

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.

**AMICUS BRIEF OF TRANSGENDER LEGAL DEFENSE AND EDUCATION
FUND, BLACK AND PINK NATIONAL, AND
NATIONAL QUEER ASIAN AND PACIFIC ISLANDER ALLIANCE
IN SUPPORT OF APPELLANT HAILEY EMMELINE ADELAIDE**

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PRELIMINARY STATEMENT

Transgender people born in almost any U.S. jurisdiction, from Alabama to Idaho and Arizona to Illinois, can correct the sex on their birth certificate.¹ Until 2020, Ohio was one of only two states that did not permit such corrections. At that time, a U.S. district court found that the Ohio Department of Health policy preventing transgender people from obtaining birth certificates with sex markers congruent with their identity and presentation violated their due process (informational privacy) and equal protection rights under the U.S. Constitution.² Moreover, the Court explained that this policy would not survive even the permissive standard of rational basis review.³

Since then, the Department of Health began accepting court orders to correct the sex marker on birth certificates for transgender people. With guidance from this Court, transgender people have obtained court orders from probate courts around the state permitting them to obtain accurate birth certificates.⁴ Hailey Emmeline Adelaide sought to do the same. However, the Clark County Common Pleas Court denied her petition, and the Second District Court of Appeals upheld the decision, reasoning that

¹ *Equality Maps: Identity Document Laws and Policies*, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/identity_document_laws (last visited Nov. 16, 2022).

² *Ray v. McCloud*, 507 F. Supp. 3d 925, 940 (S.D. Ohio 2020).

³ *Id.*

⁴ R.C. 3705.15, Application for Correction of Birth Record, https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/superintendence/probate_forms/birthCertificate/30.0.pdf (last visited Nov. 16, 2022).

R.C. 3705.15 did not apply to transgender people seeking to correct their sex marker. App. Op. ¶¶ 16-17, Appx. 11. The Department of Health will not change the sex marker on a birth certificate without a court order.

Today, one may need a birth certificate to verify age or citizenship in a wide variety of settings, such as when starting with a new employer⁵ or at a new school,⁶ applying for benefits⁷ or a driver's license,⁸ seeking professional opportunities,⁹ or, in some states, seeking the opportunity to vote.¹⁰ When transgender people must display birth certificates showing the wrong sex, they are revealed to be transgender in circumstances when they would not have chosen to disclose that information ("outed"), and they are identified as a sex contrary to the sex they know themselves to be ("misgendered"). Given the level of antipathy toward transgender people today, that disclosure compromises their physical safety and robs them of the ability to choose when, how, and with whom to share this personal information.

Because the Department of Health's policy subjected transgender people to risk of bodily harm and revealed highly intimate information, the Southern District of Ohio

⁵ 8 C.F.R. § 274a.2(b)(1)(v)(C)(3).

⁶ See, e.g., Ohio Rev. Code Ann. § 3313.672(A)(1)(b); Ohio Admin. Code 4713-5-09(B)(2).

⁷ See, e.g., Ohio Admin. Code 5101:1-3-07(A)(1); Ohio Admin. Code 5505-7-02(C); 28 C.F.R. § 79.71(d).

⁸ See, e.g., Ohio Admin. Code 4501:1-1-21.

⁹ See, e.g., Ohio Admin. Code 3701-18-26(B)(1)(b); 68 Ind. Admin. Code 2-3-4(e)(7); 33 C.F.R. § 141.25(a)(2).

¹⁰ See, e.g., Ariz. Rev. Stat. Ann. § 16-166(F)(2).

concluded that refusing to issue birth certificates to transgender people with the correct sex marker violated the Due Process Clause.¹¹ The court further held that the policy violated the Equal Protection Clause because it treats transgender people differently from those who seek to change the information on their birth certificates for other reasons without a rational basis for doing so.¹² The court's reasoning was sound, well-supported by the factual record, and based on well-established constitutional doctrine. Other courts have consistently ruled in favor of transgender people in similar cases.¹³ While the court addressed administrative action in *McCloud*, the reasoning applies equally to any state action that forces transgender people to use a birth certificate with the wrong sex marker or no birth certificate at all.

Here, the lower court erred when it construed Ohio law in a manner that violates the constitutional rights of transgender people. *Amici* write to explain the magnitude of the due process rights at issue, and the impact on transgender people of bearing a birth certificate that not only forces them to identify their sex incorrectly, but also reveals them to be transgender to anyone else who sees it. The government may not compel

¹¹ *Ray v. McCloud*, 507 F. Supp. 3d 925, 940 (S.D. Ohio 2020); *Ray v. Himes*, No. 2:18-cv-272, 2019 WL 11791719, at *7 (S.D. Ohio Sept. 12, 2019).

¹² *McCloud*, 507 F. Supp. at 940.

¹³ *E.g.*, *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL 2685183, at *6 (Alaska Super. Ct. Mar. 12, 2012); *In re Childers-Gray*, 487 P.3d 96, 123 (Utah 2021); *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015) (*motion to reconsider denied*, *Love v. Johnson*, No. 15-11834, 2016 WL 106612 (E.D. Mich. Jan. 10, 2016)); *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 334 (D.P.R. 2018).

disclosure of information that exposes the individual to substantial risk of bodily harm, such as a person's transgender status. Nor may it compel disclosure of information of sensitive, personal, or humiliating nature, such as information about one's genitalia. To avoid the constitutional problems, and to protect the safety and dignity of transgender people born in Ohio, *amici* urge the Court to interpret state law in a manner that permits transgender people to correct the sex on their birth certificates and reverse the decision of the Court of Appeals.

INTERESTS OF AMICI

Amici are organizations that serve or advocate for transgender people, including transgender people who were born in Ohio. Some are also run by transgender people. Each has an interest in ensuring that transgender lives are not put needlessly at risk, and in ensuring that transgender people's constitutional rights are not infringed upon.

The Transgender Legal Defense and Education Fund (TLDEF) is a non-profit organization that advocates on behalf of transgender individuals across the United States. TLDEF is committed to ensuring that transgender individuals receive the same rights and protections under the law as cisgender individuals. TLDEF seeks to coordinate with other civil rights organizations to address key issues affecting transgender individuals in the areas of identity recognition, safety, access to healthcare, and freedom from discrimination. It also provides public education on transgender rights.

TLDEF has been granted the status of *amicus curiae* before numerous courts, including the United States Supreme Court, in support of transgender individuals. *See, e.g., Fulton v. Philadelphia*, No. 19-123, Br. of GLBT Advocates and Defenders and 27 other LGBTQ Advocacy Groups (S.Ct. Aug. 20, 2020); *June Med. Servs. v. Gee*, No. 18-1323, Br. of LGBT Orgs. (S.Ct. Dec. 12, 2019); *R.G. & G.R. Harris Funeral Homes v. Eq. Emp. Opportunity Comm'n*, No. 18-107, Br. for TLDEF and 33 Orgs. Serving Transgender Individuals (S.Ct. Jul. 2, 2019). TLDEF provides legal assistance and referrals to pro bono counsel to hundreds of transgender people in states around the country annually, including dozens born in Ohio, and is uniquely qualified to understand the difficulties that these petitioners face when seeking to correct the sex markers on their birth certificates.

Black & Pink National is a community of LGBTQ+ people both inside and outside prison walls. Its work toward the abolition of the prison industrial complex is rooted in the experience of currently and formerly incarcerated people. Black & Pink National is outraged by the specific violence of the criminal legal system against LGBTQ+ people, and responds through advocacy, education, direct service, and organizing. Its work is centered on the experience of people who are or were in prison. Black & Pink National knows that those most hurt by the violence of the criminal legal system have the knowledge of how to tear it down. LGBTQ people are deeply impacted

by the injustices of our legal system. Additionally, trans, gender-nonconforming, and Two-Spirit people are often denied access to life saving gender-affirming care.

Black & Pink National feels that cases like *In re Adelaide* are crucial to achieving collective justice and freedom for our LGBTQ+ community members. The legal system has disproportionately surveilled and incarcerated trans people whose gender markers do not align with their gender identity. Black & Pink National believes that it is essential to the safety and wellbeing of our community to uphold the constitutional right to privacy.

The National Queer Asian and Pacific Islander Alliance (NQAPIA) is a nonprofit, non-partisan organization that empowers lesbian, gay, bisexual, transgender, and queer Asian and Pacific Islanders (LGBTQ+API) through movement capacity building, policy advocacy, and representation. NQAPIA represents a federation of small grassroots organizations serving the LGBTQ+API community, across the country, as well as the individuals who are members of these communities. NQAPIA builds the grassroots capacity of local grassroots organizations, advances an intersectional equity agenda, ensures LGBTQ+API representation, and supports the intergenerational family building all members of our community. As part of its advocacy for these groups NQAPIA has actively participated and monitored the status of legal decisions affecting any members of the intersectional communities it represents.

In representing API communities NQAPIA is critically aware of the importance that documentation has to API diasporic communities. Many API people came to this country as immigrants, never once losing sight of the importance of being accurately represented on the documentation that guaranteed their legal status in their new home. Many LGBTQ+API people come to this country seeking the freedom to express their truest selves and to have the State finally recognize them for they are without fear of persecution or prosecution. The true inclusion of all members of the LGBTQ+API community is at the core of NQAPIA's mission, and at the center of this inclusion is the legal and State-sanctioned recognition of our communities' truest selves. It is with that lens of inclusion and the historical understanding of the importance of documents proving identity, as well as all arguments in the following brief, that NQAPIA asks for the Court to reverse the decision of the Court of Appeals and allow transgender people to correct the inaccuracies of sex on their birth certificate.

STATEMENT OF FACTS

Ohio courts have ordered sex marker corrections on Ohio birth certificates for transgender people for many years. In 2015, the Ohio Department of Health decided to stop honoring those court orders, purportedly because state statute did not explicitly authorize them, and refused to allow transgender people to correct the sex marker on their birth certificates under any circumstances. *McCloud*, 507 F. Supp. at 929. Four transgender people (Stacie Ray, Ashley Breda, Basil Argento, and Jane Doe) challenged

this policy in federal court as unconstitutional and won. *Id.* at 928-29.

Pursuant to the court's injunction, the Ohio Department of Health began again accepting court orders to correct the sex marker on birth certificates. *See* Ohio Dep't of Health, Changing or Correcting a Birth Record (last visited Nov. 20, 2022), <https://odh.ohio.gov/know-our-programs/vital-statistics/changing-correcting-birth-record>. The Department did not create any administrative avenue to make these changes without a court order. This Court and numerous probate courts updated existing forms, created new ones, or otherwise offered guidance to the public on how to seek court orders correcting the sex marker on their birth certificate. *See, e.g.,* Probate Court of Franklin County, Affidavit to Correct Gender Marker in Birth Record for an Adult, (2021), <https://probate.franklincountyohio.gov/forms/birth-records/affidavit-to-correct-gender-marker-in-birth-record>. Transgender people born in counties around the state began availing themselves of the option to correct the sex marker on their birth certificates, consistent with their safety, privacy, health, and dignity.

In October 2021, Hailey Emmeline Adelaide applied to correct her birth record to reflect her female sex, submitting supporting letters from her mental health providers confirming her female identity and presentation. App. Op. ¶¶ 2-3, Appx. 11. The Clark County Probate Court denied her request, and the Second District Court of Appeals affirmed. The court found that the relevant statute, which permits people to apply to correct their birth certificate if their "registration of birth . . . has not been properly and

accurately recorded,” R.C. 3705.15, did not permit corrections to sex markers for transgender people. The court interpreted this language to refer only to errors recording the genital appearance of an infant at birth, not errors arising from the reality that, for transgender people, genital appearance at birth does not accurately predict the person’s sex.¹⁴ App. Op. ¶¶ 9-10, Appx. 11.

ARGUMENT

State action that compels transgender people to use a birth certificate that discloses their transgender status and genital appearance at birth or go without any birth certificate at all infringes on their right to privacy. The U.S. Supreme Court has repeatedly assumed and strongly implied that the U.S. Constitution protects against unwanted disclosure of personal information. *See, e.g., Whalen v. Roe*, 429 U.S. 589, 598–

¹⁴ Gender identity is a deeply-felt, internal sense of one’s sex and gender, which cannot be voluntarily changed by the individual or others. *See, Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 594 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021). It is at least a component of sex and, for most purposes, the most important component. *See, e.g., Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty., Fla.*, 318 F. Supp. 3d 1293, 1298-99 (M.D. Fla. 2018), *aff’d* 968 F.3d 1286 (11th Cir. 2020), *opinion vacated and superseded*, 3 F.4th 1299 (11th Cir. 2021), *reh’g en banc granted, opinion vacated* (11th Cir. 2021). At minimum, *for purposes of a public-facing identity document*, it is the most pertinent aspect of sex, as it is the sex an individual holds themselves out to be and is known as in the community. *See Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015) (finding policy requiring surgery before transgender people could correct the sex marker on their driver’s license “undermines Defendant’s interest in accurately identifying Plaintiffs” because the sex marker “fails to match their appearance and the sex associated with their names.”).

99 (1977).¹⁵ The Sixth Circuit has interpreted this right “narrowly” to protect only against disclosures of information that “implicate a fundamental liberty interest,” such as information that may lead to bodily harm, *see Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir. 1998), and information of a sexual, personal, or humiliating nature, *Kenny v. Bartman*, No. 16-2152, 2017 WL 3613601, at *6 (6th Cir. May 19, 2017).¹⁶ Given the impact of the disclosure of the wrong sex marker on a birth certificate for transgender people, withholding corrected birth certificates infringes on the right to informational privacy.

If state law were interpreted narrowly not to confer jurisdiction on probate courts to even consider ordering correct sex markers on transgender people’s birth certificates, transgender people could be left with no redress. Transgender people could face, on the one hand, a Department of Health that indicates it complies with the injunction in *McCloud* by accepting orders from probate courts, and it is not the

¹⁵ Nothing in the Supreme Court’s recent *Dobbs v. Jackson Women’s Health Organization* is contrary to this proposition. In fact, *Dobbs* cites *Whalen* and describes “the right to shield information from disclosure,” noting that it is not relevant to the issue of abortion, and that “our conclusion that the Constitution does not confer . . . a right [to abortion] does not undermine” other Supreme Court substantive due process decisions “in any way.” *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2237 (2022).

¹⁶ While this Court is not bound to follow Sixth Circuit precedent, the Sixth Circuit “has imposed one of the most exacting standards for applying that [informational privacy] right to a disclosure of private information” of all the federal courts of appeal. Larry J. Pittman, *The Elusive Constitutional Right to Informational Privacy*, 19 Nev. L.J. 135, 175 (2018) (criticizing this approach as overly narrow). Because the claim succeeds under this standard, it would also succeed under virtually any alternative framework the Court might adopt.

agency's concern if courts decline to issue such orders; and, on the other, probate courts that do not issue court orders and indicate that it is none of their affair if that is all the agency accepts. In the meantime, transgender people will continue to suffer from the impact of non-consensual government disclosures of their personal information, with profound implications for their safety, health, and dignity. In deciding how to best interpret the phrase "accurately recorded" with regard to a transgender person's sex on a public-facing birth certificate, *amici* urge the Court to adopt the meaning that will prevent further deprivation of transgender people's constitutional right to privacy.

Proposition of Law No. I: Inaccurate birth certificates expose transgender people to risk of bodily harm, triggering due process protections under the Fourteenth Amendment of the U.S. Constitution.

Because it infringes on the fundamental right to bodily integrity and personal security, the Sixth Circuit has acknowledged that when the state discloses information that creates "substantial risk of serious bodily harm, possibly even death, from a perceived likely threat," it has violated the right to privacy. *Kallstrom*, 136 F.3d at 1064. As the court found in *Himes*, "forced disclosure of Plaintiffs' transgender status upon presentation of their birth certificates place their personal safety and bodily integrity in jeopardy." *Himes*, No. 2:18-cv-272, 2019 WL 11791719, at *7 (S.D. Ohio Sept. 12, 2019). It is an unfortunate reality that, in Ohio and throughout the country, transgender people are highly vulnerable to violence because of anti-transgender animus. Numerous studies show that transgender people face greatly increased odds of being physically

and sexually assaulted, bullied and demeaned at school, subjected to workplace harassment, and targeted with vandalism against their homes or property, when their status as transgender is disclosed. *See infra*. A birth certificate showing a sex marker that differs from how a person identifies and presents themselves reveals the person to be transgender, thus creating a significant risk that someone who otherwise would have no reason to know that a particular person is transgender will now commit acts of violence against that person.

A. Transgender people are targeted for violence throughout the U.S.

Transgender people are subject to disproportionate levels of violence and harassment because of anti-transgender bias. The 2015 United States Transgender Survey (USTS), a survey based on responses from 27,715 transgender respondents from all 50 States—the most comprehensive study ever conducted regarding the transgender experience in this country—found that in just one year preceding the survey, 9% of respondents reported being physically assaulted and 46% reported being verbally harassed because they are transgender. S. E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality, National Center for Transgender Equality, 198 (2016) (hereinafter “U.S. Transgender Survey”). More than half (66%) of those who were physically assaulted in that year reported that they were physically attacked in public and by strangers because the attackers believed they were transgender. *Id.* at 203. It is most often strangers to whom a person must display a birth

certificate. Many respondents from the study who were physically assaulted were assaulted more than once. Of those respondents who reported being physically attacked in the past year, 45% reported being attacked once, 25% reported being attacked twice, 13% reported being attacked three times, and 16% reported being attacked four or more times that year. *Id.* at 204.

A recent report prepared by the Williams Institute, a leading research center at the UCLA School of Law that studies sexual identity and gender law, concluded that transgender people are over four times more likely than their cisgender peers to experience violent victimization. Andrew Flores, et al., *Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017-2018*, 111 Am. J. Public Health 4, e2 (2021) (hereinafter “Criminal Victimization Survey”) (finding that “[t]ransgender people experienced violence at a rate of 86.2 victimizations per 1000 persons compared with 21.7 per 1000 persons among cisgender people”). That study also found that households with a transgender person living in the home experienced nearly twice the rate of property victimization than households without transgender persons. *Id.* at 3 (finding that 214.1 per 1000 transgender households experienced property crimes versus 108 per 1000 non-transgender households). Only half of all violent victimizations and one-third of property victimizations were reported to the police. *Id.*

The number of transgender people in our country who have been sexually assaulted is even more disturbing. The U.S. Transgender Survey found that 47% of respondents reported being sexually assaulted at some point in their lives and that 10% of respondents reported being sexually assaulted at least once in just the one year preceding the survey. *U.S. Transgender Survey* at 15.

Sexual violence is particularly common for transgender people in institutional settings. The Department of Justice Bureau of Justice Statistics found that an estimated 35% of transgender people held in prisons and 34% held in jails had experienced sexual victimization while incarcerated in the last year alone. Allen Beck, *PREA Data Collection Activities 2* (June 2015), <https://bjs.ojp.gov/content/pub/pdf/pdca15.pdf>. One California study that surveyed incarcerated people found that transgender women were 13 times more likely to have been sexually assaulted while in prison than people in prison overall. Valerie Jenness, et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* 3 (2009). A nationwide survey of transgender people found that transgender people who had been in prison in the past year were five times more likely to have been sexually assaulted by prison staff and nine times more likely to have been sexually assaulted by other incarcerated people than the general prison population. *U.S. Transgender Survey* at 15.

Transgender people also experience high rates of discrimination and harassment within educational institutions. Harassment and discrimination against transgender

students are especially prevalent in elementary through high school (K-12), with 54% of respondents who were known or perceived to be transgender during those years stating that they were verbally harassed, 24% stating they were physically attacked, and 13% stating they were sexually assaulted. *U.S. Transgender Survey* at 11. They believed these actions occurred because their peers either knew or believed they were transgender. *Id.* Of those respondents who had experienced harassment in school, 17% reported that they were compelled to leave the school where it occurred because of the severity of the harassment. *Id.*

The harassment that transgender people experience unfortunately continues in college and vocational institutions. Of the respondents who attended either college or a vocational institution, 24% whose peers knew or believed they were transgender experienced verbal, physical, or sexual that they believed occurred because they are transgender. *Id.* at 136. Of those who reported they were harassed, 16% reported that they left a college or vocational institution because the harassment was so severe. *Id.*

Another recent study compared the educational experiences of transgender students with the experiences of their cisgender peers and concluded that “transgender . . . youth are at heightened risk for in-school discrimination that can greatly hinder their right to an education,” Joseph Kosciw, et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, Queer Youth in Our Nation’s Schools*, Lesbian & Straight Education Network (GLSEN), 65 (2019) (hereinafter

“GLSEN Survey”), and “[t]ransgender . . . students are at higher risk of in-school victimization, absenteeism, school discipline, and ultimately leaving school altogether.” *Id.* at 83. The study found that “transgender students were more likely to experience discrimination at school than students of all other gender identities,” *id.* at 102, and that, based on a study of all LGBTQ students, transgender students “faced a more hostile climate than their cisgender LGBTQ peers,” *id.* at 105. Moreover, compared to their cisgender peers, transgender students are more likely to feel unsafe and experience higher levels of victimization based on their gender expression. *Id.* at 94.

Relying in part on statistics such as the above, courts nationwide have long recognized that the transgender community is subject to disproportionately high levels of violence and discrimination. *See, e.g., Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) (“There is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity.”); *McCloud*, 507 F. Supp. 3d at 933 (“[U]nfortunately, many transgender individuals do face a heightened risk of discrimination, harassment, and violence because of their gender identity.”) (quoting *Whitaker*, 858 F.3d at 1051) (internal quotation marks omitted); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 720 (D. Md. 2018) (recognizing that transgender individuals suffer “very high rates of violence due to their transgender status.”); *Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty., Florida*, 318 F. Supp. 3d 1293, 1299 n.15 (M.D. Fla. 2018) (relying on multiple

sources to find that there is a documented history of violence and discrimination toward the transgender community); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139 (S.D.N.Y. 2015) (“Transgender people have suffered a history of persecution and discrimination.”); *Sacklow v. Betts*, 450 N.J. Super. 425, 435-6 (Ch. Div. 2017) (recognizing that “transgender people continue to be disproportionately targeted for bias motivated violence” and “that transgender youth are bullied and harassed at an alarming rate”).

Courts have recognized these dangers create a privacy interest in information that reveals one’s transgender status. *See, e.g., Powell v. Schriver*, 175 F.3d 107, 111-12 (2d Cir. 1999) (“It is similarly obvious that an individual who reveals she is transsexual potentially exposes herself . . . to discrimination and intolerance.”) (quoting *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994)) (internal quotation marks omitted); *see also McCloud*, 507 F. Supp. 3d at 932 (an “individual’s status as transgender was highly personal sexual information that was protected by the due process clause’s informational right to privacy”); *Grimes v. Cnty. of Cook*, 455 F. Supp. 3d 630, 638 (N.D. Ill. 2020) (holding that transgender status qualifies as a private medical information for Fourteenth Amendment purposes); *Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018) (“The Commonwealth’s forced disclosure of plaintiffs’ transgender status violates their constitutional right to decisional privacy”); *Doe v. Washington State Dep’t of Corr.*, No. 4:21-CV-5059-TOR, 2021 WL 2453099, at *7 (E.D. Wash. May 17, 2021) (indicating that the disclosure of transgender status by the State

must be (“narrowly tailored to serve a legitimate penological purpose”); *In re T.I.C.-C.*, 470 N.J. Super. 596, 609 (App. Div. 2022) (holding that transgender status is protected by a privacy interest that “substantially outweighs the presumption that all court and administrative records are open for public inspection”). For that reason, courts have waived publication requirements and granted sealing in name change proceedings for transgender people. *See, e.g., id.* at 608; *In re R.E.*, 142 N.E.3d 1045, 1046 (Ct. App. Ind. 2020) (recognizing principle that had emerged in Indiana courts whereby transgender name change petitioners are “entitled to have their court records sealed to avoid the well-known potential for harm or harassment to which our transgender population has been subjected”); *In re E.P.L.*, 891 N.Y.S.2d 619, 620-21 (Sup. Ct. 2009) (holding that “while petitioner did not, and hopefully could not, cite a personal experience of violence or crime against him,” the data showing violence against the transgender community was sufficient to demonstrate that failing to seal the record would “jeopardize the safety of the petitioner”).

Not surprisingly, all of this violence weighs heavily on transgender people, who often reasonably fear attack for being who they are. One transgender woman of color veteran observed, “I’ve slowly accepted the fact that my chances of surviving in Afghanistan were higher than my chances being out in America.” Brynn Tannehill, *Pondering Male Privilege Post-Transition*, Huffington Post (Aug. 13, 2013),

http://www.huffingtonpost.com/brynn-tannehill/pondering-male-privilege-post-transition_b_3744103.html.

B. Transgender people are targeted for violence in Ohio.

Transgender people who live in Ohio are at least as vulnerable to violence and harassment as they are elsewhere in the U.S. In 2021, at least two transgender women, Tierramarie Lewis and Diamond Kyree Sanders, were shot to death in Cincinnati in separate incidents. *Fatal Violence Against the Transgender and Gender Non-Conforming Community in 2021*, Human Rights Campaign, <https://www.hrc.org/resources/fatal-violence-against-the-transgender-and-gender-non-conforming-community-in-2021> (last visited Nov. 11, 2022). Devinity Jones, an Ohio transgender community leader, told Cleveland 19 News that she has been sexually assaulted and pistol-whipped for being who she is, and she held another transgender woman in her arms as she died of a gunshot wound on the street. Kelly Kennedy, *Violence against transgender community grossly underreported in Cleveland*, News 19 (March 3, 2022, 7:29 PM), <https://www.cleveland19.com/2022/03/04/ive-been-sexually-assaulted-pistol-whipped-19-investigates-violence-against-transgender-community-grossly-underreported/>. Research shows these experiences are not anomalies. The U.S. Transgender Survey included 941 respondents who lived in Ohio. *The Report of the 2015 U.S. Transgender Survey: Ohio State Report*, National Center for Transgender Equality, 1 (2017) (hereinafter “USTS: Ohio Report”). Of those Ohio respondents who reported seeing a health care

provider in the past year, nearly a third (32%) had at least one negative experience related to being transgender, including being refused treatment, verbally harassed, or physically or sexually assaulted. *Id.* at 3. Fifty-five percent of those who interacted with a law enforcement officer who thought or knew they were transgender reported some sort of mistreatment, such as being verbally harassed, physically assaulted, or sexually assaulted, including being coerced into sexual activity to avoid arrest. *Id.* at 2.

Transgender students in Ohio also experience high levels of harassment in school. The 2019 GLSEN National School Climate Survey found that the vast majority of LGBTQ K-12 students in Ohio regularly hear anti-LGBTQ remarks, and most had experienced anti-LGBTQ harassment or assault in the last year. *2019 State Snapshot: School Climate for LGBTQ Students in Ohio*, GLSEN (2021), <https://www.glsen.org/sites/default/files/2021-01/Ohio-Snapshot-2019.pdf> (last visited Nov. 17, 2022). According to the USTS Ohio Report, 57% of those in Ohio who were out or perceived as transgender in K-12 were verbally harassed, 27% were physically attacked, and 15% were sexually assaulted in school because of being transgender. *USTS: Ohio Report* at 1-2. Twenty percent faced such severe mistreatment they left a K-12 school. *Id.* And at Kent State University, 39% of transgender people (including students, faculty, and staff) had experienced exclusionary, intimidating, offensive, or hostile conduct, compared with 17% of cis women and 15% of cis men. *Campus Climate*

Research Study, Kent State University, 82 (Jan. 2017), <https://www-s3-live.kent.edu/s3fs-root/s3fs-public/file/Kent%20State%20University%20-%20Aggregate.pdf>.

C. Birth certificates with the wrong sex marker endanger transgender people.

Whenever a transgender person shows gender-incongruent documents, such as a birth certificate with the wrong sex marker, the people who see those documents—and anyone who hears about it from them—learn that the person is transgender and that the state does not recognize them as their gender identity. Co-workers and classmates may harass or assault a peer or colleague in light of this knowledge.

These harms are not hypothetical. In *McCloud*, one plaintiff’s co-worker threatened to “beat [her] ass” after learning she was transgender through her birth certificate. 507 F. Supp. 3d at 932. And an expert testified that a couple received death threats and survived an attempt on their lives (their brake lines were cut) after one of them was outed as transgender through a birth certificate at work. *Id.* at 933. “One in 50 [transgender people] who presented an incongruous identification document has been physically attacked after doing so.” *Corbitt v. Taylor*, 513 F. Supp. 3d 1309, 1314 (M.D. Ala. 2021) (appeal pending). These risks do not fall equally on all transgender people—Middle Eastern people were almost five times as likely to be physically attacked, Native people were three times as likely, Black people were twice as likely, and Asian people were 50% more likely. *USTS Report* at 90.

It is not an overstatement to say that the wrong sex marker on a birth certificate can be a matter of life or death. In another court's words, what transgender people seek when they attempt to avoid disclosures of an incorrect sex marker on their birth certificate is ultimately "their right to exist, to live more and die less." *Arroyo Gonzalez*, 305 F. Supp. 3d at 334. That is a right "deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

Proposition of Law No. II: Inaccurate birth certificates disclose information of a personal, sensitive nature, triggering due process protections under the Fourteenth Amendment of the U.S. Constitution.

Beyond the very real threat of bodily harm, it is also humiliating for a transgender person to bear a birth certificate that identifies them as the wrong sex—and to be forced to disclose private information about their genital appearance at birth and transgender status. Foreclosing the opportunity for transgender people to correct the sex marker on birth certificates violates the right to privacy for this reason as well.

The Sixth Circuit has found that personal sexual information is of the type that goes to a fundamental right, implicit in ordered liberty, that is protected by the constitution—regardless of whether it involves threat of bodily harm. That is because "[o]ur sexuality and choices about sex . . . are interests of an intimate nature which define significant portions of our personhood," and because exposing such information can lead to "criticism," "scrutiny," and "humiliation." *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998). As the court found in *Himes*, refusing to change birth certificates to reflect gender

identity implicates a release of personal information that is of a “sexual, personal, and humiliating nature.” *Himes*, 2019 WL 11791719, at *9; see also *Arroyo Gonzalez*, 305 F. Supp. 3d at 333, 334 (“Disclosing that one is transgender involves a deeply personal choice which the government cannot compel, unless disclosure furthers a valid public interest. . . . The right to identify our own existence lies at the heart of one's humanity.”).

For cisgender (non-transgender) people, the sex marker on a birth certificate may not be especially sensitive information, because it is consistent with their actual, lived sex. A person who saw the sex marker on their birth certificate would not necessarily learn anything new about them, nor would their thoughts be drawn immediately to the birth certificate holder’s genitals. The same is true for transgender people who have been able to correct the sex marker on their birth certificate to conform to their actual, lived sex.

But that is not the case for transgender people prevented from correcting the sex marker on their birth certificate. For these transgender people, a sex marker that is based solely on their genital appearance at the time of birth not only reveals them to be transgender but also shares intimate information about their genital anatomy. The declaration that they are something other than the sex that they know themselves to be creates further dignitary injury. The experiences of the plaintiffs in *McCloud* bear out this reality—both Ashley Breda and Stacie Ray faced a barrage of verbal harassment, including questioning about their genitalia, at their respective companies when human resources personnel learned they were transgender through their birth certificates.

McCloud, 507 F. Supp. 3d at 933.

The intimacy, privacy, and potential for humiliation related to these forced disclosures are evident in the wide range of discrimination and mistreatment that often follow from presenting an incongruent birth certificate or other identity documents. *See, e.g., Corbitt*, 513 F. Supp. 3d at 1313 (describing experiences of transgender plaintiffs not allowed to correct the sex marker on their driver’s licenses, including one who felt that to bear an inaccurate license would be to “proclaim a lie” in conflict with her religious obligations as a Christian, and one who felt inaccurate ID rendered her “unable to be [her] true self”); *Love*, 146 F. Supp. 3d at 855 (describing experiences of transgender plaintiffs when showing ID with their sex assigned at birth, including public embarrassment while voting, embarrassment and misgendering at a bar, and being told that their ID did not belong to them at a store); *In Re Childers-Gray*, 487 P.3d 96, 124 (Utah 2021) (finding transgender woman experienced “invasive and embarrassing scrutiny, including pat-downs, because her documentation doesn’t match who she is”). While not always involving bodily harm, these forms of mistreatment have a profound impact on transgender people’s dignity, mental health, and emotional, financial, and physical well-being.

The impact of gender-incongruent identity documents on transgender people’s ability to participate in public life cannot be overstated. *See* Bryanna A. Jenkins, *Birth Certificate with A Benefit: Using LGBTQ Jurisprudence to Make the Argument for A*

Transgender Person's Constitutional Right to Amended Identity Documents, 22 CUNY L. Rev. 78, 97 (2019) ("A transgender person needs an amended birth certificate to enjoy the benefits of living secure in their affirmed identity and participating in the necessary mundane activities, such as applying for jobs, searching for and securing housing, enrolling in school, opening a bank account, or going through airport security."); *see also* Dean Spade, *Documenting Gender*, 59 Hastings L.J. 731, 752 (2008) ("Lack of ID that matches a person's current gender is a significant factor contributing to employment discrimination."). In Ohio, 36% of transgender respondents who had shown an ID with a sex marker or name that did not match their gender presentation were verbally harassed, denied benefits or service, asked to leave, or assaulted. *USTS: Ohio Report* at 3.

Accurate documents correspond with improved outcomes for transgender people across multiple dimensions of life. One study found that, of 1,301 transgender Texas residents, those with their chosen name and gender marker on all identity documents were less likely to experience eviction, homelessness, or harassment in places of business, government agencies, or public spaces. Oralia Loza, Oscar Beltran, Adri Perez, & Jamison Green, *Impact of name change and gender marker correction on identity documents to structural factors and harassment among transgender and gender diverse people in Texas*, 4 Sexuality, Gender, & Pol'y 76, 92 (2021). They were more likely to be comfortable asking police for help, and if they had police contact, were less likely to report a negative experience. *Id.* at 98. Further, those with fully gender-congruent identity documents were more likely to

travel by air, and less likely to report negative airport experiences when they did travel.

Id.

Transgender people who can change the sex marker on their identity documents experience significantly less anxiety, depression, and suicide risk than transgender people prevented from doing so, as multiple studies have shown. For example, a Canadian public health study found that transgender individuals possessing at least one legal identity document with a gender marker congruent with gender presentation were at reduced risk of past-year suicide ideation and attempts. Greta Bauer, Ayden Scheim, Jake Pyne, Robb Travers, & Rebecca Hammond, *Intervenable factors associated with suicide risk in transgender persons: A respondent-driven sampling study in Ontario, Canada*, 15 BMC Pub. Health 525, 526 (2015). Another study, among transgender youth aged 15-21 in the U.S., found that the use of a transgender person's chosen name by others was associated with reduced depression, suicidal ideation, and suicidal behavior, with the lowest levels of depression and suicidality when the chosen name was used across home, school, work, and social contexts. Stephen Russell, Amanda Pollitt, Gu Li & Arnold Grossman, *Chosen Name Use Is Linked to Reduced Depressive Symptoms, Suicidal Ideation, and Suicidal Behavior Among Transgender Youth*, 63 J. Adolesc. Health 503, 503-05 (Oct. 2018). Conversely, frequency of misgendering has been associated with increased appearance-related anxiety, reduced feelings of authenticity, and increased experience of stigma for transgender people. Kevin McLemore, *Experiences with Misgendering: Identity Misclassification of*

Transgender Spectrum Individuals, 14 *Self and Identity* 1, 1 (Aug. 2014), DOI: 10.1080/15298868.2014.950691 (“Identity misclassification, or the experience of not having one’s social identity correctly recognized by others, is psychologically disruptive.”).

One study, drawing on data from 27,715 respondents in the U.S. Transgender Survey, assessed the relationship between congruent identity documents or records and mental health. Ayden Scheim, Amaya Perez-Brumer & Greta Bauer, *Gender-concordant identity documents and mental health among transgender adults in the United States: A cross-sectional survey*, 5 *The Lancet Pub. Health* 196 (April 2020). The study examined whether current psychological distress and past-year suicidal thinking, planning, and attempts varied based on whether all, some, or none of a respondent’s documents reflected the chosen name and correct sex marker listed on their documents. *Id.* at e199. Compared to transgender individuals who had no identity documents reflecting their true sex, those who had the sex marker they chose on some or all documents were less likely to report psychological distress and suicidal thinking. *Id.* at e201-02. Indicating the importance of consistently gender-concordant documents, the positive associations with mental health were significantly larger when the correct name and sex marker appeared on all documents. *Id.*

Similarly, a 2019 study of 475 transgender adults in Massachusetts and Rhode Island concluded that individuals who had changed the sex marker on both their driver’s license and their passport had lower odds of anxiety, somatization (physical symptoms

arising from psychological factors), emotional upset due to gender-based mistreatment, and overall psychological distress symptoms. Arjee Restar, Harry Jin, Aaron Breslow, Sari Reisner, Matthew Mimiaga, Sean Cahill & Jaclyn Hughto, *Legal gender marker and name change is associated with lower negative emotional response to gender-based mistreatment and improve mental health outcomes among trans populations*, 11 SSM Pop. Health 5 (2020). The study controlled for gender identity, age, race, education, employment, income, and insurance status. Those who had changed their sex marker on only one of those two documents experienced less frequent emotional upset due to gender-based mistreatment, but did not have lower rates of anxiety, somatization, or overall psychological distress.

Focusing specifically on sex marker and name changes on birth certificates and passports, a 2022 New Zealand study found that those who had experienced barriers to changing their sex markers and had incorrect sex markers on either their birth certificate or their passport “reported significantly higher levels of psychological distress, suicidal ideation, and suicide attempt” when compared with those who had been able to change their sex markers or had not yet tried to change their sex markers. Kyle Tan, et al., *Barriers to Possessing Gender-Concordant Identity Documents are Associated with Transgender and Nonbinary People’s Mental Health in Aotearoa/New Zealand*, 9 LGBT Health 6, 405 (2022).

Again, the experiences of the *McCloud* plaintiffs bear out this reality—Jane Doe was so humiliated by the treatment she received after showing her birth certificate at a Social Security office, she fled the office and cried in her car for nearly an hour. Mr.

Argento explained that he had “a lot of anxiety about how [he'll] be treated . . . it's a lot of times dehumanizing” to have to show a birth certificate that misidentified him as female. *McCloud*, 507 F. Supp. 3d at 934. As one respondent to the U.S. Transgender Survey explained, “not being able to change my gender on any of my identification documents is really disheartening, dysphoria inducing, and kind of dehumanizing. I'm not allowed to be me.” *U.S. Transgender Survey* at 85.

The American Medical Association (AMA) considers information about the sex one is assigned at birth based on genital appearance to be sufficiently sensitive that it should not appear on the face of the public portion of a birth certificate at all, and instead should only be used for medical and statistical purposes. Am. Med. Ass'n Resolution 5-I-19, *Removing Sex Designation from the Public Portion of the Birth Certificate* (June 15, 2021), <https://www.ama-assn.org/system/files/2021-04/j21-bot15.pdf>. The AMA further recognizes the importance of people being able to correct the sex marker on documents and supports people being able to do so. Am. Med. Ass'n Policy No. H-65.967, *Conforming Sex and Gender Designation on Government IDs and Other Documents* (2021), <https://tinyurl.com/y77mwft5> (“support[ing] policies that allow for a sex designation or change of designation on all government IDs to reflect an individual's gender identity.”). Other major medical associations agree. *See, e.g.*, Am. Psych. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 *Am. Psychologist* 832, 841 (2015), <https://www.apa.org/practice/guidelines/>

transgender.pdf (recommending psychologists help transgender people cope with traumatization that occurs related to identity documentation, provide information about how to change one's name or sex marker, and advocate for policies permitting transgender people access to documents with appropriate sex markers).

Courts around the country have acknowledged the right to keep information about one's transgender status private. *See Arroyo Gonzalez*, 305 F. Supp. 3d at 333 (invalidating rule preventing transgender people from correcting the sex marker on their birth certificates, stating that "forced disclosure of a transgender person's most private information is not justified by any legitimate government interest"); *Love*, 146 F. Supp. 3d at 855 (rejecting motion to dismiss in a case challenging surgery requirement for sex marker change on a driver's license, in part because of the "harassing conduct that transgender persons often live through when forced to produce an ID document that fails to match their lived gender" which "cut at the very essence of personhood") (internal quotation marks omitted); *Doe v. Washington State Dep't of Corr.*, No. 4:21-cv-5059, 2021 WL 2453099, at *13 (E.D. Wash. May 17, 2021), appeal dismissed, No. 21-35453, 2022 WL 2155112 (9th Cir. Feb. 4, 2022) (granting a preliminary injunction preventing disclosure of the identity of transgender people in prison in response to a public records act request); *Doe v. Indep. Blue Cross*, No. CV 22-2412, 2022 WL 2905252, at *2 (E.D. Pa. July 22, 2022) (granting motion to allow transgender woman to proceed under a pseudonym due to the "private and intimate" nature of information about

transgender status, as well as her “genuine and reasonable fear of severe harm”); *Powell*, 175 F.3d at 111 (in context of a prisoner’s lawsuit against prison staff for disclosing that she was transgender to other incarcerated people, ruling “the Constitution does indeed protect the right to maintain the confidentiality of one’s transsexualism”).

All people should be permitted to correct inaccurate information on their birth certificates and prevent unwanted disclosures of information about their transgender status. The Second District Court of Appeals erred when it failed to consider the overriding constitutional interests at play and interpreted Ohio law in a manner that would result in violations of the due process clause.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the judgment be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2022, the foregoing *Amicus Brief of Transgender Legal Defense and Education Fund, Black and Pink National, and National Queer Asian and Pacific Islander Alliance in Support of Appellant Hailey Emmeline Adelaide* was filed electronically and sent via email to the following counsel of record:

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