[Cite as *In re B.C.A.*, 2023-Ohio-2931.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY

IN THE MATTER OF: B.C.A.	**CASE NO. 2022-L-101** Civil Appeal from the Court of Common Pleas, Probate Division Trial Court No. 2022 CB 1116

O P I N I O N

Decided: August 21, 2023
Judgment: Affirmed

Monica R. Zibbel and *Glenn E. Forbes*, Forbes Law LLC, 166 Main Street, Painesville, OH 44077 (For Appellants, A.A. and A.A.).

EUGENE A. LUCCI, J.

{¶1} Appellants, Mr. and Mrs. A. (respectively, "Father" and "Mother, and collectively, "the parents"), appeal the judgment of the Lake County Common Pleas Court, Probate Division, denying their application to change the sex marker on the birth record of their child B.C.A. ("the minor") from "male" to "female." We affirm.

{¶2} The minor was born in 2009 in Lake County, Ohio. In June 2022, the parents filed the present application in the probate court pursuant to R.C. 3705.15 to correct the sex marker on the minor's birth record from "male" to "female."

{¶3} Thereafter, the probate court held a hearing on the application, after which it found the following facts, which are not in dispute:

> The minor was born as a twin on July 9, 2009, in Lake County, Ohio. Mother resided in Lake County at the time of birth, and the minor and the minor's family continue to reside in Lake County.
>
> The minor's birth record was filed on August 8, 2009, and reflects the minor's sex as male.
>
> Mother testified that all of the information contained on the minor's birth certificate is correct except the sex marker as male. Mother testified that at the time of birth Mother thought the record was accurate, but the minor is now a transgender female.
>
> The minor was born with male anatomy, but at two-years-old the minor verbalized that the minor was a girl. The parents consulted with medical professionals to gain a better understanding. At five-years-old, the minor began a social transition to female, i.e. the minor began to present as a girl and use she/her pronouns.
>
> The minor was diagnosed with "gender dysphoria" at five-years-old. The minor maintains mental health treatment with professionals as well as appointments with physicians regarding hormone levels.
>
> Plaintiff's Exhibit 2 was completed by Dr. Ajuah Davis, the minor's prior endocrinologist, who opined that the minor's gender identity is female. The minor presently sees another physician due to scheduling issues with Dr. Davis.
>
> Mother testified that the minor's birth record identifying the minor's sex as male "outs" the minor to those unaware at school that the minor is transgender, and places the minor's safety and mental health at risk based on threats that the minor has received.
>
> Mother testified that the minor would benefit from having the birth record corrected to reflect how the minor currently presents.

> Father affirmed much of Mother's testimony. Father testified that the sex marker as male is not properly and accurately recorded because it "does not match my daughter." Father testified that because the birth record does not match his child, it raises confusion and could be potentially dangerous for his child.
>
> The minor testified that the sex marker as male is not properly and accurately recorded. The minor stated that the minor has always been a girl regardless of the minor's genitalia.
>
> The minor testified that the correction of birth record will allow the minor's forms to match who the minor is now, not who the minor was at birth.
>
> The minor described incidents at school where the minor feels awkward because the minor has to explain why the minor's birth record reflects the minor's sex as male but the minor presents as female.
>
> The minor has experienced threats of violence when other students have learned that the minor is transgender.
>
> The minor wants the sex marker corrected so the minor can feel more comfortable going forward in life.
>
> In 2021, a name change was granted by this Court and the minor's birth certificate was changed to reflect the name change from a traditionally male name to the current name pursuant to R.C. 2717.09, R.C. 2717.13, and R.C. 3705.13.

{¶4} Based on these facts, the probate court concluded that it lacked statutory authority under R.C. 3705.15 to order the requested change to the sex marker on the birth certificate.

{¶5} The parents assign the following two errors:

> [1.] The Probate Court erred by finding it lacked authority under R.C. 3705.15 to order the correction of the sex marker on a birth certificate.
>
> [2.] The Probate Court erred and abused its discretion when it denied the application to correct the birth record of B.C.A.

{¶6} In their first assigned error, the parents challenge the trial court's construction of R.C. 3705.15. "The meaning of statutory language is a question of law, which we review de novo." *State v. Jeffries*, 160 Ohio St.3d 300, 2020-Ohio-1539, 156 N.E.3d 859, ¶ 15, citing *State v. Vanzandt*, 142 Ohio St.3d 223, 2015-Ohio-236, 28 N.E.3d 1267, ¶ 6. "Our paramount concern in examining a statute is the legislature's intent in enacting the statute." *Gabbard v. Madison Local School Dist. Bd. of Education*, 165 Ohio St.3d 390, 2021-Ohio-2067, 179 N.E.3d 1169, ¶ 13, citing *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 21. "To discern that intent, we first consider the statutory language, reading all words and phrases in context and in accordance with the rules of grammar and common usage." *Gabbard* at ¶ 13, citing *Morrissey* at ¶ 21; *see* R.C. 1.42. *See also Jeffries* at ¶ 15, citing *Vanzandt* at ¶ 7 ("A fundamental preliminary step in our analysis of any legislation is to review the plain language of the statute."). "We give effect to the words the General Assembly has chosen, and we may neither add to nor delete from the statutory language." *Gabbard* at ¶ 13, citing *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 19.

{¶7} Accordingly, "[w]hen the statutory language is unambiguous, we apply it as written without resorting to rules of statutory interpretation or considerations of public policy." *Gabbard* at ¶ 13, citing *Zumwalde v. Madeira & Indian Hill Joint Fire Dist.*, 128 Ohio St.3d 492, 2011-Ohio-1603, 946 N.E.2d 748, ¶ 23-24, 26. "In other words, our review 'starts and stops' with the unambiguous statutory language." *Gabbard* at ¶ 13, quoting *Johnson v. Montgomery*, 151 Ohio St.3d 75, 2017-Ohio-7445, 86 N.E.3d 279, ¶ 15.

{¶8} Mindful of these principles, we turn to the statutory provisions regarding birth certificates. "A birth certificate for each live birth in [Ohio] shall be filed in the registration district in which it occurs within ten calendar days after such birth and shall be registered if it has been completed and filed in accordance with [R.C. 3705.09]." R.C. 3705.09(A). R.C. 3705.09 does not specify the information that must be recorded on a birth certificate. Instead, R.C. 3705.08 provides:

> (A) The director of health, by rule, shall prescribe the form of records and certificates required by this chapter. Records and certificates shall include the items and information prescribed by the director, including the items recommended by the national center for health statistics of the United States department of health and human services, subject to approval of and modification by the director.
>
> (B) All birth certificates shall include a statement setting forth the names of the child's parents.

{¶9} Pursuant to R.C. 3705.08(A), the director of the Ohio department of health ("ODH") has issued an administrative rule prescribing a standard form for a "certificate of live birth." *See* Ohio Adm.Code 3701-5-02(A)(1). The information to be recorded for a child consists of the "child's name," "time of birth," "sex," "date of birth," "facility name," "city, town or location of birth," and "county of birth." Appendix A to Ohio Adm.Code 3701-5-02.

{¶10} Corrections to the birth record may be made in accordance with R.C. 3705.15(A), which provides, in relevant part:

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

> minor the application shall be signed by either parent or the person's guardian.
>
> (A) An application to correct a birth record shall set forth all of the available facts required on a birth record and the reasons for making the application, and shall be verified by the applicant. Upon the filing of the application the court may fix a date for a hearing, which shall not be less than seven days after the filing date. * * * *The application shall be supported by the affidavit of the physician or certified nurse-midwife in attendance.* If an affidavit is not available, the application shall be supported by the affidavits of at least two persons having knowledge of the facts stated in the application, by documentary evidence, or by other evidence the court deems sufficient.
>
> The probate judge, if satisfied that the facts are as stated, shall make an order *correcting* the birth record, except that in the case of an application to correct the date of birth, the judge shall make the order only if any date shown as the date the attending physician or certified nurse-midwife signed the birth record or the date the local registrar filed the record is consistent with the corrected date of birth. If supported by sufficient evidence, the judge may include in an order correcting the date of birth an order correcting the date the attending physician or certified nurse-midwife signed the birth record or the date the local registrar filed the record.

(Emphasis added.)

{¶11} The question before this court is whether R.C. 3705.15 authorized the probate court to order the ODH to change the sex marker on the minor's birth record from "male" to "female." This is a matter of first impression in this district, and the issues implicated in this appeal are currently before the Supreme Court of Ohio on appeal from the Second District's decision in *In re Application for Correction of Birth Record of Adelaide*, 2022-Ohio-2053, 191 N.E.3d 530, ¶ 9 (2d Dist.), *appeal accepted*, 168 Ohio St.3d 1405, 2022-Ohio-3546, 195 N.E.3d 1044, ¶ 9.

{¶12} Similar to the present case, *Adelaide* addressed the issue of whether R.C. 3705.15 permitted a probate court to change the sex marker on the birth certificate of the applicant, a transgender female who was born with biologically male anatomy. *Id.* at ¶ 4, 9. In its discussion, the Second District held that R.C. 3705.15, "by its express terms, permits making corrections, not amendments. Adelaide's application essentially asked the probate court to amend her birth certificate, not to correct it. But the probate court had no authority under R.C. 3705.15 to make that amendment and could not grant Adelaide's request." *Adelaide* at ¶ 17, citing *In re Easterling*, 135 N.E.3d 496, 2019-Ohio-1516, ¶ 11 (1st Dist.) (probate court lacked authority to amend rather than correct the applicant's birth certificate under R.C. 3705.15); *In re Maxey*, 8th Dist. Cuyahoga No. 34558, 1976 WL 190807, *1 (Feb. 5, 1976) (applying former R.C. 3705.20 amended and renumbered as R.C. 3705.15; "there is no statutory enactment vesting the Probate Court with authority to order a change to the gender indicated on properly and accurately recorded birth records.").

{¶13} Here, the parents maintain that the dictionary definition of a "correction" includes an "amendment." *See* https://www.merriam-webster.com/dictionary/correction (last accessed April 4, 2023). The dissent likewise focuses on the dictionary definitions of "accurately" and "correction." Although a "correction" connotes a change, not all changes are corrections. For something to be corrected, it must have first been incorrect, i.e., inaccurate. Nonetheless, regardless of dictionary definitions of "correction," "amendment" or "accurately," the crux of the issue is whether R.C. 3705.15(A) uses the term "correction" to permit a probate court to order alteration of the original birth certificate

to reflect accurate circumstances present at the time of birth only, or whether it may order alteration of a birth certificate to reflect circumstances existing at some point later in life.

{¶14} The Second District addressed this issue in the context of the statute's language regarding a birth record that "has not been properly and accurately recorded[.]" *Adelaide* at ¶ 14; *see* R.C. 3705.15. The Second District concluded that "[b]irth records are recorded at the time of birth, or shortly thereafter, and are then filed with the office of vital statistics. R.C. 3705.01; R.C. 3705.09. The language regarding the accurate and proper recordation of the information relates back to the original filing of the birth record and whether it was properly and accurately recorded at that time." *Adelaide* at ¶ 16. Again, we agree with *Adelaide* on this issue. The dissent's discussion of the present progressive tense, i.e., the "has been" form, of the verb "recorded" does not alter this analysis. The statute allows for correction of the birth certificate, whenever in the past it was recorded, but only if it was not "properly and accurately" recorded. The point of contention is a threshold determination of whether the *correction* permitted under R.C. 3705.15 is one that accurately reflects circumstances as they existed at *birth* or at some point later in life. The language of the statute does not grant the broad authority espoused by the dissent to allow any change to a birth record to reflect later-in-life identifications.

{¶15} Moreover, we note that the statute's requirement that, when available, the application "shall be supported by the affidavit of the physician or certified nurse-midwife *in attendance*" also indicates that the statute applies to corrections of circumstances as they existed at the time of birth. (Emphasis added.) R.C. 3705.15. The dissent minimizes this language by referencing the next provision in the statute that provides, as

stated above, "*If an affidavit is not available*, the application shall be supported by the affidavits of at least two persons having knowledge of the facts stated in the application, by documentary evidence, or by other evidence the court deems sufficient." (Emphasis added.) The dissent points out that an affidavit of the attending physician is not always required. However, the dissent fails to afford any meaning to this language. The general requirement of the affidavit of the attending physician, and allowance of other evidence only where such an affidavit is unavailable, plainly indicates that the statute pertains to corrections of facts and circumstances as they existed at birth. We cannot excise language from the statute to afford it some other meaning. To be clear, R.C. 3705.15 does not preclude a probate court from ordering a change to the sex marker on birth certificates in all cases. However, the plain language of the statute constrains such a change to one that corrects the birth record to accurately reflect circumstances existing *at the time of birth*.

{¶16} Moreover, the Second District identified other statutes that *do* permit alterations of the birth record to reflect later-in-life changes. *Adelaide* at ¶ 18. These include name changes and adoptions. *Id.*, citing R.C. 2717.02 and 3705.13 (name changes), and R.C. 3705.02 (adoptions). Although the name-change and adoption statutes permit changes to the birth record based upon circumstances occurring after birth, it does not follow that R.C. 3705.15 likewise permits such changes. *Adelaide* at ¶ 18. To the contrary, as noted by the Second District, "[i]f we were to construe R.C. 3705.15 as permitting the probate court to change, not just correct, any of the required facts in the birth certificate, then there would be no need for the other statutes that allow modifications." *Adelaide* at ¶ 19. Accordingly, the court held that "[a]bsent the express

authority from the legislature to modify the birth certificate to correlate with a later-in-life change, not just make corrections, the probate court lacked the authority to do so under R.C. 3705.15." *Adelaide* at ¶ 19. Because the plain meaning of the statute allows the probate court to correct birth records to reflect circumstances existing at the time of birth, and the parties did not advance a position that the minor was not male at birth, R.C. 3705.15(A) did not authorize the probate court to issue an order to change the minor's birth record.

{¶17} The dissent charges us with construing the statute in accordance with a purported policy preference. To the contrary, we reach our decision on the unambiguous language of the statute, reading *all* words and phrases in context and in accordance with the rules of grammar and common usage. *Gabbard*, 2021-Ohio-2067, at ¶ 13. It is not this court's role to legislate. As Justice Lee of the Supreme Court of Utah expressed in his dissent addressing a similar issue, the court is in no position to create law with far-reaching effects on public policy interests:

> The question of whether and how to balance these interests in the adoption of a new law in this field is a matter for the Utah legislature. That is a political body representing a wide range of ideologies and interests, with the manner and means of amending the laws on the books based on input from a diverse constituency and a wide range of views—through committee hearings, open debate, and a public vote. This court is in no such position—least of all in a "case" like this one, in which the court has heard from only one side of this difficult problem.

(Emphasis sic.) (Footnotes omitted.) *Matter of Childers-Gray*, 2021 UT 13, 487 P.3d 96, ¶ 145 (Lee, J., dissenting).

{¶18} In reaching this conclusion, we decide no constitutional issues relative to the statute. To the extent that the parents rely on *Ray v. McCloud*, 507 F.Supp.3d 925

(S.D.Ohio 2020) and maintain that the trial court should have considered the constitutional issues when construing the statute, we note that "[t]he preservation-of-constitutionality rule is applicable when ambiguous statutory language *is subject to two plausible interpretations*, one of which renders the statute unconstitutional." (Emphasis added.) *Jeffries*, 2020-Ohio-1539, at ¶ 27, citing *Salinas v. United States*, 522 U.S. 52, 59, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997). Despite the dissent's position that we should opine on any potential constitutional issues, "when the statutory language is unambiguous, the possibility of its unconstitutionality does not give the judiciary license to alter its language." *Jeffries* at ¶ 27, citing *Salinas* at 59. *See also Adelaide*, 2022-Ohio-2053, at ¶ 23. Here, the language is unambiguous, and thus the preservation-of-constitutionality rule is inapplicable. The issue of the constitutionality of the plain language of the statute was not before the probate court and is not properly before this court on appeal.

{¶19} Further, we do not advance any position as to the policy rationales set forth in the parents' brief, as, again, where the statute is unambiguous, courts must apply the statute as written, without consideration of policy issues. *Gabbard*, 2021-Ohio-2067, at ¶ 13.

{¶20} For the foregoing reasons, the parents' assigned errors lack merit, and the judgment is affirmed.

MATT LYNCH, J., concurs with a Concurring Opinion,

MARY JANE TRAPP, J., dissents with a Dissenting Opinion.

MATT LYNCH, J., concurs with a Concurring Opinion.

{¶21} I fully concur in the majority opinion's position that R.C. 3705.15, which provides for the correction of birth records, does not authorize a probate court to order the Department of Health to change the "sex marker" or "sex" on a birth certificate to reflect circumstances other than those existing at the time of birth. *Supra* at ¶ 16. In other times, no more would be necessary to resolve the issue before this Court and support the judgment rendered. *See Gajovski v. Gajovski*, 81 Ohio App.3d 11, 13, 610 N.E.2d 431 (9th Dist.1991) ("in the contemplation of Ohio jurisprudence, one's gender at birth is one's gender throughout life"); *In re Marriage License for Nash*, 11th Dist. Trumbull Nos. 2002-T-0149 and 2002-T-0179, 2003-Ohio-7221, ¶ 31 ("public policy in Ohio concerning changes to birth certificates is to allow a court to 'correct[] **Errors/Mistakes Only** on the original birth record,' and not changes in the sexual designation when the original designation was correct").

{¶22} The present times, however, are not those other times. In these times, it is worthwhile to re-affirm a foundational principle behind all law, that is a respect for truth. It may no longer be presumed that words, such as "man" and "woman," convey a common and ordinary meaning. Thus, we are confronted with the issue of whether the applicant is entitled to correct the sex marker on the birth record from male, an accurate representation of the applicant's sex at birth, to female, "to reflect how the minor currently presents."

{¶23} "What is truth?", it has been famously asked and, for present purposes, it is not amiss to proffer what is intended by truth. Truth is that which is, i.e., the state of things as they actually exist. *Compare Moulor v. Am. Life Ins. Co.*, 111 U.S. 335, 345, 4 S.Ct.

466, 28 L.Ed. 447 (1884) ("that only is true which is conformable to the actual state of things * * * [i]n that sense, a statement is untrue which does not express things exactly as they are"). The law, then, inasmuch as it aspires to reflect the truth, must aspire to conform to the actual state of things.

{¶24} The probate court determined, and it has not been disputed that, "[t]he minor was born with male anatomy." Accordingly, the minor's birth record correctly identifies the sex as "male," that being the actual state of things.

{¶25} This is confirmed by the evidence presented in support of the application itself. The applicant is diagnosed as having "gender dysphoria." That condition is defined by the American Psychiatric Association as follows:

> The DSM-5-TR [*Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision*] defines gender dysphoria in children as a marked incongruence between one's experienced/expressed gender and assigned gender, lasting at least 6 months, as manifested by * * * [a] strong desire to be of the ***other gender*** or an insistence that one is the ***other gender*** (or some alternative gender different from one's assigned gender)[.][1]

(Emphasis added.) To be clear, "assigned gender" is the "[t]raditional designation of a person as 'female,' 'male,' or 'intersex' based on anatomy (e.g., external genitalia and/ or internal reproductive organs) and/or other biological factors (e.g., sex chromosomes)."

1. American Psychiatric Association, *What is Gender Dysphoria?*, https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria (accessed June 7, 2023).

Assigned gender stands in contrast with one's gender identity, i.e., "[a] person's inner sense of being a girl/woman, boy/man, some combination of both, or something else."[2] Thus, the male applicant herein could not have gender dysphoria unless the applicant demonstrated a 'strong desire' or insistence on being "the other gender," i.e., female. The applicant's assigned or actual gender is correctly reflected in the birth record, i.e., male. The applicant's testimony to having "always been a girl" is necessarily at variance with the medical diagnosis of Gender Dysphoria.

{¶26} Contrariwise, the applicant's father testified that it was not until the age of two or three that the applicant "presented us with ***her truth*** that she was female." "Her truth" is a reflection of the applicant's expressed gender identity. The birth record, however, reflects the applicant's actual sex. These are two different things. Under the law, and for the reasons ably set forth in the majority opinion, a birth record is intended "to reflect accurate circumstances at the time of birth only." *Supra* at ¶ 13; R.C. 3705.09(A) ("[a] birth certificate * * * shall be filed * * * within ten calendar days after [live] birth").

{¶27} The insistence on the accurate designation of the applicant's sex at birth in the birth record is not a moralistic or esoteric preoccupation with violating "the right to define one's own concept of existence." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). Not only does this insistence respect the state of things as they actually exist, i.e., the truth, but it is necessary for the just application of existing laws.

2. *Id.*

{¶28} There are twenty-one states that ban transgender students from participating in sports consistent with their gender identity.[3] The Ohio High School Athletic Association does not outright prohibit transgender students from participating in sports consistent with their gender identity, but such participation is conditional: "Before a transgender female [defined in relevant part as "a person whose sex at birth is male"] can participate in **girl's sport or on a girl's team** she must either: (1) have completed a minimum of one year of hormone treatment related to gender transition and/or (2) demonstrate * * * that she does not possess physical (bone structure, muscle mass, testosterone, hormonal, etc.) or physiological advantages over genetic females of the same age group."[4] Like the American Psychiatric Association, the Ohio Athletic Association recognizes the distinction between "sex" which is "assigned at birth as male or female, usually based on the appearance of the external genitalia," and "gender identity" which is "[a] person's own understanding of themselves in gendered categories."[5] Allowing the modification of birth records to reflect one's gender identity rather than one's actual or assigned identity frustrates the application of any such laws or rules that recognize the biological reality of sex.

{¶29} The applicant's birth record in the present case accurately identifies the sex as male and there is no basis in law or fact to alter that designation.

3. Movement Advancement Project, *Bans on Transgender Youth Participation in Sports*, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans (accessed June 7, 2023).
4. Ohio High School Athletic Association, *OHSAA Transgender Student Policy*, https://ohsaaweb.blob.core.windows.net/files/Eligibility/OtherEligibiltyDocs/TransgenderPolicy.pdf (accessed June 7, 2023).
5. *Id.*

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MARY JANE TRAPP, J., dissents with a Dissenting Opinion.

{¶30} I respectfully dissent from the majority's determination that R.C. 3705.15 did not authorize the probate court to correct the sex marker on B.C.A.'s birth record from "male" to "female." While R.C. 3705.15 does not explicitly contemplate a transgender individual's ability to change the sex marker on their birth certificate to reflect their gender identity, its plain language is sufficiently broad to permit that action. I further dissent from the majority's determination that the probate court did not abuse its discretion in denying the parents' application. The probate court's denial resulted from its erroneous interpretation of R.C. 3705.15 and, thus, constitutes an abuse of discretion.

{¶31} To be clear, I do agree with the lead opinion that the legal question presented for review is one of statutory interpretation. The case before us was not brought to determine whether a transgender student may compete in athletics. It is also not about versions of "the truth," metaphysics, or competing dictionary definitions of a word. It is, however, about a young person's and their parents' desire to exercise rights afforded under Article I, Section I of the Ohio Constitution, which include the right to obtain "happiness and safety."

{¶32} It is also about their trust and confidence in our state's executive and judicial branches, which promulgated policies, forms, and procedures that would objectively lead a reasonable family to believe the state of Ohio permits a correction of the sex marker on a birth certificate to conform with one's gender identity, only to find themselves now engaged in a costly appeal.

{¶33} It is also about the public's confidence in our judicial system to not overstep into the area of creating law where our General Assembly, unlike those in other states, has chosen not to proscribe the change sought by the parties in this case. The General Assembly specifically left that issue to the executive branch by delegating rule making authority to an administrative agency. As explained in greater detail below, the Ohio Department of Health's current application of correction form explicitly permits an applicant to request correction of the sex marker on a birth certificate. The Supreme Court of Ohio adopted a standardized probate form that explicitly permits an applicant to request correction of the sex marker on a birth certificate,[6] and the Lake County Probate Court led these applicants to believe their goal could be accomplished by adopting a form that specifically contemplates a correction to accurately reflect one's gender identity.

{¶34} This was not an adversarial process. There was no one sitting at opposing counsel's table challenging the application. In fact, the hearing below ended with the probate court saying, "What I'm going to do is issue a written opinion so we have a paper trail for it. * * * And then this could be the case that gets things changed in Lake County. We'll see, right?" To this statement, the mother replied, "I'm hoping." At no time during the hearing did the probate court challenge or take issue with the application.

{¶35} This family's reasonable expectations were then thwarted by the decision below and now by the majority of this court. Since this was not designed as an adversarial hearing, they had no reason, nor were they given any reason at the hearing,

6. *See* "Court Revises Birth Certificate Probate Form," https://courtnewsohio.gov/happening/2021/birthCertificateRule_081721.asp (accessed July 21, 2023).

to advance an extensive constitutional argument supporting the application in order to preserve their ability to make the argument on appeal. Now the majority is penalizing them by dismissing their constitutional arguments.

R.C. 3705.15 Construed

{¶36} The question of law before this court is whether R.C. 3705.15 authorized the probate court to correct the sex marker on B.C.A.'s birth record from "male" to "female."

{¶37} R.C. 3705.15 provides, in relevant part, "[w]hoever claims to have been born in this state, and whose registration of birth * * * has not been properly and accurately recorded, may file an application for * * * correction of the birth record in the probate court of the county of the person's birth or residence or the county in which the person's mother resided at the time of the person's birth."

{¶38} The probate court determined it was authorized "to correct information that was not properly or accurately recorded at the time the birth record was registered, i.e., to correct an error on the record at the time it was created following a birth" but "not to make an amendment or change to the record to reflect information as it may presently exist." (Emphasis sic.)

{¶39} R.C. 3705.15 is silent as to whether individuals may change the sex marker on their birth certificates. However, based on the plain language of R.C. 3705.15, the probate court's express authority is sufficiently broad to permit that action.

{¶40} Contrary to the probate court's assertion, its authority under R.C. 3705.15 is not limited to the correction of an "error." The statute does not use the word "error" in any form. While the statute uses the words "accurately" and "correction," their meanings

are not limited to *error* correction. The meaning of "accurate" includes "conforming exactly to truth." *Merriam-Webster*, https://www.merriam-webster.com/dictionary/accurate (accessed July 21, 2023). The meaning of "correction" includes "amendment" and "rectification." *Merriam-Webster*, https://www.merriam-webster.com/dictionary/correction (accessed July 21, 2023).

{¶41} For example, in *In re Correction of Birth Certificate of House*, 1st Dist. Hamilton No. C-930374, 1994 WL 176905 (May 11, 1994), a child's mother and father "were married at the time of both conception and birth of the child" and had agreed to give the child a hyphenated last name including the surname of both parents. *Id*. at *1. The couple divorced after the child's birth, and the mother had the father's surname excluded in the name recorded on the birth certificate. *See id*. The probate court granted the father's application to have the birth record corrected pursuant R.C. 3705.15 to include his surname, consistent with the couple's original agreement. *Id*. The First District affirmed, rejecting the mother's contention R.C. 3705.15 required "a finding that an error had been made in the birth record." *Id*. at *2. The court reasoned "R.C. 3705.15 states that an application to correct a birth record 'shall set forth all of the available facts required on a birth record and the reasons for making the application, and shall be verified by the applicant. * * * If the probate judge is satisfied that the facts are as stated, he shall make an order correcting the birth record, * * *.' The statute does not specifically require a finding of error[,] and * * * the [probate] court's decision demonstrates that [it] was satisfied with the facts as presented by the father." *Id*., quoting R.C. 3705.15.

{¶42} The probate court's authority under R.C. 3705.15 is also not limited to the correction of an inaccuracy that would have been apparent at the time of birth. The

statute refers to a birth certificate that "has not been properly and accurately recorded," or, stated differently, one that has been improperly and inaccurately recorded. To "record" means "to set down in writing: furnish written evidence of" and "to cause (sound, visual images, data, etc.) to be registered on something (such as a disc or magnetic tape) in reproducible form." *Merriam-Webster*, https://www.merriam-webster.com/dictionary/record (accessed July 21, 2023). The phrase "has been" indicates an action that occurred at an unspecified point in the past. *See*, *e.g.*, *State v. Garcia*, 12th Dist. Madison No. CA2019-11-030, 2020-Ohio-3232, ¶ 14 (the use of "has not been convicted of or pleaded guilty to" means "convictions or plea[s] that occurred at an unspecified point in the past").[7] Thus, at the time the individual files an application for correction, there must be recorded information on the birth certificate that is improper and inaccurate. Obviously, one would have no reason to seek correction of a birth certificate when the recorded information is proper and accurate. The statutory language does not address *when* the recorded information was determined to be improper and inaccurate. Accordingly, the statute imposes no limitation in that regard.

{¶43} The lead opinion quotes the portion of R.C. 3705.15(A) that states, "The application shall be supported by the affidavit of the physician or certified nurse-midwife *in attendance*," as purportedly demonstrating the statute applies only to the correction of circumstances existing at the time of birth. (Emphasis added.) However, the next sentence states, "If an affidavit is not available, the application shall be supported by the

7. *See also State v. Jones*, 159 Ohio St.3d 228, 2019-Ohio-5159, 150 N.E.3d 58, ¶ 32 (Kennedy, J., concurring in judgment only) ("The verb 'has done' * * * indicates that the [actions] must have previously occurred at some unspecified time."); *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, ¶ 26 (the use of "has been convicted of or pleaded to" in the sexually-violent-predator specification "indicate[s] that at time of indictment, the person has already engaged in a sexually violent offense").

affidavits of at least two persons having knowledge of the facts stated in the application, by documentary evidence, or by other evidence the court deems sufficient." Thus, this purported limitation does not apply in all circumstances. The statute further states, "in the case of an application to correct the *date of birth*, the judge shall make the order only if any *date* shown as the *date* the attending physician or certified nurse-midwife *signed* the birth record or the *date* the local registrar *filed* the record is consistent with the corrected *date of birth*." (Emphasis added.) Thus, the statute expressly limits only the correction of a *birth date* to a certain time period.

Persuasive Authority

{¶44} This construction of R.C. 3705.15 is supported by the Supreme Court of the United States' recent decision in *Bostock v. Clayton Cty*., *Georgia*, --- U.S. ---, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020). In a 6-3 decision, the court held an employer who fires an individual merely for being gay or transgender violates the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964. The employers had argued (and two dissenting justices agreed) since homosexuality and transgender status cannot be found on Title VII's list of protected characteristics, they are implicitly excluded from Title VII's reach. *See id*. at 1746. In other words, if Congress had wanted to address those matters, it would have referenced them specifically. *See id*. Justice Gorsuch, writing for the court, rejected this argument, explaining "there [is no] such thing as a 'canon of donut holes,' in which Congress's failure to speak directly to a specific case that falls within a more general statutory rule creates a tacit exception. Instead, when Congress chooses not to include any exceptions to a broad rule, courts apply the broad rule." *Id*. at 1747. He further explained, "Ours is a society of written laws. Judges are not free to overlook

plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations." *Id*. at 1754. *See Lingle v. State*, 164 Ohio St.3d 340, 2020-Ohio-6788, 172 N.E.3d 977, ¶ 14, quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), paragraph two of the syllabus ("In construing a statute, we do not ask 'what did the general assembly intend to enact, but what is the meaning of that which it did enact.'")

{¶45} Here, R.C. 3705.15 does not explicitly restrict a person's ability to change the sex marker on his or her birth certificate, nor does it explicitly limit changes to only those matters inaccurately or improperly recorded at birth, as may be found in the laws of other states. *See*, *e.g*., Tenn.Code 68-3-203(d) ("The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery."). Therefore, this court must apply the statute's broad language as written.

{¶46} The majority's constrained interpretation of R.C. 3705.15, rather than being mandated by the statutory text, reflects a policy preference. This is demonstrated by ODH's history of enforcement regarding R.C. 3705.15. For instance, ODH previously prohibited transgender individuals from changing the sex marker on their birth certificates. As this court noted in a 2003 decision, "*public policy* in Ohio concerning changes to birth certificates is to allow a court to 'correct[] Errors/Mistakes Only on the original birth record,' and not changes in the sexual designation when the original designation was correct." (Emphasis added.) *In re Application for Marriage License for Nash*, 11th Dist. Trumbull Nos. 2002-T-0149 and 2002-T-0179, 2003-Ohio-7221, ¶ 31, quoting ODH's website.

{¶47} ODH later reversed its policy and permitted transgender individuals to change the sex marker on their birth certificates if they obtained a court order, paid a processing fee, and completed an ODH-provided form. *See Ray v. McCloud*, 507 F.Supp.3d 925, 929 (S.D.Ohio 2020) ("*Ray II*"). In 2015, however, after consultation with in-house counsel and the Governor's office, ODH "re-reviewed" its policy. *Id*. ODH decided to no longer permit changes to the sex marker on Ohio birth certificates when the basis for that change was the person was transgender. *Id*.

{¶48} In 2018, four transgender individuals challenged ODH's policy on constitutional grounds in the United States District Court for the Southern District of Ohio. *See Ray v. Himes*, S.D.Ohio No. 2:18-cv-272, 2019 WL 11791719, *4 (Sept. 12, 2019) ("*Ray I*"). The district court classified the plaintiffs' claims as both an as-applied challenge to R.C. 3705.01 et seq. and a facial challenge to ODH's policy. *See Ray II* at 931. In denying ODH's motion to dismiss, the district court stated it was "not convinced" Ohio law actually prohibits transgender individuals from changing the sex marker on their birth certificates. *See Ray I* at *4. The district court ultimately granted the plaintiffs' motion for summary judgment, found ODH's policy violated the plaintiffs' rights to substantive due process and equal protection, and permanently enjoined ODH from enforcing it. *See Ray II* at 940.[8]

{¶49} ODH did not appeal the district court's decision. Rather, ODH revised its policy to comply with *Ray II* and posted the following instructions on its website:

8. Other federal district courts have ruled in favor of transgender individuals in similar cases. *See*, *e.g.*, *F.V. v. Barron*, 286 F.Supp.3d 1131 (D.Idaho 2018) (birth certificates); *Arroyo Gonzalez v. Rossello Nevares*, 305 F.Supp.3d 327 (D.P.R.2018) (birth certificates); *Love v. Johnson*, 146 F.Supp.3d 848 (E.D.Mich.2015) (driver's licenses and state identification cards).

{¶50} "Court-Ordered Corrections can be done at any Ohio Probate Court. It can be used to correct any errors and/or mistakes on the original birth record. In some cases it can also add any missing information. Please contact the Probate Court in the county that you reside in for more information. In order to comply with the court decision in *Ray v. McCloud*, Case # 2:18-cv-00272, the Ohio Department of Health will make changes to the sex marker on a birth certificate with a probate court order." Court-Ordered Correction of Birth Record, https://odh.ohio.gov/know-our-programs/vital-statistics/changing-correcting-birth-record (accessed July 21, 2023).

{¶51} ODH's current form for an application of correction explicitly permits an applicant to request correction of the sex marker on a birth certificate. *See* Ohio Adm.Code 3701-5-02(A)(14); Appendix N. Similarly, Standard Probate Court 30.0 ("Application For Correction of Birth Record"), which the Supreme Court of Ohio adopted effective August 3, 2021, explicitly permits an applicant to request correction of the sex marker on a birth certificate. *See* https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/superintendence/probate_forms/birthCertificate/30.0.pdf (accessed July 21, 2023).

{¶52} The Lake County Probate Court has gone one step further by adopting Lake County Probate Form 30.01 ("Licensed Professional Statement Regarding Birth Record Change"):

PROBATE COURT OF LAKE COUNTY, OHIO
JUDGE MARK J. BARTOLOTTA

IN THE MATTER OF THE BIRTH RECORD OF

CASE NO.

LICENSED PROFESSIONAL STATEMENT
REGARDING BIRTH RECORD CHANGE

See https://www.lakecountyohio.gov/probate-court/document/lcpc-form-30-01-licensed-professional-statement (accessed July 21, 2023).

{¶53} The Lake County Probate Court also accepted for filing the standardized "Consent to Gender Designation Change" form signed by the parents (a redacted copy of the form appears below:

PROBATE COURT OF
LAKE COUNTY, OHIO
JUDGE MARK J. BARTOLOTTA

IN THE MATTER OF: _____

CASE NO: 20 CP 1114

CONSENT TO GENDER DESIGNATION CHANGE

The undersigned _____

[Check one of the following capacities by which your consent is given]

☐ Mother
☒ Legal Father
☐ Alleged Father

Hereby provides this Court Notice of its Application for Gender Designation Change and consents to the sex marker for _____ being changed on the birth certificate from Male to Female as proposed in the Application.

Signature

Typed/Printed Name

Sworn to me and signed in my presence this 14th day of May 2020.

MONICA K. SOBEL, ATTORNEY
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date
Section 147.03 O.R.C.

Notary Public

{¶54} Based on these approved forms, a reasonable family would objectively believe the state of Ohio permits a correction of the sex marker on a birth certificate to conform with one's gender identity.

Contrary Authority

{¶55} The probate court and the lead opinion erroneously rely on the Second District's decision in *In re Application for Correction of Birth Record of Adelaide*, 2022-Ohio-2053, 191 N.E.3d 530 (2d Dist.), *appeal accepted*, 168 Ohio St.3d 1405, 2022-Ohio-3546, 195 N.E.3d 1044. In that case, the Second District held the probate court lacked authority under R.C. 3705.15 to amend a transgender individual's birth certificate to reflect an amendment to the sex marker. *Id*. at ¶ 27. The court determined the phrase "has not been properly and accurately recorded" in R.C. 3705.15 is not ambiguous. *Id*. at ¶ 16. According to the court, the language means "an individual, at any time after the error is discovered, may file to correct the error because it has not yet been corrected. It does not mean that because something has changed after the original determination

occurred that it then makes the original determination incorrect." *Id*. "Birth records are recorded at the time of birth, or shortly thereafter, and are then filed with the office of vital statistics." *Id*. "The language regarding the accurate and proper recordation of the information relates back to the original filing of the birth record and whether it was properly and accurately recorded at that time." *Id*.

{¶56} *Adelaide* is not persuasive and should not be adopted. As explained above, the statutory text does not mandate the limitations the *Adelaide* court purported to identify in the statute. The probate court's authority under R.C. 3705.15 is not limited to the correction of "error" or to the correction of an inaccuracy that would have been apparent at the time of birth.

{¶57} Further, the *Adelaide* court's statutory interpretation was premised on the probate court's limited jurisdiction. *See id*. at ¶ 11, citing *In re Guardianship of Hollins*, 114 Ohio St.3d 434, 2007-Ohio-4555, 872 N.E.2d 1214, ¶ 11 ("It is a well-settled principle of law that probate courts are courts of limited jurisdiction and are permitted to exercise only the authority granted to them by statute and by the Ohio Constitution.") While this may be true, the *Adelaide* court also recognized "R.C. 3705.15 *expressly confers* jurisdiction on the probate court to correct birth records." (Emphasis added.) *Id*. at ¶ 12. The probate court's limited jurisdiction does not mandate a narrow interpretation of its express statutory authority.

{¶58} The *Adelaide* court also relied on the Stark County Probate Court's decision in *In re Declaratory Relief for Ladrach*, 32 Ohio Misc.2d 6, 513 N.E.2d 828 (P.C.1987), a case that should be accorded no persuasive weight. *Ladrach* involved "whether a post-operative male to female transsexual is permitted under Ohio law to marry a male." *Id*.

at 6. The *Ladrach* court had previously dismissed the appellant's application for correction of birth record filed pursuant to former R.C. 3705.20. *See id*. at 7. In dicta, the *Ladrach* court stated former R.C. 3705.20 "is strictly a 'correction' type statute, which permits the probate court when presented with appropriate documentation to correct errors such as spelling of names, dates, race and sex, if in fact the original entry was in error." *Id*. at 8.

{¶59} Crucially, the *Ladrach* court engaged in no discussion of the statutory text. Instead, the court cited outdated and offensive 1960s policy conclusions from the New York Academy of Medicine. *See id*., quoting *Anonymous v. Weiner*, 50 Misc.2d 380, 382, 270 N.Y.S.2d 319 (1966) ("'it is questionable whether laws and records such as the birth certificate should be changed and thereby used as a means to help psychologically ill persons in their social adaption.'")

{¶60} It must be noted New York adopted a contrary policy in 1971 and permitted the issuance of new birth certificates for transgender individuals. *See In re Birney v. New York City Dept. of Health & Mental Hygiene*, 34 Misc.3d 1243(A), 950 N.Y.S.2d 607, 2012 WL 975082, *7 (Mar. 16, 2012). In any event, the *Ladrach* court's policy discussion was inappropriate absent an initial finding that the statutory language was ambiguous. *See Dunbar v. State*, 136 Ohio St.3d 181, 2013-Ohio-2163, 992 N.E.2d 1111, ¶ 16 ("[I]nquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. 1.49 is inappropriate absent an initial finding that the language of the statute is, itself, capable of bearing more than one meaning.").

{¶61} The *Ladrach* court also relied on the "generally accepted" notion that "a person's sex is determined at birth by an anatomical examination by the birth attendant," which "results in a declaration on the birth certificate of either 'boy' or 'girl' or 'male' or 'female,'" and which "becomes the person's true sex." *Id*. at 10. The *Ladrach* court cited no Ohio legal authority imposing this requirement. Modern courts recognize the issue is more complicated. For instance, the Supreme Court of Utah has recently explained:

{¶62} "[E]ven if we were to concede that 'sex' means 'biological sex,' the concept very likely extends beyond what a cursory physical examination of an infant can reveal." *In re Childers-Gray*, 2021 UT 13, 487 P.3d 96, ¶ 85. "[T]he 'anatomical examination' done at birth contemplates only the observable genitalia, which is limited at the neonatal stage. Of course, secondary sex characteristics, such as those that may be altered by hormone therapy, do not begin to develop until later in life. And certainly, 'a baby has no capacity for expression of gender identity.' * * * So even if we look only to the observable physiological indicators of sex to guide us, many transgender individuals would still lie within the * * * definition [of biological sex], given that they may later undergo sex-reassignment surgery, hormone therapy, or other treatment to bring their physical appearances into alignment with their gender identities." *Id.* at ¶ 87.

{¶63} One wonders how an anatomical examination is supposed to apply to individuals such as Stella Walsh, who was an Olympic champion sprinter in the 1930s. After she was murdered in a 1980 mugging gone awry, Ms. Walsh's autopsy revealed she had ambiguous genitalia. *See* Raga, *The Olympic Sprinter Who Nearly Lost Her Medals Because of Her Autopsy*, Mental Floss (July 28, 2016),

https://www.mentalfloss.com/article/69911/how-olympic-sprinter-stella-walsh-nearly-lost-her-medals-because-her-autopsy (accessed July 21, 2023).

{¶64} Most importantly, R.C. Chapter 3705 imposes no particular method of determining sex, much less requiring a person's purported "true sex" to be determined at birth based solely on anatomical examination. *See*, *e.g.*, Session Laws of Kansas, Senate Bill No. 180, Section 1(a)(1) ("An individual's 'sex' means such individual's biological sex, either male or female, at birth"). *See* https://www.kslegislature.org/li/b2023_24/measures/documents/sb180_00_0000.pdf (accessed July 21, 2023).

{¶65} In sum, the probate court's authority under R.C. 3705.15 is sufficiently broad to correct the sex marker on B.C.A.'s birth record from "male" to "female." I would find the probate court erred as a matter of law and would sustain the parents' first assignment of error.

Constitutional Issues

{¶66} The majority also fails to substantively address the constitutional issues directly arising from its interpretation of R.C. 3705.15. As stated, the district court in *Ray II* found it is unconstitutional to prohibit transgender individuals from changing the sex marker on their birth certificates. *Id.* at 940. While *Ray II* is not binding authority, federal court rulings on issues of constitutional law should be accorded "some persuasive weight." *State v. Burnett*, 93 Ohio St.3d 419, 424, 755 N.E.2d 857 (2001). At the very least, a case involving the very statute under consideration is worthy of substantial discussion.

{¶67} Here, the lead opinion states, "[t]he issue of the constitutionality of the plain language of the statute was not before the probate court and is not properly before this court on appeal." However, "the question of the constitutionality of a statute must generally be raised at the first opportunity * * *." *State v. Awan*, 22 Ohio St.3d 120, 122, 489 N.E.2d 277 (1986). Here, there was no adversarial hearing, and the probate court did not raise any issues regarding the application for correction. Therefore, the family had no reason to advance constitutional arguments in support. The parents have raised their constitutional arguments at their first opportunity—in this court. The majority should decide these constitutional issues or, alternatively, remand to the probate court to consider them in the first instance.

Denial of Application

{¶68} I would also sustain the parents' second assignment of error, where they contend the probate court abused its discretion when it denied their application to correct B.C.A.'s birth record.

{¶69} The standard of review for a denial of an application pursuant to R.C. 3705.15 is abuse of discretion. *In re Application for Correction of Birth Record of Lopez*, 5th Dist. Tuscarawas No. 2004-AP-06 0046, 2004-Ohio-7305, ¶ 29. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. Clark No. 09-CA-54, 2010-Ohio-1900, ¶ 62, quoting *Black's Law Dictionary* 11 (8th Ed.2004). "When a pure issue of law is involved in appellate review, the mere fact that the reviewing court would decide the issue differently is enough to find error." *Id*. at ¶ 67. "By contrast, where the issue on review has been

confided to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error." *Id*.

{¶70} R.C. 3705.15(A) provides, in relevant part:

{¶71} "An application to correct a birth record shall set forth all of the available facts required on a birth record and the reasons for making the application, and shall be verified by the applicant. * * * The application shall be supported by the affidavit of the physician or certified nurse-midwife in attendance. If an affidavit is not available, the application shall be supported by the affidavits of at least two persons having knowledge of the facts stated in the application, by documentary evidence, or by other evidence the court deems sufficient. * * * The probate judge, *if satisfied that the facts are as stated*, *shall make an order correcting the birth record*, except that in the case of an application to correct the *date* of birth," in which particular evidence is required. (Emphasis added.) *Id*.

{¶72} Here, the parents filed application materials consisting of Standard Probate Form 30.0 and Lake County Probate Court Form 30.01, the latter of which contained Dr. Davis' professional opinion regarding B.C.A.'s gender identity. The probate court held a hearing at which it heard testimony and admitted documents into evidence.

{¶73} In its judgment entry, the probate court set forth "findings of fact" consistent with the undisputed evidence submitted at the hearing. Thus, the probate court's judgment entry demonstrates it was satisfied the facts were as stated. However, the probate court denied the application based on its erroneous interpretation of the governing statute. No court, in the exercise of its discretion, is permitted to commit an

error of law. *See Beechler* at ¶ 69. Accordingly, I would also find the probate court abused its discretion in denying the parents' application.