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13 **UNITED STATES DISTRICT COURT**
14 **FOR THE DISTRICT OF ARIZONA**

15 Helen Roe, a minor, by and through her
16 parent and next friend Megan Roe; et al.,

17 Plaintiffs,

18 v.

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

21 Defendant.

Case No. 4:20-cv-00484-JAS

**PLAINTIFFS’ OPPOSITION TO
DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT**

ORAL ARGUMENT REQUESTED

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1 **I. INTRODUCTION**

2 There is no dispute that A.R.S. § 36-337(A)(3) (“Subsection (A)(3)”) and its
3 implementing regulation establish a relatively simple, inexpensive, and confidential way
4 for people to apply directly to the Arizona Department of Health Services (“ADHS”) to
5 change the sex markers listed on their birth certificates. There is also no dispute that this
6 private administrative process is not available to Plaintiffs Helen Roe, James Poe, or Carl
7 Voe, or the class of people they represent (collectively, “Plaintiffs”), who have not
8 “undergone a sex change operation.” Rather than defend the constitutionality of this
9 “Surgical Requirement,” the core of Defendant’s argument in her Motion for Summary
10 Judgment, (Dkt. 230 (“Br.”)), is that enforcing this discriminatory law against Plaintiffs is
11 constitutionally permissible because Plaintiffs could attempt to change their sex markers
12 via the court-order process in A.R.S. § 36-337(A)(4) (“Subsection (A)(4)”)—a different and
13 “much more burdensome” process that “does not provide any standards whatsoever” and
14 “requires a transgender person to file a lawsuit” in state court and “entails much more cost,
15 confusion and uncertainty than a private administrative process before a local registrar.”
16 (Dkt. 83 at 12 n.9.) The Court has already soundly rejected the argument that
17 Subsection (A)(4) cures the obvious constitutional defects with the Surgical Requirement.
18 (*Id.*) It should do so again, now supported by the undisputed factual record.

19 With respect to Plaintiffs’ Due Process claims, Defendant does not challenge that
20 Plaintiffs have fundamental due process rights to privacy, individual liberty and autonomy,
21 and the right not to undergo a particular medical procedure. She does not disagree that the
22 Surgical Requirement, considered on its own, infringes Plaintiffs’ exercise of those rights.
23 She does not contest Plaintiffs’ expert evidence, which shows that not all transgender
24 individuals undergo surgery, and in fact adopts that evidence in support of her motion. And
25 she does not identify any disputes of material fact in this case. Instead, Defendant’s sole
26 contention is that the availability of the court-order process means that Plaintiffs *could*
27 amend their sex markers. That argument fails on the law and the facts.

28 There is no legal authority to support Defendant’s theory that a constitutional defect

1 in a statute is cured by the mere existence of a far more burdensome and intrusive avenue
2 for obtaining the same legal benefit or protection. Contrary to what Defendant’s motion
3 suggests, considering the statutory scheme as a whole further highlights the discrimination
4 transgender people face: while there may be various ways for obtaining the same relief, to
5 use them transgender people are required to either undergo a surgical procedure or—if they
6 cannot get or do not need or want surgery—are forced to take a lengthy, costly, winding
7 path littered with landmines. The Surgical Requirement is thus facially unconstitutional
8 because it forces *all* transgender people to make this difficult (and, in many cases,
9 impossible) choice simply to obtain an accurate state-issued identity document. In contrast,
10 Defendant provides most non-transgender people with correct birth certificates at birth or,
11 in the rare instance when a change is necessary, allows them the option of “correcting” the
12 sex marker on their birth certificates without first undergoing a surgical procedure.

13 There is also no factual support for Defendant’s theory. The undisputed record here
14 demonstrates that state courts in Arizona have incorporated the Surgical Requirement into
15 the standard necessary to obtain a court order under Subsection (A)(4). Defendant does not
16 contest that ADHS filed objections in state courts arguing that the Surgical Requirement
17 applied to court orders under Subsection (A)(4). Nor is there a dispute that state courts
18 denied Plaintiffs Helen Roe’s and James Poe’s Subsection (A)(4) petitions and pointed to
19 the Surgical Requirement as the reason. The manifest uncertainty and risk of being outed
20 as transgender that are inherent in the court-order process have persuaded other transgender
21 people, like Plaintiff Carl Voe, not to even file a petition, even when no other avenue exists
22 to seek a change to the sex marker on their birth certificates. Given these undisputed facts,
23 there can be no doubt that the Surgical Requirement effectively bars Plaintiffs like Helen
24 Roe, James Poe, and Carl Voe from changing their sex markers. Moreover, the undisputed
25 facts demonstrate that the court-order process is more burdensome and uncertain than the
26 private administrative process because it involves additional legal procedures and costs,
27 uniquely harms transgender individuals, and is devoid of standards for applicants or courts.

28 For the same reasons, Defendant cannot show that Subsection (A)(4) cures the

1 Surgical Requirement’s violation of the Equal Protection Clause. And the Court has already
2 held that the Surgical Requirement facially discriminates based on transgender status, which
3 is also discrimination based on sex, and is therefore subject to heightened scrutiny.

4 Finally, Defendant attempts to shield the Surgical Requirement by proffering three
5 purported governmental justifications for enforcing it. But Defendant waived two of these
6 justifications by never before disclosing or asserting them in this litigation, and none of the
7 three are supported by the evidentiary record or otherwise sufficient to sustain the Surgical
8 Requirement under heightened scrutiny or even rational-basis review. Accordingly, for the
9 reasons stated below, the Court should find the Surgical Requirement unconstitutional
10 under any level of scrutiny and deny Defendant’s motion.

11 **II. ADDITIONAL FACTUAL BACKGROUND**

12 Plaintiffs incorporate into this opposition brief the facts section from their Motion
13 for Summary Judgment, as well as the Separate Statement of Facts and supporting evidence
14 they submitted with that brief. (Dkt. 232 (“Pls.’ Br.”) at 2–8; Dkt. 233 (“SOF”); Dkts. 233-
15 1–233-12 (Exhibits 1–35).)¹ With respect to the Statement of Facts that Defendant filed in
16 support of her Motion for Summary Judgment (Dkt. 231), Plaintiffs file with this brief a
17 Statement of Controverted and Additional Facts (“SCAF”) to preserve their disputes, none
18 of which are material.² Plaintiffs also provide additional factual background in the SCAF
19 to contextualize Defendant’s arguments.

20 Defendant’s Motion for Summary Judgment focuses on two ways an individual may
21 seek to change the sex listed on their birth certificate: Subsection (A)(3)’s private

22 ¹ Plaintiffs and Defendant (each a “Party” and together the “Parties”) met and conferred and
23 agree that it is in the interests of judicial economy and avoiding needless duplicative filings
24 for each to incorporate into their opposition briefs the statements of fact and evidence they
submitted in support of their cross-motions for summary judgment. (Dkt. 242.)

25 ² The Parties also met and conferred regarding the statements of fact each submitted with
26 their cross-motions for summary judgment (Dkts. 231, 233), and agree that, while each
27 Party has certain disagreements with and objections to the opposing Party’s statement of
28 facts, any such disputes and objections are about each party’s interpretation of or
characterization of the evidence. The Parties agree that there are no disputes that would
require a fact-finding or evidentiary hearing before the Court. Thus, the Parties are each
filing a controverting Statement of Facts to preserve their arguments and present their view
of the other party’s evidence, but nevertheless, the Parties believe that the record permits
the Court to resolve their cross-motions as a matter of law.

1 administrative process and Subsection (A)(4)'s court-order process. Defendant essentially
2 ignores the third way: a non-transgender person whose sex marker is incorrect may apply
3 for a "correction" to their birth certificate directly from either ADHS or their county vital
4 records office. (Pls.' Br. at 5; SOF ¶¶ 29–34; Ex. 9 at 5–7; Ex. 10 at 5–7; *see also* A.R.S.
5 §§ 36-301(6), 33-323; A.A.C. §§ R9-19-102, R9-19-207.) Under the "corrections" process,
6 requests made within 90 days of the individuals' birth do not require any evidentiary
7 document attesting to their correct sex. (SOF ¶ 31.) Requests made after 90 days of birth
8 require an evidentiary document "that supports the correction to the birth record," such as
9 a medical record or "a document from an independent source containing information that
10 supports the request." (Ex. 9 at 7; *see also* Ex. 5 (100:11–14); SOF ¶ 32.) If ADHS grants
11 the requested "correction," it seals the record. (SOF ¶ 33.) Crucially, transgender people are
12 not permitted to apply for a "correction" to change their sex markers. (SOF ¶ 34.)

13 In stark contrast to this straightforward "corrections" process, transgender people are
14 only permitted to seek to change their sex markers via Subsections (A)(3) or (A)(4), both
15 of which impose additional and, in some cases insurmountable, burdens. (Pls.' Br. at 5–7;
16 SOF ¶¶ 35–52.) Subsection (A)(3) requires transgender people to submit a request to ADHS
17 (they are not allowed to apply to their county vital records office) with an evidentiary
18 document in the form of a physician statement attesting they have "undergone a sex change
19 operation." (SOF ¶ 36; *see also* A.R.S. § 36-337(A)(3).) And Subsection (A)(4) requires
20 petitioners take the added step of "fil[ing] a lawsuit against government entities to obtain a
21 'court order' which entails much more cost, confusion, and uncertainty than a private
22 administrative process before a local registrar." (Dkt. 83 at 12 n.9.)

23 Defendant's Motion also fails to provide other critical details about the court-order
24 process. For example, Defendant declines to address that Subsection (A)(4) is devoid of any
25 standard for Arizona state courts to apply when deciding whether to grant petitions for
26 orders to change sex markers, and leaves petitioners guessing about how to prepare a
27 successful petition. (Dkt. 83 at 12 n.9; SOF ¶ 50.) Defendant also declines to acknowledge
28 ADHS's previous position in Arizona state court that the Surgical Requirement applies to

1 the court-order process. (SOF ¶ 51.) ADHS has never disavowed its previous position either
 2 publicly or to the Arizona judiciary directly. (SCAF ¶ 1). As an unsurprising consequence,
 3 Arizona state courts continue to apply the Surgical Requirement to deny transgender
 4 peoples’ petitions for orders to change their sex markers. (SOF ¶¶ 51, 60.)

5 **III. LEGAL STANDARD**

6 Summary judgment is warranted if there are no genuine issues of material fact and
 7 the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A fact is
 8 “material” if it may affect the outcome of the case, *Anderson v. Liberty Lobby, Inc.*, 477
 9 U.S. 242, 248–49 (1986), and there is no genuine issue for trial if, based on the record as a
 10 whole, no reasonable trier of fact could find for the non-moving party, *Matsushita Elec.*
 11 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The non-moving party cannot
 12 “simply show that there is some metaphysical doubt as to the material facts,” *id.* (citations
 13 omitted), but must instead come forward with “concrete evidence” from which a reasonable
 14 trier of fact could return a verdict in his favor, *Anderson*, 477 U.S. at 256; *see also Estate*
 15 *of Tucker v. Interscope Records, Inc.*, 515 F.3d 1019, 1029–30 (9th Cir. 2008).

16 **IV. ARGUMENT**

17 **A. Subsection (A)(4)’s Court-Order Process Does Not Render the Surgical** 18 **Requirement Constitutional.**

19 Defendant’s Motion for Summary Judgment rests chiefly on a single, faulty premise:
 20 the court-order process in Subsection (A)(4)—a *different* process contained in a *different*
 21 part of the statute—absolves her of legal responsibility for enforcing the Surgical
 22 Requirement. The Court correctly rejected that argument when Defendant asserted it in her
 23 Motion to Dismiss the Amended Complaint. (Dkt 83 at 12 n.9.) The Court should reject it
 24 again for the same reasons, which are now supported by undisputed facts in the record.

25 **1. The Court has already rejected Defendant’s repeated attempts to** 26 **deploy Subsection (A)(4) to shield the Surgical Requirement.**

27 Defendant first argued that Subsection (A)(4) renders the Surgical Requirement
 28 constitutional when she opposed former Plaintiff Jane Doe’s Motion for Preliminary
 Injunction, contending that Jane Doe was unlikely to succeed on the merits of her Equal

1 Protection and Due Process claims because she allegedly could amend her sex marker
2 through the court-order process. (Dkt. 23 at 12–14.) Plaintiffs replied that “[t]he existence
3 of a separate court-order process in Subsection (A)(4) does not cure the constitutional
4 defects in the administrative process in Subsection (A)(3), which Defendant[] admit[s] is
5 not open to transgender young people because they have not ‘undergone a sex change
6 operation’ and do not ‘have a chromosomal count that establishes [their] sex as different
7 than in their registered birth certificates.’” (Dkt. 30 at 1 (quoting Dkt. 23 at 7); *see also*
8 Dkt. 30 at 7–10.) The parties resolved Jane Doe’s preliminary-injunction motion before the
9 Court ruled on it. (Dkt. 39.)

10 Defendant re-asserted the exact same argument in her Motion to Dismiss, arguing
11 that because Subsection (A)(4) is available the Surgical Requirement does not infringe
12 Plaintiffs’ Equal Protection rights or their Due Process rights to individual liberty and
13 autonomy or to choose a medical procedure. (Dkt. 56 at 22–24; Dkt. 71 at 10–12.) Plaintiffs
14 opposed, contending with evidence that Arizona state courts have imported the Surgical
15 Requirement into Subsection (A)(4)’s court-order process and that “[a] constitutional defect
16 in one statute is not cured by the mere existence of a far more burdensome and intrusive
17 avenue for obtaining the same legal benefit or protection.” (Dkt. 61 at 17.) The Court agreed
18 with Plaintiffs, finding that Subsection (A)(4) did not render the Surgical Requirement
19 constitutional because “state judges have imported [the Surgical Requirement] and have
20 denied relief” and, in any event, “[Subsection] (A)(4) does not provide any standards” and
21 seeking a court order “is a much more burdensome process [that] entails much more cost,
22 confusion and uncertainty than a private administrative process.” (Dkt. 83 at 12 n.9.)

23 Defendant repeats this argument for the third time in her Motion for Summary
24 Judgment but offers no authority to undermine the Court’s previous judgment. And, despite
25 her third attempt, she still fails to cite any case to support her argument that excluding a
26 class of persons from a statutorily-created process in violation of the Fourteenth
27 Amendment can be remedied by the existence of a different statutory procedure that is much
28 more burdensome, risks the very privacy interests Plaintiffs desire to protect, and is not

1 guaranteed to result in the relief they seek.³ And even if the Court were to consider the
 2 entire statutory scheme—as Defendant proposes, (Br. at 10–12)—the “corrections” process
 3 reinforces the unconstitutionality of the Surgical Requirement because, unlike Plaintiffs,
 4 non-transgender people seeking to change the sex marker on their birth certificates are not
 5 forced to undergo surgery or obtain a court order.

6 **2. The undisputed material facts confirm that Subsection (A)(4)’s**
 7 **court-order process is not an alternative to Subsection (A)(3)’s**
 8 **private administrative process.**

9 **a. Arizona state court judges have imported the Surgical**
 10 **Requirement into Subsection (A)(4) and denied relief.**

11 The record demonstrates that Defendant for years asserted in Arizona state court that
 12 the Surgical Requirement was an essential prerequisite to *any* request to change a sex
 13 marker, even when an individual petitioned a court for such a change. (SOF ¶ 2.) For
 14 example, in an objection to a petition filed in Pima County Superior Court, ADHS asserted
 15 various arguments against the court’s jurisdiction under Subsection (A)(4), including that
 16 the court-order process did not “creat[e] a broad grant to the courts to amend birth
 17 certificates that would circumvent the procedures and standards established by [ADHS] for
 18 amendments.” (Ex. 22 (“ADHS Objection”) at 3.) According to ADHS, “[t]he existing
 19 statutory scheme for vital records and the attendant rules adopted by [ADHS] require that
 20 request to amend or correct birth certificates ordinarily be initiated by filing a request with
 21 [ADHS].” (*Id.* at 4.) ADHS also argued that “[ADHS’s] expertise is essential” to decide
 22 “request[s] to change the sex on the birth certificate.” (*Id.* at 5–6.) Thus, ADHS required
 23 applicants to “present the physician’s written statement as required” by Subsection (A)(3)

23 ³ Defendant’s attempt to re-frame Subsection (A)(3)’s private administrative process as an
 24 “affirmative benefit” akin to the “school finance system” at issue in *San Antonio*
 25 *Independent School District v. Rodriguez*, 411 U.S. 1 (1973), misses the mark. (Br. at 14,
 26 19.) In *Rodriguez*, the Supreme Court observed that the “relative differences in spending
 27 levels” were troublesome but not unconstitutional, in part because they did not cause “an
 28 absolute denial of educational opportunities to any of its children.” 411 U.S. at 37–40. Here,
 however, Plaintiffs have been entirely foreclosed from changing their sex markers via the
 state’s private administrative process, which is a state-created pathway to correct an
 essential identity document issued by Arizona to every individual born in the state. Access
 to such an essential process is hardly an “affirmative benefit” and, even if it was, “the Court
 already concluded that the ‘sex change operation’ requirement at issue invades Plaintiffs’
 rights under the Due Process and Equal Protection Clauses.” (Dkt. 214 at 6.)

1 because it “has historically recognized that the Arizona Legislature placed this very specific
2 requirement in section (A)(3)(b) to ensure that this particular type of amendment is
3 accurately documented.” (*Id.* at 6.) Therefore, ADHS stated it “will not amend the birth
4 certificate for [the] registrant and objects to the portion of this Court’s order regarding that
5 amendment.” (*Id.* at 7.)⁴

6 Moreover, ADHS’s representative—who testified at a deposition in this case
7 pursuant to Federal Rule of Civil Procedure 30(b)(6)—conceded under oath that ADHS had
8 a policy of enforcing the Surgical Requirement for court orders, has not published any
9 public statement that it had reversed that policy, and has not communicated any such policy
10 change to the Arizona courts. (SCAF ¶ 1.) Given ADHS’s prior statements to the Arizona
11 judiciary, it is unsurprising that Arizona courts continue to look to the Surgical Requirement
12 when denying petitions filed by transgender petitioners. For example, Arizona state courts,
13 like those in Maricopa County, still maintain public websites suggesting that people must
14 first apply to ADHS for changes to birth certificates before they petition the court. (Ex. 27
15 at 1 (stating petitioners “may use these forms if,” among other requirements, “[t]he Arizona
16 Office of Vital Records was unable to make the correction”).)

17 In addition, Arizona state courts denied petitions to change the sex marker on the
18 birth certificates of two Named Plaintiffs, Helen Roe and James Poe. It is undisputed that,
19 in each case, judges denied the petitions and provided Helen Roe and James Poe with
20 printed copies of Subsection (A)(3), which contains the Surgical Requirement. (SOF ¶ 60;
21 SCAF ¶ 7.) The judge in James Poe’s case even specifically marked the Surgical
22 Requirement on the printed copy, and then informed him at the hearing that the court *would*
23 have granted his petition, but the judge knew ADHS would not “honor it” because the
24

25 ⁴ Defendant argues that when deciding a facial challenge, a court is limited to reviewing the
26 text of the statute itself, not what others have said the statute means. (Br. at 9.) However,
27 the Supreme Court has explicitly stated that administrative interpretation and
28 implementation of a statute or regulation is essential to the analysis. *See Ward v. Rock*
Against Racism, 491 U.S. 781, 795–96 (1989) (“In evaluating a facial challenge to a state
law, a federal court must . . . consider any limiting construction that a state court or
enforcement agency has proffered.” (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman*
Ests., Inc., 455 U.S. 489, 495 n. 5 (1982))).

1 agency enforced the Surgical Requirement. (Ex. 6 (94:13–95:14); *see also* SCAF ¶ 7.) And
 2 Named Plaintiff Carl Voe’s mother did not even try to file a petition for a court order
 3 because she recognized the significant risk that the state court would deny it, given Carl
 4 Voe had not undergone surgery—an outcome that she knew would devastate her son. (SOF
 5 ¶ 61; Ex. 26 (117:19–118:12).)⁵ This undisputed evidence is more than sufficient to establish
 6 that “state judges have imported the A.R.S. § 36-337(A)(3) requirement of a ‘sex change
 7 operation’ and have denied relief.” (Dkt. 83 at 12 n.9; *see also* Pls.’ Br. at 7.)

8 Defendant does not deny that ADHS expressly informed Arizona state courts that
 9 the agency would not accept court orders that commanded ADHS to change a sex marker
 10 unless the order was also accompanied by proof of a “sex change operation.” Instead,
 11 Defendant cites to *McLaughlin v. Swanson*, an Arizona case addressing whether same-sex
 12 parents may both be listed as mothers or as parents on a child’s birth certificate, and suggests
 13 it shows that “Arizona courts have broad authority to order amendments to birth certificates
 14 based on § 36-337(A)(4).” (Br. at 11 (citing 476 P.3d 336, 338 ¶ 9 (Ariz. App. 2020)).) But
 15 *McLaughlin* did not address the Surgical Requirement or changes to sex markers under
 16 Subsection (A)(4), and thus does not dispel the manifest confusion that Arizona state courts
 17 have suffered regarding the lack of standards for such petitions—especially in light of
 18 ADHS’s previous position on the issue.

19 **b. Subsection (A)(4) is far more burdensome, intrusive, and**
 20 **uncertain than Subsection (A)(3).**

21 The Court now has an undisputed evidentiary record to support its prior finding that
 22 Subsection (A)(4) “is a much more burdensome process as it requires a transgender person
 23 to file a lawsuit against government entities to obtain a ‘court order’ which entails much
 24 more cost, confusion and uncertainty than a private administrative process.” (Dkt. 83 at 12
 25 n.9.) Compared to Subsection (A)(3)—which allows applicants to submit a confidential
 26 request directly to ADHS accompanied by only a physician’s letter—petitioning for a court

27 ⁵ Former Plaintiff D.T. also attempted to petition for a court-ordered amendment to the sex
 28 marker on his birth certificate, but was told by the judge that, per ADHS, his petition would
 only be granted “upon compliance with the rules and regulations for gender change.”
 (Dkt. 30-3, Declaration of Lizette Trujillo Exhibit A at 2; *see also id.* ¶ 18; Dkt. 30 at 4–5.)

1 order requires extra filing fees, additional time, numerous court documents that are filed
2 publicly, appearing in open court, and additional motion practice to protect a transgender
3 person’s privacy (which, like the petition itself, may or may not be granted by the court).
4 (Pls.’ Br. at 6–7.)

5 At the outset, Subsection(A)(4)’s court-order process requires an individual to
6 prepare a petition—a complicated undertaking that often requires hiring an attorney. (*See*,
7 *e.g.*, Ex. 27 at 1 (“Consulting a lawyer before filing documents with the court may help
8 prevent unexpected results.”); SOF ¶ 48.) It also requires applicants to pay a filing fee, yet
9 another additional cost not imposed under Subsection (A)(3). (SOF ¶ 46.) Costs aside, the
10 public nature of court filings forces petitioners to disclose their names on the docket, thus
11 disclosing their identities. (*Id.*) And although petitioners can request that the court seal their
12 records, there is no guarantee the request will be granted. (*Id.*; *see also* SCAF ¶¶ 3–4.) As
13 the uncontroverted expert testimony in the record here demonstrates, forcing transgender
14 people to file documents in court and publicly disclose their identities leads to the very
15 harms that Plaintiffs are seeking to avoid by changing their sex markers. (SOF ¶ 47; Ex. 1
16 ¶ 56; Ex. 4 (93:23–94:4, 95:5–16, 96:9–97:8.))

17 Named Plaintiffs Helen Roe’s and James Poe’s unsuccessful attempts to petition for
18 court orders are prime examples of the severe obstacles awaiting Plaintiffs under
19 Subsection (A)(4). Not only was Helen Roe’s petition denied by the court, the state-court
20 judge *also* denied her request to seal her petition, leaving her real name and other identifying
21 information available to the public. (SOF ¶ 60; SCAF ¶ ¶ 3, 7.) To seal that information,
22 Helen Roe was forced to seek an attorney’s help to prepare a new sealing request, which
23 only happened years later, after her identity had already been made public. (SCAF ¶ 4.)
24 James Poe’s mother was forced to ask a friend for help preparing James’s petition, which
25 was nevertheless denied by a state-court judge who marked the Surgical Requirement and
26 told her “I’m not going to give you a court order” because she knew that ADHS “isn’t going
27 to honor it.” (Ex. 6 (94:13-95:14); *see also* SOF ¶ 48; SCAF ¶ 7.) And Carl Voe’s mother,
28 who was required to move out of Arizona for employment, faced myriad difficulties in her

1 unsuccessful attempt to seek, from afar, a court order from an Arizona court to change Carl
 2 Voe’s name. (SOF ¶ 49.) As Named Plaintiffs’ experiences plainly show, and as this Court
 3 observed, “navigating through the litigation process is often difficult and fraught with peril
 4 for trained attorneys, let alone a transgender person without the money, education and
 5 resources to properly navigate the litigation process.” (Dkt. 83 at 12 n.9.)⁶

6 **c. Subsection (A)(4) contains no standards for when**
 7 **transgender applicants may obtain a court-ordered**
 8 **amendment to their sex marker.**

8 Finally, one need only glance at Subsection (A)(4) to see that “[it] does not provide
 9 any standards whatsoever as to when a transgender child, like the ones at issue in this case,
 10 could obtain a ‘court order’ ordering an amendment to their birth certificate.” (Dkt. 83 at 12
 11 n.9; *see also* SOF ¶ 50.) Nor has ADHS published regulations or instructions to aid
 12 applicants or the courts in navigating this process. Thus, “these kids and their parents are
 13 left alone under (A)(4) to file a lawsuit against government entities under a provision of a
 14 statute that provides no standard to obtain necessary relief.” (Dkt. 83 at 12 n.9; *see also* Pls.’
 15 Br. at 7.) As the record demonstrates, Defendant’s contention that Subsection (A)(4) is a
 16 viable alternative to the private administrative process in Subsection (A)(3), let alone one
 17 that renders the Surgical Requirement constitutional, is simply incorrect.

18 **B. The Surgical Requirement Violates the Equal Protection Clause.**

19 The Surgical Requirement, as contained in Subsection (A)(3) and its implementing
 20 regulation, infringe on Plaintiffs’ Equal Protection rights because they are “aimed directly
 21 at ‘transgender’ people,” an unavoidable conclusion given that they require “a ‘sex change
 22 operation’ to obtain an accurate birth certificate that properly aligns with their gender
 23 identity.” (Dkt. 83 at 9–10.) In reaching this conclusion and denying Defendant’s Motion
 24 to Dismiss the Equal Protection claim, the Court already rejected Defendant’s arguments
 25 that the Surgical Requirement does not discriminate based on sex and transgender status.
 26

27 ⁶ Defendant appears to concede that the court-order process “‘is more expensive, confusing,
 28 and time-consuming[,] . . . does not guarantee that [Plaintiffs] will receive a corrected birth
 certificate at the end,’ and ‘create[s] an easily accessible public record.’” (Br. at 13 (quoting
 Dkt. 47, ¶¶ 6, 54).)

1 (*Id.*) And the uncontroverted facts in this case demonstrate that the Surgical Requirement
2 prevents transgender people from applying to change their sex markers using the state’s
3 private administrative process. Meanwhile, non-transgender people either will never need
4 to apply for a sex-marker change or, if they do, may seek a “correction” that does not require
5 them to undergo surgery to obtain one. (Pls.’ Br. at 11–12; *see also* SOF ¶ 63.)

6 Nevertheless, Defendant re-asserts the exact same arguments in her Motion for
7 Summary Judgment that she did in her Motion to Dismiss, contending that
8 Subsection (A)(3) and its implementing regulation do not “make[] any such classification
9 on their face” and any classification “is not one based on ‘sex’ or ‘transgender status.’” (Br.
10 at 16–17; *see also* Dkt. 56 at 22 (arguing “both the statute and the regulation . . . do not
11 target or even reference transgender persons”); Dkt. 71 at 10 (contending “[t]he statute
12 applies to *all* persons equally”).) The Court already squarely rejected that argument:

13 [T]he statute and regulation do not explicitly use the phrase ‘transgender’ or
14 explicitly state that these laws are aimed directly at ‘transgender’ people, [but]
15 any logical reading of the statute and regulation reflects that it applies nearly
16 exclusively to transgender people; who else is going to voluntarily seek out a
17 “sex change operation”? *See Latta v. Otter*, 771 F.3d 456, 467-68 (9th Cir.
18 2014) (“Whether facial discrimination exists does not depend on why a policy
discriminates, but rather on the explicit terms of the discrimination . . .
[W]hile the distinction . . . that defendants seek to draw could in theory
represent a *justification* for the discrimination worked by the law, it cannot
overcome the inescapable conclusion that the [states’ laws] discriminate on
the basis of sexual orientation.”) (emphasis in the original).

19 (Dkt. 83 at 9–10.) Defendant’s Motion for Summary Judgment provides no good reason
20 why the Court should depart from its prior holding.

21 Defendant argues that the Surgical Requirement’s classification is not based on
22 transgender status, but instead based whether the individual has undergone a medical
23 procedure, *i.e.* “a sex change operation.” (Br. at 17–18.) The Court found otherwise when
24 it granted Plaintiffs’ Motion for Class Certification and ruled that “the relevant injuries at
25 issue in this case are [Plaintiffs’] constitutional injuries (via Arizona’s ‘sex change
26 operation’ requirement) stemming from the Equal Protection and Due Process Clause
27 violations.” (Dkt. 214 at 6.) All transgender people in Arizona suffer the same
28 “constitutional injuries.” In any event, when, as here, a statute facially discriminates against

1 every member of a protected class, the Equal Protection Clause applies notwithstanding that
 2 *some* members of a protected class, despite the classification, may yet be able to achieve
 3 the same outcome as similarly-situated people outside of the class. Put simply, because the
 4 Surgical Requirement applies to all transgender people, it is immaterial that some
 5 transgender people (those who have undergone surgery) may apply to change their sex
 6 markers under Subsection (A)(3) because, to do so, they were first required to undergo that
 7 surgery, a requirement that Defendant concedes is not imposed on non-transgender people.⁷
 8 Heightened scrutiny is thus the correct standard. (*See also* Pls.’ Br. at 12–13.)

9 Defendant also asserts that the Surgical Requirement is constitutional because
 10 Subsection (A)(3) applies to transgender people *and* intersex people. (Br. at 17 & n.5.) But
 11 it is another part of Subsection (A)(3), addressing an applicant’s “chromosomal count,” that
 12 applies to intersex people. (Br. at 17 (quoting A.R.S. § 36-337(A)(3); A.A.C. R9-19-
 13 208(O)).) And even if some intersex people might also undergo a “sex change operation,”
 14 it is still true that “any logical reading of [Surgical Requirement] reflects that it applies
 15 *nearly* exclusively to transgender people.” (Dkt. 83 at 9–10 (emphasis added).)⁸

16 C. The Surgical Requirement Violates the Due Process Clause.

17 The Surgical Requirement is also unconstitutional because it deprives Plaintiffs—in
 18 three different ways—of their constitutional rights under the Due Process Clause.
 19 Specifically, it invades their right to privacy, their right to individual liberty and autonomy,
 20 and their right to choose to undergo a certain medical procedure. Plaintiffs’ Motion for
 21

22 ⁷ Defendant’s reliance on *United States v. Salerno* is thus misplaced, as that case involved
 23 pre-trial detention procedures that the Supreme Court found “fully comports with
 24 constitutional requirements.” 481 U.S. 739, 741 (1987). The same is not true of the Surgical
 Requirement, which classifies all transgender people differently from non-transgender
 people and is thus unconstitutionally discriminatory.

25 ⁸ Because the Surgical Requirement facially discriminates based on sex and transgender
 26 status, Defendant is incorrect that Plaintiffs are required to prove the Legislature’s
 27 subjective animus or hostility toward transgender people when enacting Subsection (A)(3).
 28 (Br. at 18.) The operation and effect of the classification itself is sufficient to demonstrate
 any required intent. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 609 (4th Cir.
 2020); *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1051–52 (7th Cir.
 2017); *see also Latta*, 771 F.3d at 467 (holding that bans on same-sex marriage violated the
 Equal Protection Clause and rejecting argument that “differential treatment by sexual
 orientation is an incidental effect of, but not the reason for, those laws”).

1 Summary Judgment explains in more depth why the Surgical Requirement infringes on each
2 of these rights. (Pls.’ Br. at 16–20.)

3 Defendant’s Motion for Summary Judgment does not challenge that these Due
4 Process rights exist or that Plaintiffs possess them. (*See, e.g.*, Br. at 10 (“Assuming for
5 purposes of this motion that Plaintiffs have identified a protected fundamental liberty
6 interest. . .”).) Nor does Defendant dispute that the Surgical Requirement, on its own,
7 violates those Due Process rights. Rather, Defendant’s only argument rests on the court-
8 order process—a *different* procedure under a *different* part of Arizona’s vital records laws.
9 As discussed above, this argument fails. (*See* Section IV.A, *supra*.)

10 Defendant’s last gambit is to argue, without support in the record, that “[n]o part of
11 the challenged Arizona law prohibits Plaintiffs from living their lives consistent with their
12 gender identities.” (Br. at 15.) This argument entirely ignores the uncontroverted record
13 evidence showing that Defendant’s enforcement of the Surgical Requirement has prevented
14 Plaintiffs Helen Roe, James Poe, and Carl Voe from obtaining accurate birth certificates,
15 which has made them unable to live consistently with their gender identities. (SOF ¶¶ 51,
16 56, 60–62.) Defendant also misapprehends the nature of Plaintiffs’ claim, which is that birth
17 certificates are critical identity documents and that transgender people who cannot change
18 their sex markers to accurately reflect their gender identity face many practical, social, and
19 psychological consequences. (SOF ¶¶ 19–24, 49, 58, 67.) Those consequences may include,
20 for example, that a transgender person’s inaccurate birth certificate may not prove their
21 identity, could disclose their transgender status to third parties, and might interfere with
22 their treatment for gender dysphoria. (SOF ¶¶ 19–24, 58; *see also* Pls.’ Br. at 3–4.)

23 Although Defendant imagines that some hypothetical transgender people may not
24 encounter these consequences (Br. at 14–16), she cites no supporting evidence from the
25 record. And while it is true that not all transgender people share the same lived experience
26 or face the same challenges, that is irrelevant where, as here, “the Court already concluded
27 that Plaintiffs’ injuries stem from Subsection (A)(3)’s invasion and violation of
28

1 Plaintiffs’ rights to Due Process and Equal Protection.” (Dkt. 214 at 6.)⁹ For example, as
 2 the Court observed, transgender children with birth certificates that do not align with their
 3 gender identities are “involuntarily outed every single time they are forced to present their
 4 birth certificate to a complete stranger,” which “is akin to death by a thousand cuts as being
 5 continuously outed unnecessarily exposes this child to stigma, bullying, fear, and violence.”
 6 (Dkt. 83 at 11.) That reasoned conclusion by the Court is now supported by a robust and
 7 undisputed evidentiary record that contains testimony from Plaintiffs’ mothers
 8 demonstrating that a birth certificate reflecting the wrong sex can and will disclose an
 9 individuals’ transgender status (SOF ¶¶ 58, 66–67), as well as unchallenged expert opinion
 10 that such disclosures are harmful to transgender people (SOF ¶¶ 18, 20, 21, 24; Ex. 1 ¶¶ 37,
 11 56; Ex. 4 (93:23–94:4, 95:5–16, 96:9–97:8)).

12 **D. Defendant’s Asserted Justifications Are Insufficient and The Surgical**
 13 **Requirement Cannot Survive Any Level of Scrutiny.**

14 Under Ninth Circuit precedent, heightened scrutiny applies to the Court’s review of
 15 the Surgical Requirement under the Equal Protection Clause because the law discriminates
 16 based on transgender status, which is also discrimination based on sex. *Hecox v. Little*, 79
 17 F.4th 1009, 1021–22 (9th Cir. 2023) (“We conclude that while the Act certainly classifies
 18 on the basis of sex, it also classifies based on transgender status, triggering heightened
 19 scrutiny on both grounds.”); (Pls.’ Br. at 12–13).¹⁰ Further, as argued in Plaintiffs’ Motion
 20 for Summary Judgment, strict scrutiny applies to all three Due Process claims. *Love v.*
 21 *Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015); (Pls.’ Br. at 20–21).

22 ⁹ Defendant’s citation to *Salerno* is inapt for the same reasons as above. (See n.7, *supra*.)

23 ¹⁰ Defendant generally agrees that heightened scrutiny applies to an Equal Protection
 24 challenge to a law that discriminates based on transgender status, but suggests that only as-
 25 applied (as opposed to facial) challenges warrant such scrutiny. Not so. Defendant’s
 26 argument principally relies on *Witt v. Department of the Air Force*, but *Witt* did not address
 27 what standard of review applies to a facial challenge, nor did it limit its holding to as-applied
 28 challenges. 527 F.3d 806, 819 (9th Cir. 2008). Rather, *Witt* merely ruled that, on the facts
 of that case, “this heightened scrutiny analysis is as-applied rather than facial.” *Id.*
 (emphasis added). Contrary to Defendant’s argument, “the level of scrutiny the Court
 applies depends not on the nature of the legal challenge, but rather on the nature of the right
 implicated.” See *Log Cabin Republicans v. United States*, No. CV 04-08425-VAP (EX),
 2010 WL 11508368, at *3 (C.D. Cal. July 6, 2010). And this Court has already ruled that
 heightened scrutiny applies because “[d]iscrimination against transgender people is
 discrimination based on sex; as such, heightened scrutiny applies.” (Dkt. 83 at 9.)

1 The undisputed material facts show that the Surgical Requirement cannot survive
2 any level of scrutiny. (Pls.’ Br. at 13–16, 20–21.) Defendant contends otherwise, asserting
3 three purported governmental justifications in support of her enforcement of the Surgical
4 Requirement. Each misses the mark.

5 *First*, Defendant asserts that she has a governmental interest in the “integrity and
6 accuracy of the sex field on a birth certificate.” (Br. at 21.) Plaintiffs do not dispute the
7 general proposition that the integrity and accuracy of a birth certificate is a legitimate
8 governmental interest. However, Defendant does not (because she cannot) cite to any
9 evidence in the record demonstrating that the Surgical Requirement *advances* that interest.
10 Rather, as Plaintiffs argue in their Motion for Summary Judgment, the record shows the
11 opposite: the Surgical Requirement leads to *inaccurate* identity documents because it forces
12 Plaintiffs to maintain birth certificates that do not reflect who they are. (Pls.’ Br. at 13–15.)
13 Further, the Surgical Requirement plainly fails to advance an interest in accurate identity
14 documents when other state and federal agencies—including the Arizona Department of
15 Transportation, the U.S. Department of State, the Social Security Administration, and the
16 U.S. Citizenship and Immigration Services—do not require proof of surgery to change the
17 sex markers on the identity documents they issue. (Pls.’ Br. at 14–15; SOF ¶¶ 64–65;
18 Dkt. 83 at 15 (citing 1 Sexual Orientation and the Law § 10:11 (2020–21 ed.).)

19 *Second*, Defendant asserts for the first time that “preserv[ing] historical facts,
20 including information acquired and observations made at the time of a child’s birth” is a
21 governmental interest supporting the Surgical Requirement. (Br. at 21.) Defendant waived
22 this purported justification because, during the years of litigation preceding summary
23 judgment and Plaintiffs’ many requests for Defendant’s alleged governmental interests, she
24 never asserted it until now. Courts refuse to consider a party’s new theories raised for the
25 first time on summary judgment because discovery is closed and it would prejudice the
26 opposing party. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000)
27 (affirming refusal to consider a party’s theory raised for first time on summary judgment
28 because doing so would have required the opposing side to develop different defenses after

1 discovery closed); *Jimmie’s Limousine Serv., Inc. v. City of Oakland*, No. C 04-03321
2 WHA, 2005 WL 2000947, at *5 (N.D. Cal. Aug. 18, 2005) (rejecting new theories at
3 summary judgment where discovery ended months before).

4 During discovery, Plaintiffs requested that Defendant produce “information as to
5 whether the ADHS has any justification for implementing and enforcing the surgical
6 requirement in A.R.S. § 36-337(A)(3) and related regulations.” (Dkt. 153 at 1 n.1.) Plaintiffs
7 were ultimately forced to file a Motion to Compel (Dkt. 121 at 6–9), which the Court
8 granted, ruling that “this information is relevant to both Defendant’s potential defenses
9 (such as justifications for the surgical requirement) and Plaintiffs’ claims pursuant to the
10 Equal Protection and Due Process Clauses of the 14th Amendment” (Dkt. 153 at 1 n.1).
11 Defendant’s subsequent supplemental responses contained only one purported justification:
12 that “maintaining and ensuring the truthfulness, completeness, and correctness of
13 information in vital records and statistics.” (Ex. 23 at 24.) And ADHS’s Rule 30(b)(6)
14 representative later confirmed under oath that this was the *only* government interest for
15 enforcing the Surgical Requirement. (SCAF ¶ 5.) Defendant never disclosed that the
16 Surgical Requirement is allegedly justified to “preserve historical facts,” and thus Plaintiffs
17 have had no opportunity to take discovery about this new theory, such as by deposing
18 ADHS’s Rule 30(b)(6) witness or any other witness about it. Given the obvious prejudice
19 to Plaintiffs, the Court should not consider this purported justification. *See Coleman*, 232
20 F.3d at 1292; *Jimmie’s Limousine Serv.*, 2005 WL 2000947, at *5.

21 Even if the Court were to consider this new theory, Defendant proffers no evidence
22 to support it, or that the Surgical Requirement advances it. Defendant merely strings
23 together portions of older versions of Arizona vital records laws, including some that were
24 enacted decades before the Surgical Requirement, and cites to statistics published by the
25 U.S. Centers for Disease Control and U.S. Census Bureau regarding the ratio of live male
26 to female births. (Br. at 21.) Such “evidence” is plainly insufficient to demonstrate that the
27 Surgical Requirement—which by its terms permits a limited set of individuals to change
28 their birth-assigned sex markers in some circumstances—advances a governmental interest

1 in preserving historical facts recorded at the time of a person’s birth. Defendant’s key
2 authority, *Gore v. Lee*, 2023 WL 4141665 (M.D. Tenn. June 22, 2023), proves the point.
3 At issue in *Gore* was a Tennessee law that categorically prohibited transgender individuals
4 from changing the sex marker on a Tennessee birth certificate, and the court thus found that
5 sex markers on Tennessee birth certificates constituted “historical facts.” *Id.* at *3.¹¹ In
6 contrast, Defendant in this case concedes that Arizona birth certificates are critical identity
7 documents (not just historical records), and that Arizona law affirmatively permits
8 transgender individuals to change their sex markers in certain circumstances. (*See Br.* at 1.)
9 There is thus no support for Defendant’s “historical facts” justification.

10 *Third*, Defendant asserts that she has a governmental interest in “collecting evidence
11 to support an application to amend a birth certificate to . . . deter fraud or other abuse.” (*Br.*
12 at 22.) As with the “historical facts” theory, Defendant has failed to fully assert or develop
13 a “fraud” theory in this litigation. Again, ADHS’s Rule 30(b)(6) representative confirmed
14 under oath that Defendant was not advancing any justification apart from ensuring the
15 “truthfulness, completeness, and correctness” of birth certificates. (SCAF ¶ 5.) Defendant
16 has thus also waived a “fraud” theory at the summary judgment stage. *Coleman*, 232 F.3d
17 at 1292; *Jimmie’s Limousine*, 2005 WL 2000947, at *5.

18 In any event, even if the Court were to consider the “fraud” theory, Defendant fails
19 to cite anything in the record to demonstrating that the Surgical Requirement was enacted
20 to prevent or deter fraud related to sex markers on Arizona birth certificates. No such
21 evidence exists, and Defendant may not rely on purported justifications that are
22 “hypothesized or invented *post hoc* in response to litigation.” *United States v. Virginia*, 518
23 U.S. 515, 533 (1996). More notably still, Defendant does not even cite to *post hoc* evidence
24 showing that the Surgical Requirement actually functions to prevent or deter fraud related
25 to sex markers, because *there is no fraud related to sex markers on Arizona birth*
26

27 ¹¹ Additionally, neither *Gore*, 2023 WL 4141665, at *3, nor *Fowler v. Stitt*, No. 22-CV-
28 115-JWB-SH, 2023 WL 4010694 (N.D. Okla. June 8, 2023), are apt in this case because
those cases were decided on motions to dismiss, involve different statutory regimes, and
apply out of circuit authority.

1 *certificates*. The only record evidence on this point comes from the deposition testimony of
 2 the former Deputy Bureau Chief and Fraud Manager of ADHS's Bureau of Vital Records,
 3 the position responsible for investigating any kind of fraud related to a birth certificates.
 4 That witness testified under oath that, during her time in the position (March 2019 to March
 5 2022), she did not recall *ever* investigating or even seeing documents related to any alleged
 6 fraud related to sex markers. (SCAF ¶ 6.) Moreover, far from showing that the Surgical
 7 Requirement was intended to deter fraud, the record shows that it could actually *enable*
 8 fraud by preventing or discouraging transgender people, like Plaintiffs, from correcting the
 9 sex markers on their birth certificates, thus ensuring that they possess an inaccurate identity
 10 document. (Pls' Br. at 21.) Accordingly, Defendant fails to establish that any of her
 11 purported justifications allow the Surgical Requirement to survive any level of scrutiny.

12 **V. CONCLUSION**

13 For the foregoing reasons, Plaintiffs request that the Court deny Defendant's Motion
 14 for Summary Judgment and declare that the Surgical Requirement violates the Equal
 15 Protection and Due Process Clauses of the Fourteenth Amendment.

16
 17
 18 Dated: December 22, 2023

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