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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Helen Roe, a minor, by and through her parent and next friend Megan Roe; James Poe, a minor, by and through his parent and next friend Laura Poe; and Carl Voe, a minor, by and through his parent and next friend, Rachel Voe,

Plaintiffs,

v.

Jennie Cunico, in her official capacity as State Registrar of Vital Records and Director of the Arizona Department of Health Services,

Defendant.

NO. 4:20-cv-00484-JAS

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Jennie Cunico ("the Director") understands the inherent challenges that transgender people face in navigating their daily lives when they do not have identity documents that are consistent with their gender identity and has empathy for Plaintiffs and other class members faced with those challenges. The Director also understands Plaintiffs' desire to have a convenient method by which they could obtain an amended birth certificate. But it is not within the Director's power to enact the procedure Plaintiffs propose because the Director is obligated to follow and implement the law as written.

Under current Arizona law, any Arizonan may request that the Arizona Department of Health Services ("the Department") amend the "sex" field on their Arizona birth record. Such a request must be accompanied by one of two different forms of documentation: (1) a court order directing the Department to amend the sex field on the individual's birth certificate; *or* (2) a written verification from a physician that the individual has either "undergone a sex change operation"[1] or has a chromosomal count that establishes that their sex is different from what was recorded in their birth certificate. *Any* individual can petition the superior court for an order directing the Department to amend their birth certificate, and the superior court has broad discretion to order amendments and seal documents. This process may not be satisfactory to Plaintiffs, but it is not unconstitutional. The Court should grant summary judgment in favor of the Director.

I. Background.

A. Arizona's Vital Records Laws.

Arizona has a long history of preparing and preserving accurate vital records, dating back to 1913, when its first State Legislature mandated that "[a]ll births that occur in this state shall be immediately registered in the districts in which they occur." Rev. Stat. Ariz., Civ. tit. 41, § 4416 (1913) (Appendix ("App.") 1). The "state board of health," through the

[1] The Director uses the phrase "sex change operation" throughout this Motion only because it appears in A.R.S. § 36-337(A)(3). It is not intended to discount other terms used by medical professionals or members of the transgender community, nor is it intended to suggest that *all* transgender persons must undergo some kind of surgical procedure. Indeed, the Director does not dispute that some transgender people do not pursue any form of surgery as part of their transition process. (DSOF ¶ 1.)

"central bureau of vital statistics" and with the assistance of "county boards of health" and "local registrar[s]," was charged with "obtaining and preserving" "accurate" birth records, "insur[ing] their faithful registration," and the "uniform and thorough enforcement" of the vital records laws. *Id.* §§ 4404, 4405, 4406, 4423. Anyone who failed "to make prompt and complete returns of birth" was subject to removal from office and other penalties. *Id.* §§ 4408. "[U]niform observance of [the vital records laws] and the maintenance of a perfect system of registration" was mandated. *Id.* § 4422; s*ee also id.* §§ 4423, 4424, 4428.

The process started at the place and moment of birth, where the attending physician or midwife was required to "properly and completely" fill out a birth certificate and file it with the local registrar within five days after the date of birth. *Id.* § 4417. Necessary information included the place of birth, name of child, "[s]ex of the child," "[w]hether a twin, triplet, or other plural birth," "[w]hether legitimate or illegitimate," the name, residence, birthplace, birthdate, occupation, and race of the child's father and mother, the "[n]umber of child of this mother, and number of children of this mother now living," whether the child was "[b]orn at full term," and a certification by the attending physician or mid-wife stating the "year, month, day, and hour of birth and whether the child was alive or dead at birth." *Id.* § 4418. Incomplete birth certificates were invalid, *id.*, and it was a misdemeanor to include false information on a birth certificate, *id.* § 4427.

In 1925, the Arizona Legislature replaced these laws with the State Code of Vital Statistics. 1925 Ariz. Sess. Laws, ch. 37, §§ 1, 24 (7th Leg., Reg. Sess.) (H.B. 16) (App. 2). The substantive laws remained largely the same. *See id.*, §§ 2–5, 13–23. Relevant here, a birth certificate still required the attending physician or midwife—that is, the physician or mid-wife "in attendance" of birth—to include in the birth certificate the "[s]ex of child." *Id.*, § 14(3). The Legislature expressly declared that the information included in a birth certificate was "necessary for the legal, social, and sanitary purposes subserved by registration records," *id.*, § 14, and that "the preservation of the public peace, health and safety makes it necessary that the provisions of this Act shall become immediately operative," *id.*, § 26. It also authorized "the United States Census Bureau [to] obtain,

without expense to the State, transcripts or certified copies of births and deaths without payment of the fees herein prescribed." *Id.*, § 21.

In the decades that followed, the vital records laws moved to other titles and chapters within Arizona's Civil Code, but the relevant substance remained the same, with notable additions discussed below. *See*, *e.g.*, Ariz. Rev. Code §§ 2725–2726, 2733–2742 (1928) (App. 3); Ariz. Code §§ 68-601–602, 610–618 (1939) (App. 4); 1945 Ariz. Sess. Laws, ch. 12, §§ 1–6 (17th Leg., 1st Reg. Sess.) (H.B. 18) (App. 5); 1952 Ariz. Sess. Laws, ch. 27, §§ 3–16 (20th Leg., 2nd Reg. Sess.) (H.B. 76) (App. 6); Ariz. Rev. Stat. ("A.R.S.") §§ 33-300 to -333 (1956) (App. 7); 1967 Ariz. Sess. Laws, ch. 77, §§ 2–3 (28th Leg., 1st Reg. Sess.) (H.B. 137) (A.R.S. §§ 36-301 to -326, -332, -337, -338, -342 to -347) (App. 8).

In 1928, the Legislature declared that a properly certified birth certificate is "prima facie evidence of the facts therein stated." Ariz. Rev. Code § 2740. In 1945, the Legislature amended the vital records laws to authorize the preparation of a "supplementary certificate" "[i]n cases of adoption" "upon receipt of a certified copy of an order or decree of adoption." 1945 Ariz. Sess. Laws, ch. 12, § 4 (amending Ariz. Code § 68-616a (1939)).

In 1952, the Legislature: (1) authorized the "state board of health" to use the information contained in birth certificates "for research and statistical purposes … or … by federal, state, county and municipal agencies for the verification of data required in the conduct of their duties," 1952 Ariz. Sess. Laws, ch. 27, § 6 (amending Ariz. Code § 68-616(d) (1939)); and (2) authorized a "supplementary certificate of birth," upon receipt of a court order, when a person was adopted or their parents married, *id.*, § 8 (amending Ariz. Code § 68-624 (1939)).

In 1967, the Legislature removed the statutory requirements for information included in a birth certificate (former Ariz. Code § 68-610 (1939)) and replaced it with a requirement that the "form of certificates" "shall include as a minimum the items recommended by the federal agency responsible for national vital statistics subject to approval of and modification by the state board of health." 1967 Ariz. Sess. Laws, ch. 77, § 2 (A.R.S. § 36-321(A)). It also reaffirmed that data in birth certificates may be furnished to federal, state,

local, or other such agencies "for statistical or research purposes." *Id.* (A.R.S. § 36-341(E)). Finally, it permitted the "state registrar" to issue a new birth certificate upon proof of adoption or legitimacy, *id.* (A.R.S. § 36-326(A)(1)–(3)), or submission of a "sworn statement from a licensed physician in good standing that he has performed a surgical operation or a chromosomal count on a person and that by reason of this operation or count the sex of the person has been established as different from that in the original documents," *id.* (A.R.S. § 36-326(A)(4)).[2]

In 2004, the Legislature revamped the vital records laws again. 2004 Ariz. Sess. Laws, ch. 117, §§ 7–8 (46th Leg., 2nd Reg. Sess.) (H.B. 2200) (App. 10). In relevant part, it:

- Defined "certificate" to mean "a record that documents a birth" and defined "amend" to mean "a change, other than a correction, to a registered certificate by adding, deleting, or substituting information on that certificate." *Id.*, § 8 (A.R.S. § 36-301(2), (4)).
- Directed the State Registrar to "[a]dopt rules to implement a statewide system of vital records pursuant to this Chapter," including the content to be included in birth certificates, "using the recommendations of the federal agency responsible for national vital statistics as guidelines subject to modification by the state registrar." *Id.* (A.R.S. §§ 36-302(B)(1), -333(A)).
- Directed the State Registrar to prescribe "by Rule the information required to be submitted to create or amend a vital record," *id.* (A.R.S. § 36-321(A)), and "amend a registered certificate pursuant to this Chapter and Rules adopted pursuant to this Chapter," *id.* (A.R.S. § 36-323(A)).

The Legislature kept in (albeit slightly modified) the provision directing the State Registrar to amend a birth certificate upon proof of a surgical operation or chromosomal count that established the "sex" different from that in the original birth certificate, *id.* (A.R.S. § 36-337(A)(3)), and added an additional amendment directive: the State Registrar "shall amend

[2] In 1973, the Department of Health Services replaced the state board of health. *See* 1973 Ariz. Sess. Laws, ch. 158, § 1 (31st Leg., 1st Reg. Sess.) (H.B. 2004) (App. 9).

the birth certificate for a person in this state when [it] receives … a court order ordering an amendment to a birth certificate," *id*. (A.R.S. § 36-337(A)(4)).

The current vital records laws are substantially similar, if not identical, to the 2004 amendments in all relevant respects, including:

- The State Registrar is charged with adopting and implementing rules, "using the recommendations of the federal agency responsible for national vital statistics as guidelines," "[p]rescrib[ing] and distribut[ing] [required] forms," "prescribe[ing] by rule the information required to be submitted to create or amend a vital record," and "amend[ing] a registered certificate pursuant to this chapter and rules adopted pursuant to this chapter." A.R.S. §§ 36-302(B)(1), (4), (7), (11), -321(A), -323(A).
- A birth certificate must be submitted "[w]ithin seven days after a child's birth." A.R.S. § 36-333(A).
- "If the birth occurs at a hospital, the chief administrative officer of the hospital or that person's designee shall … [o]btain the information for a birth certificate … [and] [f]ill out the birth certificate." A.R.S. § 36-333(B). If a birth does not occur at a hospital, someone (physician, nurse, midwife, parent, or family member) who was "present at the birth" must "obtain the information" for and "fill out the birth certificate." A.R.S. § 36-333(C).
- A birth certificate can only be registered if it is "accurate and complete." A.R.S. § 36-333(E).
- The State Registrar "shall amend" a birth certificate "when [she] receives … an adoption certificate or a court order for adoption required pursuant to § 36-336," A.R.S. § 36-337(A)(1), or "[a] voluntary acknowledgment of paternity pursuant to § 25-812," A.R.S. § 36-337(A)(2).
- The State Registrar "shall amend" a birth certificate "when [she] receives … [f]or a person who has undergone a sex change operation or has a chromosomal count that establishes the sex of the person as different than in

the registered birth certificate, both of the following: (a) A written request for an amended birth certificate from the person or, if the person is a child, from the child's parent or legal guardian. (b) A written statement by a physician that verifies the sex change operation or chromosomal count." A.R.S. § 36-337(A)(3).

- The State Registrar "shall amend" a birth certificate "when [she] receives … [a] court order ordering an amendment to a birth certificate." A.R.S. § 36-337(A)(4).
- A registered birth certificate "is prima facie evidence of the facts stated in the certificate." A.R.S. § 36-345.
- It is a crime to knowingly submit "false information" to be used in the creation or amendment of a birth certificate. A.R.S. § 36-344(A).
- The United States public health service is entitled to receive information from the State Registrar "to prepare national vital statistics," A.R.S. § 36-324(C), and the State Registrar "may provide information contained in vital records to … federal, state, local and other agencies, as required by law and for statistical or research purposes," A.R.S. § 36-342(A).

In accordance with these statutory directives and authority, the Arizona Administrative Code ("A.A.C.") requires a birth record to include "[t]he individual's sex," A.A.C. R9-19-201(A)(3)(a), which can be reported as either "male," "female," or "not yet determined." (DSOF ¶ 2.) That requirement comports with the U.S. Standard Certificate of Live Birth, issued by the Centers for Disease Control and Prevention, National Center for Health Statistics ("NCHS"). (DSOF ¶ 3.)

The A.A.C. also sets forth administrative processes to amend various aspects of an individual's birth record. *See* A.A.C. R9-19-208. The general rule is that an individual seeking an amendment must submit to the State Registrar (1) a written request, (2) a "copy of a court order to amend the individual's birth record," and (3) an administrative fee. A.A.C. R9-19-208(B). That general rule comports with the NCHS's Model State Vital

Statistics Act and Regulations ("Model"). (DSOF ¶ 4.) However, also consistent with the NCHC's guideline that amendments may be made "in accordance with … regulations adopted by the State Agency" (DSOF ¶ 5), the A.A.C. requires an individual requesting certain amendments to follow other processes. *See* A.A.C. R9-19-208(C)–(O); *see generally* A.A.C. R9-19-208(B). A.A.C. R9-19-208(O) provides:

> To request an amendment to an individual's registered birth record when the individual has undergone a sex change operation or has had a chromosomal count that establishes the sex of the individual as different than in the individual's registered birth record, an individual … shall submit to the State Registrar or a local registrar: 1. a written request … 2. A written statement on a physician's letterhead paper, signed and dated by the physician, that the individual has … [u]ndergone a sex change operation, or … [h]ad a chromosomal count that establishes the sex of the individual as different from that in the individual's registered birth record[,] … [and] 4. The [administrative] fee ….

That process is slightly different than the guideline in the NCHS's Model, which allows for an amendment to the sex field *only* "*[u]pon receipt of a certified copy of an order of (a court of competent jurisdiction)* indicating the sex of an individual … has been changed by surgical procedure." (DSOF ¶ 6.)

The Department has assisted with procuring—and has received and honored—court orders to change the sex field on a person's birth certificate.[3] (DSOF ¶ 7.)

B. Plaintiffs' Allegations.

Plaintiffs are transgender individuals. (Dkt. 47, ¶ 1.) They would like to amend the sex field on their original birth certificates so that it is consistent with their gender identity. (*Id*., ¶ 19.) Plaintiffs acknowledge that § 36-337(A)(4) and R9-19-208(B) allow sex-field amendments if they secure a court order and submit it to the State Registrar, but that route, they claim, is "expensive, confusing, and time-consuming" and "does not guarantee that they will receive a corrected birth certificate." (*Id*., ¶¶ 6, 50–55.) Instead, they want to use the "direct and private administrative process" set forth in § 36-337(A)(3) and R9-19-

[3] In 2017, a state court Administrative Law Judge ruled that the documentation required by § 36-337(A)(3) and R9-19-208(O) is not required to secure a court order under § 36-337(A)(4) and R9-19-208(B). (DSOF ¶ 8.)

208(O) "[f]or a person who has undergone a sex change operation or has a chromosomal count that establishes the sex of the person as different than in the registered birth certificate." (*Id*., ¶¶ 5, 55.) But they contend that the "surgical requirement" in § 36-337(A)(3) and R9-19-208(O) precludes them from using that available process. (*Id*.)

Thus, Plaintiffs assert that § 36-337(A)(3) and R9-19-208(O) are unconstitutional because they "impermissibly discriminate[] against transgender people on the basis of sex and transgender status," in violation of the Equal Protection Clause, and deprive them of their rights to "privacy," to "define and express their identity," and to "choose whether to undergo a particular medical treatment," in violation of the Due Process Clause. (*Id*., ¶¶ 57, 116, 125, 129, 137, 141–142 & at 33, ¶ B.) They further argue that § 36-337(A)(3) and R9-19-208(O) deprive them of their ability to amend their birth certificates to reflect their gender identity, whereas "nontransgender peers … can have accurate birth certificates." (*Id*., ¶ 125.)

II. Legal Standard and Scope of Claims.

Summary judgment is appropriate where the record shows that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Whereas, at the pleading stage, this Court's review was limited to the allegations in the Amended Complaint, which it was required to accept as true and construe in the light most favorable to Plaintiffs, *Walter v. Drayson*, 538 F.3d 1244, 1247 (9th Cir. 2008), Plaintiffs have the burden at the summary-judgment stage to support their claims with facts. Fed. R. Civ. P. 56(c), (e). They "cannot rest upon mere allegations" in their Amended Complaint. *Woodward v. U.S. Customs & Border Prot.*, 2022 WL 294214, at *7 (D. Ariz. Feb. 1, 2022).

The scope of Plaintiffs' claims has also changed since the pleading stage. Plaintiffs have dropped their as-applied challenge, and they are now "exclusively asserting a facial challenge." (Dkt. 153 at 3 & n.4.) In addition, in seeking class certification, Plaintiffs clarified that the class is comprised of "[a]ll transgender individuals," not just transgender minors. (Dkt. 181 at 5; Dkt. 214 at 3–8.) These modifications are not insignificant.

Because Plaintiffs pursue only a facial challenge on behalf of a much broader class, their burden is exceedingly more difficult—they must "establish that no set of circumstances exists under which [§ 36-337(A)(3) and R9-19-208(O)] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). In other words, they must show that the statute and regulation are "unconstitutional in every conceivable application." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998). "[W]hen reviewing a facial challenge, [a court is] limited to reviewing the text of the statute itself, not what others have said the statute means. How the statute has been interpreted and applied by local officials is the province of an as-applied challenge, which is not before us today." *Calvary Chapel Bible Fellowship v. Cnty. of Riverside*, 948 F.3d 1172, 1177 (9th Cir. 2020).

Facial "challenges are considered the most difficult to mount successfully." *Willis v. City of Seattle*, 943 F.3d 882, 886 (9th Cir. 2019). They are disfavored because "[c]laims of facial invalidity often rest on speculation," they "run contrary to the fundamental principle of judicial restraint," and they "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449–50 (2008). Courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Id.* Rather, they must presume that legislative acts are constitutional. *United States v. Schlesinger*, 2021 WL 5579235, at *2 (D. Ariz. Nov. 29, 2021); *see also Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) ("A ruling of unconstitutionality frustrates the intent of the elected representatives of the people.").

III. The Court Should Grant the Director Summary Judgment on all Claims.

A. Plaintiffs' Substantive Due Process Claims Fail Because Arizona's Vital Records Laws Do Not Deprive Them of Their Rights.

The Fourteenth Amendment's Due Process Clause forbids the government from depriving individuals "certain 'fundamental' liberty interests, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."

Reno v. Flores, 507 U.S. 292, 302 (1993); *see also Daniels v. Williams*, 474 U.S. 327, 331 (1986) (holding that the purpose of the Due Process Clause is "to prevent governmental power from being 'used for purposes of oppression'") (citation omitted). Assuming for purposes of this motion that Plaintiffs have identified a protected fundamental liberty interest, they cannot demonstrate that Arizona's vital records laws—on their face—deprive them of any liberty interest. Plaintiffs allege that Arizona's vital records laws "entirely prevent[] [them] from changing the sex listed on their Arizona birth certificates," which, in turn, "requires them to disclose their transgender status" (privacy), "subject[s] them to the risk of exposure, stigma, discrimination, harassment, and violence" (autonomy), and "pressures [them] into undergoing surgeries that may be medically unnecessary" (bodily integrity). (Dkt. 47, ¶¶ 53, 132, 137, 142.) Plaintiffs mischaracterize the laws' framework and effect. *See Stambaugh v. Killian*, 398 P.3d 574, 575, ¶ 7 (Ariz. 2017) ("In construing a specific provision, we look to the statute as a whole ….").

Arizona's vital records laws, on their face, do not prevent Plaintiffs or anyone from requesting an amendment to their birth certificate. Additionally, the regulations' "private administrative processes," on their face, do not exclude anyone. Any person who wants to request an amendment to their registered birth record must submit to the Department a "written request to amend," A.A.C. R9-19-208(A)(1)–(4), and specific supporting documentation, *id.*, (A)(5). Some form of supporting documentation is required for *all* requests to amend a birth record. *See generally* A.A.C. R9-19-208. For example, a person seeking an amendment to their registered birth record "because of a hospital error" must submit a "written statement attesting to the validity of the submitted amendment, signed and dated by" either "the hospital administrator or the person in charge of the hospital's medical records." A.A.C. R9-19-208(C)(1)(c). A person seeking an amendment to their birth record to add a first name, middle name, or suffix "90 days or less after the individual's birth" must submit an "affidavit attesting to the validity of the submitted amendment, signed" by "[e]ach parent whose name is included in the individual's birth record" or "[t]he individual's guardian." A.A.C. R9-19-208(E)(1)(c).

A court order is another form of documentation that can support an application to amend a birth record. *See* A.R.S. § 36-337(A)(1) (the Department "shall amend" a birth certificate upon receipt of "a court order for adoption"); A.R.S. § 36-337(A)(4) (the Department "shall amend the birth certificate for a person born in this state" upon receipt of a "court order ordering an amendment to a birth certificate"); A.R.S. § 36-337(B)(1) (the Department "shall" amend the name of the father on a birth certificate upon receipt of "an administrative order or a court order ordering the [Department] to change the father's name"). Although some court orders that may serve as support for an amendment request may arise in the context of other court proceedings, such as adoption proceedings, A.A.C. R9-19-208(M), or a paternity action, A.A.C. R9-19-208(L), *any* Arizonan may file an action to amend *any* information on a birth record pursuant to § 36-337(A)(4). And Arizona courts have broad authority to order amendments to birth certificates based on § 36-337(A)(4)—the "plain language of the statutory scheme establishes that a trial court may order [the Department] to add, delete, or substitute information on birth certificates beyond changing the names of the parties identified." *McLaughlin v. Swanson*, 476 P.3d 336, 338 ¶ 9 (Ariz. App. 2020). Arizona courts "have the authority and discretion to amend a birth certificate when petitioned to do so and when appropriate in a particular case." *Id.*, ¶ 10 (internal quotation marks omitted). Additionally, Arizona courts have recognized that "[n]o language in the [Department's] regulation[s] limits the court's discretion" in ordering changes to birth records. *Id*. As noted above, the Department has received court orders directing it to amend the sex field on a birth record as supporting documentation for amendment requests and has processed those requests and issued amended birth certificates. (DSOF ¶ 7.)

Arizona law also allows persons seeking a court order directing an amendment to a birth record to request that a court seal such a request, including the case-initiating document. *See* Ariz. R. Civ. P. 5.4(c) (outlining standard for sealing a document); *id*., 5.4(i) (outlining the procedure for sealing a case-initiating document). Courts in other jurisdictions have recognized that transgender persons have a substantial interest in sealing

court documents that could reveal their transgender status. *See*, *e.g.*, *Matter of T.I.C.-C.*, 271 A.3d 350, 360 (N. J. App. 2022) (finding trial court abused its discretion in denying request to seal name change because substantial evidence demonstrated that "requiring that appellant's name change application be publicly available … would violate appellant's right to privacy and could heighten the risk of physical harm to appellant[.]"); *In re A.L.*, 81 N.E.3d 283, 290–91 (Ind. App. 2017) (finding that transgender man established that "he would face a significantly higher risk of violence, harassment, and homicide" and ordering records sealed). This Court has as well. (Dkt. 49.)

Yet another form of documentation that the Legislature has directed the Department to accept to support an application to amend a birth certificate is a "written statement by a physician" verifying one of two circumstances: (1) that a person has undergone a sex change operation; or (2) that a person has a chromosomal count that establishes that their sex is different than that in the registered birth certificate. A.R.S. § 36-337(A)(3); A.A.C. R9-19-208(O). As discussed below, that *additional alternative* form of documentation does not result in a deprivation of a fundamental liberty interest.

1. Arizona's vital records laws do not deprive Plaintiffs of any privacy rights.

Plaintiffs contend that Arizona's vital records laws deprive them of privacy rights because when they are required to show their birth certificates to people to enroll in school or recreational activities, it reveals their "transgender status" because the birth certificate "does not match who they are." (Dkt. 47, ¶¶ 3–4, 42–43.) But Arizona's vital records laws do not, on their face, prevent any transgender person from obtaining a birth certificate that is consistent with their gender identity, nor do they force any transgender person to reveal their transgender status.

As discussed above, Plaintiffs (and all Arizonans) *can* obtain a birth certificate with an amended sex field via a sealed court proceeding/order and private administrative application to the Department. *See McLaughlin*, 476 P.3d at 338 ¶ 9; A.R.S. § 36-337(A)(4); A.A.C. R9-19-208(B); Ariz. R. Civ. P. 5.4(c), (i). Plaintiffs do not challenge

the constitutionality of § 36-337(A)(4) or R9-19-208(B), thereby acknowledging they are constitutional in at least that circumstance. *Foti*, 146 F.3d at 635. Rather, Plaintiffs claim they cannot utilize § 36-337(A)(4) or R9-19-208(B). But Plaintiffs *can* utilize § 36-337(A)(4) and R9-19-208(B); they just choose not to do so. The Director does not discount Plaintiffs' asserted reasons for that choice—that is, pursuing a court order "is more expensive, confusing, and time-consuming[,] … does not guarantee that they will receive a corrected birth certificate at the end," and "create[s] an easily accessible public record." (Dkt. 47, ¶¶ 6, 54.)

On their face, though, neither § 36-337 nor R9-19-208 deprives anyone of the ability to request an amendment to their birth certificate or creates an accessible public record. Based on the plain text of current Arizona law, a person wanting to amend the sex field on their birth certificate could obtain a sealed court order directing the Department to amend the sex field on their birth certificate and then utilize § 36-337(A)(4) and R9-19-208(B) to obtain an amended birth certificate. That is enough to withstand a facial constitutional challenge. *Salerno*, 481 U.S. at 745; *see also Hayes v. Cont'l Ins. Co.*, 872 P.2d 668, 676 (Ariz. 1994) ("[I]f possible this court construes statutes to avoid rendering them unconstitutional."). That the Arizona Legislature *could* adopt a different, more streamlined, or more convenient process to amend the sex field on registered birth records does not render the current process unconstitutional. Nor does it empower the Department to adopt regulations that are not supported by the text of current Arizona law.

Even though Plaintiffs can obtain a birth certificate with an amended sex field pursuant to § 36-337(A)(4) and R9-19-208(B) without creating a public record, *see* Ariz. R. Civ. P. 5.4(c), (i), they complain that they are deprived of privacy rights because they cannot utilize § 36-337(A)(3) or R9-19-208(O). Put another way, Plaintiffs argue that those transgender people who do not need to, do not want to, or are unable to undergo surgical procedures as part of their transition are deprived of their rights because they must obtain a court order rather than a physician's letter to submit as supporting documentation for a request to amend the sex field on their birth certificate.

The Director does not dispute that many transgender people do not pursue surgery as part of their transition process and that those transgender people are therefore unable to submit a physician's letter as supporting documentation for a request to amend the sex field on their birth certificate. But read as a whole, neither § 36-337 nor R9-19-208 prohibits any transgender person, or any person, from obtaining an amended birth certificate that is consistent with their gender identity. *See generally Stambaugh*, 398 P.3d at 575, ¶ 7. The fact that § 36-337(A)(3) and R9-19-208(O) require the Department to accept alternative documentation in support of a request to amend the sex field on a birth certificate in some circumstances, or that not all Arizonans who may seek to amend the sex field on their birth certificate will be able to attain such alternative documentation, does not render the process afforded by § 36-337(A)(4) and R9-19-208(B) insufficient or unconstitutional. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37–40 (1973) (noting the "critical distinction" between laws that "'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty" and those that merely "extend" an "affirmative" "benefit[]," even if it "benefits some more than others").

What's more, no part of § 36-337 or R9-19-208 forces a transgender person to disclose their transgender status. The parties agree that the sex field on a birth certificate does not document a baby's gender identity. (DSOF ¶ 9.) "Gender identity" is not anatomical, but rather "a person's inner sense of belonging to a particular sex, such as male or female," which is only "detectible by self-disclosure." (DSOF ¶ 10.) For transgender persons, "there is a divergence between anatomy and identity," and the former "does not align with" the latter. (DSOF, ¶ 11.) However, "[l]ike non-transgender people, transgender people do not simply … behave consistently with their gender identity." (DSOF ¶ 12.) In other words, not all transgender persons "align their physical characteristics, voice, mannerisms, and appearance to match their gender identity." (DSOF ¶ 13.)

Because (1) an Arizona birth certificate does not document a person's gender identity, (2) a person's physical appearance is not necessarily reflective of their gender identity, and (3) only a person can disclose their gender identity, a person presenting a birth

certificate to a third party does not, without more, disclose their gender identity. It follows that Arizona's vital records laws do not compel disclosure of a person's gender identity. In addition to this evidence, nothing in Arizona's vital records laws requires anyone to disclose their transgender status. And, again, it is conceivable that a transgender person would have no problem sharing their birth certificate with a third party.[4] *Salerno*, 481 U.S. at 745.

2. Arizona's vital records laws do not deprive Plaintiffs of the right to live consistent with their gender identity.

Plaintiffs also allege that the laws deprive them of their right to live consistent with their gender identity and expose them to the risk of "stigma, discrimination, harassment, and violence." (Dkt. 47, ¶¶ 136–137.) This argument fails for the same reasons as the first: Arizona birth certificates do not say anything about gender identity. No part of the challenged Arizona law prohibits Plaintiffs from living their lives consistent with their gender identities. Moreover, Plaintiffs do not allege or provide evidence that the Director is responsible for any acts of discrimination, harassment, or violence, only that they are subjected to those acts by third parties. But the government's "failure to act to protect [a person's] liberty interests against harms inflicted by other means" does not violate the Due Process Clause. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989); *see also Harris v. McRae*, 448 U.S. 297, 316 (1980) (government need not remove obstacles in the path of exercising a fundamental right that are "not of its own creation," including indigency). Nonetheless, not all transgender individuals may see fit to amend their birth certificate to live consistent with their gender identity. *Salerno*, 481 U.S. at 745.

3. Arizona's vital records laws do not force anyone to undergo an unwanted medical procedure.

Finally, Plaintiffs' contention that the laws force them to undergo an unwanted medical procedure (a "sex change operation") (Dkt. 47, ¶ 142), is unsupported by the plain language of the statute and regulation. As discussed above, any Arizonan can obtain an amended birth certificate by submitting a court order directing the Department to amend

[4] Notably, Plaintiffs do not challenge the requirements or policies by the individuals or entities that require showing a birth certificate for enrollment or participation.

their birth certificate. A.R.S. § 36-337(A)(4). Arizona law does not require anyone to undergo a sex change operation to obtain an amended birth certificate. Rather, it allows those who *have* "undergone a sex change operation" to submit a physician's written verification of that procedure rather than a court order as support for an application to amend. A.R.S. § 36-337(A)(3); A.A.C. R9-19-208(O). A transgender person who does not want or need to undergo a sex change operation may obtain an amended birth certificate via § 36-337(A)(4). The laws are not facially unconstitutional. *Salerno*, 481 U.S. at 745.

B. Plaintiffs' Equal Protection Claim Fails Because Arizona's Vital Records Laws Do Not Discriminate Based on Plaintiffs' Purported Membership in a Protected Class.

The Fourteenth Amendment's Equal Protection Clause directs that "all persons similarly situated should be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted). To prove an equal protection violation, Plaintiffs must show that § 36-337 and R9-19-208 intentionally discriminate against them "based upon membership in a protected class." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). These laws are "presum[ably] … valid and will be sustained if the classification drawn by [them] is rationally related to a legitimate state interest" unless it involves a "suspect" or "quasi-suspect" classification, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 437–40 (1985), in which case heightened review is warranted, *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). To be clear, "[t]he Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id*.

Plaintiffs contend that § 36-337(A)(3) and R9-19-208(O) "discriminate[] against transgender people on the basis of sex and transgender status" because "[u]nlike their nontransgender peers and other Arizonans who can have accurate birth certificates and correct their birth certificates when necessary, transgender people are denied accurate birth certificates." (Dkt. 47, ¶ 125.) But neither the statute nor the regulation makes any such classification on their face. *See Country Classic Dairies, Inc. v. Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988) ("The first step in equal protection analysis is to identify the

[laws'] classification of groups.").

The statute and regulation plainly require *all* "person[s] born in this state" to comply with its requirements, no matter their gender identity. *See* A.R.S. § 36-337(A)(3), (4); A.A.C. R9-19-208(B) ("a person"). As discussed above, R9-19-208 provides a general procedure for requesting amendments to registered birth records and outlines different types of documentation that may be submitted in support of an amendment request. To request an amendment to the sex field on a birth certificate, a person must submit either a "court order" or verification from a physician that they have "undergone a sex change operation or ha[ve] a chromosomal count that establishes the sex of the person as different than in the registered birth certificate." A.R.S. § 36-337(A)(3), (4); A.A.C. R9-19-208(B), (O). Whatever hardships or inconveniences may exist with these requirements, they apply equally to all Arizonans.

Furthermore, even assuming that § 36-337(A)(3) and R9-19-208(O) draw a classification, it is not one based on "sex" or "transgender status." Rather, those laws merely authorize an alternate form of supporting documentation for those who have undergone a medical procedure ("sex change operation") or have a specific intersex condition (if their "chromosomal count [XY or XX]… establishes the[ir] sex … as different than in the[ir] registered birth certificate"). A.R.S. § 36-337(A)(3); A.A.C. R9-19-208(O). That is the "control group," *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1187 (9th Cir. 1995), which includes both transgender and cisgender persons.[5] The "class" of persons who cannot rely on the alternate supporting documentation authorized by § 36-337(A)(3) and R9-19-208(O) are those who have *not* undergone that medical procedure or whose chromosomal count *is* consistent with the sex field on their original birth certificate. That

[5] In its Order denying Defendant's Motion to Dismiss, the Court posited: "who else is going to voluntarily seek out a 'sex change operation'?" (Dkt. 47, ¶ 9.) The parties agree that some intersex individuals may also seek them out. (DSOF ¶ 14.); *see also Hecox v. Little*, 79 F.4th 1009, 1016 (9th Cir. 2023) (noting that intersex "is an umbrella term for people born with unique variations in certain physiological characteristics associated with sex, such as chromosomes, genitals, internal organs …, or hormone production or response") (internal quotation marks omitted).

group likewise includes both transgender and cisgender persons.

Because neither § 36-337(A)(3) nor R9-19-208(O) draws any "suspect" or "quasi-suspect" classification on its face, the most that Plaintiffs could claim is that those provisions have a disparate impact on transgender persons. But to prevail on a disparate impact theory, Plaintiffs must establish that the laws were enacted with discriminatory intent. *See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977) (a statute "will not be held unconstitutional solely because it results in a … disproportionate impact. … Proof of … discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). Plaintiffs cannot do so.

The legislative history underpinning Arizona's vital records laws clearly demonstrates no intent to discriminate against transgender persons. Since their enactment in 1913, birth certificates in Arizona have documented only an observation—at birth—of a baby's external genitalia. In 1967, the Arizona Legislature added § 36-337(A)(3) to authorize a process by which individuals could amend the sex field on their birth certificate if they underwent a "surgical operation" or if it was discovered that their chromosomal count differed from the sex marked on the sex field. That was not a slight towards transgender persons. Before that addition, *nobody* could amend the sex field on their birth certificate, and the new law goes *further* than the federal guideline. (DSOF ¶ 6.) The 1967 amendment was also a first step towards allowing such amendments, and, in 2004, the Legislature expanded that opportunity by enacting § 36-337(A)(4), legislation that was supported by Eleanor Eisenberg, Executive Director of the Arizona Civil Liberties Union. (DSOF ¶ 15.) The lack of any evidence of discriminatory intent or animus refutes any contention that the laws are the result of anti-transgender bias. *See City of New Orleans v. Dukes*, 427 U.S. 297, 305 (1976) ("[A] statute is not invalid under the Constitution because it might have gone farther than it did, … a legislature need not 'strike at all evils at the same time, and … reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."). Thus, any disparate impact theory is unsupported.

C. Arizona's Vital Records Laws Serve an Important and Compelling Interest.

Finally, a law is not automatically unconstitutional solely because it treats similarly situated individuals differently or because it deprives Plaintiffs of a protected right; rather, it is subjected to judicial scrutiny. *Reno*, 507 U.S. at 302; *United States v. Ayala-Bello*, 995 F.3d 710, 714 (9th Cir. 2021). The degree of scrutiny depends on the claim. Most equal protection claims must satisfy a rational basis test—is there "a rational relationship between the disparity of treatment and some legitimate governmental purpose"? *Ayala-Bello*, 995 F.3d at 715 (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)). That test is satisfied if "there is a plausible policy reason" for the law and it is neither arbitrary nor irrational. *Nordlinger*, 505 U.S. at 11. "The government doesn't have to articulate the purpose of its policy or the reasons for its classifications. Instead, the party raising an equal protection challenge must negate 'every conceivable basis which might support it.'" *Id*. (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)). However, if the challenged law deprives a "fundamental right" or draws a "suspect" or "quasi-suspect" classification, it is subject to heightened scrutiny—is it "suitably tailored to serve a compelling state interest"? *City of Cleburne*, 473 U.S. at 437–40; *see also United States v. Virginia*, 518 U.S. 515, 533 (1996) (proffered justification must be "exceedingly persuasive").

Similarly, for most due process claims, a law that deprives a fundamental right must be "narrowly tailored to serve a compelling state interest." *Reno*, 507 U.S. at 302. However, the Supreme Court has held that heightened scrutiny does not apply to laws that merely fail to extend affirmative relief to a class (as opposed to a deprivation), *Rodriguez*, 411 U.S. at 37–40, and the Ninth Circuit has held that the "heightened scrutiny analysis is as-applied rather than facial," *Witt v. Dep't of Air Force*, 527 F.3d 806, 819 (9th Cir. 2008). *Accord Log Cabin Republicans v. United States*, 2009 WL 10671433, at *6 (C.D. Cal. June 9, 2009) ("*Witt* expresses a strong preference for as-applied challenges and clearly limits the heightened scrutiny standard it announces to such challenges."). Moreover, laws that do not deprive a fundamental right or discriminate based on a suspect classification are

subject only to the rational basis test. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1085 (9th Cir. 2015).

Plaintiffs have argued that heightened scrutiny applies because they are transgender. (Dkt. 61 at 17–18.) This Court has also noted that "[d]iscrimination against transgender people is discrimination based on sex; as such, heightened scrutiny applies." (Dkt. 83 at 9.) The Director agrees that "gender-based classifications" and laws that discriminate "based on transgender status" are subject to heightened scrutiny. *Hecox*, 79 F.4th at 1021–22. But as discussed above, Arizona's vital records laws do not draw any classification based on sex or transgender status nor do they deprive transgender Arizonans of any rights. *Cf. id.* at 1023–27 (holding that heightened scrutiny applied to Idaho law banning transgender women from women's student athletics because its definition of "biological sex" was "designed precisely as a pretext to exclude transgender women from women's athletics," and it discriminated on the basis of sex "because only women and girls who want to compete on Idaho school athletic teams, and not male athletes, are subject to the sex dispute verification process").[6] Rather, Arizona's vital records laws generally require supporting documentation (such as a court order) to amend a birth certificate, and adds an additional option for people who have undergone a particular medical procedure or whose chromosomal count is different from the sex field designation on their birth certificate. That is not a classification based on sex or transgender status.

Because Arizona's vital records laws do not classify based on sex or transgender status or deprive Plaintiffs of a fundamental right, and are challenged only on facial grounds, the rational basis test applies. *See City of Cleburne*, 473 U.S. at 440; *Stormans,*

[6] Plaintiffs (and the Court) previously relied on *Adams v. School Board of St. Johns County*, 3 F.4th 1299, 1306 (11th Cir. 2021), which applied heightened scrutiny in reviewing a policy that required "boys go to boys' rooms, and girls go to girls' rooms." That decision was subsequently vacated on rehearing en banc, and the full court held that heightened scrutiny applied because the policy classified "on the basis of biological sex." *See Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 801, 803 (11th Cir. 2022). The other cases Plaintiffs relied on similarly analyzed "bathroom laws" that involved sex-based or transgender-based classifications. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020); *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017). This case does not.

Inc., 794 F.3d at 1085; *Witt*, 527 F.2d at 819. Nonetheless, they satisfy both rational-basis and heightened-scrutiny review.

The purpose of Arizona's vital records laws is to preserve historical facts, including information acquired and observations made at the time of a child's birth. *See* A.R.S. §§ 36-304(4), -333(B), (C); R9-19-201. Such preservation is "necessary for the legal, social, and sanitary purposes subserved by registration records" and for "public peace, health and safety." 1925 Ariz. Sess. Laws, ch. 37, §§ 14, 26. In Arizona, a registered birth certificate "is prima facie evidence of the facts stated in the certificate," A.R.S. § 36-345, and it is a crime to knowingly submit "false information" to be used in the creation or amendment of a birth certificate, A.R.S. § 36-344(A). Thus, Arizona has a significant interest in preserving the integrity and accuracy of those birth records. *See Fowler v. Stitt*, 2023 WL 4010694, at *22 (N.D. Okla. June 8, 2023) ("Protecting the integrity and accuracy of vital records is obviously a legitimate state interest."); *see also*, *e.g.*, A.R.S. §§ 1-501 (birth certificate used for eligibility of federal public benefits), -502 (birth certificate used for eligibility of state or local public benefits), 16-166(F)(2) (birth certificate used for verification of voter registration), 41-1080 (birth certificate used for licensing).

The integrity and accuracy of the sex field on a birth certificate is particularly important. "[T]he relative rate of births [for each recorded] sex is a matter of significant, social, scientific, and medical (and perhaps also economic and political) interest and consequence." *Gore v. Lee*, 2023 WL 4141665, at *15 (M.D. Tenn. June 22, 2023); *see also id*. at *20 n.44. ("[F]or medical, safety, security, demographic, and/or other reasons, it is useful to make a record of the [sex recorded at birth]."). "[K]eeping and maintaining records of sex [recorded at birth] (based on birth appearance) has a value in the potential compilation of statistics that are important from demographic, scientific, and other perspectives." *Id*. at *22. Indeed, that information is used not only for Arizona vital statistics and related reports (DSOF ¶ 16), but also to "to prepare national vital statistics, A.R.S. § 36-324(C), and other "statistical or research purposes," A.R.S. § 36-342(A). (DSOF ¶ 17.) *See Gore*, 2023 WL 4141665, at 22 n.47 ("[B]oth the Centers for Disease

Control and Prevention (CDC) and the U.S. Census Bureau have seen fit to publish certain statistics regarding the ratio of live births of 'males' versus live births of 'females," and such birth rates "cannot be assessed without raw data categorizing persons as male or female at the time of birth").

The Department also has an important interest in collecting evidence to support an application to amend a birth certificate to maintain the integrity and accuracy of vital records and the statistics and reports that rely on them, and deter fraud or other abuse. (DSOF ¶ 18.) As discussed above, under R9-19-208, the Department must receive various forms of documentation in support of requests to amend birth records and these requirements serve an important interest. For example, some applications must be reviewed by the judiciary to provide necessary oversight and to protect individuals (particularly minors) from an abuse of this process—requiring a court order to amend. A.R.S. § 36-337(A)(4); A.A.C. R9-19-208(B); *McLaughlin*, 476 P.3d. at 338, ¶ 9. For requests to amend certain information that was correct at the time it was recorded (at birth) but which became incorrect because of subsequent circumstances—for changes in parentage because of adoption; a change of paternity because of a voluntary acknowledgment; or a change in a person's sex characteristics either through a "sex change operation" or revised chromosomal count—the Legislature provided a streamlined process to provide supporting documentation. A.R.S. § 36-337(A)(3); A.A.C. R9-19-208(K), (M), (O). But it nevertheless still required supporting documentation in each of these circumstances, and the Department has an important interest in receiving such documentation to maintain the accuracy of vital records and protect vulnerable individuals against fraud and abuse. Arizona's vital records laws are thus appropriately tailored to serve an important and compelling state interest.

IV. Conclusion.

For these reasons, the Court should grant summary judgment in Defendant's favor.

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