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TO LIVE MORE AND DIE LESS:

CHALLENGING TENNESSEE'S ANTI-TRANS BIRTH CERTIFICATE POLICY

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I. TENNESSEE IS THE ONLY REMAINING JURISDICTION THAT CATEGORICALLY BARS TRANS PEOPLE FROM CHANGING THE GENDER MARKER ON THEIR BIRTH CERTIFICATES TO REFLECT THEIR GENDER IDENTITY

"[F]ew things are as essential to one's personhood and navigating the world as being able to correctly and accurately identify one's gender to the world."¹

Why do we even have birth certificates? Shouldn't a person's existence be sufficient certification that they were born? In reality, a birth certificate does much more than that. Our birth certificates are central to our social and legal existences. They are core to a person's identity as a citizen of Tennessee and a citizen of the United States.² So naturally, we want our birth certificates to be accurate, and possessing

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¹ Complaint for Declaratory and Injunctive Relief at para. 4, *Gore v. Lee*, No. 3:19cv00328 (M.D. Tenn. filed Apr. 23, 2019).

² *Id.* at para. 3.

a birth certificate that is consistent with a person's gender identity³ is essential to basic social and economic well-being.⁴ Having identification that matches lived gender is "incredibly vital[,] as one's legal gender designation has the potential to impact many areas of life: the ability to marry, the ability to travel, the ability to inherit, insurance coverage, one's enrollment in the draft, where one might be incarcerated, and more."⁵ Each of these requires accurate documentation that reflects a person's true identity.⁶

Birth certificates with inaccurate gender markers expose trans⁷ people to potentially harmful disclosure of their transgender status. The disclosures subject trans people to pervasive violence, harassment, and discrimination.⁸ Trans people experience trauma and hardships throughout their lives, "being turned away or terminated from employment, denied equal access to public accommodations and health services, or harassed or attacked for being who they are. Having an ID that reflects and substantiates one's gender identity gives trans people agency over when and whether to disclose their gender history."⁹ So, what happens when a person is born in Tennessee and the gender assigned on their birth certificate does not correctly

³ "Gender identity" refers to every "person's basic sense of [gender]," and is a "deeply felt, core component of a person's identity." Everyone has a gender identity – not just transgender people. Gender identity may be congruent or incongruent with the doctor's determination of sex made at the time of birth. M. Dru Levasseur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 VT. L. REV. 943, 951 (2015).

⁴ Complaint for Declaratory and Injunctive Relief, *supra* note 1, at para. 3.

⁵ Leslie Dubois-Need & Amber Kingery, *Transgendered in Alaska: Navigating the Changing Legal Landscape for Change of Gender Petitions*, 26 ALASKA L. REV. 239, 241 (2009).

⁶ Complaint for Declaratory and Injunctive Relief, *supra* note 1, at para. 3.

⁷ Author uses the terms "trans" and "transgender" interchangeably to identify persons whose gender assigned at birth does not accurately reflect their gender identity.

⁸ Levasseur, *supra* note 3 at 946-47.

⁹ Anna James (AJ) & Neuman Wipfler, *Identity Crisis: The Limitations of Expanding Government Recognition of Gender Identity and the Possibility of Genderless Identity Documents*, 39 HARV. J. L. & GENDER 491, 496-97 (2016).

or accurately identify their gender identity? They're stuck with it.¹⁰

Tennessee is the only remaining jurisdiction that categorically bars trans people from changing the gender marker on their birth certificates to reflect their gender identity.¹¹ Tennessee's prohibition is explicit; section 68-3-203(d) states, "[T]he sex of an individual shall not be changed on the original certificate of birth as a result of sex-change surgery."¹² In contrast, Tennessee allows cisgender¹³ people to correct the sex listed on their birth certificates.¹⁴ In effect, this prohibition deprives trans people born in Tennessee of access to birth certificates they can use without unnecessary invasions of privacy and stigma but provides cisgender people with accurate birth certificates reflecting a gender consistent with their identity.¹⁵

Tennessee is an extreme outlier when it comes to anti-trans birth certificate policies. According to an interactive infographic supplied by the Movement Advancement Project (MAP), thirteen states allow their residents to mark male, female, or X on their birth certificates.¹⁶ Twenty-four states, one territory, and D.C. will issue a new birth certificate without a court order and do not require gender confirmation surgery.¹⁷ Although there are fourteen additional states and a territory that will permit trans people to change their gender marker, they require proof that the person has undergone gender confirmation surgery.¹⁸ While some states legislate these inclusive birth certificate policies, other states require judicial intervention by Federal Courts. Ohio is the most recent state to lose its

¹⁰ See TENN. CODE ANN. § 68-3-203(d) (2021).

¹¹ Identity DOCUMENT LAWS AND POLICIES, https://www.lgbtmap.org/equality-maps/identity_document_laws (last visited Sep. 10, 2021).

¹² TENN. CODE ANN. § 68-3-203(d) (2021).

¹³ "Cisgender" is used to describe people whose gender assigned at birth accurately reflects their gender identity. *Cisgender*, ATTORNEY'S DICTIONARY OF MEDICINE (2021).

¹⁴ Complaint for Declaratory and Injunctive Relief, *supra* note 1, at para. 5.

¹⁵ *Id.*

¹⁶ IDENTITY DOCUMENT LAWS AND POLICIES, *supra* note 11.

¹⁷ *Id.*

¹⁸ *Id.*

anti-trans birth certificate policy.¹⁹ A lawsuit filed in 2018, *Ray v. Himes*, survived a Motion to Dismiss in 2019²⁰ and the Court ultimately decided against the State.²¹ In the Opinion and Order, United States District Judge Michael H. Watson found that Ohio's policy "resembles the sort of discrimination-based legislation struck down under the equal protection clause . . . as nothing more than a Policy 'born of animosity toward the class of person affected' that has 'no rational relation to a legitimate government purpose.'"²² Will Tennessee be next?

That is for the United States District Court in the Middle District of Tennessee to decide. In 2019, Plaintiffs, trans persons born in the State of Tennessee, sued Governor Bill Lee and Commissioner of the Department of Health for their enforcement of the State's anti-trans birth certificate policy.²³ This comment studies that case, *Kayla Gore; Jason Scott; L.G.; and K.N. v. William Byron Lee et al.*, by introducing the parties, summarizing, analyzing, and discussing the litigation strategies, and reflecting on where the case is situated and how significant the lawsuit is to civil rights litigation.

II. GORE V. LEE: BACKGROUND, PARTIES, AND SUMMARY

A. KAYLA GORE AND HER FIGHT FOR TRANSGENDER RIGHTS

*"One of the most significant pieces of paper we have"*²⁴

- *Kayla Gore*

¹⁹ See Samy Nemir, *VICTORY! Transgender Ohioans to Get Their Day in Court in Lawsuit Against the State*, LAMBDA LEGAL (Sep. 12, 2019), https://www.lambdalegal.org/news/oh_20190912_victory-trans-ohioans-get-day-in-court.

²⁰ See *id.*

²¹ *Ray v. McCloud*, 507 F. Supp. 3d 925, 928 (S.D. Ohio 2020).

²² *Id.* at 940 (quoting *Romer v. Evans*, 517 U.S. 620, 634 (1996)).

²³ Complaint for Declaratory and Injunctive Relief, *supra* note 1.

²⁴ Molly Sprayregen, *Activist Kayla Gore is Building Tiny Homes for Trans Women of Color*, FORBES (Feb. 19, 2021, 5:09 PM), <https://www.forbes.com/sites/mollysprayregen/2021/02/19/activist-kayla-gore-is-building-tiny-homes-for-trans-women-of-color/?sh=66b9a93f5a5e>.

Allow me to introduce you to Kayla Gore; Ms. Gore was born in Memphis, Tennessee, and still lives there.²⁵ She is a trans woman and life-long advocate for lesbian, gay, bisexual, transgender, and queer (LGBTQ) rights.²⁶ Kayla dedicated her career to lifting barriers for LGBTQ people in the south by organizing and coordinating roles with regionally based organizations.²⁷ These organizations focus on facilitating the participation of LGBTQ people fully in their economic, social, and political life.²⁸

Today you'll find Kayla doing that same work at her organization, My Sistah's House, as the Executive Director.²⁹ What started with Kayla providing temporary housing for trans adults in her own home five years ago has evolved into an organization dedicated to providing emergency housing for trans people in need.³⁰ But that need is great; according to the National Center for Transgender Equality, "one in five trans people have experienced homelessness."³¹ That's why "My Sistah's House" has purchased a 30-acre plot of land and plans to build twenty tiny homes; the first two homes will finish construction in April of 2021.³²

Gore is also a lead plaintiff in the lawsuit challenging Tennessee's birth certificate policy.³³ Kayla's identity documents, including her Tennessee identification card, voter registration card, and social security records, reflect her name and gender consistent with her gender identity.³⁴ The only exception is her birth certificate³⁵ because Tennessee's birth certificate policy explicitly prohibits her from changing her gender marker.³⁶ For Kayla, the significance of having inaccurate birth certificate documents is paramount, as "[a birth certificate is] one of the most

²⁵ *Meet the Plaintiffs Challenging Tennessee's Discriminatory Birth Certificate Policy Against Transgender People*, LAMBDA LEGAL, <https://www.lambdalegal.org/gore-v-lee-tn-plaintiffs> (last visited Mar. 21, 2021) [hereinafter *Meet the Plaintiffs*].

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Sprayregen, *supra* note 24.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Meet the Plaintiffs*, *supra* note 25.

³⁵ *Id.*

³⁶ TENN. CODE ANN. § 68-3-203(d) (2021).

significant pieces of paper we have, we can't change it on there and that's a real concern for me as an advocate."³⁷ She's not alone.

Jason Scott, another lead plaintiff, is a 47-year old trans man who was also born in Memphis, Tennessee.³⁸ Mr. Scott currently lives in Seattle, Washington, where he works as a respiratory therapist in a hospital.³⁹ Jason corrected his identity documents, including his driver's license, to accurately reflect his name and gender identity in 1995.⁴⁰ But, because of Tennessee's policy, he cannot change the gender marker on his Tennessee birth certificate. Jason joins Kayla and two other plaintiffs who have chosen to proceed under pseudonyms L.G. and K.N., as named plaintiffs.⁴¹ The unnamed plaintiffs would effectively represent every trans person born in the State of Tennessee.

B. TENNESSEE'S GOAL TO MAINTAIN THE STATUS QUO

William Lee, known colloquially as Bill Lee, is the Republican Governor of Tennessee and named in his official capacity as the defendant in this case.⁴² Although not independently responsible for the existence of the birth certificate policy, Governor Lee must execute the laws of the state.⁴³ Governor Lee is well known for his conservative and often controversial policies. In 2020 Governor Lee signed a bill allowing adoption agencies to deny gay couples.⁴⁴ A spokesperson for Governor Lee stated, "[T]he governor believes that protection of rights is important, especially religious liberty."⁴⁵ The spokesperson said that Governor Lee signed the bill because it is "centered around protecting the religious liberty of Tennesseans."⁴⁶ In February of 2021,

³⁷ Sprayregen, *supra* note 24.

³⁸ *Meet the Plaintiffs*, *supra* note 25.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Complaint for Declaratory and Injunctive Relief, *supra* note 1.

⁴² *Id.* at 1.

⁴³ *Id.* at 6.

⁴⁴ Joel Ebert, *Tennessee Gov. Bill Lee signs bill allowing adoption agencies to deny gay couples*, USA TODAY (Jan. 25, 2020, 12:43 AM), <https://www.usatoday.com/story/news/nation/2020/01/24/tennessee-gay-adoption-gov-bill-lee-signs-anti-lgbt-measure/4570788002/>.

⁴⁵ *Id.*

⁴⁶ *Id.*

Governor Lee scrutinized the idea of trans athletes competing in women's sports, saying, "I do believe that transgenders participating in women's sports, it will ruin the opportunity for girls to earn scholarships it will put a glass ceiling back where there hasn't been one. I think it will destroy women's sports."⁴⁷ Suffice it to say, based on Governor Lee's track record, the likelihood is high that his beliefs align with the legislators who are responsible for drafting the anti-trans birth certificate policy. Commissioner Lisa Piercy is not as well-known, except that she is the Commissioner for the Tennessee Department of Health.⁴⁸ Commissioner Piercy is responsible for enforcing vital records laws in her official capacity, including the Vital Records Act.⁴⁹

C. GORE'S GOAL TO END TENNESSEE'S BIRTH CERTIFICATE POLICY

Plaintiffs request the Court to permanently enjoin the Defendants from enforcing Tennessee's Birth Certificate Policy,⁵⁰ to permit Trans people born in Tennessee to correct their birth certificates to list their gender identity accurately,⁵¹ and to issue corrected birth certificates to the named plaintiffs immediately.⁵² Plaintiffs also requested reasonable fees, including attorneys' fees.⁵³

III. ANALYZE THE LITIGATION

Two years after filing the initial Complaint, *Gore, v. Lee*, is still in its infancy. And with a protective order in place, some filings are irretrievable.⁵⁴ However, inasmuch that Tennessee is the last jurisdiction with a statute or policy

⁴⁷ John Madewell, *Update: TN Gov. Lee: Letting transgender athletes play "will destroy women's sports"*, NEWS CHANNEL 9 ABC (Feb. 9, 2021), <https://newschannel9.com/news/local/controversial-transgender-athletics-bill-moves-forward-in-tennessee-house>.

⁴⁸ Complaint for Declaratory and Injunctive Relief, *supra* note 1, at para. 20.

⁴⁹ *Id.*

⁵⁰ *Id.* at para. b.

⁵¹ *Id.* at para. c.

⁵² *Id.* at para. d.

⁵³ *Id.* at para. e.

⁵⁴ *Gore v. Lee*, No. 3:19cv328 (M.D. Tenn. filed Apr. 23, 2019.).

that directly prohibits trans people from correcting their birth certificate gender markers,⁵⁵ counsel for Plaintiffs had several compelling legal theories and documents to reference.

A. PUERTO RICO COURTS HAVE FOUND FORCED DISCLOSURE OF TRANSGENDER STATUS IS A VIOLATION OF AN INDIVIDUAL'S RIGHT TO PRIVACY

For instance, in Puerto Rico, Plaintiffs raised a Fourteenth Amendment right to privacy argument.⁵⁶ Under this theory, Plaintiffs argued that the inability to correct the gender marker on their birth certificates violated their decisional privacy because it forced them to disclose their transgender status.⁵⁷ Persuasive? Judge Cerezo thought so. “The Supreme Court recognizes that ‘a constitutional right to privacy is now well established.’”⁵⁸ Within that doctrine exists informational privacy, which “include[s] ‘the individual interest in avoiding the disclosure of personal matters’”⁵⁹ Puerto Rico’s policies permitting trans people to correct their name while prohibiting them from correcting their gender exposed them to a substantial risk of stigma, discrimination, intimidation, violence, and danger.⁶⁰ The Court ultimately held that “forced disclosure of transgender status violates the constitutional right to decisional privacy.”⁶¹ Traction in Puerto Rico undoubtedly led to advocates filing a similar case challenging Ohio’s policy that effectively placed trans Ohioans in the same position.

⁵⁵ IDENTITY DOCUMENT LAWS AND POLICIES, *supra* note 11.

⁵⁶ See *Gonzalez v. Nevares*, 305 F. Supp. 3d 327, 332 (D. P.R. 2018).

⁵⁷ *Id.* at 333.

⁵⁸ *Id.* at 332 (quoting *Daury v. Smith*, 842 F.2d 9, 13 (1st Cir. 1988)) (referring to *Roe v. Wade*, 410 U.S. 113 (1973)); *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

⁵⁹ *Gonzalez*, 305 F. Supp. 3d at 333 (quoting *Daury*, 842 F.2d at 13) (citing *Whalen v. Roe*, 429 U.S. 589, 599 (1977)).

⁶⁰ *Gonzalez*, 305 F. Supp. 3d at 333.

⁶¹ *Id.*

B. OHIO COURTS RULE THAT OHIO'S BIRTH
CERTIFICATE POLICY VIOLATES AN INDIVIDUALS'
RIGHT TO PRIVACY AND THE EQUAL PROTECTION
CLAUSE UNDER THE FOURTEENTH AMENDMENT

Advocates in Ohio built on the legal arguments raised by those in Puerto Rico. In *Ray v. Director, Ohio Department of Health*, legal advocates also raised the Constitutional right to privacy, but they didn't stop there.⁶² Ohio Plaintiffs also raised an Equal Protection Clause violation and a First Amendment Freedom of Speech violation.⁶³ The First Amendment of the Constitution provides that states "shall make no law . . . abridging the freedom of speech."⁶⁴ Ohio Plaintiffs argued that Ohio's birth certificate policy violates the First Amendment, which protects both the right to speak and the *right to refrain from speaking* since it forces trans people to disclose their trans status when they inevitably show their birth certificates to others.⁶⁵ They further argued that the policy prevents trans people from accurately expressing their gender.⁶⁶ "The gender marker listed on the Plaintiffs' birth certificates conveys the state's ideological message that gender is determined solely by the appearance of external genitals at the time of birth and never deviates from that."⁶⁷ Having found that the Ohio birth certificate policy violated the Plaintiff's Fourteenth Amendment protections under both theories – Right to Privacy and Equal Protection Clause – the Court declined to provide any analysis under the Plaintiff's First Amendment claims.⁶⁸ To say that advocates in Tennessee took a page out of the Ohio playbook would be an understatement. They took the entire playbook.

C. TENNESSEE

⁶² *Ray v. Dir., Ohio Dep't of Health*, No. 2:18-cv-272, 2018 U.S. Dist. LEXIS 174305, at *2 (S.D. Ohio 2018).

⁶³ *Id.*

⁶⁴ U.S. CONST. amend. I.

⁶⁵ Initial Complaint, *supra* note 62.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *See Ray v. McCloud*, 507 F. Supp. 3d 925, 940 (S.D. Ohio 2020).

While reading the initial complaint filed by Tennessee Plaintiffs, the adage comes to mind, “don’t reinvent the wheel.” Not only do Tennessee Plaintiffs raise the same constitutional violations that the plaintiffs raised in Ohio, but they do so using nearly identical language.⁶⁹ The District Court in Ohio found that the State’s policy prohibiting trans people from correcting their gender marker violated the Due Process Clause and the Equal Protection Clause.⁷⁰ Considering both states are in the same Federal Circuit, Tennessee’s judges will likely view the issue similarly.

This paper will analyze the strengths and weaknesses of the Plaintiffs’ claims under the Equal Protection Clause of the Fourteenth Amendment.

The Fourteenth Amendment of the United States Constitution states, in pertinent part, “[N]o State shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws.”⁷¹ To be successful in an Equal Protection claim, Plaintiffs must prove that they are being treated differently than similarly situated people.⁷² Once Plaintiffs establish a difference in treatment, the Court must determine what level of scrutiny to apply.⁷³ There is strong evidence to prove that Tennessee treats trans people born in Tennessee differently than cisgender people. The birth certificate policy explicitly prohibits trans people from correcting their gender markers, whereas cisgender people can correct theirs.⁷⁴ Additionally, adoptive parents are permitted to change their children’s birth certificates to reflect their new parentage.⁷⁵ In essence, the State issues Trans people unalterable birth certificates while allowing cisgender people to alter theirs. Thus, much of the advocacy wiggle room exists in determining what level of scrutiny to apply.

What is a level of scrutiny? Well, there are three of them: Rational basis, intermediate scrutiny, and strict

⁶⁹ Initial Complaint, *supra* note 62.

⁷⁰ *Ray*, 507 F. Supp. 3d at 940.

⁷¹ U.S. CONST. amend. XIV.

⁷² *Ray*, 507 F. Supp. 3d at 935.

⁷³ *Id.*

⁷⁴ Complaint for Declaratory and Injunctive Relief, *supra* note 1, at para. 5; TENN. CODE ANN. § 68-3-203(d) (2021).

⁷⁵ Complaint for Declaratory and Injunctive Relief, *supra* note 1, at para. 68.

scrutiny, and in a nutshell, they are the analytical framework applied to laws to determine whether or not they violate the United States Constitution. Depending on the classification of the affected group or groups, the higher the state's burden to prove that law is constitutional. Unless a “suspect class”⁷⁶ is implicated, most classifications are subject to Rational Basis review, which means the classification must be rationally related to a legitimate state purpose.⁷⁷ Historically, neither the Sixth Circuit nor the Supreme Court has explicitly acknowledged Trans people as a suspect class.⁷⁸ Thus, the default level of scrutiny, rational basis, would apply. However, courts do have the ability to find that a person belongs to a “discrete and insular minority.” Courts will look at a variety of factors: whether the person has an inherent trait, whether the person has a highly visible trait, whether the person is part of a class that has been disadvantaged historically, and whether the person is part of a group that has historically lacked effective representation in the political process. Plaintiffs assert that courts should classify trans people as a “discrete and insular minority” and argue that intermediate scrutiny should apply.⁷⁹ If the Court is persuaded and applies intermediate scrutiny, the State must prove that their birth certificate policy is substantially related to an important government interest.⁸⁰ There is an additional argument that although *Bostock* arose within a different context, the Supreme Court’s interpretation of Title VII’s “on the basis of sex” to include LGBT individuals is a persuasive indication that intermediate scrutiny should apply because it has historically applied in sex-based classification.⁸¹

What is the government’s interest in denying trans people the ability to correct their gender marker? It’s difficult to distinguish Tennessee’s legal argument because a

⁷⁶ Under Equal Protection, when a statute discriminates against an individual based on a suspect classification, that statute will be subject to either strict scrutiny or intermediate scrutiny. There are four generally agreed-upon suspect classifications: race, religion, national origin, and alienage. However, this is not an inclusive list.

⁷⁷ *Ray*, 507 F. Supp. 3d at 936.

⁷⁸ *Id.*

⁷⁹ Complaint for Declaratory and Injunctive Relief, *supra* note 1, at para. 190.

⁸⁰ *Ray*, 507 F. Supp. 3d at 936.

⁸¹ *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020).

Protective Order is in place, and the pending Motion to Dismiss is irretrievable.⁸¹ However, the State will assert that it has an important interest in maintaining accurate records, an argument raised by Ohio.⁸² Accurate records are undoubtedly important, but the fact that the State permits cisgender people to correct their gender marker and name weakens the State's argument.⁸³ There is a strong likelihood that courts will find any argument asserted by the State to be little more than an attempt to shroud blatant discrimination of trans people; thus, TENN. CODE ANN. § 68-3-203(d) would not survive rational basis review, let alone intermediate scrutiny.

IV. LAWYERING STRATEGY

Plaintiffs have made some interesting strategic choices. Two of the named Plaintiffs are proceeding under pseudonyms. This is likely a strategic move that supports their Due Process Clause argument regarding informational privacy. Plaintiff L.G. underwent clinically appropriate medical treatments for her gender dysphoria and took transitional steps to bring her outside appearance in conformity with her gender identity.⁸⁴ L.G. also asserts that the public perceives her as the woman she is, and her transgender status is not publicly known, even by most of her co-workers.⁸⁵ L.G.'s decision to proceed under pseudonym indicates the importance of informational privacy. Tennessee's birth certificate policy subjects L.G. to involuntary disclosure of her transgender status.

Plaintiffs' attorneys have used narrative in a way that triumphantly examines the invasion of privacy experienced by plaintiffs when forced to disclose their transgender status. "[N]arrative can be an effective tool to reveal the underlying discrimination . . . and to convince courts to 'disrupt' an entrenched social institution."⁸⁶ "As

⁸¹ *Gore v. Lee*, No. 3:19cv328 (M.D. Tenn. filed Apr. 23, 2019.).

⁸² *Ray*, 507 F. Supp. 3d at 938.

⁸³ Complaint for Declaratory and Injunctive Relief, *supra* note 1, at para. 5.

⁸⁴ *Id.* at para. 132.

⁸⁵ *Id.* at para. 133.

⁸⁶ Valorie K. Vojdik, *At War: Narrative Tactics in the Citadel and VMI Litigation*, 19 HARV. WOMEN'S L. J. 1, *2 (1996).

Jerome Bruner explains, we organize our experience and our memory of events in our lives primarily in narrative form as stories, excuses, or myths that explain our experience.”⁸⁷ “Narrative frames experience and provides a means of constructing meaning from events in the world.”⁸⁸ Drafting the complaint required the attorneys to provide a narrative explaining how Tennessee’s birth certificate policy harmed the plaintiffs. For example, in attempts to obtain employment, Ms. Gore has had to provide documentation that inaccurately states her gender, leading to potential employers’ deeply personal and invasive questions about her transgender status and transition.⁸⁹ “Ms. Gore has also felt dissuaded at times from pursuing employment opportunities because of the scrutiny her birth certificate would cause.”⁹⁰ Trans people face violence and experience discrimination in nearly every aspect of their lives. The narratives help the reader understand and give meaning to the trans experience.

V. LESSONS LEARNED

This lawsuit is incredibly significant to civil rights litigation because legislatures regularly target trans people. Even though 2020 brought wins in Ohio⁹¹ and the Supreme Court,⁹² the fight for trans equality has barely started. Mainstream LGBT civil rights organizations have long neglected the legal needs of trans people in the United States;⁹³ the result has been a calculated attack on the livelihood of a historically disenfranchised community. Specifically, 2021 is a record year for anti-trans legislation.⁹⁴ “Legislation filed this week marks the 80th, 81st, and 82nd

⁸⁷ *Id.* at *21 n. 10 (quoting Jerome Bruner, *The Narrative Construction of Reality*, 18 *Crit. Inquiry* 1, 4 (1991)).

⁸⁸ *Id.* at *21 n. 10 (quoting Jerome Bruner, *ACTS OF MEANING*, 56 (1992)).

⁸⁹ Complaint for Declaratory and Injunctive Relief, *supra* note 1, at para. 93.

⁹⁰ *Id.*.

⁹¹ See *Ray v. McCloud*, 507 F. Supp. 3d 925, 940 (S.D. Ohio 2020).

⁹² See *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020).

⁹³ Gabriel Arkles, et al., *Transgender Issues and the Law: The Role of Lawyers in Trans Liberation: Building a Transformative Movement for Social Change*, 8 *SEATTLE J. SOC. JUST.* 579 (2010).

⁹⁴ Wyatt Ronan, *BREAKING: 2021 Becomes Record Year for Anti-Transgender Legislation*, HUMAN RIGHTS CAMPAIGN (Mar. 13, 2021), <https://www.hrc.org/press-releases/breaking-2021-becomes-record-year-for-anti-transgender-legislation>.

anti-transgender bill introduced in the 2021 state legislative session, surpassing the 2020 total of 79 and marking the highest number of anti-transgender bills in history.”⁹⁵

Anti-Trans rhetoric isn’t a new phenomenon, but it has been brought to the forefront by former President Donald Trump and his political base.⁹⁶ Former President Trump’s controversial Trans military ban directly attacked former President Barack Obama’s promise to Trans individuals that they could serve openly and have access to gender-affirming medical and psychological care.⁹⁷ In addition, trans people are continuously being leveraged as political pawns to secure votes in the next general election. Candidates run on platforms dangling the basic human rights of Trans people like carrots on a string as if their value is little more than political fodder.

Trans people face discrimination on all fronts: housing, employment, education. They deal with verbal and physical assaults daily by the general public, and now they are forced to watch their rights debated on the public stage. Trans teens worry that they won’t have access to gender-confirming healthcare, correct their birth certificates, and sports teams; many now fear that their immutable traits will be sufficient to shield a healthcare professional from liability if they choose not to provide healthcare.⁹⁸ Throughout the history of civil rights movements, social and legal strategies of oppression ambushed groups of minorities. Today, Trans people experience such oppression at increasing rates. Three months into 2021 and the U.S. has surpassed the record for anti-trans legislation. Federal courts continue to lay the groundwork to support stronger trans protections by striking down state-level legislation.

If the Court severs Tennessee’s birth certificate policy from the vital statistics statute, legislators will surely draft laws requiring Trans people to receive gender confirmation surgery to correct birth certificate gender markers. Not

⁹⁵ *Id.*

⁹⁶ Hallie Jackson & Courtney Kube, *Trump’s controversial transgender military policy goes into effect*, NBC NEWS (Apr. 12, 2019, 11:53 AM), <https://www.nbcnews.com/feature/nbc-out/trump-s-controversial-transgender-military-policy-goes-effect-n993826>.

⁹⁷ *Id.*

⁹⁸ Dan Levin, *A Clash Across America Over Transgender Rights*, N.Y. TIMES (last updated June, 15 2020), <https://www.nytimes.com/2020/03/12/us/transgender-youth-legislation.html>.

because Tennessee has any such substantial interest in ensuring that Trans people's external genitalia matches the majority's perception of the gender binary, but because it's a legislative tactic to burden Trans people's ability to move about and live freely. Thus, the next step is to challenge state laws requiring Trans people to have gender confirmation surgery to change legal documentation. I believe the answer lies in the First Amendment -- Freedom of Expression.

Plaintiffs in Ohio argued that the Ohio policy prevented trans people from accurately expressing their gender: "The gender marker listed on the Plaintiffs' birth certificates conveys the state's ideological message that gender is determined solely by the appearance of external genitals at the time of birth and never deviates from that."⁹⁹ Freedom of Speech is a fundamental right enumerated in the Constitution and thus subject to strict scrutiny, meaning states must prove that requiring trans people to get gender confirmation surgery is a narrowly-tailored law in furtherance of a compelling state interest.¹⁰⁰ The Court elected not to address the Ohio Plaintiff's First Amendment Argument. Still, the state interest would be the same, and the Court indicated that the interest wouldn't meet rational basis, let alone strict scrutiny.¹⁰¹

The freedom of speech and expression in the First Amendment guarantees the preservation of the LGBT community's right to openly speak and express themselves in ways that agree with their identities.¹⁰² Often, a person's LGBT status is not immediately apparent and they must "speak" – through conduct or expression – to make their status known.¹⁰³ This "speech" is indispensable because it empowers LGBT people to affirm their identity and participate equally, and with dignity, in society.¹⁰⁴ "Courts have increasingly applied this principle to government laws

⁹⁹ Complaint at para. 128, *Ray v. Dir.*, Ohio Dep't of Health, No. 2:18-cv-00272-MHW-CMV, 2018 WL 1570363 (S.D. Ohio 2018).

¹⁰⁰ *Ray v. McCloud*, 507 F. Supp. 3d 925, 932 (S.D. Ohio 2020).

¹⁰¹ *Id.* at 940 n.11.

¹⁰² Kara Ingelhart, Jamie Gliksberg & Lee Farnsworth, *LGBT Rights and the Free Speech Clause*, AMERICAN BAR ASSOCIATION (April 14, 2020), https://www.americanbar.org/groups/gpsolo/publications/gp_solo/2020/march-april/lgbt-rights-free-speech-clause/.

¹⁰³ Kelly Wessels, *Constitutional Law Chapter: The First Amendment and Expression of Sexual Orientation*, 5 *Geo. J. Gender & L.* 109 (2004).

¹⁰⁴ Ingelhart, *supra* note 103.

and regulations that directly target certain behavior or that have the effect of stifling or discouraging identity-affirming speech or expression.”¹⁰⁵ Relying on the freedoms of speech and expression to advance LGBT rights isn’t as avant-garde an approach as one might think. First Amendment law was *the* approach to further LGBT rights even before the Fourteenth Amendment’s substantive due process and equal protection extended constitutional rights for the LGBT community. ¹⁰⁶ But, its use isn’t obsolete. Rather, it’s an appropriate vessel to challenge laws that restrict a person’s autonomy with respect to gender expression and identity. We see this in *Obergefell*. The opinion’s opening lines observed that the Constitution protects “a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”¹⁰⁷

Trans people are entitled to First Amendment protections with respect to their ability to “freely identify and express their gender in a way that aligns with *their* personal definition.”¹⁰⁸ As in *Obergefell*, courts continue to recognize the principles at stake concerning policies that restrict free expression.¹⁰⁹ One recent example of the First Amendment being used to thwart anti-LGBT federal policies is the 2017 policy known colloquially as the trans military ban. A federal lawsuit asserted, among other claims, that the ban was a “violation of service members’ First Amendment rights to free speech and expression.”¹¹⁰ In that case, the federal district court issued an injunction, holding “[p]laintiffs were likely to succeed in showing that the transgender military service ban violated the First Amendment for penalizing transgender people for speech that discloses that they are transgender, or conduct consistent with their gender

¹⁰⁵ *Id.*

¹⁰⁶ Jason M. Shepard, *The First Amendment and the Roots of LGBT Rights Law: Censorship in the Early Homophile Era, 1958-1962*, 26 Wm. & Mary J. Race, Gender & Soc. Just. 599, 599 (see three landmark decisions by the Supreme Court of the United States: *One, Inc. v. Olesen*, 355 U.S. 371 (1958); *Sunshine Book Co. v. Summerfield*, 355 U.S. 372 (1958); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478 (1962)).

¹⁰⁷ Timothy Zick, *The Dynamic Relationship Between Freedom of Speech and Equality*, 12 Duke J. Const. Law & Pub. Pol’y 13, 14 (quoting *Obergefell v. Hodges*, 576 U.S. 644 (2015)).

¹⁰⁸ Ingelhart, *supra* note 103.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

identity. . . .”¹¹¹ Government regulations that restrict First Amendment protections are subject to the highest level of scrutiny and provide just one more useful tool for fighting against government actions that discriminate against LGBT people.

The First Amendment is a great mechanism to contest state requirements that trans persons undergo gender confirmation surgery to correct the gender marker on their birth certificates. The state’s cognizable state interest would not meet the standard required to overcome First Amendment protections. Social constructionist theories of gender establish that dress, appearance, and other behavior communicate the social meaning of gender and should qualify as communicative under the First Amendment.¹¹² By requiring a trans person to undergo a clinical procedure to correct the gender marker on an ID document, like a birth certificate, the State’s interest is suppressing gender nonconformity, violating freedom of speech under the governing *O’Brien* doctrine.¹¹³ “Under *O’Brien*, government regulations of conduct are subject to the First Amendment when the government’s interest is related to expression.”¹¹⁴ The “bedrock principle” is that “the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹¹⁵ As discussed in *Texas v. Johnson*, “the state’s concerns with flag burning ‘blossom only when a person’s treatment of the flag communicates some message”¹¹⁶ Similarly, clinical procedure requirements for trans people who want to correct the gender marker on their birth certificates to reflect their gender identity accurately penalize trans people for expressing gender nonconformity. Trans people are trying to live their true lives while constantly facing challenges to their existence. Plaintiffs should not abandon the successful Fourteenth Amendment arguments used in federal courts because of the First Amendment approach. Instead,

¹¹¹ *Id.*

¹¹² Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. OF WOMEN & L. 187, 200-01 (2013).

¹¹³ *See id.* at 192.

¹¹⁴ *Id.* at 211.

¹¹⁵ *Id.* at 211 (quoting *Tex. v. Johnson*, 491 U.S. 397, 414 (1989)).

¹¹⁶ *Id.* at 211 (quoting *Johnson*, 491 U.S. at 410).

advocates should be aware of this additional tool in their fight for trans rights. I leave you with Judge Cerezo's words.

The right to identify our own existence lies at the heart of one's humanity. And so, we must heed their voices: "the woman that I am," "the man that I am." Plaintiffs ... have stepped up for those whose voices, debilitated by raw discrimination, have been hushed into silence. They cannot wait for another generation, hoping for a lawmaker to act. They, like Linda Brown, took the steps to the courthouse to demand what is due: their right to exist, to live more and die less.¹¹⁷

¹¹⁷ *Arroyo Gonzalez v. Rossello Nevares*, 305 F.Supp.3d 327, 334 (D. P. R. 2018).