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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 RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

This case boils down to a misunderstanding of Arizona law. Plaintiffs' claims are premised on their misinterpretation of A.R.S. § 36-337 as only allowing a person born in Arizona to amend the sex field on their Arizona birth record if they have "undergone a sex change operation." The Director does not dispute that Plaintiffs have presented evidence that two superior court judges have similarly misread § 36-337. But that interpretation is incorrect. Section 36-337 neither requires anyone to undergo a "sex change operation" nor limits amendments to the sex field on an Arizona birth record to only those who have undergone a "sex change operation." *Any* Arizonan may obtain a court order directing ADHS to amend *any* field, including the sex field, on their Arizona birth record, and ADHS must comply with such orders (and, in fact, has done so). A.R.S. § 36-337(A)(4). Director Cunico understands Plaintiffs' desire for a different method to amend the sex field on their Arizona birth records, but she must implement Arizona law as written. Inconvenience does not equal unconstitutionality; Plaintiffs' motion should be denied.

I. The Parties and the Court Agree on the Meaning of "Sex" on an Arizona Birth Record and Its Distinction from Gender Identity.

The parties and the Court agree that the sex field on an Arizona birth record documents only a child's "observable anatomy" or external genitalia at the time of birth, as observed and recorded by a health care provider or other person present at the birth, as either "male," "female," or "not yet determined." (DCSOF ¶ 1; Dkt. 83 at 10 n.7; Dkt. 233-2 at 317–320.) The parties also agree that the sex field on an Arizona birth record neither documents nor predicts a child's gender identity, which is not discernable at the time of birth. (Dkt. 231, ¶ 9.) A person's gender identity is their "inner sense of belonging to a particular sex, such as male or female, which is only detectible by self-disclosure" (Dkt. 231, ¶ 10). As discussed below, this is an important agreed-upon distinction that undermines Plaintiffs' legal theories.

II. Plaintiffs Misconstrue Arizona's Vital Records Laws.

Plaintiffs would like to amend their respective birth records so that the sex field aligns with their gender identity. (Dkt. 232 at 6–7.) Plaintiffs contend, though, that A.R.S.

§ 36-337(A)(3) and R9-19-208(O) preclude them from doing so because those laws purportedly "mandate[]" that "*all* transgender people undergo" a "sex change operation" before ADHS will amend the sex field and they have not done so (and cannot do so or may not need to in the future). (Dkt. 232 at 6–7). Plaintiffs further contend that non-transgender people may amend their birth record without having to undergo surgery and "with no more than a physician's letter attesting that they are a certain sex." (*Id.*) But Arizona's vital records laws do not operate the way Plaintiffs claim. Arizona law permits all persons—regardless of their gender identity—to submit a request to correct or amend their birth record in the exact same way, and neither process requires any person to undergo a "sex change operation" or any surgical procedure. A brief overview of the correction and amendment process will help frame Plaintiffs' claims.

Corrections

A.R.S. § 36-323(C) instructs the State Registrar (Director Cunico is also the State Registrar) to make "corrections" to a vital record in accordance with the regulations. A "correction" is "a change made to a registered certificate because of a typographical error, including misspelling and missing or transposed letters or numbers." A.R.S. § 36-301(6). R9-19-207 sets forth the requirements for requesting a correction to a birth record.

A correction request can be submitted to the State Registrar or a local registrar by the hospital administrator or person in charge of medical records for the hospital where the individual was born and certain medical personnel who were present at the birth. A.A.C. R9-19-207(A), (B), (C). These individuals must submit a written request, a "written statement attesting to the validity of the submitted correction," and a copy of the original birth record. *Id*. In addition to these medical personnel, *any* person (or the person's parent, guardian, or custodian) may request to correct their own birth record. A.A.C. R9-19-207(D). To do so, they must submit a written request, an administrative fee, an "affidavit attesting to the validity of the submitted correction," a copy of the original birth record, and, if the request is made more than 90 days after the person's birth, "an evidentiary document that includes the specific information to be corrected." A.A.C. R9-19-207(E). An

evidentiary document is not required if the correction request is made within 90 days after the person's birth because an evidentiary document typically will not exist by that time. (Dkt. 233-2 at 338.) Correction requests, along with supporting documents, and the resulting correction are kept confidential and sealed. (Dkt. 233-2 at 345–346.)

Correction requests will only be granted—no matter who submits it or the field sought to be corrected—if the requested change corrects a typographical error in the person's original birth record. (Dkt. 233-2 at 332, 340–341.) *See* A.R.S. § 36-301(6). Because Arizona birth records do not document a person's gender identity, and because the regulations do not impose any requirements based on gender identity, the gender identity of the person requesting a correction is not relevant to any correction request. It is therefore incorrect to say that "[t]ransgender individuals born in Arizona are not permitted to 'correct' the sex [field] listed on their birth certificates through this process" or that "[n]on-transgender people may use this process [to correct the sex field]… with no more than a physician's letter attesting that they are a certain sex." (*See* Dkt. 232 at 10, 17.) As noted above, the sex field on an Arizona birth record documents a child's observable anatomy at the time of birth. (DCSOF ¶ 1; Dkt. 83 at 10 n.7; Dkt. 233-2 at 317–320.) It does not document a child's gender identity; nor could it. Accordingly, any incongruence between a person's gender identity and the sex field on their Arizona birth record cannot be considered a "typographical error" for purposes of the above-referenced correction process. In any event, Plaintiffs do not allege a typographical error in their original birth records, so the corrections process is immaterial to their claims.

Amendments

A.R.S. § 36-323(A) instructs the State Registrar to "amend" a vital record in accordance with the statute and regulations. "'Amend' means to make a change, other than a correction, to a registered certificate by adding, deleting or substituting information on that certificate." A.R.S. § 36-301(2). A.R.S. § 36-337 and R9-19-208 set forth the requirements for requesting an amendment to a birth record.

A.R.S. § 36-337(A) requires the State Registrar to amend a birth record if she

receives any of the following:

(1) "[A]n adoption certificate or court order for adoption … pursuant to § 36-336."

(2) "A voluntary acknowledgment of paternity pursuant to § 25-812."

(3) "For 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."

(4) "A court order ordering an amendment to a birth certificate."

A.R.S. § 36-337(B) requires the State Registrar to change the name of the father on a registered birth record if she "receives an administrative order or a court order ordering [her] to change the father's name on the registered birth certificate" or "[p]aternity is established through a voluntary acknowledgement of paternity pursuant to § 25-812."

Any person may request an amendment under § 36-337, and all requests—regardless of the requester's gender identity—are subject to the same regulations. A.A.C. R9-19-208. Those regulations require a written request, an administrative fee, and some form of supporting documentation—regardless of the gender identity of the requester or the requested amendment. A.A.C. R9-19-208(A)–(O). Relevant here, the State Registrar must amend the sex field on a person's birth record if she receives *either* (1) a "copy of a court order to amend the individual's registered birth record" *or* (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." A.A.C. R9-19-208(B), (O). Like the correction process, amendment request submissions, including supporting documents, and the resulting amendment are kept confidential and sealed. (Dkt. 233-2 at 383.)

III. Plaintiffs' Motion for Summary Judgment and Supporting Facts Confirm that Arizona's Vital Records Laws Are Not Unconstitutional on Their Face.

Plaintiffs' Motion for Summary Judgment challenges only § 36-337(A)(3) and R9-19-208(O), which they contend impose a "surgical requirement" for requests to amend the sex field on an Arizona birth record. They contend that the "surgical requirement" is unconstitutional because it requires transgender persons to undergo a "sex change operation" before they can request an amendment to the sex field on their birth certificate but "not all transgender people undergo surgery … for a variety of reasons." (Dkt. 232 at 6.) Because Plaintiffs pursue only a facial challenge on behalf of a class consisting of all transgender persons born in Arizona (Dkt. 153 at 3 & n.4; Dkt. 181 at 5; Dkt. 214 at 3–8), their challenge is "the most difficult to mount successfully." *Willis v. City of Seattle*, 943 F.3d 882, 886 (9th Cir. 2019). They must "establish that no set of circumstances exists under which [§ 36-337(A) and R9-19-208] 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). Plaintiffs' Motion for Summary Judgment and supporting evidence do not meet that high burden.

Plaintiffs' facial challenges fail because any person born in Arizona may request an amendment to the sex field on the Arizona birth record under § 36-337(A)(4) and R9-19-208(B), which require only a court order. *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 ….). Plaintiffs argue that securing a court order is burdensome because it requires transgender persons to "prepare a court petition, pay a fee, file it with the court, and …appear in person in open court, thereby publicly disclosing their transgender status," and that, "[i]n practice," Arizona courts require proof of a sex change operation before granting a petition to amend the sex field. (Dkt. 232 at 11–12.) The Director does not dispute that the process to secure a court order may be difficult for some. But for purposes of Plaintiffs' facial challenge, any inconvenience associated with following the process to obtain a court order makes no

difference. Plaintiffs do not argue that § 36-337(A)(4) or R9-19-208(B) are unconstitutional. The court order requirement is consistent with the NCHS's Model State Vital Statistics Act and Regulations. (Dkt. 231, ¶ 4.) And the evidence is such that not every transgender person would be deterred from pursuing an amendment via court order. For example, Plaintiffs Helen Roe and James Poe filed petitions and requested a court order ordering a name and sex change to their birth records. (Dkt. 233, ¶ 60; Dkt. 234, Ex. 24–25.) Other people have as well.[1] (Dkt. 231, ¶¶ 7–8.) Although the state court judges in Plaintiffs Roe's and Poe's cases (erroneously) denied their requests to amend the sex field on their birth certificates based on an apparent misunderstanding of the law (rulings that were appealable), (Dkt. 233, ¶ 60), other state court judges have properly granted such requests and ADHS has issued amended birth certificates based on those orders. (Dkt. 231, ¶¶ 7–8.) *See also McLaughlin v. Swanson*, 476 P.3d 336, 338 ¶¶ 9–10 (Ariz. App. 2020) (holding that Arizona courts have broad discretion to order ADHS to amend a birth certificate). Because there is a "set of circumstances" in which transgender persons can and have secured a court order directing an amendment to the sex field on their Arizona birth record without supplying verification of any surgical procedures, *Salerno*, 481 U.S. at 745, Plaintiffs cannot show that § 36-337(A) and R9-19-208 are facially unconstitutional. *See Calvary Chapel Bible Fellowship v. Cnty. of Riverside*, 948 F.3d 1172, 1177 (9th Cir. 2020) ("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.").

Additionally, as Plaintiffs acknowledge, at least some transgender persons can or do undergo some form of surgery as part of their transition process. (*See* Dkt. 233-2 at 12, 15, 17, ¶¶ 34, 46, 53 [opining that surgery is a treatment option for gender dysphoria and that "33% of transgender individuals undergo some form of gender-related surgery"]; Dkt. 233-

[1] Petitioners can request to defer or waive the filing fee, *see* A.R.S. § 12-302, seal the petition and/or proceedings, *see* Ariz. R. Civ. P. 5.4(c), (i), and request the assistance of pro bono counsel and other legal aid clinics, *see* Dkt. 234, Ex. 7 at 95:15-97:20; Dkt. 234, Ex. 26 at 103:25-104:15. And like Plaintiffs Roe and Poe, some individuals may find it more efficient to include a request to amend the sex field on their birth certificate in their request for a name change.

2 at 55, ¶¶ 37–38 [opining that some transgender people require surgery]; Dkt. 233-3 at 98, 105 [survey reflecting that 25% of respondents underwent "some form of transition-related surgery"]; Dkt. 233-4 at 2–4 [showing breakdown of different transition-related surgeries by transgender persons].) *See also* A.R.S. § 32-3230 (prohibiting only certain gender reassignment surgeries to individuals under 18 years of age). Because it is conceivable that at least some transgender persons can request an amendment by submitting the alternative forms of documentation authorized by § 36-337(A)(3) and R9-19-208(O)—in other words, because there *is* a "set of circumstances exists under which [§ 36-337(A) and R9-19-208] would be valid," *Salerno*, 481 U.S. at 745—Plaintiffs' facial challenges fail.

IV. Plaintiffs' Underlying Constitutional Challenges Fail as Well.

A. Arizona's Vital Records Laws Do Not Discriminate Against Transgender Persons.

Plaintiffs argue that the "surgical requirement" in § 36-337(A)(3) and R9-19-208(O)(2) "treats transgender and non-transgender people differently" and "discriminates against transgender individuals on its face" because it requires transgender people to "undergo a surgical operation" before they can amend the sex field on their birth certificate to align with their gender identity. (Dkt. 232 at 16.) But as discussed above, neither the statute nor the regulation requires anyone to undergo a "sex change operation," much less requires only transgender persons to undergo surgery, to request an amendment. Those laws simply require the State Registrar to accept as one available form of supporting documentation a physician's verification that the requester has undergone a "sex change operation." R9-19-208(O)(2)(a). A person may also submit, and the State Registrar is required to accept, a physician's verification that the requester has a chromosomal count that establishes their sex as different from that in their birth record, R9-19-208(O)(2)(b), or a court order directing ADHS to amend the sex field on their birth record, R9-19-208(B)(2).

The laws also do not treat transgender people differently or otherwise prescribe regulations that apply because of a person's transgender status. The laws' prescriptions apply equally to all persons—regardless of their gender identity. *See* A.R.S. § 36-

337(A)(3), (4); A.A.C. R9-19-208(B), (O). Indeed, this Court has already determined that the laws do *not* on their face reference gender identity or transgender status: "[T]he statue and regulation do not explicitly use the phrase 'transgender' or 'explicitly state that these laws are aimed directly at 'transgender' people." (Dkt. 83 at 9.)

Plaintiffs point to a portion of the Court's Order denying Defendant's Motion to Dismiss, wherein the Court stated that "any logical reading of the statute and regulation reflects that it applies *nearly* exclusively to transgender people; who else is going to voluntarily seek out a 'sex change operation'?" (Dkt. 232 at 16–17, quoting Dkt. 83 at 9, emphasis added.) Although Plaintiffs argue that "[n]othing has changed since the Court's order" and "the same logic applies today," they are incorrect. (*Id*. at 17.) Much has changed. At the motion-to-dismiss stage, Plaintiffs asserted an as-applied challenge to the statute and regulation, and the Court was required to accept the allegations in the First Amended Complaint as true. Since then, Plaintiffs have dropped their as-applied challenge and now pursue only a facial challenge. Thus, even if, as the Court pondered then, the laws "applie[d] *nearly* exclusively" to transgender people, a "set of circumstances exists under which [§ 36-337(A)(3) and R9-19-208(O)] would be valid," *Salerno*, 481 U.S. at 745, because they also apply to non-transgender people. Indeed, a person born with an intersex condition, such as Congenital Adrenal Hyperplasia, which can result in "ambiguous genitalia," may seek out one or more surgical procedures that would require or warrant an amendment to the sex field on their Arizona birth record. (Dkt. 231, ¶ 14.) That person could submit verification of their surgical procedure(s) pursuant to § 36-337(A)(3) and R9-19-208(O) as support for an application to amend the sex field on their Arizona birth record. Thus, as discussed above, the laws survive Plaintiffs' facial challenge because they are not "unconstitutional in every conceivable application." *Foti*, 146 F.3d at 635.

In addition, to the extent the Court's order on Defendant's Motion to Dismiss could be read to suggest that the laws may support a claim of discrimination by disparate impact, Plaintiffs have neither raised such a claim, nor would it be supported by the evidence if properly before the Court. A disparate impact theory requires evidence 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."); *see also Columbus Bd. of Ed. v. Penick*, 443 U.S. 449, 464 (1979) ("[D]isparate impact and foreseeable consequences, without more, do not establish [an equal protection] violation."). There is no evidence that the Arizona Legislature was motivated by animus against transgender persons when it enacted § 36-337(A)(3) in 1967. (Dkt. 230 at 19:10-28.) Rather, the Legislature expanded the limited grounds to amend a birth record to include a process for those who have undergone a medical procedure or, as the parties agree, have a specific intersex condition. (Dkt. 231, ¶ 14; *see also* Dkt. 233-2, ¶ 42 [Plaintiffs' expert opining that "states have created a streamlined process that allows people with [an intersex condition] to correct their birth certificate"].) That prescribed process is consistent with—indeed, more progressive than—the NCHS's Model State Vital Statistics Act and Regulations. (Dkt. 231, ¶ 6.) *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."). That process is also equally available (and restrictive) to both transgender and non-transgender persons. (*See* Dkt. 233-2 at 113–115 [Plaintiffs' expert opining that both non-transgender and transgender persons can have an intersex condition].) And written requests to amend are processed the same regardless of the requester's gender identity. (DCSOF ¶ 28.)

The cases Plaintiffs rely on are inapposite because they all involved statutes or policies that were not only based on transgender status but expressly discriminated against transgender persons. In *Hecox v. Little*, 79 F.4th 1009, 1022 (9th Cir. 2023), the "animating purpose" of the Idaho statute, as reflected in the statute's "legislative findings and purpose" and "legislative debate" "was to ban transgender women from 'biologically female' teams."

Hundley v. Aranas, No. 21-15757, 2023 WL 166421, at *1 (9th Cir. Jan. 12, 2023), addressed a claim alleging that a Nevada prison denied an inmate "female undergarments because she is a transgender woman." *Karnoski v. Trump*, 926 F.3d 1180, 1186 (9th Cir. 2019), involved an executive policy "that transgender individuals would not be allowed to serve in the military." And the "legislative history" of the statute challenged in *Doe v. Horne*, No. CV-23-00185-TUC-JGZ, 2023 WL 4661831, at *7 (D. Ariz. July 20, 2023), "demonstrate[d] that the purpose of the Act is to exclude transgender girls from girls' sports teams." *Cf. also Latta v. Otter*, 771 F.3d 456, 467 (9th Cir. 2014) ("[T]he laws at issue distinguish on their face between opposite-sex couples, who are permitted to marry and whose out-of-state marriages are recognized, and same-sex couples, who are not permitted to marry and whose marriages are not recognized."). Section 36-337(A)(3) and R9-19-208(O) are not based on transgender status. They do not facially discriminate against transgender persons. And there is no evidence that they were enacted to discriminate against transgender persons. *See Gore v. Lee*, No. 3:19-cv-0328, 2023 WL 4141665, at *14 (M.D. Tenn. June 22, 2023) (concluding that Tennessee's birth certificate statute enacted in 1977 was not "aimed at transgender persons as a whole *because they are transgender* or even at a subset of transgender persons (i.e., those who have had sex-change surgery) *because they are transgender*" but instead "aimed at persons whose external genitalia was surgically changed *irrespective of whether they are transgender*") (emphasis in original).

B. Arizona's Vital Records Laws Do Not Deprive Plaintiffs of Their Rights.

1. Section 36-337 and R9-19-208 Do Not Deprive Plaintiffs of any Privacy Rights.

Plaintiffs contend that the "surgical requirement" violates their right to privacy because they are "outed as transgender" each time they present their original birth certificate to a third party. (Dkt. 232 at 23.) There are several flaws in this argument. First, there can be no dispute that an Arizona birth record does not contain any information about a person's gender identity. (DCSOF ¶ 1; Dkt. 83 at 10 n.7; Dkt. 231, ¶¶ 9–10; Dkt. 233-2 at 317–320.) A person's gender identity is innate and only detectible by self-disclosure. (Dkt. 233-2 at

7, ¶ 19 & at 14, ¶ 41.) Voluntarily showing a birth certificate to a third party, without more, does not and cannot reveal a person's transgender status. *See Gore*, 2023 WL 4141665, at *29.

Second, Plaintiffs' privacy argument incorrectly presumes that a person's gender identity can be ascertained based on their physical appearance or gender expression. Plaintiffs' own experts disagree with that presumption. (*See* Dkt. 233-2, 7, ¶ 21 & at 16, ¶ 50 & at 53, ¶ 32.) *See also Gore*, 2023 WL 4141665, at *30 (noting that a person's gender identity is not always "conveyed based on external appearance created by activities, dress, or physical features"). This is enough to defeat Plaintiffs' facial challenge. *Salerno*, 481 U.S. at 745.

Third, Arizona's vital records laws do not "obligate" anyone to disclose their gender identity to anyone else. (Dkt. 232 at 23.) To the extent a person is concerned that third parties may make assumptions about their gender identity based on the sex field as recorded on their Arizona birth record, Arizona law provides a method for any Arizonan to amend that field. A person may choose not to pursue an amendment because they conclude that the process is inconvenient or some other document (e.g., a passport or driver's license) will suffice to participate, but that is their prerogative. If a person elects not to pursue an amendment to their birth certificate and voluntarily discloses their birth certificate to a third party, that disclosure was not mandated by the statute or regulation but rather was the result of the person's own choice.[2] If a person elects to pursue an amendment under § 36-337(A)(4) and R9-19-208(B), there are measures available to keep that process under seal. (*See* Dkt. 230 at 12–13.)

The cases that Plaintiffs rely on are readily distinguishable. In both *Love v. Johnson*, 146 F. Supp. 3d 848, 851 (E.D. Mich. 2015), and *Ray v. Himes*, No. 2:18-CV-272, 2019 WL 11791719, at *1 (S.D. Ohio Sept. 12, 2019), the policies at issue did not provide the individual plaintiffs *any* opportunity to change the sex field on their identity documents.

[2] Plaintiffs do not challenge the constitutionality of the sex field requirement itself.

Here, Plaintiffs and the Class members *do* have the opportunity to amend the sex field on their birth certificates. *See* A.R.S. §§ 36–337(A)(4); A.A.C. R9-19-208(B). That some may choose not to pursue an amendment does not render the amendment process unconstitutional.[3]

2. Section 36-337 and R9-19-208 Do Not Deprive Plaintiffs of the Right to Live Consistent with their Gender Identity.

Plaintiffs argue that "[r]equiring surgery to apply for a sex [field amendment] infringes on [their] right to define their identities and live as their authentic selves" and "deprives them of the ability to define their own identities." (Dkt. 232 at 24.) But the premise of that contention is incorrect. Arizona's vital records laws do not require a person to undergo a "sex change operation" before amending the sex field on their birth certificate. Any Arizonan can request an amendment of the sex field by either obtaining a court order under § 36-337(A)(4) and R9-19-208(B) *or*, *if* they have undergone a "sex change operation" or have a chromosomal count that establishes that their sex is different than that in their birth record, submitting a physician's written verification under § 36-337(A)(3) and R9-19-208(O). Furthermore, nothing in § 36-337 or R9-19-208 infringes on a person's ability to live consistent with their gender identity. As Plaintiffs agree, a person's gender identity is internal, innate, and immutable and "not subject to voluntary change." (Dkt. 233, ¶¶ 3–5.) That is distinct from a person's "observable anatomy" at the time of birth, which is all the sex field on a birth certificate records. (Dkt. 233, ¶ 1.) Any discord between the two is not a deprivation by § 36-337 or R9-19-208 of their ability to live consistently with their gender identity. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37–40 (1973) (noting "critical distinction" between laws that "'deprived,' 'infringed,' or 'interfered' with" certain rights and those that merely "extend" an "affirmative "benefit[]," even if it "benefits some more than others"); *Gore*, 2023 WL 4141665, at *28 (ruling that Tennessee's birth certificate statute does not "stand in the way of transgender persons

[3] Both *Love* and *Ray* were decided on motions to dismiss. *See Ray*, 2019 WL 11791719, at *1; *Love*, 146 F. Supp. 3d at 850. The evidentiary record in this case has been developed.

expressing … their gender identity … let alone stand in the way of transgender persons 'defining' … themselves in terms of" their gender identity). In fact, those laws allow transgender persons the opportunity to rectify any discordance. *Compare* A.R.S. § 36-337(A)(4); A.A.C. R9-19-208(B), *with Arroyo Gonzalez v. Rossello Nevares*, 305 F. Supp. 3d 327, 329 (D.P.R. 2018) (involving a challenge to Puerto Rico's policy that "prohibits transgender persons from correcting the gender marker in their birth certificates").

The cases that Plaintiffs rely on are either unhelpful to them or inapposite. *See Washington v. Glucksberg*, 521 U.S. 702, 727 (1997) ("That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."); *cf. Obergefell v. Hodges*, 576 U.S. 644 (2015) (affirming the right to marry a person of the same sex); *Lawrence v. Texas*, 539 U.S. 558 (2003) (affirming the right to engage in private, consensual sexual acts); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–620 (1984) (addressing a person's freedom of intimate association with other persons, particularly familial relationships); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (affirming the right to obtain contraceptives); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to make decisions about the education of one's children).

C. Section 36-337 and R9-19-208 Do Not Force Anyone to Undergo an Unwanted Medical Procedure.

Plaintiffs argue that § 36-337 and R9-19-208 "condition[]" their ability to amend the sex field on their birth certificates on having undergone a "sex change operation" and thus "forces [them] to choose between undergoing medically inappropriate unnecessary, unaffordable, or even illegal surgery or subjecting themselves to the constant risk of expos[ing]" their transgender status. (Dkt. 232 at 25.) But again, Arizona's vital records laws do not require or force anyone to undergo a "sex change operation" or condition an amendment to the sex field on such a procedure. They simply allow those who *have* undergone a "sex change operation" to submit a physician's written verification of those procedures *instead of* a court order as support for an application to amend the sex field on

an Arizona birth record. A.R.S. § 36-337(A)(3); A.A.C. R9-19-208(O). Any person who has not undergone a "sex change operation" may obtain an amended birth certificate via § 36-337(A)(4). Even assuming that submitting verification of a "sex change operation" pursuant to § 36-337(A)(3) is "easier" or "more convenient" than obtaining a court order pursuant to § 36-337(A)(4), that would not render § 36-337(A)(4) unavailable or make § 36-337(A)(3) constitutionally infirm. *See Rodriguez*, 411 U.S. at 37–40. Thus, § 36-337 and R9-19-208 keep Plaintiffs' bodily integrity and choices about medical treatment in-tact. *See also Salerno*, 481 U.S. at 745.

The cases that Plaintiffs rely on are inapposite. *Cf. Glucksberg*, 521 U.S. at 705 (involving a state's prohibition against assisted suicide); *Washington v. Harper*, 494 U.S. 210 (1990) (recognizing the right to be free from forced administration of medication); *Parham v. J. R.*, 442 U.S. 584, 600 (1979) (recognizing that children and adults have a substantial liberty interest "in not being confined unnecessarily for medical treatment").

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

A law is not automatically unconstitutional solely because it treats similarly situated individuals differently or because it deprives individuals of a protected right; rather, it is subjected to judicial scrutiny. *Reno v. Flores*, 507 U.S. 292, 302 (1993); *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 v. Hahn*, 505 U.S. 1, 11 (1992). "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 v. Cleburne Living Ctr.*, 473 U.S. 432, 437–40 (1985); *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 argue that heightened scrutiny applies because § 36-337 and R9-19-208 are based on transgender status and deprive them of fundamental rights. (Dkt. 232 at 17–18, 25–26.) As discussed above, Arizona's vital records laws do not draw any classification based on transgender status nor do they deprive transgender Arizonans of any rights.[4] Moreover, Plaintiffs make only a facial challenge. Consequently, at most, the rational basis test applies. *See City of Cleburne*, 473 U.S. at 440; *Stormans, Inc.*, 794 F.3d at 1085; *Witt*,

[4] 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.

527 F.2d at 819. Nonetheless, the challenged laws satisfy both rational-basis and heightened-scrutiny review.

The Director's Motion for Summary Judgment outlined the important and compelling reasons for Arizona's vital records laws: (1) to preserve the integrity and accuracy of vital records, including information acquired and observations made at the time of a child's birth (including the sex field on a birth certificate); and (2) to collect evidence supporting amendment applications for necessary judicial oversight, protection of vulnerable individuals (particularly minors), and deterrence of fraud or other abuse. (Dkt. 230 at 22–23.) None of Plaintiffs' counter-arguments undermine these reasons.

Plaintiffs first argue that the "surgical requirement" "ensures that Plaintiffs do not have truthful, complete, or correct birth certificates." (Dkt. 232 at 18.) That contention assumes that a birth certificate is rendered "incomplete" or "incorrect" whenever a person's gender identity does not align with the sex field on their birth certificate. The contention is thus flawed because, as explained above, the sex field on a birth certificate documents a child's external genitalia as observed by a health care provider or other person present at their birth; it does not—nor could it—document a child's gender identity. (DCSOF ¶ 1; Dkt. 83 at 10 n.7; Dkt. 231, ¶¶ 9–10; Dkt. 233-2 at 317–320.) The Director understands that a person's gender identity and the sex field recorded on their birth certificate can be conflated. But the fact that third parties may conflate a person's sex recorded at birth with their gender identity or may make assumptions about a person's gender identity based on the sex recorded on their birth record does not render the birth record itself untruthful, incomplete, or incorrect. The Director further understands Plaintiffs' desire for a different method to address the incongruence between their gender identity and the sex field on their birth record. Of course, any proposed solutions are not within the Director's power or control; they would require legislative action. But Arizona's current vital records laws are not unconstitutional nor is any birth record incomplete or incorrect simply because *the Legislature could* amend the statutes.

Plaintiffs also argue that the U.S. Department of State, Social Security Administration, U.S. Citizenship and Immigration Services, and Arizona Department of Transportation recently changed their policies and no longer require evidentiary proof of a sex change to change the sex or gender marker on the identity documents issued by those departments, which is an implicit recognition that the "surgical requirement" "does not lead to truthful, correct, and complete identity documents." (Dkt. 232 at 19.) But with due respect to Plaintiffs, birth certificates and other forms of identity documents are simply not comparable. No other identity document has the express purpose of documenting an observation made at the time of a person's birth (the appearance of external genitalia). *Gore*, 2023 WL 4141665, at **16–17. "Current identification documents," such as driver's licenses or passports, serve other purposes that may not necessarily be served by the inclusion of a person's sex recorded at birth. *Id*. Of course, how other federal or state agencies regulate their current identification documents does not undermine the purpose and requirements of Arizona's vital records laws.

Plaintiffs last rely on cases that addressed the propriety of birth certificate/driver's license policies in Alaska, Idaho, Michigan, and Puerto Rico to show that Arizona's vital records laws are an outlier. Aside from the fact that "federal-court suppression of outliers *on the grounds that they are outliers* is inconsistent with federalism," *Gore*, 2023 WL 4141665, at *17, the policies in those other states are distinguishable because they do not permit any amendment of the sex field on a birth certificate (Idaho, Puerto Rico) and/or involved current identification documents, not birth certificates (Alaska, Michigan). *See Arroyo Gonzalez*, 305 F. Supp. 3d at 329 (Puerto Rico policy that "prohibits transgender persons from correcting the gender marker in their birth certificates"); *F.V. v. Barron*, 286 F. Supp. 3d 1131, 1134–1135 (D. Idaho 2018) (Idaho policy "categorically and automatically denying applications submitted by transgender individuals to change the sex listed on their birth certificates"); *Love*, 146 F. Supp. 3d at 851 (Michigan policy precluded plaintiffs from amending the gender on their driver's licenses "under any circumstances"); *K.L. v. State, Dep't of Admin., Div. of Motor Vehicles*, No. 3AN-11-05431-CI, 2012 WL

2685183, at *1 (Alaska Super. Ct. Mar. 12, 2012) (Alaska policy that "merely accepts the applicant's word for changes in weight, height, hair color, and eye color," but required "a medical certification of a sex change … before the DMV would change the sex code on an individual's license"). Plaintiffs also ignore the outcomes in *Gore*, 2023 WL 4141665, at *37 (denying challenge to Tennessee's birth certificate statute) and *Fowler v. Stitt*, No. 22-cv-115-JWB-SH, 2023 WL 4010694, at *24 (N.D. Okla. June 8, 2023) (denying challenge to Oklahoma's birth certificate policy). Arizona's vital records statutes are more inclusive than any of the statutes or policies in these other jurisdictions because they permit—in fact, require—amendments upon submission of a court order. Therefore, they survive both rational-basis and heightened scrutiny.

V. Conclusion.

For these reasons, Plaintiffs' Motion for Summary Judgment should be denied.

DATED this 22nd day of December, 2023.

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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

[PROPOSED] ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

After reviewing Plaintiffs' Motion for Summary Judgment (Dkt. 232), and good cause appearing, it is hereby ordered denying Plaintiffs' Motion for Summary Judgment.