?*, Sci. Am. (Jan. 1, 2016) 19

Silver, *An Offer You Can't Refuse: Coercing Consent to Surgery Through the Medicalization of Gender Identity*, 26 Colum. J. Gender & L. 488, 490 (2014) 17

Wenstrom, *"What the Birth Certificate Shows": An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 Law & Sexuality 131 (2008) 22

I. INTRODUCTION

R.C. 3705.15 contains a broadly worded *catchall* provision allowing for the "correction" of birth records that "ha[ve] not been properly and accurately recorded." It places no substantive limitations on the types of corrections that can be made, it does not mention "sex" or "gender," and it does not specify when the error to be corrected must manifest. Nevertheless, the Second District Court of Appeals read these limitations into the statute to establish a rule of law constraining the jurisdiction of probate courts, effectively prohibiting a single type of correction: the "sex" marker for transgender citizens' birth certificates.

This restrictive interpretation of the statute not only runs contrary to the statute's plain text, but has been rejected as unconstitutional by a federal court. And it is contrary to the guidance of the Ohio Department of Health (ODH), this Court's standard probate Form 30.0, and the forms and procedures of several probate courts across the State.

The Second District's decision revives a legal issue that ripened—and resolved—between 2015 and 2020. Before 2016, Ohio allowed sex-marker corrections to birth certificates, but a transgender citizen's application prompted ODH to reassess its policy under R.C. 3705.15 at some point in 2015. *Ray v. McCloud*, 507 F.Supp.3d 925, 929–30 (S.D.Ohio 2020) ("*Ray II*").[1] As of 2020, the policy change left Ohio as one of only two states that prohibited sex-marker changes for transgender citizens' birth certificates. *Id.* at 928. The *Ray II* court concluded that the exclusionary policy derived from the statute was unconstitutional on both federal equal protection and due process privacy grounds, issuing a permanent injunction. *Id.* at 940. The state agencies declined to appeal, accepted a final judgment, and ODH changed its policy to comply with *Ray II* by once

[1] The federal district court previously made similar findings in ruling on the agencies' motion to dismiss, which this Brief refers to as "*Ray I*." *Ray v. Himes*, S.D.Ohio No. 2:18-CV-272, 2019 WL 11791719, at *12 (Sept. 12, 2019).

again allowing these corrections. Following *Ray II* and ODH's acquiescence, this Court and more than a dozen county probate courts adopted standard probate forms and/or guidance on how to process these corrections. *See* Part III.B–C. The matter had resolved, so it seemed.

The Second District's contrary decision creates an unnecessary split of authority as to whether transgender citizens may obtain the constitutional remedy promised by *Ray II*, with many county probate courts—including those of Ohio's most populous counties—following ODH and this Court's guidance to issue birth certificate corrections. *See* Part III.C. Under Ohio law, citizens may alter practically every facet of their birth certificates subject to appropriate forms of proof. The Second District's decision singles out a specific type of correction for exclusionary treatment—the sex marker—even though the statute does not.

At issue is whether a probate court may summarily deny a transgender citizen's application to correct the sex marker of her birth certificate under R.C. 3705.15 where (1) the broad statutory grant of authority does not expressly address (let alone, forbid) such corrections; (2) a federal court has already concluded that the narrow reading of the statute that results in a "blanket prohibition against transgender people changing their sex marker" violates both the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the U.S. Constitution; and (3) the state courts gave no persuasive weight to the federal court's ruling on federal constitutional issues. The plain text of the statute, an unbroken line of constitutional authority relied upon by the federal court, and principles of federal-state comity demonstrate that the answer to each of these questions is "No." Until this Court resolves these issues, transgender individuals' constitutionally protected interest in having core identifying documents that reflect their identity will exist in a phase of twilight, depending on whether their counties follow *Ray II* and implementing guidance.

Appellant respectfully asks this Court to REVERSE the judgment of the court of appeals, or at a minimum VACATE its judgment and remand for consideration of the constitutional issues in the first instance.

II. THE RELEVANT STATUTORY LANGUAGE: R.C. 3705.15

Section 3705.15 provides in pertinent part:

> *Whoever claims to have been born in this state, and whose registration of birth is not recorded, or has been lost or destroyed, or has not been properly and accurately recorded, may file an application for registration of birth or correction of the birth record in the probate court of the county of the person's birth* * * * .

Appellant refers to this as the "catchall" provision because it does not limit the *type* of correction, unlike provisions providing birth certificate alterations to record name changes or include adoptive parents. *See* R.C. 3705.12; R.C. 3705.13.

Section 3705.15 provides additional instructions on the birth-certificate-correction application process and method for correcting birth records. Subsection A provides that the application "shall set forth all of the available facts required on a birth record and the reasons for making the application, and shall be verified by the applicant," and, pertinent here, "shall be supported by the affidavits of at least two persons having knowledge of the facts stated in the application, by documentary evidence, or by other evidence the court deems sufficient." R.C. 3705.15(A). The probate court serves as the claims-processor. "[I]f satisfied that the facts are as stated," the probate court "shall make an order correcting the birth record." *Id.* Once ordered, the corrected birth record "shall have the same legal effect for all purposes as an original birth record," but the "application, affidavits, findings, and orders of the court, together with a transcript of the testimony * * * , shall be recorded in a book kept for that purpose," which "shall become a part of the records of the probate court." R.C. 3705.15(C). The probate court then forwards the order of correction to ODH, enabling the department to "prepare a new birth record." R.C. 3705.15(D)(1).

Importantly, neither the catchall provision nor the remainder of section 3705.15 contains the word "sex." Indeed, that is true for much of Chapter 3705 of the Code.[2] The provision delineating the "Filing and registration of birth certificate," R.C. 3705.09, also does not mention "sex," despite providing detailed instructions for *how* and *when* birth certificates shall be prepared when the birth occurs within an institute or outside an institution. Rather, the relevant portions of that provision require the recorder to obtain "personal data" and "prepare the certificate." R.C. 3705.09(B)–(D). Section 3705.01, which defines the terms used in Chapter 3705, does not address either "sex" or "personal data." R.C. 3705.01. Other birth certificate scenarios found in this Chapter, likewise, omit the word "sex." *E.g.*, R.C. 3705.10 (delayed birth certificate), 3705.12 (new or foreign birth record after adoption), 3705.121 (adoption, out-of-state court), 3705.123–124 (adoptions prior to 1964), 3705.125 (prima facie evidence), 3705.13 (name change), 3705.14 (supplemental report, given name), 3705.22 (amendments to correct error).

III. RELEVANT PRECEDING CASE: *RAY II* AND ITS AFTERMATH

A. *Ray II* Resolves Ohio's Competing Approaches to Birth Certificate Corrections: Ohio Cannot Constitutionally Deny Sex-Marker Changes.

Prior to 2016, Ohio permitted sex-marker changes to birth certificates. *Ray II*, 507 F.Supp.3d at 929. That policy changed at some point in 2015 after consultation with in-house counsel and the Ohio Governor's office, with ODH deciding that R.C. 3705.15 did not authorize such changes. *Id.* at 930 fn. 4 (noting that the agency's changed position reflected "an interpretation of the Ohio statute"). The reassessment took place after an agency official noticed that a

[2] Only two birth certificate related sections of Chapter 3705 appear to reference sex: (1) section 3705.11, pertaining to birth certificates issued for foundling children, includes "sex" among the characteristics that must be recorded, including date and place of finding, race of the child, and approximate age of the child; and (2) section 3705.23(B)(1)–(3), concerning copies of birth certificates. It appears the inclusion of a sex marker on birth certificate forms comes from the standard form included as Appendix A to Ohio Adm.Code 3701-5-02.

transgender individual had applied for the sex-marker correction. *Id.* at 939–40. The *Ray II* plaintiffs, transgender individuals, challenged the constitutionality of the statute and ODH's policy on federal due process and equal protection grounds, noting that the State allowed persons to change almost every other fact recorded on birth certificates.

The *Ray II* court resolved the dispute in December 2020 by issuing a permanent injunction against the director of ODH and officers of the Ohio Office of Vital Statistics (OVS). The judgment made two key findings: (1) the agencies' narrow interpretation of the statutory provision to prohibit transgender individuals from correcting their birth certificate was unconstitutional on multiple grounds; and (2) the agencies were permanently enjoined from enforcing that policy to deny birth certificate sex-marker corrections. *Id.* at 940. Specifically, the *Ray II* court found due process violations concerning the fundamental right to privacy in sensitive personal information and equal protection violations under both a quasi-suspect-class analysis (intermediate scrutiny) and targeted-discrimination / animus analysis (rational basis). *Id.* at 932–40.

B. ODH Revises Policy to Comply with *Ray II*, Allows Sex-Marker Changes with Probate Court Order.

Neither agency appealed the *Ray II* decision. Instead, ODH revised its policy, posting instructions for "Court-Ordered Correction of Birth Record" on its website stating that it "will make changes to the sex marker on a birth certificate with a probate court order" to comply with *Ray II*. Changing or Correcting a Birth Record, https://odh.ohio.gov/know-our-programs/vital-statistics/changing-correcting-birth-record (select "Court-Ordered Correction of Birth Record" tab) (accessed Dec. 18, 2022). The ODH statement informs Ohio's citizens that "Court-Ordered Corrections can be done at any Ohio Probate Court." ODH's reference to probate courts makes sense, as the *Ray II* decision ruled on the constitutionality of an interpretation of R.C. 3705.15, which provides a *process* for probate courts, working in conjunction with ODH, to

authorize birth certificate corrections. R.C. 3705.15 (providing for correction applications to be filed "in the probate court of the county of the person's birth" and authorizing the probate court to "make an order correcting the birth record," which the probate court forwards to ODH "to prepare a new birth record").

C. This Court Issues New Standard Probate Form 30.0, and Numerous Probate Courts Follow Suit.

ODH and OVS were not alone in accepting the constitutional rulings in *Ray II*. Effective August 31, 2021, this Court issued a new standard probate Form 30.0—"Birth Certificate Correction" that expressly allows the probate court to *correct* item 4 ("Sex") under R.C. 3705.15.

PROBATE COURT OF ____________ COUNTY, OHIO

__________, JUDGE

IN THE MATTER OF THE CORRECTION OF BIRTH RECORD OF__________

CASE NO. ________

APPLICATION FOR CORRECTION OF BIRTH RECORD
[R.C. 3705.15]

In the Probate Court of __________ County on the ____ day of __________ 20___ appeared __________________ requesting that their birth record be corrected in accordance with Section 37.05.15 of the Revised Code as follows:

Information recorded in this box should match information currently listed on the Birth Record			
Child's Information			
1. Full Name of Child	2. Date of Birth	3. Place of Birth (city and county)	4. Sex
Information of parent(s) currently listed on the Birth Record			
5. Parent's Name		6. Parent's Name	
7. Place of Birth	8. Date of Birth	9. Place of Birth	10. Date of Birth

ITEMS TO BE CORRECTED OR ADDED

Box No. ____ Reads as __________ Should Read __________
Box No. ____ Reads as __________ Should Read __________
Box No. ____ Reads as __________ Should Read __________
Box No. ____ Reads as __________ Should Read __________

The undersigned being first duly sworn, says the facts stated in the foregoing Application are true as they verily believe and pray that the Court order the correction of the registration of birth.

____
Signature of Registrant or Applicant

____
Address

Sworn to before me and subscribed in my presence this ____ day of __________, 20____.

____
Notary Public

FORM 30.0 – APPLICATION FOR CORRECTION OF BIRTH RECORD

Effective Date: August 3, 2021

See https://www.supremecourt.ohio.gov/forms/all-forms/probate/5 (select Form 30.0 under "Birth Certificate Correction") (accessed Dec. 18, 2022).

Similarly, several county probate courts—including those for Ohio's most populous counties—have issued standard forms, checklists, and/or related guidance for changing sex markers on birth certificates. Though the number of counties offering these birth-certificate corrections has changed since the Second District's ruling, and the exact number is difficult to say depending on anecdotal reports, the following counties have guidance, sample forms, or checklists available for this type of birth-certificate correction on their websites, as of December 16, 2022: Butler County, Cuyahoga County, Fairfield County, Franklin County, Hamilton County, Lucas County, Marion County, Summit County, Warren County, and Wayne County. *See* Appx. 25.

IV. STATEMENT OF THE CASE AND FACTS

A. A Transgender Pianist, with the Help of a Legal Clinic, Seeks a Birth Certificate Correction in Clark County Under ODH's New Policy.

In October of 2021, Ms. Adelaide, with the support of the Equality Ohio Legal Clinic, sought to have the sex marker on her birth certificate corrected in the county where she was born, Clark County. She submitted an application for the correction of her birth record on Form 30 and included affidavits from herself and her therapist, as well as a letter signed by a supervising clinical psychologist. By separate order, the Probate Court authorized Ms. Adelaide's name change application. *In Re: Change of Name of Brian Edward DeBoard*, Clark P.C. No. 20219085 (Nov. 15, 2021). After conducting a hearing and allowing supplemental briefing on the issues decided in *Ray II*, however, the Probate Court denied the application to change sex marker.

There were no factual disputes as to Ms. Adelaide's birth-certificate-correction application, which was verified and supported by the affidavit and statement of two therapists, William H. Ford, Sr., MRC and John P. Layh, Ph.D. The application states that her sex "Reads as Male" and

"Should Read Female." (R. 1.[3]) During the evidentiary hearing on February 5, 2022, Ms. Adelaide testified that she had always identified as female—as long as she could remember—including when she first began piano lessons at age 4, and that her gender identity had not changed throughout her entire life. (R.2, Tr. at 19:3–22:15, 24:14–25:15.) She further testified that, in her opinion, an error occurred at the time of her birth when her sex was assigned as male. (*Id.* at 22:17–23:1.) The court accepted the documentary evidence and indicated that the factual record before it was not at issue, later referring to Ms. Adelaide's testimony as compelling. (*Id.* at 12:12–16, 34:1–2.) The court also permitted supplemental briefing on whether it had statutory authority to allow the sex-marker change. (R. 3.)

B. The Probate Court Denies Ms. Adelaide's Unopposed Application.

Notwithstanding the undisputed evidence, the Probate Court concluded that it lacked authority under R.C. 3705.15 to issue a sex-marker correction, and it summarily rejected Ms. Adelaide's argument that the narrow interpretation of R.C. 3705.15 infringed her constitutional rights. Pro. Op. at 2–6, Appx. 19–23.

C. The Second District Affirms.

The Second District affirmed, concluding that R.C. 3705.15 is a "correction" statute, and does not expressly authorize changes to sex markers. App. Op. ¶¶ 16–17, Appx. 11. According to the Second District, a transgender person cannot seek a *correction* of the birth certificate sex marker under R.C. 3705.15 because the doctor's genital-based determination of sex at the time of birth was presumptively accurate. Any such adjustment would be an *amendment*, not a *correction*, and the absence of express authorization to make this sort of alteration precludes the probate court from exercising jurisdiction. App. Op. ¶¶ 17–25, Appx. 11–16.

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[3] All Record citations refer to the record on appeal in the Second District.

The Court of Appeals gave no persuasive weight to *Ray II*—despite admitting that the federal court "relied on established constitutional law principles"—believing that *Ray II* "did not analyze the jurisdiction and authority of Ohio probate courts or the constitutionality of R.C. 3705.15, but rather the blanket policy enacted by ODH." App. Op. ¶ 22, Appx. 14. And it declined to consider Ms. Adelaide's constitutional arguments, citing forfeiture of those issues in the Probate Court, App. Op. ¶ 23, Appx. 14—even though the Probate Court ruled on those issues below, Pro. Op. at 5, Appx. 22.

This Court accepted discretionary review. At no point has any party appeared to oppose Ms. Adelaide's application.

V. ARGUMENT

Proposition of Law No. 1: The plain language of R.C. 3705.15 does not preclude probate courts from hearing a transgender person's application to correct the sex-marker of her birth certificate.

The Probate Court below inferred two substantive limitations that constrained the type of *corrections* that could be made under R.C. 3705.15: *sex* and *as determined by a doctor's genital inspection at the time of birth*. Pro. Op. at 4–5, Appx. 21–22. The Second District wisely eschewed the Probate Court's reliance on the meaning of "sex" because that term appears nowhere in R.C. 3705.15. But it relied on the second limiting principle in construing the term "correction." App. Op. ¶ 25, Appx. 14–15. It also appears to have conflated this perceived substantive limitation with a jurisdictional limitation. *See id.* ¶¶ 11–12, 24–27, Appx. 7–9, Appx. 15–17.

Both limiting principles have no basis in the plain text of the statute. As this Court has reiterated, "[i]n any case concerning the meaning of a statute, [the] focus is the text," and "when a statute is unambiguous in its terms, courts must apply it rather than interpret it." *Elliot v. Durrani*, 2022-Ohio-4190, ¶ 8, quoting *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 106 Ohio St.3d 70, 2005-Ohio-3807, 831 N.E.2d 987, ¶ 38. Further, it is well established that courts interpret

the meaning of remedial statutes "broadly." *Convenient Food Mart, Inc., No. 392 v. Ohio Liquor Control Comm.*, 10th Dist. Franklin No. 10AP-248, 2010-Ohio-4612, ¶ 14, quoting *Miami Cty. v. Dayton*, 92 Ohio St. 215, 219, 110 N.E. 726 (1915) ("A statute undertaking to provide a rule of practice, a course of procedure, or a method of review, is * * * remedial [and] should receive a broad and liberal construction to effect the purposes of its enactment."); R.C. 1.11 ("Remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice."). The Second District's narrow interpretation defies these principles to the exclusion of a specific type of correction, and also runs contrary to basic principles of probate jurisdiction. It should be reversed.

A. The Plain Language of the R.C. 3705.15's Catchall Provision Allows Birth Certificate Corrections—and Does Not Exclude Corrections to Sex Markers for Transgender Citizens.

As detailed in Part II above, the catchall provision of R.C. 3705.15 allows any person "whose registration of birth * * * has not been properly and accurately recorded," to file an application for correction of the birth record. Like the vast majority of Chapter 3705, nothing in that provision mentions the term "sex." The following elements of the catchall provision and subsections (A) and (D) of 3705.15 reflect on the scope of the administrative remedy:

Relevant Qualify Event	- *Whoever claims to have been born in this state, and whose registration of birth * * * has not been properly and accurately recorded*
Administrative Remedy	- *may file an application for * * * correction of the birth record in the probate court of the county of the person's birth or residence*
Requisite Proofs	- *An application to correct a birth record shall set forth all of the available facts required on a birth record and the reasons for making the application, and shall be verified by the applicant.* - *If an affidavit [from the physician or nurse-midwife in attendance] is not available, the application shall be supported by the affidavits of at least two persons having knowledge of the facts*

	stated in the application, by documentary evidence, or by other evidence the court deems sufficient. (Subsection (A))
Probate Court's Claims-Processing Role	*- The probate judge, if satisfied that the facts are as stated, shall make an order correcting the birth record*[4] (Subsection (A)) *- * * * whenever a correction is ordered in a birth record under division (A) of this section, the court ordering the correction shall forthwith forward to the department of health a certified copy of the order containing such information as will enable the department to prepare a new birth record.* (Subsection (D)(1))

Section 3705.15 is remarkable in its breadth. Unlike other provisions in Chapter 3705.15, it does not specify substantive limitations on the birth-certificate items that may be altered. *See* R.C. 3705.12 (adoptive parents); R.C. 3705.13 (name change). Nothing in Section 3705.15 mentions "sex," let alone sets a method for determining sex for purposes of preparing a birth record. Nor does Section 3705.15 exempt transgender individuals from the class of persons who may claim relief under the statute.

The Second District effectively inferred these limitations from the qualifying event language ("whose registration of birth * * * has not been properly and accurately recorded") and the statute's multiple references to *correction* of birth records. App. Op. ¶ 25, Appx. 16 ("[T]hough Adelaide's gender identity is now female, she testified that she was born with male genitalia, further demonstrating that the identification made at the time of her birth was correctly recorded based on the standard determinations used at that time, and which continue to be used today. Adelaide is seeking an amendment of her birth records, not a correction * * * ."). But the statutory language cannot bear this gloss, which rests on several faulty presumptions.

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[4] This language in subsection (A) contains special evidentiary requirements for one specific type of birth-certificate correction: date of birth. R.C. 3705.15 (providing "in the case of an application to correct the date of birth, the judge shall make the order only if any date shown as the date the attending physician or certified nurse-midwife signed the birth record or the date the local registrar filed the record is consistent with the corrected date of birth").

1. The Second District Erroneously Presumes R.C. 3705.15 Requires a Specific Type of Error.

First, the Second District's restrictive interpretation begins with the presumption that Section 3705.15 requires, as a prerequisite, a finding of *error*. More specifically, the Second District envisions a specific type of error: one based on the facts available at the time of the birth but not noticed until later. App. Op. ¶ 16, Appx. 11 ("[T]he [properly and accurately recorded] language emphasizes the fact that an individual, at any time after the error is discovered, may file to correct the error because it has not yet been corrected."). But, as the First District explained in a 1994 birth-certificate-correction case, the catchall provision "does not specifically require a finding of error." *Matter of Correction of Birth Certificate of House*, 1st Dist. Hamilton No. C-930374, 1994 WL 176905, *2.

House demonstrates why this is not a mere semantic point. There, the mother and father of the child "were married at the time of both conception and birth of the child," and the couple had agreed to give the child a hyphenated last name including the surname of both parents. *Id.* at *1. The couple divorced after the child's birth, and the mother had the father's surname excluded in the name recorded on the birth certificate. *See id.* at *1; *id.* at *3 (dissent). The probate court granted a birth-certificate correction under R.C. 3705.15 to include the father's surname, consistent with the couple's original agreement, and the First District affirmed. In affirming, the appellate court rejected the mother's contention that R.C. 3705.15 required a finding of error in the birth record. Not only did the provision lack an express *error* requirement, the court reasoned, but its discussion of the application and the probate court's claims-processing role says nothing about showing or finding an error. *Id.* at *2 ("R.C. 3705.15 states that an application to correct a birth record 'shall set forth all of the available facts required on a birth record and the reasons for making the application, and shall be verified by the applicant. * * * If the probate judge is satisfied that

the facts are as stated, he shall make an order correcting the birth record, * * *.'"). The probate court's factual determination that the couple had agreed to the hyphenated last name sufficed for purposes of the birth-certificate correction. *Id.* at *2 ("[T]he [probate] court's decision demonstrates that the trial court was satisfied with the facts as presented by the father.").

The statute's repeated use of the term and *correction* does not compel a contrary result. Given its ordinary meaning,[5] the term connotes more than just revision of errors. Merriam-Webster includes the following definitions of the noun "correction":

(1) The action or an instance of correcting: such as

a. Amendment, rectification

* * *

(3)

a. Something substituted in place of what is wrong (marking *corrections* on the students' papers)

b. A quantity applied by way of correcting (as for adjustment of an instrument)

Merriam-Webster online, https://www.merriam-webster.com/dictionary/correction (accessed Dec. 18, 2022). Similarly, the transitive verb "correct" reaches beyond revision of errors, to include "1a: to make or set right: AMEND" and "1c: to alter or adjust so as to bring to some standard or required condition," with the example "The editor *corrected* the author's manuscript." *Id.*, https://www.merriam-webster.com/dictionary/correcting (accessed Dec. 18, 2022). It is telling that the primary definitions of both the noun and verb forms of *correct* reference *amendment*—the very concept that the Second District assumed the term could not include.

[5] Where the statute does not define a given term, courts may utilize dictionaries to give the term its ordinary meaning. *See, e.g.*, *State v. Hammock*, 1st Dist. Hamilton No. C-210518, 2022-Ohio-3570, ¶ 18; *State v. Lucko*, 5th Dist. Coshocton No. 2021CA0007, 2021-Ohio-3293, ¶ 7.

To be sure, the catchall provision alludes to *inaccuracies* by limiting the relevant qualifying event to a birth record that "has not been properly and accurately recorded." R.C. 3705.15. But this term, too, encompasses not just error-correction, but also "conforming * * * to truth or to a standard." Merriam-Webster online, https://www.merriam-webster.com/dictionary/accurate (accessed Dec. 18, 2022). The dictionary illustration further notes that "accuracy" reflects freedom from error "as the result of care," as in "an *accurate* diagnosis." *Id.* In the absence of a statutory accuracy standard, a proper timeframe for ascertaining accuracy (*see infra* Part V.P1.A.2), or a sex-based limitation (*see infra* Part V.P1.A.3), the provision's reference to birth records that "ha[ve] not been properly and accurately recorded" does not support the Second District's concept of error based only on information available at the time of birth.

Under the Second District's restrictive interpretation, *House* would be wrongly decided. The subjective selection of a child's name contrary to a previous agreement does not constitute an objective factual error in the birth certificate. The probate court order there amended the birth certificate to match a set of subjective determinations made at a time other than the time of birth. The First District has the better of the argument. The plain text of the catchall provision does not require a finding of error as a prerequisite to correction.

2. The Second District Imposes Temporal Limits Contrary to the Statute's Use of the Present Perfect Tense.

Second, the Second District's quest for *error* results in a construction that overrides the tenses used in the qualifying-event language, which suggest a broader construction.

Notably, the qualifying-event language uses the present perfect tense: "whose registration of birth * * * *has not been* properly and accurately recorded." (Emphasis added.) R.C. 3705.15. This use of tense differs from that of other qualifying events in that sentence.

-*whose registration of birth is not recorded* (present tense)

-*or has been lost or destroyed* (present perfect)

-*or has not been properly and accurately recorded* (present perfect).

R.C. 3705.15. The use of the present perfect tense in the properly/accurately clause expresses a time period that began before the present moment *and* "includes the present moment." Hewings, Martin, Advanced Grammar in Use, 3rd Ed., p. 6, Cambridge University Press, 2013; *see also* The Chicago Manual of Style Online § 5.132 (explaining that the present perfect tense "denotes an act, state, or condition that is now completed or continues up to the present," but encompassing a closer period of time than the past tense, which "indicates a more specific or a more remote time in the past"). It would have a more limited reach if the language had been drafted in the past perfect—*i.e.*, *had not been properly and accurately recorded*.

Put differently, the present perfect tense connotes a past event that has a continuing or "current relevance" because "its consequences are still in force." (Citation and internal quotation marks omitted.) C. Chareonkul and R. Wijitsopon, *Patterns of the "Current Relevance" Meaning of the Present Perfect in Real Use and Textbooks: A Corpus-driven Perspective*, 12 LEARN Journal 55, 56 (2019).[6] "One of the central meanings of [present perfect tense] is the 'current relevance' meaning * * * ." *Id.* at 55.

The Second District's interpretation elides the "current relevance" aspect of this clause. What is the relevant timeframe for determining *accuracy in recordation*, in the absence of an objective standard for accuracy provided by statute? One would not say that a medical diagnosis *has been properly and accurately recorded* if subsequent diagnostic information contradicts that finding. The original diagnosis still has current relevance for the patient who might sue, though,

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[6] Available at https://files.eric.ed.gov/fulltext/EJ1225662.pdf (accessed Dec. 18, 2022).

because the patient *now* knows it is not accurate. Similarly, one would not say that paternity *has been properly and accurately recorded* if subsequent testing revealed different parentage.

A transgender individual suffers from the current relevance of the misdiagnosis of sex every day until she can obtain an order of correction based on information not knowable at the time of birth. Until such correction takes place, the birth record was—and still is—not accurately recorded.

3. The Second District Infers a Sex-Based Limitation Not Present in the Statute.

Third, and perhaps most critical given its substantive impact, the Second District infers a sex-based limitation not present in the statute. Specifically, the court adopts a traditional genital-inspection method for determining a child's sex for purposes of the birth certificate, and then presumes that determination infallible. App. Op. ¶ 25, Appx. 16.[7]

Though admittedly this has been a traditional method of assigning a baby's sex, neither the term "sex" nor this method for determining sex appears anywhere in R.C. 3705.15 or other relevant provisions in Chapter 3705. Rather, the sex requirement traces to administrative guidance and tradition. *See* Ohio Adm. Code 3701-5-02, Appx. O.[8] The Second District provides no explanation for deferring to this administrative guidance, while simultaneously rejecting ODH's current

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[7] Strangely, the Probate Court below feared a chilling effect on delivery-room doctors. Pro. Op. at 5 n.2, Appx. 22 ("But this Court is reluctant to embrace any 'science' that prevents a doctor who delivers a new baby into this world from advising the birth parents that the baby is a 'boy' or a 'girl'".)

[8] Oddly, the Second District cites Appendix N for the proposition that "[t]he personal data included for a registration of birth includes * * * the name of the child, place of birth, name and birthplace of mother, and name and birthplace of father," as well as a box for either "male" or "female." App. Op. ¶ 15, Appx. 11. Appendix N, enacted in 2016, is a standard form for "Correction of Birth Record." Much like this Court's current standard probate form 30.0, Appendix N does not single out "sex" as an item that cannot be corrected. Neither Appendix O nor Appendix N provide a methodology for determining "sex."

administrative guidance allowing birth-certificate corrections with a probate court order. Regardless, the past century of medical science has amply demonstrated that sex determinations are not strictly binary or infallible, making the Second District's inference problematic.

For one, this narrow view of "sex" reduces a multi-variable medical assessment to a simple eyeball test that any layperson could do, and it fails to account for intersex individuals.[9] Modern medical science recognizes that many people do not fall into neat "male" and "female" categories. As detailed in one recent case:

> [T]here are a number of components that determine a person's gender: external genitalia, internal sex organs, chromosomal sex, gonadal sex, fetal hormonal sex, hypothalamic sex, pubertal hormonal sex, neurological sex, and gender identity and role. * * * In most people, all the markers, including external genitalia, lead to a singular conclusion that an individual is either a male or a female. Sometimes, though, they are not congruent, with some indicators suggesting the individual is female, and others male. In this situation, neurological sex and related gender identity are the most important and determinative factors.

Adams by & through Kasper v. School Bd. of St. Johns Cty., Florida, 318 F.Supp.3d 1293, 1298 (M.D.Fla. 2018) (finding developmental and clinical psychologist's opinions sufficiently reliable to be admissible under federal *Daubert* standard[10]); *accord* Silver, *An Offer You Can't Refuse: Coercing Consent to Surgery Through the Medicalization of Gender Identity*, 26 Colum. J. Gender & L. 488, 490 (2014).

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[9] *See Hoffman v. State Med. Bd.*, 113 Ohio St. 3d 376, 2007-Ohio-2201, 865 N.E.2d 1259, ¶ 26 (recognizing that specialized uses of terms used in the medical field can imbue that term with a "technical meaning"); *see also* R.C. 1.42 (specialized terms receive "technical" meaning).

[10] By comparison, the Probate Court did not engage in a *Daubert / Miller* analysis before summarily rejecting modern medical science concerning gender identity. Pro. Op. at 5 fn. 2, Appx. 22. *See Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 611, 687 N.E.2d 735 (1998).

A survey of medical literature from 1955 to 2000 estimated that 1.7% of live births display physiological characteristics belonging to both genders. Blackless, et al., *How Sexually Dimorphic Are We? Review and Synthesis*, Am. J. of Human Biology, 12:151–166 (2000). Meanwhile, approximately one in 4,500 live births result in ambiguous genitalia from conditions such as 5 alpha-reductase type 2 deficiency.[11] G. Kumar & J.J. Barboza-Meca, 5 Alpha Reductase Deficiency, in StatPearls (updated Oct. 21, 2021), https://www.ncbi.nlm.nih.gov/books/NBK539904/ (National Library of Medicine online) (accessed Dec. 18, 2022). Applying these ratios to Ohio's approximate 11,780,017 citizens suggests that approximately 200,260 individuals were born with some form of "male" and "female" sex physiology, and approximately 2,618 individuals were born with ambiguous genitalia.[12] Under the Second District's interpretation, it is unclear whether intersex individuals can obtain a birth-certificate correction. In such a scenario, the misidentification of ambiguous genitalia would not necessarily be an "error," but a failure to understand that sex consists of more than just external genitalia.

For another, the Second District's view of sex fails to account for the physiological ways that transgender people align with their lived gender identity. Brain scans and neuroanatomical

[11] For babies born with 5 alpha reductase deficiency, the lack of a specific type of testosterone (DHT) can prevent the development of external genitalia, such that a baby with XY chromosomes is born with external genitals that appear female. The presence of testosterone during puberty, however, results in the development of male external genitalia. https://www.ncbi.nlm.nih.gov/books/NBK539904/

[12] *See* United States Census Bureau, *Ohio Quick Facts*, https://www.census.gov/quickfacts/OH (accessed Dec. 18, 2022).

studies of transgender individuals indicate that transgender individuals have brain structures that more closely resemble their lived gender identity than the sex they were assigned at birth.[13]

In light of this research, "the medical profession's understanding of gender has advanced considerably over the last fifty years." Brief of Amici Curiae American Medical Association, et al., at 6, *Bostock v. Clayton Cty., Georgia*, 590 U.S. ___, 140 S.Ct. 1731 (2020) (Nos. 17-1618, 17-1623, 18-107) 2019 WL 3003459, at *6. Modern medical science recognizes that a person's gender "cannot be altered voluntarily or necessarily ascertained immediately after birth." (Citations omitted.) *Id.* at 7–8. And "although gender identity is usually established in childhood, individuals may become aware that their gender identity is not in full alignment with sex assigned at birth in childhood, adolescence, or adulthood." American Psychological Association, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 836 (Dec. 2015).

Not surprisingly, courts considering applications for birth-certificate corrections to sex markers have recognized that narrow interpretations of "biological sex" and examination-based tests produce inconsistent results. As the Utah Supreme Court recently explained, "in most instances, 'sex' as designated at birth is based on a medical observation of genitalia and physical characteristics," however, "the 'anatomical examination' done at birth contemplates only the observable genitalia, which is limited at the neonatal stage." *Matter of Childers-Gray*, 487 P.3d 96, ¶¶ 85, 87 (Utah 2021). "[M]any transgender individuals would still lie within [the anatomical] definition, given that they may later undergo sex-reassignment surgery, hormone therapy, or other

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[13] *See, e.g.*, Russo, *Is There Something Unique About the Transgender Brain?*, Sci. Am. (Jan. 1, 2016), https://www.scientificamerican.com/article/is-there-something-unique-about-the-transgender-brain/ (accessed Dec. 18, 2022).

treatment to bring their physical appearances into alignment with their gender identities." *Id.* at ¶ 87, citing Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 Cardozo J.L. & Gender 213, 219 (2005) (noting that surgical procedures often serve to "bring [an individual's] 'biological sex' into line with their gender identity"). The very concept of "biological sex * * * likely extends beyond what a cursory physical examination of an infant might reveal." *Childers-Gray* at ¶ 85.

The Second District's narrow interpretation not only reads this genital-inspection requirement into Ohio law, but makes it infallible. What if doctors and/or mental health professionals agree, in light of subsequent diagnostic criteria and undisputed evidence, that the genital-inspection-based sex determination at the time of birth were wrong, incomplete, or premature? That is what happened here; two mental health professionals vouched for Ms. Adelaide's proper gender identity, and wrote specifically *in support* of her application *to correct* the sex-marker on her birth certificate. The Probate Court accepted all of this evidence and deemed Ms. Adelaide's testimony "compelling." (R.2, Tr. at 34:1–2). R.C. 3705.15 does not require probate courts to reject such compelling evidence in favor of a rigid definition of sex that appears nowhere in the statute.

B. The Birth-Certificate-Correction Authority Relied Upon by the Second District Is Outdated, Unpersuasive, and Contrary to the Plain Language of R.C. 3705.15.

The Second District relied on two non-precedential Ohio cases that address a transgender individual's attempt to obtain a correction of the birth certificate's gender marker: *In re Maxey*, 8th Dist. Cuyahoga No. 34558, 1976 WL 190807 (Feb. 5, 1976) (per curiam), and *In re Ladrach*, 32 Ohio Misc.2d 6, 10, 513 N.E.2d 828 (C.P. 1987). App. Op. ¶¶ 15–17, Appx. 11–12. Neither have any persuasive value.

For starters, the *Maxey* panel does not actually say that R.C. 3705.15 (previously codified as R.C. 3705.20) does not authorize birth-certificate sex-marker corrections. Rather, the panel notes that "there is no [separate] statutory enactment vesting the Probate Court with authority to order a change to the gender indicated * * * ." 1976 WL 190807, at *1 (noting express provisions for corrections and name-changes). The entirety of the panel's analysis about R.C. 3705.15 pertains to the applicant's out-of-state residence. *Id.* at *1 ("Appellant's reliance on R.C. 3705.20 is clearly misplaced because the appellant was neither born in this state nor was appellant's registration of birth recorded in this state."). Until the Second District's opinion, no other court, government agency, or publication had cited *Maxey* for anything. 1976 WL 190807 (select "citing references" tab). Cuyahoga County certainly does not follow its reasoning in applying the birth-certificate correction statute. *See* Appendix.

Ladrach, meanwhile, based its analysis on outdated legal principles prohibiting same-sex marriage and a New York trial court decision from the 1960s. 32 Ohio Misc.2d at 8, citing *Anonymous v. Weiner* (1966), 50 Misc.2d 380, 270 N.Y.S.2d 3199; *id.* at 9 ("It seems obvious to the court that if a state permits such a change of sex on the birth certificate of a post-operative transsexual, either by statute or administrative ruling, then a marriage license, if requested, must issue to such a person provided all other statutory requirements are fulfilled."). It is impossible to divorce the *Ladrach* court's limited analysis of the birth-certificate-correction statute (then R.C. 3705.20) from these overarching concerns. The court took pains to note that only three states at that time had laws allowing for sex-marker changes on birth certificates, *id.* at *8 (Arizona, Louisiana, and Illinois), and that a New Jersey appellate court had taken a "very liberal posture" in honoring the marriage between a trans woman and a cisgender man, *id.* at *9.

Of course, this country has seen a sea-change in the law concerning marriage equality and recognizing discrimination against transgender individuals as a form of prohibited sex-based discrimination. *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 681, 192 L.Ed.2d 609, 135 S.Ct. 2584, 2608 (2015) (recognizing that same-sex couples have constitutionally protected interest in marriage); *Bostock v. Clayton Cnty., Georgia*, 207 L.Ed.2d 218, 140 S.Ct. 1731, 1754 (2020) (holding that Title VII workplace protections against discrimination "because of sex" included discrimination against transgender employees); Respect for Marriage Act, Pub. L. No. 117-228 (enacted Dec. 13, 2022). The New York decision relied upon by *Ladrach* has long since been superseded. *Birney v. N.Y. City Dept. of Health & Mental Hygiene*, 34 Misc.3d 1243(A), 950 N.Y.S.2d 607 (Sup. Ct. N.Y. Cty. 2012) (recognizing that New York's Board of Health adopted a contrary policy allowing the issuance of new birth certificates for transgender individuals in 1971).[14] In the context of birth-certificate sex-marker corrections for transgender individuals, it is no longer a novel or "liberal" position, nor has it been for some time; as of 2020, only two states *did not* allow such corrections. *Ray II*, 507 F.Supp.3d at 928.[15]

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[14] *See also* Wenstrom, *"What the Birth Certificate Shows": An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies*, 17 Law & Sexuality 131, 141 (2008) ("When the amendment policy was introduced in 1971, New York City was one of the first jurisdictions to permit transgender people to change their birth certificate to reflect their transition. Since then, a vast majority of jurisdictions have changed their statutes or administrative policies to allow transgender people to amend their birth certificates. [As of 2008] Only three states, Tennessee, Ohio, and Idaho, do not permit correction of the gender designation on birth certificates.").

[15] According to the Movement Advancement Project, it appears that three states currently prohibit sex-marker changes for birth certificates: Montana, Oklahoma, and Tennessee. https://www.lgbtmap.org/equality-maps/identity_document_laws (accessed Dec. 18, 2022) (links to respective state laws provided in the "Citations & More Information" tab). Montana's policy has changed multiple times and been the subject of litigation since July 2021. Before the recent changes, Montana had permitted birth certificate corrections. Oklahoma, meanwhile, had implemented a policy allowing birth-certificate corrections as part of the settlement of a federal lawsuit, but a new executive order in November 2021 halted these birth-certificate corrections.

Bereft of this bygone context, the *Ladrach* decision's statutory analysis is minimalistic. Without any citations or parsing of the statutory text, it concludes that the statute "is strictly a 'correction' type statute." 32 Ohio Misc.2d at 9. It actually contemplates that the statute "permits the probate court when presented with appropriate documentation to correct errors such as spelling of names, dates, race *and sex*, if in fact the original entry was in error," but then presumes that a transgender individual could never present such evidence. (Emphasis added.) *Id.* It does not explain what it means by *error*, *correction*, or why the applicant did not meet its standard.

Inasmuch as the legal underpinnings for the *Ladrach* court's have completely eroded, and the decision suffers from similar inferential limitations as the Second District's decision, it deserves no persuasive weight.

C. Why Statutory Silence Supports Probate Court Jurisdiction.

The Second District made another fundamental error in construing the legislative silence about sex-marker changes as a jurisdictional limitation.

To be sure, probate courts are courts of limited jurisdiction that are permitted to exercise only the authority granted to them by statute and by the Ohio Constitution. *In re Guardianship of Hollins*, 114 Ohio St.3d 434, 2007-Ohio-4555, 872 N.E.2d 1214, ¶ 11. But Ohio courts—following this Court's guidance—have "embraced a 'broader view of the probate court's jurisdiction,'" which enables probate courts to order "any relief required to fully adjudicate the subject matter within" its jurisdiction. *Sosnoswsky v. Koscianski*, 8th Dist. Cuyahoga No. 106147, 2018-Ohio-3045, 118 N.E.3d 403, ¶ 14, quoting *State ex rel. Lewis v. Moser*, 72 Ohio St.3d 25, 29, 647 N.E.2d 155 (1995); *accord McDonald & Co. Sec., Gradison Div. v. Alzheimer's Disease & Related*

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https://www.lgbtmap.org/img/maps/citations-id-birth-certificate.pdf (accessed Dec. 18, 2022) (Fact Sheet at pages 5, 7).

Disorders Assn., Inc., 140 Ohio App.3d 358, 366, 747 N.E.2d 843 (1st Dist.2000). As this Court recently explained, "[a] probate court's jurisdiction is broad, so as to enable it to order relief that may be required to fully adjudicate a matter." *State ex rel. Chester Twp. v. Grendell*, 147 Ohio St.3d 366, 2016-Ohio-1520, 66 N.E.3d 683, ¶ 24 (per curiam), citing *Moser*, 72 Ohio St.3d at 29.

This pragmatic view of probate jurisdiction flows from its primary jurisdictional statute, R.C. 2101.24. That statute grants the probate court "plenary power at law and in equity to dispose fully of any matter that is properly before the court, unless the power is expressly otherwise limited or denied by a section of the Revised Code." (Emphasis added.) R.C. 2101.24(C). In *Grendell*, this Court unanimously held that the probate courts' authority over park districts encompassed inherent investigatory and enforcement powers. *Grendell* ¶¶ 23–32 (denying writ in prohibition). Though these specific powers were not expressly mentioned in the authorizing statutes in R.C. Chapter 1545, the Court cited the broad vesting language in R.C. 2101.24(C), recognizing that the absence of a statutory prohibition did not deprive the probate court of jurisdiction. In other words, statutory silence within a zone of probate jurisdiction supported the exercise of jurisdiction.

The Probate Court and Second District here, by demanding an affirmative grant of authority to process a specific type of birth certificate change, flipped this analysis on its head. They also ignored the key distinguishing feature about the catchall provision: unlike other provisions in Chapter 3705, it does not strictly limit the *type* of information that could be changed.

As shown above, nothing in section 3705.15 mentions "sex" in the context of birth-certificate corrections, let alone *expressly limits* or *denies* the power to make such corrections. Thus, under the plain language of section 2101.24(C), the Probate Court's jurisdiction was beyond dispute; it had the "plenary power at law and in equity to dispose fully of any matter that is properly before the court," including a birth certificate correction under R.C. 3705.15. The Second District's

categorical conclusion that probate courts lack the authority to process transgender individual's sex-marker birth-certificate corrections is contrary to law.

D. The Existence of Other Provisions Allowing Different Types of Birth-Certificate Modifications Undermines the Second District's Decision.

In pronouncing its narrow interpretation of R.C. 3705.15, the Second District placed great significance on the existence of other provisions permitting different types of birth-certificate modifications: R.C. 3705.12 (adoptive parents), R.C. 3705.13 (name changes), and R.C. 3705.22 (amendment to correct error). App. Op. ¶¶ 18–19, 26 Appx. 13, 16. The appellate court worried that a broad interpretation of R.C. 3705.15 would render these other modification provisions "obsolete." App. Op. ¶ 19, Appx. 13. This reasoning suffers from numerous flaws.

First, the Second District fails to appreciate that the so-called "amendment" provision, R.C. 3705.22, is also inextricably linked to the concept of "correction." It is titled "Birth certificate to be amended to *correct errors*," it contemplates that "facts stated in any birth * * * record" are allegedly "not true," and it permits the Director of ODH to choose forms of proof concerning "the matter *to be corrected*." (Emphasis added.) R.C. 3705.22. Indeed, unlike R.C. 3705.15, R.C. 3705.22 expressly refers to *error-correction*. The statute's requirement of the signature of the "person who attended the birth," *id.*, also makes it inapt for older persons seeking birth certificate amendments, as the persons who attended their births may no longer be alive.

Second, concerns about rendering other modification provisions obsolete are misplaced. It is a well-established rule of interpretation that specific provisions trump general ones. *E.g.*, *United States v. Hunter*, 12 F.4th 555, 566 (6th Cir.2021) (statutes); *State v. Anderson*, 148 Ohio St.3d 74, 2016-Ohio-5791, 68 N.E.3d 790, ¶ 26 (constitutional provisions). The name-change and adoptive-parent provisions continue to govern in their respective spheres. The existence of these other provisions does not provide a basis for grafting on substantive limitations not present in R.C.

3705.15. It bears mention that R.C. 3705.15 itself differentiates between types of corrections, opting to impose heightened proof standards only when the applicant seeks to correct the date of birth. R.C. 3705.15(A).

Third, the Second District's faulty obsolescence argument rests on a critical factual error: the belief that Ms. Adelaide's application is a mere "later-in-life change." App. Op. ¶ 19, Appx. 13. The undisputed evidence showed that this was not a simple later-in-life change. Ms. Adelaide testified that she had always identified as female—as long as she could remember—and that her gender identity had not changed throughout her entire life. She submitted the opinions of two healthcare professionals who vouched for her gender identity and agreed that her birth certificate needed to be *corrected*. *See supra* Part IV.A. The Probate Court accepted all of this evidence, but the Second District minimizes Ms. Adelaide's experience as a simple spur-of-the-moment decision rather than an inherent trait.

The existence of Section 3705.22 actually supports Appellant's reading of R.C. 3705.15. First, it shows that "correction" and "amendment" can be used interchangeably. *Id.* ("Once a *correction or amendment* of an item is made on a vital record, that item shall not be *corrected or amended* again except on the order of a court of this state or the request of a court of another state or jurisdiction."). And second, it delegates authority to the Director of ODH to set proof requirements for qualifying amendments. *Id.* ("[T]he director may require satisfactory evidence to be presented in the form of affidavits, amended records, or certificates to establish the alleged facts."). Here, ODH has made clear that its preferred form of proof is an order from the probate court, as demonstrated by the policy statement on its website. *See supra* Part III.B. The Second District provided no explanation for giving no deference to ODH's selection of proof methods. It

should have construed section 3705.15 and 3705.22 in a complementary fashion, rather than an antagonistic fashion not supported by the plain text.

E. The Better Way to Honor the Catchall Provision's Plain Text Is to Apply Its Broad Terms Broadly, and Without Assuming Exceptions.

Underlying the Second District's decision appears to be an instinct that the General Assembly did not intend to authorize sex-marker birth-certificate corrections for transgender persons. But that instinct, no matter how accurate, does not justify judicial alterations to the statutory language. Rather, as Justice Gorsuch explained in his majority opinion in *Bostock*:

> there [is no] such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule.

Bostock, 140 S.Ct. at 1747, 207 L.Ed.2d 218. Even though "few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons," *id.* at 1749, the Court would not *read that limitation into* the statute's broad terms, *id.* at 1754. "Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." This Court would be wise to give R.C. 3705.15 the breadth that its text demands.

<u>Proposition of Law No. 2</u>: Even if R.C. 3705.15 were ambiguous, the statute should be construed to avoid the unappealed constitutional injuries found in *Ray II*, which have prompted the relevant state agencies and a number of courts (including the Supreme Court of Ohio) to adopt implementing guidance.

The Second District's cramped interpretation of R.C. 3705.15 is all the more problematic because it elides ambiguity in the statute to revive constitutional injuries that had been remedied in *Ray II*. Worse, despite ample briefing on the subject, it refused to hear Ms. Adelaide's constitutional arguments, citing the failure to raise the issues below. App. Op. ¶ 23, Appx. 14 ("To

the extent Adelaide wants this Court to conduct a constitutional analysis of R.C. 3705.15 based on the same arguments raised in *Ray*, we decline to do so."). The issues were properly preserved, and R.C. 3705.15 should have been construed to comply with *Ray II*'s constitutional holdings, just as ODH's current policy and this Court's standard probate form 30.0 have done.

A. Ms. Adelaide Preserved Constitutional Arguments in Support of Her Statutory Claim.

Preliminarily, the appellate court's forfeiture finding misses the mark. The Second District fails to acknowledge the unique litigation vehicle that prompted this appeal: the filing of an *ex parte* application for birth certificate correction, not a complaint that must inform opposing parties of the specific factual allegations and causes of action asserted against them. This non-adversarial administrative proceeding thus differs considerably from traditional litigation based on pleadings. Nevertheless, and with the Probate Court's permission, Ms. Adelaide *did* raise her constitutional arguments at the first opportunity, which was in supplemental briefing to the Probate Court, *and* the Probate Court in turn ruled on those claims. Pro. Op. at 3, Appx. 20 (noting that *Ray II* held ODH's interpretation unconstitutional in violation of privacy and equal protection rights); *id.* at 5, Appx. 22 (addressing Ms. Adelaide's privacy rights and summarily rejecting *Ray II* court's conclusion that state justifications did not meet constitutional muster).) The Second District's forfeiture conclusion unfairly penalizes Ms. Adelaide and similar litigants who give fair notice of constitutional arguments at the first possible opportunity.

The Second District also overlooked the other avenue by which Ms. Adelaide raised her constitutional arguments, which undoubtedly was preserved. Both in the Probate Court and on appeal, Ms. Adelaide invoked the well-established rule that courts should "liberally construe statutes to avoid constitutional infirmities." *First Merchants Bank v. Gower*, 2nd Dist. Darke No. 2011-CA-11, 2012-Ohio-833, ¶ 16, quoting *Willoughby v. Taylor*, 180 Ohio App.3d 606, 2009-

Ohio-183, 906 N.E.2d 511, ¶ 17 (11th Dist.). (R.3, at 8–15; Br. of Petitioner / Appellant at 8–15, 25 (2d Dist. Mar. 30, 2022))

If the Court of Appeals intended to reinstitute a narrow interpretation of a statute that had been declared unconstitutional by a federal court, it should have considered the federal court's constitutional bases for striking down the provision and articulate its reasons for agreeing or disagreeing with that ruling—as part of its statutory interpretation. Instead, the Second District's reluctance to consider the constitutional issues revived the constitutional injuries identified in *Ray II*, while providing no satisfactory explanation for parting company with it.

B. R.C. 3705.15's Silence as to Sex-Marker Corrections Reflects Ambiguity.

The Second District further erred in construing legislative silence on the topic of sex-marker changes as an unambiguous prohibition.

As this Court has explained, "[a]mbiguity, in the sense used in our opinions on statutory interpretation, means that a statutory provision is 'capable of bearing more than one meaning.'" *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, ¶ 8. But "[a] statute's silence or lack of clarity on an issue often connotes ambiguity," too. *State v. Taylor*, 163 Ohio St.3d 508, 2020-Ohio-6786, 171 N.E.3d 290, ¶ 23 (collecting authority); *see also State v. Vanzandt*, 142 Ohio St.3d 223, 2015-Ohio-236, 28 N.E.3d 1267, ¶ 12 (legislative silence as ambiguity).

Here, the Second District appeared to acknowledge that the statute "does not explicitly prohibit correcting the sex marker for an individual," but deemed that insignificant. App. Op. ¶ 24, Appx. 15. If anything, that silence should have demonstrated the statute's ambiguity.

As detailed above, the statute is silent as to "sex," the method for determining "sex," and whether the birth record must contain a specific type of error. Further, the qualifying-event language relied on by the Second District to defeat ambiguity, App. Op. ¶¶ 14–16, Appx. 9–11—

"has not been properly and accurately recorded"—cannot fill in these gaps, because the statute provides no standard against which to determine the birth record's accuracy—must the inaccuracy be based on information available or knowable at the time of birth, or can it be based on later diagnostic information? The substantive limitations on sex-marker changes do not appear in the statute; they were inferred by the appellate court. *See supra* Part V.P1.A.

These are all reasons to find ambiguity.

C. External Signs of Ambiguity Abound, with ODH and Court Guidance Supporting Sex-Marker Corrections.

The administrative guidance of ODH, this Court, and numerous county probate courts reflects the shared belief that R.C. 3705.15 permits sex-marker changes for transgender citizens. *See supra* Part III.B–C. This wave of guidance did not appear in a vacuum; rather, it arose in the aftermath of the *Ray II* court's conclusion that Ohio could not constitutionally deny sex-marker changes for transgender citizens' birth certificates. *See supra* Part III.A. Apparently, none of them believed that R.C. 3705.15 prohibited probate courts from processing this particular type of birth-certificate correction. Reasonable agency interpretations of silent statutory provisions typically receive deference. *E.g.*, *State ex rel. Turner v. Eberlin*, 117 Ohio St.3d 381, 2008-Ohio-1117, 884 N.E.2d 39, ¶ 17 (collecting authority). The Second District gave no weight to this shared view, which at a minimum should have demonstrated ambiguity.

D. R.C. 3705.15 Should Have Been Construed to Avoid the Constitutional Harms Resolved in *Ray II*.

In the face of this ambiguity, the canon of constitutional avoidance required interpreting R.C. 3705.15 "liberally * * * to avoid constitutional infirmities." *First Merchants Bank* ¶ 16. As this Court has repeatedly invoked the principle, "statutes must be construed in conformity with the Ohio and Unites States Constitutions if at all possible." *In re Affidavit of Helms*, 166 Ohio St.3d 548, 2022-Ohio-293, 188 N.E.3d 166, ¶ 8, quoting *State v. Tanner*, 15 Ohio St.3d 1, 2, 472 N.E.2d

689 (1984). This principle has been codified in R.C. 1.47: "In enacting a statute, it is presumed that: (A) Compliance with the constitutions of the state and of the United States is intended."

The federal court in *Ray II* concluded under federal due process and equal protection that Ohio cannot constitutionally deny sex-marker birth-certificate corrections for transgender citizens. *Ray II*, 507 F.Supp.3d at 932–40. It reached this conclusion in response to ODH's narrow interpretation of R.C. 3705.15 as not allowing sex-marker corrections. *Id.* at 929 & fn. 4 (explaining that ODH based its policy on its reading of the statute). In light of the *Ray II* decision, Westlaw has tagged R.C. 3705.15 "unconstitutional." The Second District sidesteps this inescapable conclusion by suggesting that *Ray II* did not "expressly f[ind] R.C. 3705.15 unconstitutional * * * but rather the blanket policy enacted by ODH." App. Op. ¶ 22, Appx. 14. But this gloss ignores the federal court's repeated statements that the policy represented ODH's interpretation of the statute, and that the court was referring to it as "policy" for "ease of reference." *Id.* at 929 fn. 4; *see also id.* at 931 (noting that the policy "represents Defendants' interpretation of the statute in a particular context"). There can be no doubt that if R.C. 3705.15 had contained express language prohibiting sex-marker birth-certificate corrections, the federal court's constitutional ruling would have been the same—in which case, the proper remedy would have been severance, not the striking of the entire statute. *E.g.*, *Athens v. McClain*, 163 Ohio St.3d 61, 2020-Ohio-5146, 168 N.E.3d 411, ¶ 58.

To be sure, the federal court did not delve into the probate court's jurisdiction under R.C. 3705.15 or the rest of Chapter 3705. It dealt only with ODH's interpretation of the statute's qualifying-event language. Hypothetically, sex-marker corrections could have been authorized by other means and complied with the federal court's order. But R.C. 3705.15 is the *only* provision contemplated in *Ray II*, that is the method employed in ODH's policy to comply with *Ray II*, and

that is the provision implicated in the new standard probate forms issued in the aftermath of *Ray II*. This makes sense, because R.C. 3705.15 broadly vests probate courts with the authority to order birth-certificate corrections, without substantive limitation to the types of corrections that can be made, so long as they are "satisfied that the facts [in the application] are as stated." R.C. 3705.15(A). That remedy does not ask the probate courts to do anything that they do not already do.[16]

Against this tide, and without deference to any of these sensible developments, the Second District revives the unconstitutional interpretation struck down in *Ray II* to rule out R.C. 3705.15. As detailed above, the Second District's interpretation rests on numerous faulty assumptions at odds with the actual statutory language, and its punt to R.C. 3705.22 falls out of bounds because that provision employs similar problematic *correction* language, while effectively excluding older applicants who can no longer produce the attending physician and witnesses at birth. If R.C. 3705.22 vests ODH with authority to determine the appropriate proofs for birth certificate amendments, why not defer to ODH's current preference that the probate court be involved in the process, as contemplated in *Ray II*?

The Idaho federal court's decision in *F.V. v. Barron* shows the benefits of judicial modesty in the face of constitutional violations. Like Ohio, Idaho had a "catch-all" birth-certificate revision statute that did not specifically address sex-marker changes. The relevant state agency interpreted the statute's silence to forbid sex-marker changes for transgender individuals. 286 F.Supp.3d 1131, 1136 (Mag.). The federal court concluded that the policy violated federal equal protection on multiple grounds. In doing so, the court stressed that the agency "already has a process in place

[16] Keeping probate courts involved for this type of birth-certificate correction also has the salutary effect of providing a learned tribunal to receive and assess submitted evidence, minimizing the risks of abuse or fraud that the Probate Court stressed below.

for making amendments to birth certificates." *Id.* at 1142. "[T]hus, under an alternative, constitutionally-sound reading of Idaho's vital statistics laws, amendments to the listed sex are not only possible, but procedures are in place to facilitate such amendments—and the Act allows the [agency] to draft a rule that does just that." *Id.* In other words, the agency could simply remedy the constitutional violation by applying "an alternative, constitutionally-sound reading of" the state's "vital statistics law" that would bring this specific type of birth-certificate correction in line with the others covered by the catchall provision. *Id.*

Rather than raising invisible barriers to the enforcement of *Ray II*, R.C. 3705.15's ambiguous language should be construed to avoid the constitutional infirmities struck down there.

<u>Proposition of Law No. 3</u>: A state court should give persuasive weight to a federal court's conclusion that a specific application of a state statute violates the U.S. Constitution when all relevant data points support the federal court's decision and the state agencies charged with implementing the law acquiesce to the ruling.

Finally, the Second District's avoidance of preserved constitutional issues, with no statement of disagreement with the *Ray II* court's reasoning, reflects complete disregard for the federal court's constitutional rulings in *Ray II*. Such dismissive treatment of federal authority is contrary to this Court's instruction in *Burnett* that such federal decisions, while not binding, may receive "some persuasive weight." *State v. Burnett*, 93 Ohio St.3d 419, 424, 755 N.E.2d 857 (2001); *see also State ex rel. Painter v. Brunner*, 128 Ohio St.3d 17, 2011-Ohio-35, 941 N.E.2d 782, ¶ 46.

If this were a state-law matter of first impression heard in a federal court, the federalism and comity principles underlying the *Erie* doctrine would require the federal court to consider all relevant data points to make an educated "*Erie* guess" as to how the state supreme court would rule on the issue, including "the decisions (or dicta) of the [state] supreme court in analogous cases, pronouncements from other [state] courts," and "regulatory guidance from [state agencies]." *In re*

Amazon.com, Inc., Fulfillment Ctr. FLSA & Wage & Hour Litig., 852 F.3d 601, 610 (6th Cir.2017) (cleaned up); *accord Southern Glazer's Distribs. of Ohio, LLC v. Great Lakes Brewing Co.*, 860 F.3d 844, 849 (6th Cir.2017). A similar, inverse analysis should guide state-court review of issues of federal law.

A variety of data points support *Ray II*'s constitutional conclusions under federal due process and equal protection.

A. The *Ray II* Court Applied the Proper Constitutional Analysis—also Recognized in Ohio decisions—for Federal Due Process and Equal Protection Claims.

First, the federal due process and equal protection standards applied by the *Ray II* court are correct, and they have roots in Ohio case law, too.

Ray II struck down the narrow interpretation of section 3705.15 relied upon by ODH on multiple grounds, employing the following constitutional principles and federal authority:

Constitutional Right	**Supporting Authority**
14th Amendment, Due Process, Informational Privacy	-*Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir.1998) (release of private information → substantial risk of bodily harm implicates fundamental right to informational privacy, triggers strict scrutiny) -*Bloch v. Ribar*, 156 F.3d 673 (6th Cir.1998) (disclosure of intimate information about sexuality and choices about sex) -*Powell v. Schriver*, 175 F.3d 107 (2d Cir.1999) (transgender status is highly personal information protected by due process right to informational privacy)[17] -*United States v. Brandon*, 158 F.3d 947 (6th Cir.1998) (strict scrutiny applies to violations of fundamental rights)

[17] Referenced in *Ray II*, quoting *Ray I*, which "agree[d] with the Second Circuit that the excruciatingly private and intimate nature of being transgender, for persons who wish to preserve privacy in the matter, is really beyond doubt." *Ray I*, 2019 WL 11791719, at *9 (cleaned up), quoting *Powell* at 111.

Equal Protection Clause	-*Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586 (4th Cir.2020) (finding transgender status a "quasi-suspect class," school bathroom access case) -*Lyng v. Castillo*, 477 U.S. 635, 638 (1986); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985) (considerations for identifying suspect classifications, subject to heightened scrutiny under the Equal Protection Clause) -*Romer v. Evans*, 517 U.S. 620 (1996) (arbitrary restrictions imposed on discrete group, no rational relationship to legitimate purpose)

The following Ohio authority echoes these principles.

- Fundamental Right, Informational Privacy: *State ex rel. Plain Dealer Publishing Co. v. Cleveland*, 106 Ohio St.3d 70, 831 N.E.2d 987, ¶¶ 47–50 (2005), citing *Kallstrom* at 1055; *accord State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 370, 725 N.E.2d 1144, 1149 (2000).

- Fundamental Right Analysis, Strict Scrutiny: *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 880 N.E.2d 420, ¶ 64 (2007).

- Equal Protection, Intermediate Scrutiny: *State v. Thompson*, 95 Ohio St.3d 264, 767 N.E.2d 251, ¶ 13 (2002); *State v. Burke*, 2nd Dist. Montgomery No. 26812, 2016-Ohio-8185, 69 N.E.3d 774, ¶ 19.

- Equal Protection Review, Rational Basis Not a "Toothless" Test: *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 28, citing *Romer* at 620.

As the Court is aware, the U.S. Supreme Court substantially revised federal due process analysis in the context of abortion. *Dobbs v. Jackson Women's Health Org.*, 213 L.Ed.2d 545, 142 S.Ct. 2228, 2284 (2022) (overruling *inter alia*, *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674). Yet, in concluding that the federal constitution no longer protected abortion rights, the Court expressly distinguished that from the privacy interest in keeping sensitive information from disclosure. *Dobbs* at 2237 (reasoning that "*Roe* conflated the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference," distinguishing *Whalen v. Roe*, 429 U.S. 589, 599–600, 97

S.Ct. 869, 51 L.Ed.2d 64 (1977)). *See also Dobbs* at 2267 (same). Federal courts continue to apply the informational-privacy-related doctrine under *Whalen* and its progeny after *Dobbs*. *E.g.*, *Ibrahim v. DeFilippo*, D.N.J. No. 19-cv-5021, 2022 WL 16821503, *4 (Nov. 8, 2022); *Miller v. Farris*, C.D.Cal. 21-cv-9551, 2022 WL 17079056, *5 (Oct. 17, 2022) (Mag.), report and recommendation adopted, 2022 WL 17252580. Importantly, *Kallstrom*, *Bloch*, and *Powell* all remain undisturbed by *Dobbs*. Thus, both doctrinal aspects of the *Ray II* court's decision remain on solid constitutional footing.

While the specific application of these constitutional principles to ODH's narrow interpretation of Ohio law may have been a matter of first impression, the principles themselves are well-recognized and should be instructive. The Probate Court made no effort to engage in a strict-scrutiny fundamental rights analysis; an intermediate-scrutiny equal protection analysis; or even a *Romer*-based equal protection analysis.

Strict scrutiny requires a compelling governmental interest and narrow tailoring. *E.g.*, *Matter of Adoption of Y.E.F.*, 163 Ohio St.3d 521, 2020-Ohio-6785, 171 N.E.3d 302, ¶ 18. ODH's acquiescence to *Ray II* and continued processing of sex-marker changes with probate court orders thereafter—as well as the State's absence from this and other similar birth-certificate-correction litigation—minimizes any suggestion of a compelling government interest. Yet, assuming a compelling interest in accurate vital records, the state could not show narrow tailoring when it allows changes to nearly every other facet of a birth certificate (name, parents, date of birth); it had *previously* allowed sex-marker changes (prior to 2016); and there are available mechanisms for keeping originals and records of the birth-certificate modifications should a need ever arise. *See, e.g.*, R.C. 3705.15(D)(1) (providing that the original birth record be sealed by ODH, subject to inspection upon court order, and that the probate court keep records enabling it to differentiate

between the original and amended birth records). Never mind that the overwhelming majority of states have managed to find a way to accommodate such birth-certificate corrections.

Similarly, the narrow interpretation could not survive the important governmental interest / substantially related test applicable for intermediate scrutiny.[18] *See Virginia*, 518 U.S. at 533. And even under the most lenient, rational-basis test, the *Ray II* court found evidence of an arbitrary "re-review" policy change triggered by the applicant's transgender status, suggesting that transgender persons were being targeted for disfavored treatment. *Ray II* at 939–40. The narrow interpretation—which singles out the sex marker as somehow inviolate among all birth certificate categories—cannot survive rational basis review under *Romer* and its progeny.

The Second District, while declining to consider the constitutional issues, found no fault in the principles applied in *Ray II*. Indeed, it observed that *Ray II* "relied on established constitutional law principles in reaching its decision." App. Op. ¶ 22, Appx. 14. Its analysis was correct, and its decision should have been accorded persuasive weight.

B. Comparable Cases Show Federal Constitutional Protections Enabling Transgender Citizens to Obtain Appropriate Sex Markers on Core Identification Documents, Including Birth Certificates.

Ray II is not an outlier. It is part of an unbroken chain of federal decisions applying these constitutional principles to regulations that impose unique burdens on transgender individuals in

[18] It bears mention that in an Ohio analogue to the Fourth Circuit's bathroom-access case, *Grimm*, the Ohio federal court also concluded that transgender individuals constituted a quasi-suspect class such that exclusionary policies against them would be subject to intermediate scrutiny under federal equal protection principles. *Bd. of Education of the Highland Local School Dist. v. United States Dept. of Edn.*, 208 F.Supp.3d 850, 874 (S.D.Ohio 2016). That case involved both Title IX and federal equal protection claims. The district court entered "a preliminary injunction ordering the school district to treat an eleven-year old transgender girl as a female and permit her to use the girls' restroom," and the school district moved to stay the injunction pending appeal. *Dodds v. United States Dept. of Edn.*, 845 F.3d 217, 220 (6th Cir.2016) (per curiam). The Sixth Circuit, by a 2-1 vote, denied the stay without resolving the equal protection standard. *Id.* at 221–22.

the context of birth certificates and other core identification documents. *E.g.*, *F.V. v. Barron*, 286 F.Supp.3d 1131, 1142–46 (D.Idaho 2018) (Mag.) (permanently enjoining Idaho's exclusionary birth-certificate policy on federal equal protection grounds under both heightened scrutiny and rational basis analysis); *Arroyo Gonzalez v. Rossello Nevares*, 305 F.Supp.3d 327, 333 (D.P.R. 2018) (declaring Puerto Rico's exclusionary birth-certificate policy violated federal due process privacy rights); *Love v. Johnson*, 146 F.Supp.3d 848, 857 (E.D.Mich. 2015) (declaring Michigan's restrictive state-ID policy, which required a corrected birth certificate before sex markers on other identification documents could updated, violated federal due process privacy rights). Like *Ray II*, the *Love* decision linked the Sixth Circuit's *Bloch* / *Kallstrom* standard to the Second Circuit's decision in *Powell*. *Love*, 146 F.Supp.3d at 853–56.

Again, as of 2020, only two states disallowed sex-marker changes for birth certificates. *Ray II*, 507 F.Supp.3d at 928.

C. Acquiescence by State Government Entities Further Demonstrates that *Ray II* Deserves Persuasive Weight.

Numerous Ohio government entities have acquiesced to *Ray II*, underscoring its persuasive appeal. ODH accepted a final judgment and issued new guidance, resuming sex-marker corrections for transgender citizens' birth certificates. This Court's new standard probate Form 30.0, and the like-minded standard forms and guidance issued by several probate courts around the state, enable the correction of any birth-certificate item under R.C. 3705.15—including sex. The Second District's decision is the outlier in this company.

*   *   *

All of these data points align in support of *Ray II*. It should have controlled here, R.C. 3705.15 should be construed to avoid this constitutional infirmity, and this Court should reverse the Second District's judgment.

Yet, should this Court have any doubts, it should clarify the standards by which lower federal court constitutional decisions receive persuasive weight, such that a state court cannot reject the federal court's conclusion out-of-hand without attempting to give its own constitutional analysis of those issues.

VI. CONCLUSION

The Second District's decision has clouded the birth certificate-correction process with uncertainty, while also casting doubt as to whether state courts even need to consider lower federal courts' constitutional decisions and state-agency guidance implementing those rulings. Until this Court provides guiding light on these issues, transgender individuals' ability to access the remedy promised in *Ray II*—and implemented in guidance by ODH and courts around the state—remains in doubt. This Court should REVERSE with instructions to process Ms. Adelaide's application for birth-certificate correction, or at a minimum vacate the Second District's decision for fresh consideration of the preserved constitutional issues.

Respectfully submitted,

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Hailey Emmeline Adelaide

CERTIFICATE OF SERVICE

This appeal is taken from an uncontested appeal, which itself was taken from an uncontested application for a correction of birth record. As in the Court of Appeals, there is no opposing party to serve. Should an opposing or neutral party ultimately be appointed by this Court, counsel will serve that party accordingly.

/s/Chad M. Eggspuehler
Chad M. Eggspuehler (0094094)

Attorney for Applicant / Plaintiff-Appellant
Hailey Emmeline Adelaide

APPENDIX

In re: Application for Correction of Birth Record of Hailey Emmeline Adelaide, No. 2022-CA-1 (2d Dist. June 17, 2022) Appx. 1–17

In re: Application for Correction of Birth Record of Hailey Emmeline Adelaide, No. 20219090 (Clark P.C. Dec. 2, 2021) Appx. 18–24

Counties with Guidance Permitting Sex-Marker Corrections Appx. 25

Relevant Statutory Provisions

- R.C. 3705.15 Appx. 26–28
- R.C. 3705.22 Appx. 28

Supreme Court of Ohio Clerk of Court - Filed August 01, 2022 - Case No. 2022-0934

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Clark County, Ohio
FILED
Court of Appeals
Melissa M. Tuttle, Clerk

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

IN RE: APPLICATION FOR CORRECTION OF BIRTH RECORD OF HAILEY EMMELINE ADELAIDE

Appellate Case No. 2022-CA-1

Trial Court Case No. 20219090

FINAL ENTRY

. . . .

Pursuant to the opinion of this court rendered on the 17th day of June, 2022, the judgment of the trial court is affirmed.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the clerk of the Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing. Additionally, the clerk of the Court of Appeals shall send a mandate to the trial court for execution of this judgment and make a note in the docket of the service. Pursuant to App.R. 27, a certified copy of this judgment constitutes the mandate.

MICHAEL L. TUCKER, Presiding Judge

JEFFREY M. WELBAUM, Judge

RONALD C. LEWIS, Judge

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Hon. Richard P. Carey
Clark County Probate Court
50 E. Columbia Street, 5th Floor
Springfield, OH 45502

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Clark County, Ohio
FILED
Court of Appeals
Melissa M. Tuttle, Clerk

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
CLARK COUNTY

IN RE: APPLICATION FOR CORRECTION OF BIRTH RECORD OF HAILEY EMMELINE ADELAIDE	:	Appellate Case No. 2022-CA-1 Trial Court Case No. 20219090 (Appeal from Common Pleas Court – Probate Division)

. . . .

OPINION

Rendered on the 17th day of June, 2022.

. . . .

MAYA SIMEK, Atty. Reg. No. 0086674, 2121 Euclid Avenue, LB 138, Cleveland, Ohio 44115, and

CHAD M. EGGSPUEHLER, Atty. Reg. No. 0094094 & DANIELLE M. EASTON, Atty. Reg. No. 0099591, 950 Main Avenue, Suite 1100, Cleveland, Ohio 44113
Attorneys for Plaintiff-Appellant

. . . .

LEWIS, J.

{¶ 1} Plaintiff-Appellant Hailey Emmeline Adelaide appeals from a decision of the Clark County Common Pleas Court, Probate Division, denying her application to change the sex marker on her[1] birth certificate. For the reasons that follow, the judgment of the probate court is affirmed.

I. Facts and Procedural History

{¶ 2} Adelaide was born in 1973 in Clark County, Ohio. The birth certificate identified Adelaide as Brian Edward Deboard and the sex marker was checked as male. In September 2021, Adelaide filed an application in the Clark County Probate Court for a change of name from Brian Edward Deboard to Hailey Emmeline Adelaide pursuant to R.C. 2717.02. The following month, Adelaide filed an application in a second case for correction of her birth record pursuant to R.C. 3705.15, asking to change the sex marker designation on her birth certificate from male to female. Included with the application was an affidavit from Adelaide and a copy of a notarized affidavit from William Ford, Adelaide's mental health care provider. Both affidavits were completed on the Supreme Court of Ohio Form 30.0 application for correction of birth record. Adelaide filed a brief in support of the correction application.

{¶ 3} The two cases were consolidated for a hearing, which was held on November 15, 2021. Adelaide presented her own testimony along with a copy of an unfiled but completed Form 30.0, which mostly mirrored the original application, but included the request for both the sex marker change and the name change. She also submitted a copy of a letter signed by William Ford, a clinical intern, and Dr. John P. Layh, a clinical

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[1] Adelaide refers to herself with the pronouns "she/her" and we will likewise use those terms in conformity with her brief.

psychologist supervisor. The letter stated that it was written "[i]n support of the sexual identity validity of Ms. Hailey Deboard, I find her to be consistent in mental competency exhibiting true authenticity both in self-awareness and introspection. I, William H. Ford, Sr., MRC, acknowledge and attest to the sexual identity of Ms. Hailey DeBoard (sic) as 'female' both psychologically and in lifestyle gender expression."

{¶ 4} Adelaide testified she was born in 1973 at the Clark County Community Hospital in Clark County, Ohio, and had resided in that county most of her life. She was born with biologically male anatomy but began believing she was a female at the age of four years old. Adelaide currently identifies as female. She came out in July 2020 and had been seeing her mental health therapist, Bill Ford, for almost a year. She testified that she believed there was an error on her birth certificate when her sex marker was checked off as male, because the male sex marker did not take into account her mental state.

{¶ 5} At the conclusion of the hearing, the probate court orally granted Adelaide's application for a change of name but withheld a decision on her application for a correction of her sex marker. After the hearing, Adelaide filed a brief in support of her application to correct the sex marker, in which she stressed the importance of *Ray v. McCloud*, 507 F.Supp.3d 925 (S.D.Ohio 2020).

{¶ 6} On December 2, 2021, the probate court issued a written decision denying Adelaide's request to correct the sex marker. In addressing the case of *Ray v. McCloud*, the probate court concluded that the case did not address the authority of the Ohio probate courts to issue the order requested. The probate court stated that the "sole question before this Court is whether or not this Court enjoys the statutory authority to

permit it to order such a change." Decision at p. 2. The court rejected Adelaide's arguments that the word "sex" and the phrase "has not been properly and accurately recorded" were ambiguous and instead applied the plain meaning of R.C. 3705.15. Unlike other statutes that allow the probate court to change information on one's birth certificate due to changes that occur in life, such as the person's name or parent's names after adoption, the probate court found that nothing in R.C. 3705.15 specifically granted the probate court authority to issue a change of the sex marker, unless it was originally made in error. Because the initial recording of Adelaide's male sex marker at birth correctly noted that she was born with biologically male anatomy, and her current physical anatomy supported the determination of male on the sex marker of her birth certificate, the probate court found there was nothing to be corrected pursuant to R.C. 3705.15.

{¶ 7} This appeal timely followed.

II. Assignments of Error

{¶ 8} Adelaide raises the following two assignments of error:

THE PROBATE COURT ERRED AS A MATTER OF LAW BECAUSE ITS ORDER DENYING THE BIRTH CERTIFICATE CORRECTION FAILED TO GIVE DUE RESPECT TO THE CONSTITUTIONAL RULINGS IN *RAY II*, THE PRINCIPLES OF WHICH ARE RECOGNIZED BY OHIO COURTS AND SHOULD HAVE CONTROLLED HERE.

THE PROBATE COURT ERRED AS A MATTER OF LAW BECAUSE ITS ORDER DENYING THE BIRTH CERTIFICATE CORRECTION IN THE FACE OF UNDISPUTED FACTS RESTED ON A RESTRICTIVE

INTERPRETATION OF R.C. 3705.15 THAT ADDED LIMITS NOT CONTAINED IN THE TEXT.

{¶ 9} In her assignments of error, Adelaide argues that the probate court failed to give due weight to the constitutional rulings identified in *Ray v. McCloud*, 507 F.Supp.3d 925, which she contends required a broad reading of the applicable statutory language. She also challenges the probate court's determination that R.C. 3705.15 did not authorize the court to change Adelaide's sex marker on her birth certificate based on the statutory language. Both of the assignments of error present arguments relating to the statutory interpretation of R.C. 3705.15. As a result, we will address the assignments of error together.

III. Standard of Review

{¶ 10} Generally, an appellate court reviews a denial of an application pursuant to R.C. 3705.15 for an abuse of discretion. *In re Application for Correction of Birth Record of Lopez*, 5th Dist. Tuscarawas No. 2004-AP-06 0046, 2004-Ohio-7305, ¶ 29, citing *In re Hall*, 135 Ohio App.3d 1, 732 N.E.2d 1004 (4th Dist.). However, Adelaide challenges the probate court's refusal to grant her relief on the grounds that it lacked authority to act based on the language of the statute. This challenge presents a question of law that we review de novo. *State v. Jeffries*, 160 Ohio St. 3d 300, 2020-Ohio-1539, 156 N.E.3d 859, ¶ 15.

IV. Probate Court

{¶ 11} "It is a well-settled principle of law that probate courts are courts of limited jurisdiction and are permitted to exercise only the authority granted to them by statute and by the Ohio Constitution." *In re Guardianship of Hollins*, 114 Ohio St.3d 434, 2007-

Ohio-4555, 872 N.E.2d 1214, ¶ 11, citing *Corron v. Corron*, 40 Ohio St.3d 75, 77, 531 N.E.2d 708 (1988). R.C. 2101.24(A)(1) identifies which subject matter areas are within the exclusive jurisdiction of the probate court. R.C. 2101.24(A)(2) provides that, in addition to the specific areas enumerated under the exclusive jurisdiction of the probate court, the probate court shall also have exclusive jurisdiction over a particular subject matter if both the following apply:

> (a) Another section of the Revised Code expressly confers jurisdiction over that subject matter upon the probate court.
>
> (b) No section of the Revised Code expressly confers jurisdiction over that subject matter upon any other court or agency.

{¶ 12} R.C. 3705.15 expressly confers jurisdiction on the probate court to correct birth records. The procedure for correcting birth records is controlled by R.C. 3705.15(A), which reads, in pertinent part, as follows:

> Whoever claims to have been born in this state, and whose registration of birth is not recorded, or has been lost or destroyed, or has not been properly and accurately recorded, may file an application for registration of birth or correction of the birth record in the probate court of the county of the person's birth or residence[.] * * *
>
> (A) An application to correct a birth record shall set forth all of the available facts required on a birth record and the reasons for making the application, and shall be verified by the applicant. * * * The application shall be supported by the affidavit of the physician or certified nurse-midwife in attendance. If an affidavit is not available, the application shall be

> supported by the affidavits of at least two persons having knowledge of the facts stated in the application, by documentary evidence, or by other evidence the court deems sufficient.
>
> The probate judge, if satisfied that the facts are as stated, shall make an order correcting the birth record[.]

V. Analysis

{¶ 13} The question before this Court is whether the probate court had the authority under R.C. 3705.15(A) to change the sex marker on a birth certificate where an individual was identified as one sex at birth but later identifies as the other. Adelaide contends that the statute should be interpreted broadly to allow individuals to change their birth marker when it is discovered later in life that their gender identity does not match the sex listed on their birth certificate. The probate court found that it did not have the authority under R.C. 3705.15(A) to grant the relief Adelaide requested as the plain language of the statute only permits corrections to information on the birth certificate that was recorded in error at the time of registration.

{¶ 14} The inquiry in this case centers on the statutory language "has not been properly and accurately recorded." We must first determine if this language is ambiguous. If the language is ambiguous, then we must interpret the statute to determine the General Assembly's intent in enacting it. If it is not ambiguous, then we need not interpret it; we must simply apply it. *Lake Hosp. Sys., Inc. v. Ohio Ins. Guar. Assn.*, 69 Ohio St.3d 521, 524, 634 N.E.2d 611 (1994). "When the statutory language is plain and unambiguous, and conveys a clear and definite meaning, we must rely on what the General Assembly has said." *State v. Hudson*, Ohio Slip Opinion No. 2022-Ohio-

1435,__ N.E.3d __, ¶ 21, citing *Jones v. Action Coupling & Equip., Inc.*, 98 Ohio St.3d 330, 2003-Ohio-1099, 784 N.E.2d 1172, ¶ 12. "We 'do not have the authority' to dig deeper than the plain meaning of an unambiguous statute 'under the guise of either statutory interpretation or liberal construction.' " *Jacobson v. Kaforey*, 149 Ohio St.3d 398, 2016-Ohio-8434, 75 N.E.3d 203, ¶ 8, quoting *Morgan v. Adult Parole Auth.*, 68 Ohio St.3d 344, 347, 626 N.E.2d 939 (1994). " 'Our role is to evaluate the statute as a whole and to interpret it in a manner that will give effect to every word and clause, avoiding a construction that will render a provision meaningless or inoperative.' " *State v. Bryant*, 160 Ohio St.3d 113, 2020-Ohio-1041, 154 N.E.3d 31, ¶ 17, quoting *State ex. rel. Natl. Lime & Stone Co., v. Marion Cty. Bd. of Commrs.*, 152 Ohio St.3d 393, 2017-Ohio-8348, 97 N.E.3d 404, ¶ 14.

{¶ 15} The registration and issuance of birth certificates in Ohio is governed by R.C. Chapter 3705, which establishes a statewide system of vital statistics maintained by the Office of Vital Statistics, which is part of the Ohio Department of Health ("ODH"). R.C. 3705.02. "A birth certificate for each live birth in this state shall be filed in the registration district in which it occurs within ten calendar days after such birth and shall be registered if it has been completed and filed in accordance with this section." R.C. 3705.09(A). "When a birth occurs in or en route to an institution, the person in charge of the institution or a designated representative shall obtain the personal data, prepare the certificate, and complete and certify the facts of birth on the certificate within ten calendar days. The physician or certified nurse-midwife in attendance shall be listed on the birth record." R.C. 3705.09(B). The personal data included for a registration of birth includes information such as the name of the child, place of birth, date of birth, name and birthplace

of mother, and name and birthplace of father. Ohio Adm.Code 3701-5-02, Appendix N. This also includes checking a box of either "male" or "female." *Id.* A person's biological sex is determined at birth by an objective anatomical examination by a birth attendant. This results in a declaration on the birth certificate of either "male" or "female" for the child's sex marker. *In re Ladrach*, 32 Ohio Misc.2d 6, 10, 513 N.E.2d 828 (C.P. 1987). According to the form, "[a]ll facts must be given as of time of birth." Ohio Adm.Code 3701-5-02, Appendix N.

{¶ 16} Based on the plain language of the statute, we do not find that this language "has not been properly and accurately recorded" is ambiguous. Adelaide contends that the phrase "has not been" is in the present perfect tense such that the statute permits any changes that occur in the time period before and up to the present moment. We do not agree that the use of this tense means what she contends. Rather, the language emphasizes the fact that an individual, at any time after the error is discovered, may file to correct the error because it has not yet been corrected. It does not mean that because something has changed after the original determination occurred that it then makes the original determination incorrect. Further, the immediate following language is "accurately or properly recorded." Birth records are recorded at the time of birth, or shortly thereafter, and are then filed with the office of vital statistics. R.C. 3705.01; R.C. 3705.09. The language regarding the accurate and proper recordation of the information relates back to the original filing of the birth record and whether it was properly and accurately recorded at that time.

{¶ 17} R.C. 3705.15 is a "correction" statute, which permits the probate court, when presented with appropriate documentation, to correct errors made at the time of

recordation. *In re Ladrach*, 32 Ohio Misc.2d at 8, 513 N.E.2d 828 (applying former R.C. 3705.20 amended and renumbered as R.C. 3705.15); *In re J.A.M.V.*, 7th Dist. Harrison No. 12 HA 3, 2013-Ohio-2502 (noting that R.C. 3705.15 is only permitted to correct spelling or clerical errors on the birth certificate, not to unilaterally change the spelling of the child's name later). The statute, by its express terms, permits making corrections, not amendments. Adelaide's application essentially asked the probate court to amend her birth certificate, not to correct it. But the probate court had no authority under R.C. 3705.15 to make that amendment and could not grant Adelaide's request. *In re Easterling*, 135 N.E.3d 496, 2019-Ohio-1516, ¶ 11 (1st Dist.) (probate court lacked authority to amend rather than correct the applicant's birth certificate under R.C. 3705.15); *In re Maxey*, 8th Dist. Cuyahoga No. 34558, 1976 WL 190807, *1 (Feb. 5, 1976) (applying former R.C. 3705.20 amended and renumbered as R.C. 3705.15; "there is no statutory enactment vesting the Probate Court with authority to order a change to the gender indicated on properly and accurately recorded birth records.").

{¶ 18} Whereas other statutes specifically allow amendments to the birth certificate, R.C. 3705.15 only allows corrections. For example, R.C. 2717.02 allows an individual desiring to change their name to file an application in the probate court of the county of residence. R.C. 3705.13 then allows the individual the ability to change the original birth record and have a new birth certificate provided to reflect the name change. R.C. 3705.12 also allows the amendment of a birth record when an adoption has occurred allowing the child's adopted name and the information concerning the adoptive parents to be issued in the new birth record. While the legislature has expressly provided in other statutes for a name to be changed or parent's names to be changed to reflect facts as

they presently exist, the legislature has not provided for changing the sex marker or any other required fact on a birth certificate, in R.C. 3705.15. One would not file an application under R.C. 3705.15 to "correct" their name because they decided to amend or change their name years after birth. Rather, one would have to use the appropriate statute created by the legislature in order to amend their name on their birth certificate. This reasoning similarly applies to amendments to the sex marker on a birth certificate.

{¶ 19} The fact that other statutes specifically allow the probate court to grant amendments to a birth certificate does not mean that R.C. 3705.15 also allows it. If we were to construe R.C. 3705.15 as permitting the probate court to change, not just correct, any of the required facts in the birth certificate, then there would be no need for the other statutes that allow modifications. *E.g.* R.C. 3705.12; R.C. 3705.13. We decline to find an ambiguity in the plain language of R.C. 3705.15 where none exists, especially where doing so would make other statutes obsolete. Absent the express authority from the legislature to modify the birth certificate to correlate with a later-in-life change, not just make corrections, the probate court lacked the authority to do so under R.C. 3705.15.

{¶ 20} Adelaide relies heavily on *Ray v. McCloud*, 507 F.Supp.3d 925, for the proposition that there is nothing in R.C. 3705.15 that prohibits modifying a birth record to change the sex marker of an individual. She further contends that the probate court gave no persuasive weight to the rulings in *Ray* and that *Ray* should have controlled here. We disagree.

{¶ 21} In *Ray*, four transgender individuals born in Ohio were denied the ability to change the sex marker on their birth certificates to reflect their gender identities as a result of the ODH's blanket policy refusing to issue such birth certificates, regardless of the

manner in which the request was made. *Ray* at 929. The parties filed cross-motions for summary judgment. *Id.* at 930. After analyzing the constitutionality of ODH's policy, the Court found that "a blanket prohibition against transgender people changing their sex marker is unconstitutional" and permanently enjoined ODH from enforcing the policy. *Id.* at 939-940.

{¶ 22} Adelaide acknowledges that *Ray* is not binding on either the probate court or this Court but argues it should be accorded persuasive weight. We agree that *Ray* is not binding on either the probate court or this Court. *State v. Burnett*, 93 Ohio St.3d 419, 424, 755 N.E.2d 857 (2001) (state courts "are not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court"). While a federal district court decision may be accorded some persuasive weight, even if the federal court were to find a statute unconstitutional, it would not end our inquiry. *Id.* But contrary to Adelaide's contentions, we do not find that *Ray* expressly found R.C. 3705.15 unconstitutional or that the outcome in *Ray* requires us to ignore the plain language of the statute. *Ray* relied on established constitutional law principles in reaching its decision, but it did not analyze the jurisdiction and authority of Ohio probate courts or the constitutionality of R.C. 3705.15, but rather the blanket policy enacted by ODH. As the federal court stated, "[a]ll this Court is finding is that a blanket prohibition against transgender people changing their sex marker is unconstitutional." *Ray* at 939-940.

{¶ 23} To the extent Adelaide wants this Court to conduct a constitutional analysis of R.C. 3705.15 based on the same arguments raised in *Ray*, we decline to do so. Adelaide did not raise the constitutionality of R.C. 3705.15 in the probate court but rather

argued the plain language of the statute was ambiguous and should be read broadly. She likewise argues on appeal that the probate court's interpretation of the statutory language was erroneous because it was too restrictive. The issue in this case is of statutory interpretation, not constitutionality. Furthermore, "Ohio law abounds with precedent to the effect that constitutional issues should not be decided unless absolutely necessary." *Hall China Co. v. Pub. Util. Comm.*, 50 Ohio St.2d 206, 210, 364 N.E.2d 852 (1977). We do not believe it is necessary to decide whether R.C. 3705.15(A) is unconstitutional at this juncture.

{¶ 24} The "[p]robate court's jurisdiction [under R.C. 3705.15] pertaining to birth certificates is limited to ordering the registration of an unrecorded birth and the correction of a birth record." *Zimmerman v. Montgomery Co. Pub. Health Dept.*, 2d Dist. Montgomery No. 26816, 2016-Ohio-1423, ¶ 14, citing *Nemcek v. Paskey*, 137 Ohio Misc.2d 1, 2006-Ohio-2059, 849 N.E.2d 108, ¶ 14. (C.P.) R.C. 3705.15 expressly confers jurisdiction on the probate court to correct birth records. The significance in the statute is not that R.C. 3705.15 does not explicitly prohibit correcting the sex marker for an individual, it is that the statute does not explicitly allow the probate court to *modify* or *amend* any required fact reflected on the birth certificate. Rather, the probate court is only permitted to make corrections under R.C. 3705.15 if the sex marker, or any other required fact, "has not been properly and accurately recorded[.]"

{¶ 25} Although a copy of Adelaide's birth certificate was not submitted in this case, all evidence suggests that Adelaide was born in a hospital wherein the information for her birth certificate was prepared, completed, certified, and filed according to the applicable statutes. There is no allegation that the above-described process was done

in error. Likewise, though Adelaide's gender identity is now female, she testified that she was born with male genitalia, further demonstrating that the identification made at the time of her birth was correctly recorded based on the standard determinations used at that time, and which continue to be used today. Adelaide is seeking an amendment of her birth records, not a correction, because the birth certificate was properly and accurately recorded at the time it was completed and filed. The probate court properly found that R.C. 3705.15 did not provide the authority to grant Adelaide the relief she sought, and we do not find that *Ray* requires us to hold otherwise.

{¶ 26} R.C. 3705.15 is not the proper avenue to seek a modification of a birth certificate for any required fact, including the sex marker. While there may be alternative avenues available to Adelaide to accomplish the change that she is seeking, those alternatives are not before us. In Adelaide's post-hearing trial court brief, she acknowledged that *Ray* did not mandate that ODH adopt any particular policy or process to change the sex marker on a birth certificate, but it was suggested that ODH could utilize a process pursuant to R.C. 3705.22 that does not require a court order. She also noted in her appellate brief and conceded at oral argument that R.C. 3705.22 allows amendments to birth certificates. She requested that if we found that R.C. 3705.15 was not the proper forum for the relief she sought, she be granted leave to file a conforming application under R.C. 3705.22. Although we find that R.C. 3705.15 cannot grant Adelaide the relief she seeks, we cannot grant her leave to file a conforming application under R.C. 3705.22 with the probate court. R.C. 3705.22 contemplates that a request for an amendment to the birth record be filed with ODH as an administrative remedy, not with the probate court.

{¶ 27} Having found that the probate court lacked the authority to amend Adelaide's birth certificate to reflect an amendment to the sex marker, we overrule both of Adelaide's assignments of error and affirm the decision of the probate court.

VI. Conclusion

{¶ 28} The decision of the trial court is affirmed.

. . . .

TUCKER, P.J. and WELBAUM, J., concur.

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Danielle M. Easton
Hon. Richard P. Carey

20219090

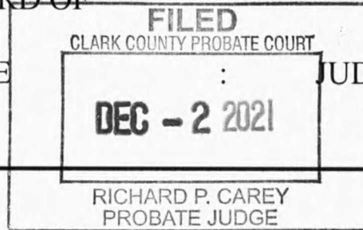
IN THE COURT OF COMMON PLEAS

PROBATE DIVISION

CLARK COUNTY, OHIO

IN RE: APPLICATION FOR CORRECTION OF BIRTH RECORD OF : CASE NO. 20219090

HAILEY EMMELINE ADELAIDE CAREY : JUDGE RICHARD P. CAREY



This matter came before this Court on November 15, 2021 to consider an Application for Correction of Birth Record filed by, now, Hailey Emmeline Adelaide concurrently with her Application to change her name from Brian Edward DeBoard to Hailey Emmeline Adelaide. Ms. Adelaide appeared with counsel, Attorney Kim Burroughs. The Court did grant her motion to change her name pursuant to her petition.

The issue at bar concerns her request to change what has been described as her gender marker[1] on her birth certificate from "male" to "female". This is a matter of first impression for this Court. R.C. 3705.15 is the applicable Ohio statute and is titled "Correction of Birth Record." That statute provides the following, to-wit:

> "Whoever claims to have been born in this State and whose registration of birth … has not been properly and accurately recorded, may file an application for … correction of the birth record in the probate court in the county of the person's birth or residence or the county in which the person's mother resided at the time of the person's birth."

Ms. Adelaide testified that she was born on October 15, 1973 and given the name of Brian Edward DeBoard. She testified that she was born with a "boy body" meaning,

[1] Petitioner herein employs the terminology "gender marker" instead of the term found on the birth certificate in question, to-wit: "sex." The two terms are not synonymous. While the term "sex" means historically one of two categories, male or female, on the basis of observable reproductive functions; "gender" is a term used more broadly to denote a range of identities that do not correspond to established understanding of male and female. For this reason, the Court will use "sex marker" to avoid confusion.

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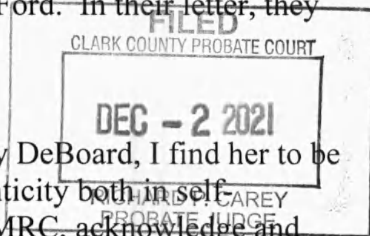
biologically speaking, that she was born with the male anatomy. This notwithstanding, Ms. Adelaide testified that she has since a very early age, likely as early as age 4, identified as a female. To this day, she identifies "in her heart" as a female. Like many others who find themselves in a similar circumstance, Ms. Adelaide has suffered many challenges throughout her life, and to that end spent much of her life trying to "hide it."

In support of this testimony, Attorney Burroughs also presented the Court with a Plaintiff's Exhibit B which is a letter dated August 9, 2021 signed by clinical psychologist Dr. John P. Layh and clinical intern, William H. Ford. In their letter, they state the following, to-wit:

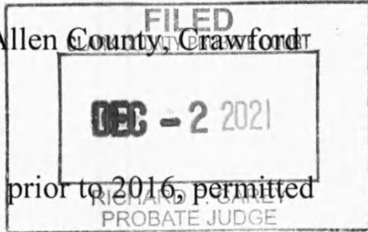


> "In support of the sexual identity validity of Ms. Hailey DeBoard, I find her to be consistent in mental competency exhibiting true authenticity both in self-awareness and introspection. I, William H. Ford, Sr., MRC, acknowledge and attest to the sexual identity of Ms. Hailey DeBoard as "female" both psychologically and in lifestyle gender expression."

The Court does not question the sincerity of Ms. Adelaide's motivations for desiring a change of the sex marker on her birth record. The sole question before this Court is whether or not this Court enjoys the statutory authority to permit it to order such a change. The Court is aware that several probate courts around the State of Ohio have addressed this issue. Several courts have ruled that they do not enjoy the statutory authority to permit an order from their respective courts changing the sex marker on birth certificates. A couple of probate courts have granted the request; nevertheless conceding that they are doing so without said statutory authority.

On this issue, the Court granted the request of Attorney Burroughs to further brief the matter for the benefit of the Court. This, Attorney Burroughs, did on November 24, 2021 with the filing of her post hearing supplemental brief. The Petitioner's well-crafted

brief addresses the history of the Ohio Department of Health's approach to this issue prior to 2016 through a 2020 Federal court decision, as well as arguments concerning the statutory interpretation of R.C. §3705.15, constitutional considerations concerning the implementation of this statute, and right of privacy issues, as well as a brief acknowledgement of decisions reached by the probate courts of Allen County, Crawford County, and Mahoning County.



The Petitioner writes that the Ohio Department of Health, prior to 2016, permitted a person to "correct" the person's sex marker upon receipt of an Order penned by an Ohio probate court. Apparently, in 2016, the Ohio Department of Health ended this procedure. The Federal Court for the Southern District of Ohio, Eastern Division, considered this policy change of the Ohio Department of Health and found that it violated the Federal constitutional rights to privacy and equal protection of transgender individuals by adopting a blanket ban precluding individuals from obtaining a correction of the sex marker on their birth certificates "when the basis for that change was that the person was transgender." See *Ray v. McCloud, 507F. Supp. 3rd 925 (2020)* That court concluded that "no portion of the Ohio Revised Code prohibits using 3705.15 to change the sex marker on a birth certificate" and then added "all this court is finding is that a blanket prohibition against transgender people changing their sex marker is unconstitutional." (ID. pg. 26).

This Court has reviewed *Ray v McCloud.* While this Court appreciates the reasoning in that decision, the focus of the decision was on the Ohio Department of Health's policy as opposed to the authority of the Ohio probate courts to issue the order requested. Indeed, the court never pointed out under what authority those probate courts acted prior to 2016. This Court must observe that while nothing in the Code in fact

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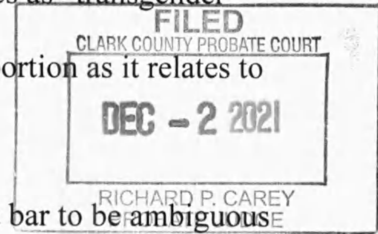
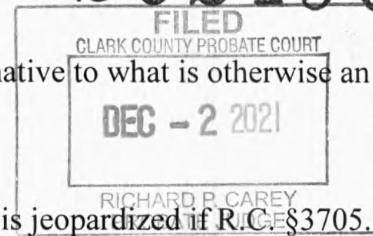
"prohibits" using 3705.15 to change the sex marker on a birth certificate, likewise, nothing in said statute specifically grants the probate court authority to order such a change. This Court must also observe that while the Health Department's policy created a "blanket prohibition" concerning the right of transgender people to change a sex marker, the statute at bar applies not simply to transgender people, but to all people. The fact that the petitioners before the Federal court described themselves as "transgender people" does not transform their case into one of constitutional proportion as it relates to the statute.



The Petitioner, however, asks this Court to find the statute at bar to be ambiguous with respect to the word "sex" and the phrase "has not been properly and accurately recorded." With respect to the word "sex", Petitioner suggests that this Court should give a "technical construction" embracing modern medicine scientific understanding of gender as opposed to the "common construction". This Court, however, finds Petitioner's "technical construction" to be geared more towards "gender identity" as opposed to "sex". The common construction of "sex" has historically been with respect to biology, and here, specifically, based on the appearance of the anatomy. This Court does not find this to be ambiguous.

Nor is this Court compelled to find the phrase "has not been properly and accurately recorded" to be ambiguous. Petitioner contends that the fact that the scriveners of the statute employed the words "has not been" as opposed to "was" suggests an invitation to fluidity. That is, that the sex marker recorded should not be considered to be a fact as much as a suggestion subject to change pending a future decision. This Court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is not inclined to believe that this fluidity is a proper alternative to what is otherwise an unambiguous phrase. [2]

The Petitioner also argues that her right of privacy is jeopardized if R.C. §3705.15 is construed to prohibit all sex marker changes. Petitioner cites the *Ray* decision in support of her argument that the risk of victimization to transgender people outweighs the public interest in maintaining the sex marker assigned at birth. The *Ray* court found that the state's interest in maintaining vital statistics must yield to the privacy interests of transgender and gender non-conforming Ohioans. This Court is not so inclined to dismiss the role vital statistics play in our society. The Court is aware that vital statistics play a significant role in medical diagnoses and treatment, in insurance matters, in the criminal justice system, and in the area of competitive sports. To subscribe to the Petitioner's argument would be to find the statute at bar to be unconstitutional. This Court is not prepared to make that leap based on what is before it today.

Petitioner also contends that the rules of statutory interpretation support a finding that R.C. 3705.15 permits applications to correct sex markers on birth certificates. Petitioner argues that this Court should read 3705.15 together with 3705.12 (permitting adoptive children to obtain birth certificates reflecting the names of the adoptive parents and not of birth parents no matter the age of the child), RC 3705.13 (permitting a person who obtained a legal change of name, whether by marriage or not, to obtain a birth certificate that reflects the name change), and RC 3111.18 (requiring the issuance of a new birth record when the identity of the biological parent is established by court order

[2] The Petitioner speaks of medical advances. And the Court believes that there will be much learned over the course of the next fifty years with respect to the matter of gender identity. But this Court is reluctant to embrace any "science" that prevents a doctor who delivers a new baby into this world from advising the birth parents that the baby is a "boy" or a "girl".

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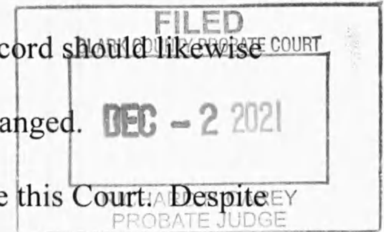
subsequent to birth). In each of those cases, Petitioner contends, the probate court is empowered to issue a "corrected birth certificate based on factual developments that occurred after a child's birth." She contends that a corrected birth record should likewise be issued if a person later believes that their sex marker should be changed.



This final argument embraces the entirety of the matter before this Court. Despite all of her arguments addressing the constitutionality of the matter, alleging the ambiguity of the statute, and analyzing the findings of the Federal court in *Ray v. McCloud*, the Court still is bound by a statute which does not specifically give it authority to do what the Petitioner requests it to do. And, in the final analysis, this is the difference between the statute at bar and the statutes involving adoption, change of name, and changing the birth record upon securing the identity of a biological parent. In all of those instances, the General Assembly has specifically given the Probate Court authority to act. Here, it has not.[3] Here, the Court is limited to "correcting" --- that is remedying or removing error or defect --- and not "changing" the sex marker on the birth record.

The statute authorizes this Court to act when the birth certificate "has not been properly and accurately recorded" and absent such a finding, this Court may not order a "correction" of the same. The Court recognizes that the Petitioner believes that there was an error in the assignment of her sex marker on her birth record. Unfortunately, and by her own admission, her anatomy contradicts this posture. The Court has before it no other evidence that the indication of "male" versus "female" on the birth certificate in question was erroneous. To that end, this Court must find that the birth certificate at bar was "properly and accurately" recorded. Accordingly, it cannot be "corrected."

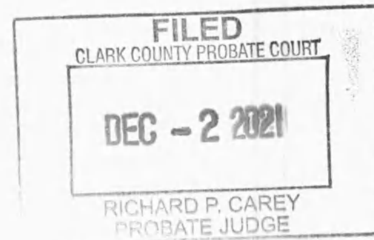
[3] Even should this Court concur with the position of the Petitioner and find the statute to be unconstitutional in application, this Court could not simply give itself authority that it does not otherwise enjoy.

In returning this decision, this Court takes no satisfaction in frustrating the genuine desire of this Petitioner to change her birth record. This Court, however, is bound to apply the law of the State of Ohio as it currently is written. That law, which is unambiguous, does not authorize this Court to change the sex marker on a birth certificate as requested by this Petitioner. [4] For these reasons, Petitioner's request to correct her birth record is denied.

IT IS SO ORDERED.

THIS IS A FINAL APPEALABLE ORDER.

RICHARD P. CAREY, PROBATE JUDGE



[4] Petitioner makes many arguments for consideration by that branch of government which has the authority to address her concerns --- namely, the Ohio General Assembly.

Counties with Guidance Permitting Sex-Marker Corrections

The following counties offer guidance and/or forms for changing birth certificate sex markers on their websites.

- Butler County, https://probatecourt.bcohio.gov/pdf/instructionsChangeOfGender Designation-20210628.pdf (checklist); https://probatecourt.bcohio.gov/pdf/BCPC620-20210628.pdf (proposed judgment entry, gender designation change);
- Cuyahoga County, https://probate.cuyahogacounty.us/COB.aspx;
- Fairfield County, https://www.fairfieldcountyprobate.com/ff-Miscellaneous-Forms.html;
- Franklin County, https://probate.franklincountyohio.gov/forms/birth-records;
- Hamilton County, https://www.probatect.org/forms/birth-correction#FAQ;
- Lucas County, http://www.lucas-co-probate-ct.org/web/guest/forms;
- Marion County, https://www.co.marion.oh.us/familycourt/forms/gender-marker-change/;
- Summit County, https://summitohioprobate.com/birth-registration-corrections-changes/
- Warren County, https://www.co.warren.oh.us/Probate_juvenile/probate/forms/packets/Correction.pdf;
- Wayne County, https://www.wayneprobateandjuvenile.org/name-changes/birth-correction-or-gender-marker-change.

All sites accessed December 16, 2022.

Relevant Statutory Provisions

Section 3705.15. Registration of unrecorded birth - correction of birth record.

Whoever claims to have been born in this state, and whose registration of birth is not recorded, or has been lost or destroyed, or has not been properly and accurately recorded, may file an application for registration of birth or correction of the birth record in the probate court of the county of the person's birth or residence or the county in which the person's mother resided at the time of the person's birth. If the person is a minor the application shall be signed by either parent or the person's guardian.

(A) An application to correct a birth record shall set forth all of the available facts required on a birth record and the reasons for making the application, and shall be verified by the applicant. Upon the filing of the application the court may fix a date for a hearing, which shall not be less than seven days after the filing date. The court may require one publication of notice of the hearing in a newspaper of general circulation in the county at least seven days prior to the date of the hearing. The application shall be supported by the affidavit of the physician or certified nurse-midwife in attendance. If an affidavit is not available, the application shall be supported by the affidavits of at least two persons having knowledge of the facts stated in the application, by documentary evidence, or by other evidence the court deems sufficient.

The probate judge, if satisfied that the facts are as stated, shall make an order correcting the birth record, except that in the case of an application to correct the date of birth, the judge shall make the order only if any date shown as the date the attending physician or certified nurse-midwife signed the birth record or the date the local registrar filed the record is consistent with the corrected date of birth. If supported by sufficient evidence, the judge may include in an order correcting the date of birth an order correcting the date the attending physician or certified nurse-midwife signed the birth record or the date the local registrar filed the record.

(B) An application of a person whose registration of birth is not recorded, or has been lost or destroyed, must comply with division (A) of this section. Upon the filing of the application the court may fix a date for a hearing, which shall be not less than seven days after the filing date. The court may require one publication of notice of the hearing in a newspaper of general circulation in the county at least seven days prior to the date of the hearing. The probate judge, or a special master commissioner, shall personally examine the applicant in open court and shall take sworn testimony on the application which shall include the testimony of at least two credible witnesses, or clear and convincing documentary evidence. The probate court may conduct any necessary investigation, and shall permit the applicant and all witnesses presented to be cross-examined by any interested person, or by the prosecuting attorney of the county. When a witness or the applicant is unable to appear in open court, the court may authorize the taking of the witness's or applicant's deposition. The court may cause a complete record to be taken of the hearing, shall file it with the other papers in the case, and may order the transcript of the testimony to be filed and made a matter of record in the court. Upon being satisfied that notice of the hearing on the application has been given by publication, if required, and that the claim of the applicant is true, the court shall make a finding upon all the facts required on a birth record, and shall order the registration of the birth of the applicant. The court shall forthwith transmit to the director of health a certified summary of its

finding and order, on a form prescribed by the director, who shall file it in the records of the central division of vital statistics.

(C) The director may forward a copy of the summary for the registration of a birth in the director's office to the appropriate local registrar of vital statistics.

A certified copy of the birth record corrected or registered by court order as provided in this section shall have the same legal effect for all purposes as an original birth record.

The application, affidavits, findings, and orders of the court, together with a transcript of the testimony if ordered by the court, for the correction of a birth record or for the registration of a birth, shall be recorded in a book kept for that purpose and shall be properly indexed. The book shall become a part of the records of the probate court.

(D)(1) Except as provided in division (D)(2) of this section, whenever a correction is ordered in a birth record under division (A) of this section, the court ordering the correction shall forthwith forward to the department of health a certified copy of the order containing such information as will enable the department to prepare a new birth record. Thereupon, the department shall record a new birth record using the correct information supplied by the court and the new birth record shall have the same overall appearance as the original record which would have been issued under this chapter. Where handwriting is required to effect that appearance, the department shall supply it. Upon the preparation and filing of the new birth record, the original birth record and index references shall cease to be a public record. The original record and all other information pertaining to it shall be placed in an envelope which shall be sealed by the department, and its contents shall not be open to inspection or copy unless so ordered by the probate court of the county that ordered the correction.

The department shall promptly forward a copy of the new birth record to the local registrar of vital statistics of the district in which the birth occurred and the local registrar shall file a copy of the new birth record along with and in the same manner as the other copies of birth records in the local registrar's possession. All copies of the original birth record, as well as any and all other papers, documents, and index references pertaining to it, in the possession of the local registrar shall be destroyed. The probate court shall retain permanently in the file of its proceedings such information as will enable the court to identify both the original birth record and the new birth record.

The new birth record, as well as any certified copies of it when properly authenticated by a duly authorized person, shall be prima-facie evidence in all courts and places of the facts therein stated.

(2) If the correction ordered in the birth record under division (A) of this section involves a change in the date of birth of the applicant and the department of health determines that the corrected date of birth is inconsistent with the date shown as the date the attending physician or certified nurse-midwife signed the birth record or the date the local registrar filed the record, the department shall request that the court reconsider the order and, if appropriate, make a new order in which the dates are consistent. If the court does not make a new order within a reasonable time, instead of issuing

a new birth record, the department shall file and record the court's order in the same manner as other birth records and make a cross-reference on the original and on the corrected record.

(E) The probate court shall assess costs of registering a birth or correcting a birth record under this section against the person who makes application for the registration or correction.

* * *

Section 3705.22. Birth certificate to be amended to correct errors.

Whenever it is alleged that the facts stated in any birth, fetal death, or death record filed in the department of health are not true, the director may require satisfactory evidence to be presented in the form of affidavits, amended records, or certificates to establish the alleged facts. When established, the original record or certificate shall be supplemented by the affidavit or the amended certificate or record information.

An affidavit in a form prescribed by the director shall be sworn to by a person having personal knowledge of the matter sought to be corrected. Medical certifications contained on fetal death or death records may be corrected only by the person whose name appears on the original record as attending physician or by the coroner of the county in which the death occurred.

The amended birth record shall be signed by the person who attended the birth and the informant or informants whose names appear on the original record. The amended death or fetal death record shall be signed by the physician or coroner, funeral director, and informant whose names appear on the original record.

An affidavit or amended record for the correction of the given name of a person shall have the signature of the person, if the person is age eighteen or older, or of both parents if the person is under eighteen, except that in the case of a child born out of wedlock, the mother's signature will suffice; in the case of the death or incapacity of either parent, the signature of the other parent will suffice; in the case of a child not in the custody of his parents, the signature of the guardian or agency having the custody of the child will suffice; and in the case of a child whose parents are deceased, the signature of another person who knows the child will suffice.

Once a correction or amendment of an item is made on a vital record, that item shall not be corrected or amended again except on the order of a court of this state or the request of a court of another state or jurisdiction.

The director may refuse to accept an affidavit or amended certificate or record that appears to be submitted for the purpose of falsifying the certificate or record.

A certified copy of a certificate or record issued by the department of health shall show the information as originally given and the corrected information, except that an electronically produced copy need indicate only that the certificate or record was corrected and the item that was corrected.