

IN THE SUPREME COURT OF OHIO

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

Case No. 2022-0934

**BRIEF OF AMICI CURIAE
CITIES OF CINCINNATI, OHIO AND COLUMBUS, OHIO
IN SUPPORT OF APPELLANT**

Counsel for Amicus Curiae City of Columbus:

MARK SELWYN* (Pro Hac Vice Pending)

**Counsel of Record*

WILMER CUTLER PICKERING

HALE AND DORR LLP

2600 El Camino Real

Palo Alto, CA 94306

(650) 858-6000

Mark.Selwyn@wilmerhale.com

ANDREW WAKS (Pro Hac Vice Pending)

QUENTIN SIMS (101303)

WILMER CUTLER PICKERING

HALE AND DORR LLP

1875 Pennsylvania Avenue NW

Washington, DC 20006

(202) 663-6000

Andrew.Waks@wilmerhale.com

Quentin.Sims@wilmerhale.com

JOSHUA ROSENTHAL (Pro Hac Vice Pending)

PUBLIC RIGHTS PROJECT

4096 Piedmont Ave #149

Oakland, CA 94611

(330) 607-0730

josh@publicrightsproject.com

ZACHARY M. KLEIN (0078222)

COLUMBUS CITY ATTORNEY

77 North Front Street, 4th Floor

Columbus, Ohio 43215

***Counsel for Appellant Hailey Emmeline
Adelaide:***

MAYA SIMEK (0086674)

EQUALITY OHIO LEGAL CLINIC

2121 Euclid Ave., LB 138

Cleveland, OH 44115

(216) 287-9837

maya@equalityohio.org

CHAD M. EGGSPUEHLER* (0094094)

**Counsel of Record*

TUCKER ELLIS LLP

950 Main Avenue, Suite 1100

Cleveland, OH 44113

(216) 592-5000

chad.eggspuehler@tuckerellis.com

(614) 645-0818
cityattorney@columbus.gov

Counsel for Amicus Curiae City of Cincinnati:

EMILY SMART WOERNER* (0089349)

**Counsel of Record*

CITY SOLICITOR

801 Plum Street, Room 214

Cincinnati, Ohio 45202

(513) 352-3307

Emily.Woerner@cincinnati-oh.gov

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
INTEREST OF AMICI CURIAE.....	1
STATEMENT OF THE FACTS AND CASE.....	2
ARGUMENT	2
I. PROPOSITION OF LAW: GOVERNMENTAL INTERESTS ARE BEST SERVED BY ALLOWING TRANSGENDER OHIOANS TO CORRECT THE SEX MARKER ON THEIR BIRTH CERTIFICATES.....	2
A. State and local governments can easily accommodate sex marker corrections to birth certificates.....	2
B. Refusing to correct transgender individuals’ birth certificates undermines local governments’ efforts to provide important services and benefits to residents	5
CONCLUSION.....	9
CERTIFICATE OF SERVICE	11

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>M.A.B. v. Board of Education of Talbot County</i> , 286 F.Supp.3d 704 (D.Md. 2018)	6
<i>Ray v. McCloud</i> , 507 F.Supp.3d 925 (S.D.Ohio 2020)	2, 3, 6, 7
<i>Whitaker v. Kenosha Unified School District No. 1 Board of Education</i> , 858 F.3d 1034 (7th Cir.2017).....	6
DOCKETED CASES	
Opinion and Order, <i>Ray v. Himes</i> , No. 18-cv-272 (S.D. Ohio Sept. 12, 2019), Doc. No. 47	4, 5
STATUTES	
R.C. 3313.672	5
R.C. 3705.12	2
R.C. 3705.13	2
Columbus Department of Public Safety License Section, Section 2329.11	6
OTHER AUTHORITIES	
Franklin County Board of Commisioners, Job & Family Services, Verifications Needed for Benefits, https://jfs.franklincountyohio.gov/getattachment/How-to-Apply-for-Food-and-Cash-Assistance/FCDJFS-Verifications-Flyer_041420.pdf.aspx?lang=en-US (accessed Dec. 16, 2022)	5
Flores, Andrew, et al., <i>Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017-2018</i> , 111 Am.J. Public Health 726 (2021)	6
Grant, Jaime M., et al., <i>Injustice at Every Turn: A Report of the National Transgender Discrimination Survey</i> , National Center for Transgender Equality & National Gay and Lesbian Task Force (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf	7, 8
James, S.E., et al., National Center for Transgender Equality, <i>The Report of the 2015 U.S. Transgender Survey</i> (updated Dec. 2017), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf	6, 8

National Center for Transgender Equality, *2015 U.S. Transgender Survey: Ohio State Report* (Apr. 2017), [https://transequality.org/sites/default/files/docs/usts/USTSOHStateReport\(1017\).pdf](https://transequality.org/sites/default/files/docs/usts/USTSOHStateReport(1017).pdf)7, 8

Ohio Bureau of Motor Vehicles Form 2369, Declaration of Gender Change, <https://publicsafety.ohio.gov/static/bmv2369.pdf> (accessed Dec. 16, 2022).
.....2

Ohio Bureau of Motor Vehicles Form 2430, Acceptable Documents List Compliant DL-ID Card, <https://publicsafety.ohio.gov/static/bmv2430.pdf> (accessed Dec. 16, 2022)5

Ohio Department of Job & Family Services, Identification Verification Checklist for Unemployment Benefits, <https://jfs.ohio.gov/ouio/pdf/ID-Verification-Checklist-for-UI-Claimants.pdf> (accessed Dec. 16, 2022).....5

Ohio Supreme Court, Form 30.0, Application for Correction of Birth Record [R.C. 3705.15], https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/superintendence/probate_forms/birthCertificate/30.0.pdf (accessed Dec. 19, 2022)3

Probate Court of Franklin County, Form PC-3A, Affidavit to Correct Gender Marker in Birth Record For an Adult, <https://probate.franklincountyohio.gov/PBCT-website/media/Documents/Forms/Birth%20Records/Affidavit-To-Correct-Gender-Marker-In-Birth-For-Record-For-An-Adult.pdf> (accessed Dec. 19, 2022)3

Probate Court of Hamilton County, Instructions for Sex Marker Change, https://www.probatect.org/docs/default-source/forms-and-services/birth-correction/instructions/inst_for-birth-record-correction6c498bac-bf6f-415a-a210-cbe1ad8c0cd1.pdf (accessed Dec. 19, 2022)3

INTRODUCTION

Accurate identification is essential for government operations. Yet for many transgender people in America, an inability to obtain vital documents—like birth certificates—that match their identity and appearance exposes them to pervasive hostility and discrimination. Ohio, riding a wave of anti-transgender sentiment, began refusing birth certificate corrections for transgender Ohioans in 2015. That discriminatory policy was blocked by a federal court four years later. But the Clark County probate court has now resuscitated the policy through a cramped interpretation of its authority, which *amici* urge this Court to reject.

The justifications offered for this policy make little sense. They generally rely on recasting it as a banal tool for facilitating smooth recordkeeping and government administration. We should ask more of a policy that inflicts such suffering on vulnerable and marginalized people. But in any event, the bureaucratic justifications for denying sex marker corrections collapse under the slightest scrutiny. Rather than aiding government functions, refusing sex marker corrections for transgender Ohioans makes the work of government more difficult and more dangerous. It increases the likelihood of administrative blunders, heightens the risk of violence and harassment in government facilities, and hinders efforts to deliver benefits and services to some of Ohio cities' most at-risk residents.

INTEREST OF AMICI CURIAE

Amici curiae are two large municipalities in Ohio. They share an interest in protecting the civil rights of all of their residents, including residents of all races, religions, sexual orientations, and gender identities. They recognize that the effective administration of government requires that every resident feels able to safely and authentically engage with the

city. Accordingly, all residents may avail themselves equally of public services and benefits that cities offer.

STATEMENT OF THE FACTS AND CASE

Amici hereby adopt and incorporate by reference the statement of facts as outlined by Appellant.

ARGUMENT

I. PROPOSITION OF LAW: GOVERNMENTAL INTERESTS ARE BEST SERVED BY ALLOWING TRANSGENDER OHIOANS TO CORRECT THE SEX MARKER ON THEIR BIRTH CERTIFICATES.

A. State and local governments can easily accommodate sex marker corrections to birth certificates.

Ohio has long recognized that changes in a person's life may require corresponding changes in official records. To that end, the state allows numerous corrections to birth certificates, including many based on factual developments that occur after birth. Adopted Ohioans can, for instance, alter the last name on their birth certificate to match the last name of their adoptive parents. R.C. 3705.12. Ohioans who legally change their names can modify their birth certificates to match. R.C. 3705.13. And children whose sex marker is listed as "undetermined" at birth can obtain a modification later in life so that their birth certificates conform to their gender identity. *See Ray v. McCloud*, 507 F.Supp.3d 925, 929 (S.D. Ohio 2020) (citing deposition of Ohio State Registrar, Office of Vital Statistics).

Ohio likewise permits sex marker corrections to other official documents, including driver's licenses and state identification cards. *See* Ohio Bureau of Motor Vehicles Form 2369, Declaration of Gender Change, <https://publicsafety.ohio.gov/static/bmv2369.pdf> (accessed Dec. 16, 2022). As a result, transgender Ohioans have long been able to correct the gender listed on those forms of identification so that it matches their gender identity and outward presentation.

For the most part, transgender Ohioans have historically been able to correct their birth certificates in similar fashion. Prior to 2016, Ohio allowed them to do so without much controversy. *See Ray*, 507 F.Supp.3d at 929. The state then changed course and revoked that right in 2015. However, following a federal court decision in 2020, such corrections have again become widely available throughout the state, including in every major city. *See id.* at 940. The only exceptions are counties where, as here, a probate court has concluded that it lacks statutory authority to order one.

Ohio has, in other words, generally followed a measured policy when it comes to altering its residents' official records. Ohio has routinely corrected birth certificates to reflect later changes in its residents' lives. It has likewise corrected the sex marker on transgender residents' driver's licenses, and so too their state identification cards. And for the most part the state has even permitted exactly the birth certificate corrections at issue in this case with guidance from this Court.¹

No one, despite years of litigation in state and federal court, has ever demonstrated that those practices produced even a single administrative mishap or case of fraud. As cities in charge of substantial government bureaucracies, *amici* have observed no such problems either. *Amici* and Ohio are far from alone in their problem-free experience with sex marker corrections. The ease with which Ohio has corrected transgender individuals' birth certificates before 2016 and since 2020—and the ease with which it continues to make other, analogous changes to

¹ *See* Ohio Sup. Ct., Form 30.0, Application for Correction of Birth Record [R.C. 3705.15], https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/superintendence/probate_forms/birthCertificate/30.0.pdf (accessed Dec. 19, 2022). Additionally, the Probate Courts for Franklin and Hamilton Counties explicitly recognize the permissibility of these changes to a birth certificate. *See* Probate Ct. of Franklin Cty., Form PC-3A, Affidavit to Correct Gender Marker in Birth Record For an Adult, <https://probate.franklincountyohio.gov/PBCT-website/media/Documents/Forms/Birth%20Records/Affidavit-To-Correct-Gender-Marker-In-Birth-For-Record-For-An-Adult.pdf> (accessed Dec. 19, 2022); Probate Ct. of Hamilton Cty., Instructions for Sex Marker Change, https://www.probatect.org/docs/default-source/forms-and-services/birth-correction/instructions/inst_for-birth-record-correction6c498bac-bf6f-415a-a210-cbe1ad8c0cd1.pdf (accessed Dec. 19, 2022).

official records—is borne out by the experience of nearly every other state in the country. With only a few exceptions, almost every other state continues to correct transgender residents’ birth certificates. And—just like Ohio before 2016, and most of the state since 2020—they have long done so without encountering any apparent administrative or other problems.

The only justification Ohio ever mustered in support of its old policy—a policy now resurrected by the lower courts in this case—is some abstract interest in preserving the “accuracy” of the state’s vital records. As that argument goes, it simply *must* be important for a historical birth record to accurately record an individual’s sex as designated at birth.

But it is impossible to plausibly complete the missing piece of that argument: What, exactly, is the danger of correcting a birth record? As already explained, despite years of litigation, no one has managed to answer that question. Even more significantly, it is impossible to square the pro-accuracy argument with the wide array of other alterations, all based on after-the-fact developments, that state law allows for birth certificates. If an adopted child’s birth certificate need not include his birth name, or if an intersex child’s need not reflect that sex was undetermined at birth, what possible interest can be served by requiring that transgender Ohioans—and only transgender Ohioans—must have their birth certificates frozen in time, whatever the human cost? Furthermore, even if Ohio must maintain a formal record of the facts at an individual’s birth, it can accomplish that by simply keeping records of birth certificate corrections. There is no reason that a birth certificate itself must bear that information, particularly when doing so is likely to cause confusion, harassment, and violence. Indeed, as just explained, Ohio law clearly anticipates that, for a multitude of reasons, birth certificates will often communicate information other than the facts as assessed at the time of birth.

If the lower courts’ refusal to order sex marker corrections has any administrative effect at all, it is to create new possibilities for mistakes and confusion. Thanks to the lower courts’ rulings, transgender Ohioans are compelled to “possess government-issued identity documents that provide they are both male and female.” Opinion and Order at 31, *Ray v. Himes*, No. 18-cv-272 (S.D. Ohio Sept. 12, 2019), Doc. No. 47. It is difficult to conceive how that helps, rather than impedes, effective recordkeeping and administration. *Id.* Consistent identification documents—consistent with each other, and with an individual’s identity—do not cause administrative trouble. The inconsistent documents the lower courts’ regime produces do.

B. Refusing to correct transgender individuals’ birth certificates undermines local governments’ efforts to provide important services and benefits to residents.

Given the feeble bureaucratic justifications for Ohio’s newly resuscitated birth certificate policy, the only explanation for it is anti-transgender animus. That animus is borne out by the consequences the policy inflicts on transgender individuals. But the harmful effects of refusing sex marker changes extend further. Local governments like *amici* also bear significant costs from pointless hostility to transgender people.

State and local governments routinely rely on birth certificates to verify residents’ identity and citizenship for various public programs. Individuals often must produce their birth certificates to obtain other forms of government identification, apply for public benefits, enroll in school, or begin employment. *See, e.g.*, Ohio Bureau of Motor Vehicles, Form 2430, Acceptable Documents List Compliant DL-ID Card (state identification card), <https://publicsafety.ohio.gov/static/bmv2430.pdf> (accessed Dec. 16, 2022); Ohio Dept. of Job & Family Servs., Identification Verification Checklist for Unemployment Benefits, <https://jfs.ohio.gov/ouio/pdf/ID-Verification-Checklist-for-UI-Claimants.pdf> (accessed Dec. 16,

2022) (unemployment benefits); Franklin Cty. Bd. of Commrs. Job & Family Servs., Verifications Needed for Benefits, https://jfs.franklincountyohio.gov/getattachment/How-to-Apply-for-Food-and-Cash-Assistance/FCDJFS-Verifications-Flyer_041420.pdf.aspx?lang=en-US (accessed Dec. 16, 2022) (state benefits); R.C. 3313.672 (school enrollment). Those are just the most common examples. Even something like a noise permit for a block party might require an individual to present their birth certificate to an official at a government office if the applicant lacks other forms of acceptable identification. Columbus Dept. of Pub. Safety License Section, Section 2329.11, Community Noise Rules & Regulations.

That widespread reliance on birth certificates puts transgender individuals at a heightened risk of violence so long as some are unable to correct their birth certificates. Transgender people already face a much higher risk of violence and harassment than the average American. A 2015 survey of transgender Americans revealed that nearly one in ten had been physically attacked for being transgender in just the past year, and nearly half had been verbally harassed in that same period. See James et al., *The Report of the 2015 U.S. Transgender Survey* 4-5, Nat'l Ctr. for Transgender Equality (updated Dec. 2017), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>. Transgender people are over four times more likely than cisgender people to experience violent victimization, including rape, sexual assault, and aggravated or simple assault. Flores et al., *Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017-2018*, 111 Am.J. Public Health 726 (2021). Numerous courts have likewise recognized the violence and discrimination transgender people face on a regular basis. See, e.g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Edn.*, 858 F.3d 1034, 1051 (7th Cir.2017) (“[T]ransgender individuals face discrimination, harassment, and violence because of their gender identity.”); *M.A.B. v. Bd. of Edn. of Talbot*

Cty., 286 F.Supp.3d 704, 720 (D.Md. 2018) (“[T]ransgender individuals suffer very high rates of violence due to their transgender status.”); *Ray*, 507 F.Supp.3d at 933 n.5 (“[T]ransgender people experience high rates of violence because of their transgender status.”).

Violence, harassment, and ostracization often flow directly from being forced to show identification displaying a gender that does not match an individual’s outward presentation. In a survey of transgender Ohioans, 36 percent of respondents who were forced to show such inconsistent identification reported being verbally harassed, denied benefits or services, asked to leave, or assaulted as a result. Natl. Ctr. for Transgender Equality, *2015 U.S. Transgender Survey: Ohio State Report 3* (Apr. 2017), [https://transequality.org/sites/default/files/docs/usts/USTSOHStateReport\(1017\).pdf](https://transequality.org/sites/default/files/docs/usts/USTSOHStateReport(1017).pdf).

The danger is particularly acute when interacting with government officials in public settings. Applying for benefits in a crowded municipal office can be a high-stress situation, conducted while surrounded by strangers. An uncorrected birth certificate risks outing the applicant’s transgender status to many unknown individuals, who may already be tense from the stress of navigating public benefits processes. For instance, one plaintiff in the *Ray* litigation “was publicly humiliated at the Social Security Administration when ... [t]he Clerk loudly, and in front of many people” outed her as transgender. 507 F.Supp.3d at 933. Indeed, data suggests that interactions with government agencies and officials are among the most likely to lead to discrimination or harassment against transgender individuals. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 129, Natl. Ctr. for Transgender Equality & Natl. Gay and Lesbian Task Force (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf. Nearly one third of transgender Ohioans surveyed reported being mistreated in places of public accommodations, including government

offices, when staff suspected or became aware that they were transgender. *Ohio State Report*, at 2. The resulting danger is obviously most acute for the transgender individuals subjected to violence or harassment. But violence and conflict in places of public accommodation create dangers for all present, including other benefits-seekers, public employees, and bystanders.

Refusing sex marker corrections also makes it harder for localities to deliver services to the individuals who need them. For one thing, transgender individuals are deterred from seeking services because of the risk of outing, embarrassment, and physical harm. A national survey in 2015 revealed that one in five transgender Americans had avoided using at least one type of public accommodations, including government benefits offices and courthouses, in the preceding year out of fear that they would be mistreated as a transgender person. *See James, 2015 U.S. Transgender Survey* 16. The prospect of displaying an uncorrected birth certificate significantly magnifies that fear.

If transgender individuals lacking accurate birth certificates brave the dangers of applying for services, they still risk being denied benefits to which they are entitled. Some may be treated with overt hostility and asked to leave without obtaining benefits. Fifteen percent of transgender Americans who presented identification not matching their gender identity reported being asked to leave the public facility where they presented incongruent identification. *Grant, Injustice at Every Turn* 5. Others may avoid such overt discrimination, but nonetheless be wrongly denied benefits or services because of discrepancies among their identification documents. *See James, 2015 U.S. Transgender Survey* 89 (reporting that 16 percent of respondents “who showed IDs with a name or gender that did not match the gender they present in were denied services or benefits”). Such deprivation of benefits is likely to hit the transgender community especially hard. Because of widespread animus and discrimination, transgender individuals make up a

disproportionate share of the beneficiaries of many public services. *See Ohio State Report*, at 1 (reporting that 16 percent of transgender Ohio respondents were unemployed, and 26 percent were living in poverty).

The lower courts' decisions therefore ensure that many Ohioans who are most in need of public benefits will never apply for them, and that still others will be denied benefits for which they applied and were entitled. Local governments' interests in distributing those benefits, uplifting their residents, and improving their communities are injured as a result.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Ohio Court of Appeals.

Dated: December 20, 2022

Respectfully submitted.

/s/ Quentin Sims
QUENTIN SIMS (101303)
ANDREW WAKS (Pro Hac Vice Pending)
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000
Quentin.Sims@wilmerhale.com
Andrew.Waks@wilmerhale.com

MARK SELWYN* (Pro Hac Vice Pending)
**Counsel of Record*
WILMER CUTLER PICKERING
HALE AND DORR LLP
2600 El Camino Real
Palo Alto, CA 94306
(650) 858-6000
Mark.Selwyn@wilmerhale.com

JOSHUA ROSENTHAL (Pro Hac Vice Pending)
PUBLIC RIGHTS PROJECT
4096 Piedmont Ave #149
Oakland, CA 94611
(330) 607-0730
josh@publicrightsproject.com

ZACHARY M. KLEIN (0078222)
COLUMBUS CITY ATTORNEY
77 North Front Street, 4th Floor
Columbus, Ohio 43215
(614) 645-0818
cityattorney@columbus.gov

Counsel for Amicus Curiae City of Columbus

/s/ Emily Smart Woerner
EMILY SMART WOERNER (0089349)
**Counsel of Record*
CITY SOLICITOR
801 Plum Street, Room 214
Cincinnati, Ohio 45202
(513) 352-3307
Emily.Woerner@cincinnati-oh.gov

Counsel for Amicus Curiae City of Cincinnati

CERTIFICATE OF SERVICE

I, Quentin Sims, hereby certify that on December 20, 2022, the foregoing was electronically filed via the Court's e-filing system. I further certify that a copy of the foregoing was served via electronic mail upon counsel for the following parties:

MAYA SIMEK (0086674)
EQUALITY OHIO LEGAL CLINIC
2121 Euclid Ave., LB 138
Cleveland, OH 44115
(216) 287-9837
maya@equalityohio.org

CHAD M. EGGSPUEHLER (0094094)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
(216) 592-5000
chad.eggspuehler@tuckerellis.com

Counsel for Appellant Hailey Emmeline Adelaide

Z GABRIEL ARKLES
TRANSGENDER LEGAL DEFENSE AND EDUCATION FUND, INC.
520 8th Avenue, Suite 2204
New York, NY 10018
garkles@transgenderlegal.com

C. BENJAMIN COOPER
COOPER & ELLIOTT, LLC
305 West Nationwide Boulevard
Columbus, OH 43215
benc@cooperelliott.com

Counsel for Amici Curiae, Transgender Legal Defense and Education Fund, Black and Pink National, and National Queer Asian and Pacific Islander Alliance

JAMES C. KNAPP (0089141)
P.O. Box 442
Burton, OH 44021
james@transohio.org

PAUL W. FLOWERS (0046625)
MELISSA A. GHRIST (0096882)
FLOWERS & GRUBE
Terminal Tower, 40th Floor
50 Public Square
Cleveland, OH 44113
(216) 344-9393
leg@pwfco.com
pwf@pwfco.com
mag@pwfco.com

Counsel for Amici Curiae, TransOhio, Inc., et al.

/s/ Quentin Sims
Quentin Sims (101303)