No.

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.

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT HAILEY EMMELINE ADELAIDE

Maya Simek (0086674)
EQUALITY OHIO LEGAL CLINIC
2121 Euclid Ave., LB 138
Cleveland, OH 44115
Tel: 216.287.9837
maya@equalityohio.org

Chad M. Eggspuehler (0094094)
(Counsel of Record)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
Tel: 216.592.5000
Fax: 216.592.5009
chad.eggspuehler@tuckerellis.com

Attorneys for Applicant / Plaintiff-Appellant Hailey Emmeline Adelaide

TABLE OF CONTENTS

Page

Appendix

I. THIS CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS ONE OF PUBLIC AND GREAT GENERAL INTEREST

This appeal arises out of a Second District decision establishing a rule of law constraining the jurisdiction of probate courts and effectively prohibiting them from processing corrections to the "sex" marker of transgender citizens' birth certificates under R.C. 3705.15. This narrow interpretation of the statute, which creates a significant split of authority as to the processing of birth certificate corrections in Ohio, has no basis in the statute's plain text, has already been rejected as unconstitutional by a federal court, and is contrary to the guidance of the Ohio Department of Health (ODH), this Court's standard probate Form 30.0, and the standard forms and procedures of more than a dozen probate courts across the State.

Ohio previously allowed these birth certificate corrections before ODH reassessed its interpretation of R.C. 3705.15 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 restrictive 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 allowing these corrections with a probate court order. *See* https://odh.ohio.gov/know-our-programs/vital-statistics/changing-correcting-birth-record (select "Court-Ordered Correction of Birth Record" tab, accessed July 25, 2022). Following *Ray II* and

[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).

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 II.B–C.

Unsettling this steady current, a handful of probate courts and now the Second District have revived the narrow interpretation of R.C. 3705.15 struck down in *Ray II* to deny birth certificate corrections. The Second District's decision creates a 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—still following ODH and this Court's guidance to issue birth certificate corrections. *See* Part II.C.

The Court should accept jurisdiction and resolve substantial constitutional questions and issues of public and great general interest, including:

- The plain text of R.C. 3705.15 neither mentions "sex" nor limits the determination of the sex marker (or any birth certificate item) to those made "at the time of birth." May the probate court nevertheless impose such limitations to decline jurisdiction to process a transgender applicant's request to correct the birth certificate sex marker in the face of undisputed evidence from two therapists and administrative guidance from ODH, this Court, and others?

- The Second District's sex-based limitations, which appear nowhere in the statute, revive the constitutional injuries permanently enjoined by the federal court in *Ray II*. These constitutional issues were presented to and ruled on by the Probate Court, but the Second District nevertheless deemed them forfeited. May a court of appeals sidestep constitutional arguments raised in briefing below, including the statutory-interpretation canon of constitutional avoidance, simply because the administrative process does not allow a formal complaint and causes of action?

- The Second District and the Probate Court below gave no persuasive weight to the federal court's constitutional rulings in *Ray II*, despite the Second District acknowledging that it "relied on established constitutional law principles in reaching its decision." They likewise gave no persuasive weight to the new guidance from ODH, this Court, and more than a dozen county probate courts. May an Ohio court summarily reject a lower federal court's constitutional ruling when the relevant data points show that it should be persuasive?

First, the Second District misconstrued R.C. 3705.15 as imposing jurisdictional limitations not present in the statute itself. Unlike other provisions in this R.C. Chapter 3705, R.C. 3705.15 does not substantively limit the types of information that can be corrected. *Cf.* R.C. 3705.12–13 (permitting name changes and inclusion of adoptive parents). It is a catchall provision that uses broad terms to provide a straight-forward process for birth certificate corrections: "Whoever claims to have been born in this state, and whose registration of birth [*inter alia*] * * * 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."

The catchall provision does not mention "sex" or limit corrections to errors manifesting "at the time of birth." Nevertheless, the Second District effectively reads those substantive limitations into the statute through a narrow interpretation of the word "correction" and the phrase "has not been properly and accurately recorded," as well as the fact that administrative guidance requires the inclusion of sex on birth certificates. App. Op. ¶¶ 16–18, Appx. 11–12. In reaching this conclusion, the Second District overlooked the expansive contours of probate courts' jurisdictional statute, which broadly empowers probate courts with "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). The Second District also ignored the contrary guidance on the statute's application to such corrections from this Court and more than a dozen county probate courts issued after *Ray II*, creating a significant split of authority.

This Court can resolve the uncertainty by clarifying that R.C. 3705.15 does not prohibit probate courts from asserting jurisdiction to process transgender individuals' sex-marker-

correction applications, but to the contrary empowers them to do so, consistent with the statute's language, ODH guidance, and this Court's Standard Form 30.0 issued in the response to *Ray II*.

Second, the Second District's sex-based limitations, which appear nowhere in the statute, revived constitutional injuries while simultaneously denying applicants an opportunity to be heard on those constitutional injuries. Unlike traditional litigation, an application under R.C. 3705.15 does not involve a complaint with separate causes of actions. It is an *ex parte*, non-adversarial process that routinely results in an order to ODH that "will enable the department to prepare a new birth record." R.C. 3705.15(D)(1). The Probate Court below (i) allowed supplemental briefing on the constitutional issues implicated by the *Ray II* decision, and (ii) ruled on the constitutional claims. (Probate Order at 5.) The Second District, despite recognizing that *Ray II* "relied on established constitutional law principles in reaching its decision," nevertheless deemed the constitutional issues forfeited, App. Op. ¶ 23, Appx. 14, and did not consider the argument that the statute should be construed to avoid the constitutional infirmity. This Court should correct this structural error, which perpetuates inequality in the application of this statute in Ohio.

Third, by failing to address the constitutional issues, the Second District gave no persuasive authority to a federal court's constitutional rulings, despite the fact that the state agencies tasked with enforcing the laws governing birth certificates accepted a final judgment and adopted a conforming policy, and despite contrary administrative guidance by this Court and more than a dozen Ohio probate courts. In doing so, the Second District offered no reasons for second-guessing the federal court's constitutional rulings under due process and equal protection grounds. Nor did it consider acquiescence of state agencies and the unbroken constitutional authority established by courts around the country that supported the *Ray II* court's constitutional findings. Such reluctant treatment of federal constitutional authority is contrary to this Court's guidance in *State v. Burnett*,

93 Ohio St.3d 419, 424, 755 N.E.2d 857, 862 (2001), that, where appropriate, federal decisions on matters of federal constitutional law should receive *persuasive* weight. This Court can clarify that state courts, while not strictly bound by lower federal court decisions, should give persuasive weight to them when various data points support the federal court's conclusion. At a minimum, a state court should not reject a lower federal court's constitutional decisions without engaging in the well-established legal doctrines applicable to those constitutional provisions.

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.

II. STATEMENT OF THE CASE AND FACTS

A. *Ray II* Resolves Ohio's Competing Approaches to Birth Certificate Corrections, Holding that 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 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*.[2] The ODH statement informs Ohio's citizens that "Court-Ordered Corrections can be done at any Ohio Probate Court."

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"), among other items, pursuant to R.C. 3705.15.[3]

---

[2] 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 July 25, 2022).

[3] *See* https://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/probate_forms/default.asp (select Form 30.0 under "Birth Certificate Correction") (accessed July 15, 2022).

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

Similarly, a number of county probate courts have issued standard forms, checklists, and/or related guidance for changing sex markers on birth certificates. Prior to the Second District's ruling, these counties included Butler, Cuyahoga, Fairfield, Franklin, Greene, Hamilton, Huron, Lucas, Marion, Portage, Summit, and Wayne County.[4]

[4] *See, e.g.*, Franklin County, https://probate.franklincountyohio.gov/departments/birth-correction-delayed-birth-registration (select "Gender Marker Changes" Tab for checklist and supporting forms) (accessed July 15, 2022).

D. A Transgender Individual, with the Help of a Legal Clinic, Seeks a Birth Certificate Correction in Clark County Under ODH's New Policy, But the Probate Court Denies the Unopposed Application, and the Second District Affirms.

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.

The Probate Court did not question the documentary and testimonial evidence establishing Ms. Adelaide's gender. Indeed, the undisputed testimony showed that Ms. Adelaide—now in her 40s—has known that she was a girl since the age of four, that she has always identified as female, and that her gender has not changed throughout her life. She further testified that, in her opinion, an error occurred at the time of her birth when her sex was assigned as male. Nevertheless, 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.

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. It 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.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

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.

According to the Second District, a transgender person cannot seek a *correction* of the birth certificate sex marker because the doctor's genital-based determination of sex at the time of birth was presumptively accurate. Any such adjustment would be an *amendment*, the court reasons, not a *correction.* App. Op. ¶ 17, Appx. 11–12. Because R.C. 3705.15 says nothing about "sex" or determinations made "at the time of birth," the Second District infers these limitations from two phrases addressing who may apply and the remedy that may be sought. The phrases are:

- Eligible Applicants: "[w]hoever claims to have been born in this state, and whose registration of birth * * * has not been properly and accurately recorded";
- Remedy: "may file an application for * * * correction of the birth record in the probate court of the county of the person's birth."

Neither phrase can bear the weight of the limiting principles imposed by the Second District.

Both phrases employ unique use of tenses reflecting that an individual may discover a birth certificate error at some point in the future. R.C. 3705.15(A). Note the three different tenses used: the eligible person "claims" the error (present tense, presumptively after time of birth), the error manifests because something "has not been properly and accurately recorded" (present perfect tense, no specific time frame), and the eligible person "may file an application * * * for correction of the birth record" (present tense, at some point in the future). The use of the present perfect tense in the eligibility 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"). Accordingly, the error with the proper or accurate recording necessarily will manifest and be discovered at some point in the future, after the original certificate, and the error will be ongoing until corrected.

Rather than grapple with the breadth granted by the provision's various tenses, the Court of Appeals presumes that a doctor's genital inspection at the time of birth is determinative of sex markers on birth certificates, and incapable of error, such that a transgender person could never seek to *correct* that item. But that birth certificate field (sex) and that method of determination (genital inspection) appear nowhere in R.C. 3705.15—nor for that matter do they appear together anywhere in R.C. Chapter 3705. Rather, the sex-marker requirement for birth certificates appears in administrative guidance that provides no method for determining sex. Ohio Adm. Code 3701-5-02, Appendix N. The mere fact that, traditionally, genital inspection has been used to determine sex at the time of birth does not mean that R.C. 3705.15 requires that as the exclusive method or prohibits such determinations from being reassessed in light of later conclusive evidence, such that they can and should be *corrected*. Nothing in the plain text of R.C. 3705.15 imposes such guardrails on sex-marker determinations.[5]

[5] Further, this narrow interpretation fails to account for intersex individuals and rejects wholesale the more nuanced understanding of sex and gender recognized in medical literature over the past 50-plus years. *See, e.g.*, Brief of Amici Curiae American Medical Association, et al., at 6, *Bostock v. Clayton Cty., Georgia*, 590 U.S. ___, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020) (Nos. 17-1618, 17-1623, 18-107) 2019 WL 3003459, at *6–8; Russo, Is There Something Unique About the Transgender Brain?, Sci. Am. (Jan. 1, 2016), available at https://www.scientificamerican.com/article/is-there-something-unique-about-the-transgender-

This interpretation thus fails to appreciate R.C. 3705.15's unique breadth, which imposes no substantive limitations on the types of birth certificate changes authorized. The catchall provision differs from other statutes that specify the types of revisions that could be made. *Cf.* R.C. 3705.12–13 (permitting name changes and inclusion of adoptive parents). R.C. 3705.15 uses broad terms to provide a straight-forward *process* for birth certificate corrections. Because no question exists regarding the probate court's jurisdiction over birth certificate corrections, generally, under R.C. 3705.15, then the jurisdictional inquiry should extend no further than confirming that no other statute expressly *divests* the probate courts of jurisdiction to hear this *specific* type of birth certificate correction. R.C. 2101.24(C) (vesting probate courts with "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). Because neither R.C. 3705.15 nor any other provision of the code speaks to this specific birth certificate-correction issue—much less "expressly" bars probate courts from processing them—it follows that the Probate Court had authority to process the application here subject to satisfactory evidence.

In holding otherwise, the Second District ignored ample authority recognizing the broad scope of probate jurisdiction under R.C. 2101.24(C) to order "any relief required to fully adjudicate the subject matter" within the probate court's jurisdiction. *E.g.*, *Keith v. Bringardner*, 10th Dist. Franklin No. 07AP-666, 2008-Ohio-950, ¶¶ 10–11 (recognizing that Ohio courts have "embraced a broader view of the probate court's jurisdiction"), *citing State ex rel. Lewis v. Moser*, 72 Ohio St.3d 25, 29, 647 N.E.2d 155 (1995); *accord Sosnoswsky v. Koscianski*, 8th Dist. Cuyahoga No.

---

brain/ (accessed July 25, 2022); American Psychological Association, Guidelines for Psychological Practice with Transgender and Gender Nonconforming People, 70 Am. Psychologist 832, 836 (December 2015). Courts should not read medical limitations into a statute that are at odds with modern medical science.

106147, 2018-Ohio-3045, 118 N.E.3d 403, ¶ 14. Inverting the proper legal test under R.C. 2101.24(C), the Second District required *express authorization* for this specific correction rather than *express limitation*.

By inserting a substantive limitation, the Second District impermissibly narrowed the scope of a broad remedial provision, and created a significant split of authority in the application of R.C. 3705.15. This Court should REVERSE and lift the arbitrary limits set by the Second District.

> **<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 Ohio Supreme Court) to adopt implementing guidance.**

The Second District refused to hear Ms. Adelaide's constitutional arguments, sounding in due process and equal protection, asserting that the claims had not been raised 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.") But this cramped forfeiture finding misstates Ms. Adelaide's presentation of these issues in the Probate Court.

First, while not presented in separately numbered causes of action (there was no complaint in this unopposed administrative application), Ms. Adelaide's briefing below did include constitutional arguments centered on the *Ray II* court's due process and equal protection conclusions. 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. To the contrary, this non-adversarial proceeding more closely resembles an administrative review than traditional litigation based on pleadings. Despite the unique nature of this court proceeding, 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. (Probate Order at 3 (noting that *Ray II* held ODH's interpretation unconstitutional in violation of privacy and equal protection rights), 5 (addressing Ms. Adelaide's privacy rights and 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.). 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).

If the Court of Appeals intended to reinstitute a narrow interpretation of a statute that had been declared unconstitutional by a federal court, it was obliged to consider 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. This Court should reverse the Second District's erroneous interpretation of R.C. 3705.15, or at a minimum vacate and remand for fresh review of constitutional injuries addressed in *Ray II*.

<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 should receive "some persuasive weight." *Burnett* at 424; *accord 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 variety of data points support *Ray II*'s constitutional conclusions. *First*, *Ray I* & *II* cite a number of supporting federal decisions applying those constitutional principles to regulations that impose unique burdens on transgender individuals in the context of birth certificate and identification documents. *E.g.*, *F.V. v. Barron*, 286 F. Supp. 3d 1131 (D. Idaho 2018); *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327 (D.P.R. 2018); *Love v. Johnson*, 146 F. Supp. 3d 848 (E.D. Mich. 2015)). Of the broader constitutional landscape, the Second District merely observed that *Ray II* "relied on established constitutional law principles in reaching its decision."

App. Op. ¶ 22, Appx. 14. *Second*, the Second District did not attempt to explain how the state's abandoned justifications met the heightened constitutional scrutiny applicable to the due process and equal protection claims. *Third*, the Second District overlooked the various levels of acquiescence to *Ray II* by different state government entities, ranging from ODH's new guidance to this Court's new Form 30.0 for probate courts, and the like-minded standard forms and guidance issued by more than a dozen probate courts around the state.

All of these data points aligned in support of the *Ray II* decision, but the Second District merely avoided the issue in reinstituting the narrow interpretation of R.C. 3705.15 struck down in *Ray II*. This Court 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.

IV. 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 granted in *Ray II*—and implemented in guidance by ODH, this Court, and probate courts around the state—remains in doubt. This Court should accept jurisdiction and 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,

Maya Simek (0086674)
EQUALITY OHIO LEGAL CLINIC
2121 Euclid Ave., LB 138
Cleveland, OH 44115
Tel: 216.287.9837
maya@equalityohio.org

/s/Chad M. Eggspuehler
Chad M. Eggspuehler (0094094)
(Counsel of Record)
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
Tel: 216.592.5000
Fax: 216.592.5009
chad.eggspuehler@tuckerellis.com

Attorneys for Applicant / Plaintiff-Appellant
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