

1 Patrick Gunn (*Pro Hac Vice*)
COOLEY LLP
2 101 California Street, 5th Floor
San Francisco, California 94111-5800
3 Telephone: (415) 693-2070
Facsimile: (415) 693-2222
4 Email: pgunn@cooley.com

5 Mary O’Grady (011434)
Colin M. Proksel (034133)
6 Payslie M. Bowman (035418)
OSBORN MALEDON, P.A.
7 2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
8 Telephone: (602) 640-9000
Facsimile: (602) 640-9050
9 Email: mogrady@omlaw.com
Email: cproksel@omlaw.com
10 Email: pbowman@omlaw.com

11 *Attorneys for Plaintiffs and the Class*

12 Additional counsel listed on following page

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’ REPLY IN FURTHER
SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT**

ORAL ARGUMENT REQUESTED

**PLAINTIFFS’ REPLY IN FURTHER
SUPPORT OF THEIR MOTION FOR
SUMMARY JUDGMENT**

22
23
24
25
26
27
28

1 Rachel Berg (*Pro Hac Vice*)
2 NATIONAL CENTER FOR LESBIAN RIGHTS
3 870 Market Street, Suite 370
4 San Francisco, California 94102
5 Telephone: (415) 343-7679
6 Facsimile: (415) 392-8442
7 Email: rberg@nclrights.org

8 Barrett J. Anderson (*Pro Hac Vice*)
9 Jessica Taylor (*Pro Hac Vice*)
10 COOLEY LLP
11 10265 Science Center Drive
12 San Diego, California 92121-1117
13 Telephone: (858) 550-6000
14 Facsimile: (858) 550-6420
15 Email: banderson@cooley.com
16 Email: jtaylor@cooley.com

17 *Attorneys for Plaintiffs and the Class*

18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

	<u>Page</u>
I. Introduction	1
II. Argument	1
A. Subsection (A)(4)’s Court-Order Process Does Not Render the Surgical Requirement Constitutional.	1
1. The Court has already correctly rejected Defendant’s attempts to deploy Subsection (A)(4) to shield the Surgical Requirement’s unconstitutionality.	1
2. The undisputed material facts confirm that Subsection (A)(4)’s court-order process is not an alternative to Subsection (A)(3)’s private administrative process.....	2
a. Arizona state court judges have imported the Surgical Requirement into Subsection (A)(4) and denied relief at ADHS’s express direction.....	2
b. Subsection (A)(4) is far more burdensome, intrusive, and uncertain than Subsection (A)(3).	5
c. Subsection (A)(4) contains no standards for when transgender applicants may obtain a court-ordered amendment to their sex marker.....	7
B. The Surgical Requirement Violates the Equal Protection Clause.....	7
C. The Surgical Requirement Violates the Due Process Clause.....	9
1. The Surgical Requirement violates Plaintiffs’ right to privacy	9
2. The Surgical Requirement violates Plaintiffs’ right to individual liberty and autonomy.	10
3. The Surgical Requirement violates Plaintiffs’ right to choose whether to undergo a certain medical procedure.	11
D. Defendant’s Asserted Justifications Are Insufficient and The Surgical Requirement Cannot Survive Any Level of Scrutiny.	12
III. Conclusion	16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page(s)

Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1,
858 F.3d 1034 (7th Cir. 2017) 8

Witt v. Department of the Air Force,
527 F.3d 806 (9th Cir. 2008) 12

Statutes

A.R.S.

 § 36-337(A)(3) *passim*

 § 36-337(A)(4) *passim*

Fed. R. Civ. P.

 30(b)(6) 3, 13, 14

1 **I. INTRODUCTION**

2 The Court should grant Plaintiffs’ Motion for Summary Judgment (Dkt. 232
3 (“Br.”)¹) because the “Surgical Requirement” in the private administrative process for
4 changing the sex marker listed on an Arizona birth certificate—as expressed in A.R.S. § 36-
5 337(A)(3) (“Subsection (A)(3)”) and its implementing regulation—violates the Fourteenth
6 Amendment’s Equal Protection and Due Process Clauses as a matter of law. Despite
7 submitting 40 pages of briefing—in both Defendant’s Motion for Summary Judgment and
8 her opposition to Plaintiffs’ Motion—Defendant has failed to identify a material dispute of
9 fact or provide a persuasive argument for why, given the undisputed facts, the Surgical
10 Requirement could survive constitutional review.

11 Rather, Defendant’s sole attempt to avoid summary judgment in this case is her
12 argument (already rejected by this Court) that the court-order process in A.R.S.
13 § 36-337(A)(4) (“Subsection (A)(4)”)—a different, standardless statutory provision that is
14 more burdensome, uncertain, and public than Subsection (A)(3)—somehow absolves the
15 Surgical Requirement of its myriad constitutional deficiencies. But, as discussed in detail
16 in Plaintiffs’ Opposition to Defendant’s Motion for Summary Judgment (Dkt. 245) and
17 herein, Defendant’s reliance on the court-order process is contrary to both the law and the
18 uncontested material facts. Accordingly, the Court should grant Plaintiffs’ Motion for
19 Summary Judgment and declare the Surgical Requirement unconstitutional under both the
20 Equal Protection and Due Process Clauses.

21 **II. ARGUMENT**

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

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

27 The Court has already held that Subsection (A)(4)’s state-court “corrections” process
28 does not render the Surgical Requirement constitutional for several independent reasons.

¹ Cites to “Br.” are to Plaintiffs’ Motion for Summary Judgment (Dkt. 232), cites to “Opp.” are to Defendant’s Opposition to Plaintiffs’ Motion for Summary Judgment (Dkt. 243), cites to “Def.’s Br.” are to Defendant’s Motion for Summary Judgment (Dkt. 230).

1 For example, “state judges have imported [the Surgical Requirement] and have denied
 2 relief” to petitioners attempting to change their sex markers via Subsection (A)(4). (Dkt. 83
 3 at 12 n.9.) Further, “[Subsection] (A)(4) does not provide any standards” for petitioners or
 4 courts to apply, and Subsection (A)(4) “is a much more burdensome process [that] entails
 5 much more cost, confusion and uncertainty than a private administrative process.” (*Id.*)

6 Defendant offers no authority that calls the Court’s previous ruling into question.
 7 Moreover, she fails to cite any case to support her novel argument that excluding a class of
 8 persons from a statutorily-created process and infringing on their fundamental rights in
 9 violation of the Fourteenth Amendment can be remedied by the existence of a different
 10 statutory procedure that is much more burdensome, risks the very privacy interests Plaintiffs
 11 desire to protect, and is not guaranteed to result in the relief they seek. And even if the Court
 12 were to evaluate the Surgical Requirement in comparison to other statutory provisions, as
 13 Defendant proposes (*Opp.* at 5–6), such an analysis must also include the state’s
 14 “corrections” process, which only reinforces the unconstitutionality of the Surgical
 15 Requirement. Unlike Plaintiffs, non-transgender people seeking to change the sex marker
 16 on their birth certificates using the “corrections” process are not forced to first undergo
 17 surgery or obtain a court order to obtain a corrected identity document.

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

21 **a. Arizona state court judges have imported the Surgical**
 22 **Requirement into Subsection (A)(4) and denied relief at**
 23 **ADHS’s express direction.**

24 The undisputed record before the Court also confirms its previous decision that
 25 Subsection (A)(4) does not remedy the Surgical Requirement’s constitutional deficiencies.
 26 Defendant concedes that some state-court judges have imported the Surgical Requirement
 27 and denied Subsection (A)(4) petitions. (*Opp.* at 6.) It is thus uncontested that court-order
 28 process imposes additional burdens and uncertainty when compared to Subsection (A)(3)’s
 private administrative process. And while Defendant suggests that only a handful of state-
 court judges have imported the Surgical Requirement, the undisputed record also shows

1 that Defendant for years asserted in Arizona state court that the Surgical Requirement was
 2 an essential prerequisite to *any* request to change a sex marker, even when an individual
 3 petitioned a court for such a change. (SOF ¶¶ 51, 60; SCAF ¶¶ 2, 7.²)

4 For example, in an objection to a petition filed in Pima County Superior Court,
 5 ADHS asserted various arguments against the court’s jurisdiction under Subsection (A)(4),
 6 including that the court-order process did not “creat[e] a broad grant to the courts to amend
 7 birth certificates that would circumvent the procedures and standards established by
 8 [ADHS] for amendments.” (Dkt. 233-10, Ex. 22 at 3.) According to ADHS, “[t]he existing
 9 statutory scheme for vital records and the attendant rules adopted by [ADHS] require that
 10 requests to amend or correct birth certificates ordinarily be initiated by filing a request with
 11 [ADHS].” (*Id.* at 4.) ADHS also argued that “[ADHS’s] expertise is essential” to decide
 12 “request[s] to change the sex on the birth certificate.” (*Id.* at 4.) Thus, ADHS required
 13 applicants to “present the physician’s written statement as required” by Subsection (A)(3)
 14 because it “has historically recognized that the Arizona Legislature placed this very specific
 15 requirement in section (A)(3)(b) to ensure that this particular type of amendment is
 16 accurately documented.” (*Id.* at 6.) Therefore, ADHS stated it “will not amend the birth
 17 certificate for the registrant and objects to the portion of this Court’s order regarding that
 18 amendment.” (*Id.* at 7.)³

19 Moreover, ADHS’s Rule 30(b)(6) witness conceded at her deposition that ADHS
 20 had a policy of enforcing the Surgical Requirement for court orders, has not published any
 21 public statement that it had reversed that policy, and has not communicated any such policy

22 ² Cites to “SOF” are to Plaintiffs’ Separate Statement of Fact in support of their Motion for
 23 Summary Judgment (Dkt. 233) and to “SCAF” are to Plaintiffs’ Statement of Controverted
 24 and Additional Facts in support of their Opposition to Defendant’s Motion for Summary
 Judgment (Dkt. 246).

25 ³ 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. (Defendant’s Motion
 27 for Summary Judgment (“Def.’s Br.”) at 9.) However, the Supreme Court has explicitly
 28 stated that administrative interpretation and 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, 494 n. 5 (1982))).

1 change to the Arizona courts. (SCAF ¶ 1.)⁴ Given ADHS’s prior efforts to defeat Subsection
 2 (A)(4) petitions, filings in the Arizona judiciary arguing that the Surgical Requirement
 3 applies to Subsection (A)(4) petitions, and lack of communication of any purported policy
 4 change, Arizona courts continue to look to the Surgical Requirement when denying
 5 petitions filed by transgender petitioners. For example, Arizona state courts, like those in
 6 Maricopa County, still maintain public websites suggesting that people must first apply to
 7 ADHS for changes to birth certificates before they petition the court. (Dkt. 233-11, Ex. 27
 8 at 1 (stating petitioners “may use these forms if,” among other requirements, “[t]he Arizona
 9 Office of Vital Records was unable to make the correction”).)

10 In addition, Arizona state courts denied petitions to change the sex marker on the
 11 birth certificates of two Named Plaintiffs, Helen Roe and James Poe. It is undisputed that,
 12 in each case, judges denied the petitions and provided Helen Roe and James Poe with
 13 printed copies of Subsection (A)(3), which contains the Surgical Requirement. (SOF ¶ 60;
 14 SCAF ¶ 7.) The judge in James Poe’s case even specifically marked the Surgical
 15 Requirement on the printed copy, and then informed him at the hearing that the court *would*
 16 have granted his petition, but the judge knew ADHS would not “honor this” because the
 17 agency enforced the Surgical Requirement. (Dkt. 234-1, Ex. 6 (94:13–95:14); *see also*
 18 SCAF ¶ 7.) And Named Plaintiff Carl Voe’s mother did not even try to file a petition for a
 19 court order because she recognized the significant risk that the state court would deny it,
 20 given Carl Voe had not undergone surgery—an outcome that she knew would devastate her
 21 son. (SOF ¶ 61; Dkt. 234-5, Ex. 26 (117:19–118:12).)⁵ This undisputed evidence is more
 22 than sufficient to establish that “state judges have imported the A.R.S. § 36-337(A)(3)
 23 requirement of a ‘sex change operation’ and have denied relief.” (Dkt. 83 at 12 n.9; *see also*

24 _____
 25 ⁴ Plaintiffs rely on and expressly incorporate their Separate Statement of Facts in Support
 26 of their Motion for Summary Judgment (Dkt. 233), and their Statement of Controverted and
 Additional Facts in Support of Plaintiffs’ Opposition to Defendant’s Motion for Summary
 Judgment herein. (Dkt. No. 246.)

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. 35, Declaration of Lizette Trujillo Exhibit A at 2; *see also* Dkt. 30-3 at ¶ 18; Dkt. 30
 at 4–5.)

1 Br. at 7.)

2 Defendant does not deny that ADHS expressly informed Arizona state courts that
3 the agency would not accept court orders that commanded ADHS to change a sex marker
4 unless the order was also accompanied by proof of a “sex change operation.” Instead,
5 Defendant cites to *McLaughlin v. Swanson*, an Arizona case addressing whether same-sex
6 parents may both be listed as mothers or as parents on a child’s birth certificate, and suggests
7 it shows that Arizona courts have broad discretion to order amendments to birth certificates.
8 (Opp. at 6 (citing 476 P.3d 336, 338 ¶¶ 9–10 (Ariz. App. 2020)).) But *McLaughlin* did not
9 address the Surgical Requirement or Subsection (A)(4) petitions to change sex markers, and
10 thus does not dispel the continuing confusion that Arizona state courts have suffered
11 regarding the lack of standards under Subsection (A)(4)—confusion occasioned by ADHS’s
12 clear position for years that the Surgical Requirement must be applied to such petitions.

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

15 The Court now has an undisputed evidentiary record to support its prior finding that
16 Subsection (A)(4) “is a much more burdensome process as it requires a transgender person
17 to file a lawsuit against government entities to obtain a ‘court order’ which entails much
18 more cost, confusion and uncertainty than a private administrative process.” (Dkt. 83 at 12
19 n.9.) Compared to Subsection (A)(3)—which allows applicants to submit a confidential
20 request directly to ADHS accompanied by only a physician’s letter—petitioning for a court
21 order requires extra filing fees, additional time, numerous court documents that are filed
22 publicly, appearing in open court, and additional motion practice to protect a transgender
23 person’s privacy (which, like the petition itself, may or may not be granted by the court).
24 (Br. at 6–7.)

25 At the outset, Subsection(A)(4)’s court-order process requires an individual to
26 prepare a petition—a complicated undertaking that often requires hiring an attorney. (*See*,
27 *e.g.*, Dkt. 233-11, Ex. 27 at 1 (“Consulting a lawyer before filing documents with the court
28 may help prevent unexpected results.”); SOF ¶ 48.) It also requires applicants to pay a filing

1 fee, yet another additional cost not imposed under Subsection (A)(3). (SOF ¶ 46.)⁶ Costs
2 aside, the public nature of court filings forces petitioners to disclose their names on the
3 docket, thus disclosing their identities. (*Id.*) And although petitioners can request that the
4 court seal their records, there is no guarantee the request will be granted. (*Id.*; *see also* SCAF
5 ¶¶ 3–4.) As the uncontroverted expert testimony in the record here demonstrates, forcing
6 transgender people to file documents in court and publicly disclose their identities leads to
7 the very harms that Plaintiffs are seeking to avoid by changing their sex markers. (SOF
8 ¶ 47; Dkt. 233-2, Ex. 1 ¶ 56; Dkt. 233-2, Ex. 4 (93:23–94:4, 95:5–16, 96:9–97:8.))

9 Named Plaintiffs Helen Roe’s and James Poe’s unsuccessful attempts to petition for
10 court orders are prime examples of the severe obstacles awaiting Plaintiffs under
11 Subsection (A)(4). Not only was Helen Roe’s petition denied by the court, the state-court
12 judge *also* denied her request to seal her petition, leaving her real name and other identifying
13 information available to the public. (SOF ¶ 60; SCAF ¶¶ 3, 7.) To seal that information,
14 Helen Roe was forced to seek an attorney’s help to prepare a new sealing request, which
15 only happened years later, after her identity had already been made public. (SCAF ¶ 4.)
16 James Poe’s mother was forced to ask a friend for help preparing James’s petition, which
17 was nevertheless denied by a state-court judge who marked the Surgical Requirement and
18 told her “I’m not going to give you a court order” because she knew that ADHS “isn’t going
19 to honor this.” (Dkt. 234-1, Ex. 6 (94:13-95:14); *see also* SOF ¶ 48; SCAF ¶ 7.) And Carl
20 Voe’s mother, who was required to move out of Arizona for employment, faced myriad
21 difficulties in her unsuccessful attempt to seek, from afar, a court order from an Arizona
22 court to change Carl Voe’s name. (SOF ¶ 49.) As Named Plaintiffs’ experiences plainly
23 show, and as this Court observed, “navigating through the litigation process is often difficult
24

25 ⁶ Defendant dismisses the burden of attorneys’ fees by suggesting that transgender people
26 could request the assistance of *pro bono* counsel or legal aid clinics. (Opp. at 6 n.1.) The
27 suggestion that *pro bono* counsel should, or have the resources to, shoulder the burden
28 imposed by an unconstitutional Arizona statute is manifestly unreasonable. And it is
especially unreasonable given that Arizona law already provides for a private administrative
process that does not require a lawyer’s assistance. Defendant also suggests that Plaintiffs
can request to defer or waive filing fees. (*Id.*) That request would also generally require the
assistance of an attorney, and there is no guarantee such a request would be granted.

1 and fraught with peril for trained attorneys, let alone a transgender person without the
 2 money, education and resources to properly navigate the litigation process.” (Dkt. 83 at 12
 3 n.9.)

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

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

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

17 The Surgical Requirement, as contained in Subsection (A)(3) and its implementing
 18 regulation, infringe on Plaintiffs’ Equal Protection rights because they are “aimed directly
 19 at ‘transgender’ people,” an unavoidable conclusion given that they require “a ‘sex change
 20 operation’ to obtain an accurate birth certificate that properly aligns with their gender
 21 identity.” (Dkt. 83 at 9–10.) In reaching this conclusion and denying Defendant’s Motion
 22 to Dismiss the Equal Protection claim, the Court already rejected Defendant’s arguments
 23 that the Surgical Requirement does not discriminate based on sex and transgender status.
 24 (*Id.*) Defendant provides no good reason why the Court should depart from its prior holding.

25 Defendant argues that the Surgical Requirement’s classification is not based on
 26 transgender status, but instead based on whether the individual has undergone a medical
 27 procedure, *i.e.* “a sex change operation.” (*See Opp.* at 6–7, 9.) The Court already found
 28 otherwise when it granted Plaintiffs’ Motion for Class Certification and ruled that “the

1 relevant injuries at issue in this case are [Plaintiffs’] constitutional injuries (via Arizona’s
2 ‘sex change operation’ requirement) stemming from the Equal Protection and Due Process
3 Clause violations.” (Dkt. 214 at 6.) All transgender people in Arizona suffer the same
4 “constitutional injuries.” In any event, when, as here, a statute facially discriminates against
5 every member of a protected class, the Equal Protection Clause applies notwithstanding that
6 *some* members of a protected class, despite the classification, may yet be able to achieve
7 the same outcome as similarly-situated people outside of the class. Put simply, because the
8 Surgical Requirement applies to all transgender people, it is immaterial that some
9 transgender people (those who have undergone surgery) may apply to change their sex
10 markers under Subsection (A)(3) because, to do so, they were first required to undergo that
11 surgery, a requirement that Defendant concedes is not imposed on non-transgender people.⁷
12 Heightened scrutiny is thus the correct standard. (*See also* Br. at 12–13.)

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

20 Because the Surgical Requirement facially discriminates based on sex and
21 transgender status, Defendant is incorrect that Plaintiffs are required to prove the
22 Legislature’s subjective animus or hostility toward transgender people when enacting
23 Subsection (A)(3). (Opp. at 8–9.) The operation and effect of the classification itself is
24 sufficient to demonstrate any required intent. *See Grimm v. Gloucester Cnty. Sch. Bd.*, 972
25 F.3d 586, 609 (4th Cir. 2020); *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1*,

26 ⁷ Defendant’s reliance on *United States v. Salerno* is thus misplaced, as that case involved
27 pre-trial detention procedures that the Supreme Court found “fully comports with
28 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.

1 858 F.3d 1034, 1051–52 (7th Cir. 2017); *see also Latta v. Otter*, 771 F.3d 456, 467–68 (9th
 2 Cir. 2014) (holding bans on same-sex marriage violate Equal Protection Clause and
 3 rejecting argument that “differential treatment by sexual orientation is an incidental effect
 4 of, but not the reason for, those laws”).⁸

5 **C. The Surgical Requirement Violates the Due Process Clause.**

6 The Surgical Requirement is also unconstitutional because it deprives Plaintiffs—in
 7 three different ways—of their constitutional rights under the Due Process Clause.
 8 Specifically, it invades their right to privacy, their right to individual liberty and autonomy,
 9 and their right to choose to undergo a certain medical procedure.

10 **1. The Surgical Requirement violates Plaintiffs’ right to privacy**

11 Defendant argues that the Surgical Requirement does not violate Plaintiffs’ rights to
 12 privacy because voluntarily showing a birth certificate to a third party, without more, does
 13 not and cannot reveal a person’s transgender status. (Opp. at 10–11.) However, as the Court
 14 already observed in ruling on Defendant’s Motion to Dismiss, transgender children with
 15 birth certificates that do not align with their gender identities are “involuntarily outed every
 16 single time they are forced to present their birth certificate to a complete stranger,” which
 17 “is akin to death by a thousand cuts as being continuously outed unnecessarily exposes this
 18 child to stigma, bullying, fear, and violence.” (Dkt. 83 at 11.) The Court’s well-reasoned
 19 conclusion is now supported by a robust and undisputed evidentiary record that contains
 20 testimony from Plaintiffs’ mothers demonstrating that birth certificates are critical identity
 21 documents used in society and that a birth certificate reflecting the wrong sex can and will
 22 disclose an individuals’ transgender status (SOF ¶¶ 17, 58, 66–67), as well as unchallenged
 23 expert opinion that such disclosures are harmful to transgender people (SOF ¶¶ 18, 20, 21,
 24
 25

26 ⁸ Defendant is also incorrect to argue that *Hecox*, *Hundley*, *Karnoski*, and *Horne* are
 27 inapposite because they involved statutes or policies that were “not only based on
 28 transgender status but expressly discriminated against transgender persons.” (Opp. at 9–10.)
 As discussed above, the Surgical Requirement discriminates based on transgender status
 and that it fails to explicitly reference transgender persons is not dispositive of the issue.

24; Dkt. 233-2, Ex. 1 ¶¶ 37, 56; Dkt. 233-2, Ex. 4 (93:23–94:4, 95:5–16, 96:9–97:8).⁹

Defendant also argues that presenting an incorrect birth certificate does not necessarily out an individual as transgender because it is possible that a person’s gender identity cannot be ascertained based on their physical appearance or gender expression. (Opp. at 10–11.) As discussed above, in the vast majority of circumstances, a transgender person will be outed by presenting a birth certificate that does not match their physical appearance or gender expression, as is true with Named Plaintiffs. (Dkt. 234-1, Ex. 6 at 25:18–26:13; Dkt. 234-2, Ex. 7 at 27:8–24, 40:5–11; Dkt. 234-5, Ex. 26 at 24:18–25:16, 66:3–8.) Defendant also overlooks that a mismatch between a birth certificate and other identity documents or between the name and sex on an Arizona birth certificate—as is the case with Named Plaintiffs here—could also lead to involuntary disclosure of Plaintiffs’ transgender status. (Dkt. 234-1, Ex. 6 at 35:9–37:3, 38:4–12; Dkt. 234-2, Ex. 7 at 43:2–8; Dkt. 234-5, Ex. 26 at 116:3–24.) Moreover, Defendant’s argument fails to recognize that every transgender person by definition will have a gender identity different from the sex on the birth certificate issued to them at birth. (Dkt. 233-2, Ex. 1 at ¶ 16.) Thus, every transgender person who has a birth certificate that does not match their gender identity is outed and has their right to privacy infringed, regardless of how the person is perceived by others based on their appearance. This Court should accordingly hold similarly to other courts that have found a due process right to privacy in similar circumstances on a facial challenge. *See, e.g., Ray v. McCloud*, 507 F. Supp. 3d 925, 934 (S.D. Ohio 2020); *Arroyo Gonzalez v. Rossello Nevaes*, 305 F. Supp. 3d 327, 333 (D.P.R. 2018); *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015).

2. The Surgical Requirement violates Plaintiffs’ right to individual liberty and autonomy.

Defendant argues, without support in the record, that “nothing in § 36-337 and R9-19-208 infringes on a person’s ability to live consistent with their gender identity.”

⁹ Defendant also argues that *Love* and *Ray* are distinguishable because the statutes at issue in those cases did not feature a provision similar to Subsection (A)(4). For the reasons discussed above, that argument fails.

1 (Opp. at 12.) This argument entirely ignores the uncontroverted record evidence showing
 2 that Defendant’s enforcement of the Surgical Requirement has prevented Plaintiffs Helen
 3 Roe, James Poe, and Carl Voe from obtaining accurate birth certificates, which has made
 4 them unable to live consistently with their gender identities. (SOF ¶¶ 51, 56, 60–62.)
 5 Defendant also misapprehends the nature of Plaintiffs’ claim, which is that birth certificates
 6 are critical identity documents and that transgender people who cannot change their sex
 7 markers to accurately reflect their gender identity face many practical, social, and
 8 psychological consequences. (SOF ¶¶ 19–24, 49, 58, 67.) Those consequences may include,
 9 for example, that a transgender person’s inaccurate birth certificate may not prove their
 10 identity, could disclose their transgender status to third parties, and might interfere with
 11 their treatment for gender dysphoria. (SOF ¶¶ 19–24, 58; *see also* Br. at 3–4.)¹⁰

12 **3. The Surgical Requirement violates Plaintiffs’ right to choose**
 13 **whether to undergo a certain medical procedure.**

14 Defendant argues that all of Plaintiffs’ due process claims fail because the existence
 15 of Subsection (A)(4) cures the Surgical Requirement’s constitutional deficiencies. As
 16 discussed above, both the law and the facts belie Defendant’s argument. Accordingly, the
 17 Court should find that the Surgical Requirement violates deprives Plaintiffs of their
 18 constitutional rights under the Due Process Clause—specifically, the right to privacy,
 19 individual liberty and autonomy, and to choose to undergo a certain medical procedure.

20
 21
 22
 23 ¹⁰ 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. (Opp. at 12.)
 26 In *Rodriguez*, the Supreme Court observed that the “relative differences in spending levels”
 27 were troublesome but not unconstitutional, in part because they did not cause “an absolute
 28 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 **D. Defendant’s Asserted Justifications Are Insufficient and The Surgical**
 2 **Requirement Cannot Survive Any Level of Scrutiny.**

3 Under Ninth Circuit precedent, heightened scrutiny applies to the Court’s review of
 4 the Surgical Requirement under the Equal Protection Clause because the law discriminates
 5 based on transgender status, which is also discrimination based on sex. *Hecox v. Little*, 79
 6 F.4th 1009, 1021–22 (9th Cir. 2023) (“We conclude that while the Act certainly classifies
 7 on the basis of sex, it also classifies based on transgender status, triggering heightened
 8 scrutiny on both grounds.”); (Br. at 12–13).¹¹ Further, as argued in Plaintiffs’ Motion for
 9 Summary Judgment, strict scrutiny applies to all three Due Process claims. *See Love*, 146
 10 F. Supp. 3d at 856; (Br. at 20–21).

11 The undisputed material facts show that the Surgical Requirement cannot survive
 12 any level of scrutiny. (Br. at 13–16, 20–21.) Defendant contends otherwise, now appearing
 13 to assert several purported governmental justifications in support of the Surgical
 14 Requirement. Each misses the mark.

15 *First*, Defendant asserts that she has a governmental interest in the “integrity and
 16 accuracy . . . [of] the sex field on a birth certificate[.]” (Opp. at 16; Def.’s Br. at 21.)
 17 Plaintiffs do not dispute the general proposition that the integrity and accuracy of a birth
 18 certificate is a legitimate governmental interest. However, Defendant does not (because she
 19 cannot) cite to any evidence in the record demonstrating that the Surgical Requirement
 20 *advances* that interest. Rather, as Plaintiffs argue in their Motion for Summary Judgment,
 21

22 ¹¹ Defendant generally agrees that heightened scrutiny applies to an Equal Protection
 23 challenge to a law that discriminates based on transgender status, but suggests that only as-
 24 applied (as opposed to facial) challenges warrant such scrutiny. Defendant’s argument
 25 principally relies on *Witt v. Department of the Air Force*, but *Witt* did not address what
 26 standard of review applies to a facial challenge, nor did it limit its holding to as-applied
 27 challenges. 527 F.3d 806, 819 (9th Cir. 2008). Rather, *Witt* merely ruled that, on the facts
 28 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, 2010 WL
 11508368, at *3 (C.D. Cal. July 6, 2010). In addition, Defendant, citing *San Antonio
 Independent School District v. Rodriguez*, 411 U.S. 1 (1973), argues that heightened
 scrutiny does not apply to laws that fail to extend affirmative relief to a class. However, as
 discussed above (*see n.1, supra*), *Rodriguez* is not on point.

1 the record shows the opposite: the Surgical Requirement leads to *inaccurate* identity
 2 documents because it forces Plaintiffs to maintain birth certificates that do not reflect who
 3 they are. (Br. at 13–15.) Further, the Surgical Requirement plainly fails to advance an
 4 interest in accurate identity documents when other state and federal agencies—including
 5 the Arizona Department of Transportation, the U.S. Department of State, the Social Security
 6 Administration, and the U.S. Citizenship and Immigration Services—do not require proof
 7 of surgery to change the sex markers on the identity documents they issue. (Br. at 14–15;
 8 SOF ¶¶ 64–65; Dkt. 83 at 15 (citing 1 Sexual Orientation and the Law § 10:11 (2020–2021
 9 ed.))¹²

10 *Second*, Defendant asserts for the first time that “preserv[ing] . . . information
 11 acquired and observations made at the time of a child’s birth”—in other words, historical
 12 facts—is a governmental interest supporting the Surgical Requirement. (Opp. at 16; *see also*
 13 Def.’s Br. at 21.) Defendant waived this purported justification because, during the years of
 14 litigation preceding summary judgment and Plaintiffs’ many requests for Defendant’s
 15 alleged governmental interests, she never asserted it until now. During discovery, Plaintiffs
 16 requested that Defendant produce “information as to whether the ADHS has any
 17 justification for implementing and enforcing the surgical requirement in A.R.S. § 36-
 18 337(A)(3) and related regulations.” (Dkt. 153 at 1 n.1.) Defendant’s response contained
 19 only one purported justification: that “maintaining and ensuring the truthfulness,
 20 completeness, and correctness of information in vital records and statistics.” (Dkt. 233-10,
 21 Ex. 23 at 24.) And ADHS’s Rule 30(b)(6) representative later confirmed under oath that
 22 this was the *only* government interest for enforcing the Surgical Requirement. (SCAF ¶ 5.)
 23

24 ¹² Defendant argues that the sex marker on a birth certificate is not inaccurate when it lists
 25 a sex that differs from a person’s gender identity because the sex field on a birth certificate
 26 only documents the child’s external genitalia as observed by a health care provider or other
 27 person present at their birth. (Opp. at 1, 16.) Not so. As discussed in Plaintiffs’ opening
 28 brief and herein, birth certificates are critical identity documents used in a myriad of
 contexts to verify one’s identity in society. The very existence of Subsection (A)(3) shows
 that Arizona recognizes the importance of birth certificates as identity documents because
 that law provides an avenue (albeit unconstitutionally limited) for an individual to amend
 the sex listed on a birth certificate. Birth certificates in Arizona are thus more than just
 historical records of what a healthcare provider observed at the time of birth.

1 Defendant never disclosed that the Surgical Requirement is allegedly justified to “preserve
2 historical facts,” and thus Plaintiffs have had no opportunity to take discovery about this
3 new theory, such as by deposing ADHS’s Rule 30(b)(6) witness or any other witness about
4 it. Courts refuse to consider a party’s new theories raised for the first time on summary
5 judgment because discovery is closed and it would prejudice the opposing party. *See*
6 *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292–93 (9th Cir. 2000) (affirming refusal to
7 consider a party’s theory raised for first time on summary judgment because doing so would
8 have required the opposing side to develop different defenses after discovery closed);
9 *Jimmie’s Limousine Serv., Inc. v. City of Oakland*, No. C 04-03321, 2005 WL 2000947, at
10 *5 (N.D. Cal. Aug. 18, 2005) (rejecting new theories at summary judgment where discovery
11 ended months before). Given the obvious prejudice to Plaintiffs, the Court should not
12 consider this purported justification.

13 Even if the Court were to consider this new theory, Defendant proffers no evidence
14 to support it, or that the Surgical Requirement advances it. Defendant merely strings
15 together portions of older versions of Arizona vital records laws, including some that were
16 enacted decades before the Surgical Requirement, and cites to statistics published by the
17 U.S. Centers for Disease Control and U.S. Census Bureau regarding the ratio of live male
18 to female births. (Def.’s Br. at 21.) Such “evidence” is plainly insufficient to demonstrate
19 that the Surgical Requirement—which by its terms permits a limited set of individuals to
20 change their birth-assigned sex markers in some circumstances—advances a governmental
21 interest in preserving historical facts recorded at the time of a person’s birth. Defendant’s
22 key authority, *Gore v. Lee*, No. 3:19-cv-0328, 2023 WL 4141665 (M.D. Tenn. June 22,
23 2023), proves the point. At issue in *Gore* was a Tennessee law that categorically prohibited
24 transgender individuals from changing the sex marker on a Tennessee birth certificate, and
25 the court thus found that sex markers on Tennessee birth certificates constituted “historical
26 information.” *Id.* at *12.¹³ In contrast, Defendant in this case concedes that Arizona birth
27

28 ¹³ Additionally, neither *Gore*, 2023 WL 4141665, nor *Fowler v. Stitt*, No. 22-CV-115, 2023
WL 4010694 (N.D. Okla. June 8, 2023), are apt in this case because those cases were

1 certificates are critical identity documents (not just historical records), and that Arizona law
2 affirmatively permits transgender individuals to change their sex markers in certain
3 circumstances. (See Def.’s Br. at 1.) There is thus no support for Defendant’s “historical
4 facts” justification.

5 *Third*, Defendant asserts that she has a governmental interest in “collect[ing]
6 evidence supporting amendment applications for . . . deterrence of fraud or other abuse.”
7 (Opp. at 16.) As with the “historical facts” theory, Defendant has failed to fully assert or
8 develop this “fraud” theory in this litigation; Defendant has thus waived it at the summary-
9 judgment stage. See *Coleman*, 232 F.3d at 1292–93; *Jimmie’s Limousine*, 2005 WL
10 2000947, at *5. Even if the Court were to consider the “fraud” theory, Defendant fails to
11 cite anything in the record to demonstrating that the Surgical Requirement was enacted to
12 prevent or deter fraud related to sex markers on Arizona birth certificates because no such
13 evidence exists.¹⁴

14 Critically, the evidence in the record establishes that *there is no fraud related to sex*
15 *markers on Arizona birth certificates*. The only record evidence on this point comes from
16 the deposition testimony of the former Deputy Bureau Chief and Fraud Manager of ADHS’s
17 Bureau of Vital Records, the position responsible for investigating any kind of fraud related
18 to a birth certificates. That witness testified that, during her time in the position (March
19 2019 to March 2022), she did not recall *ever* investigating or even seeing documents related
20 to any alleged fraud related to sex markers. (SCAF ¶ 6.) Moreover, far from showing that
21 the Surgical Requirement was intended to deter fraud, the record shows that it could actually
22 *enable* fraud by preventing transgender people, like Plaintiffs, from correcting the sex
23 markers on their birth certificates, thus ensuring that they possess an inaccurate identity

24 _____
25 decided on motions to dismiss, involve different statutory regimes, and apply out of circuit
26 authority.

27 ¹⁴ Defendant also asserts apparently new purported governmental interests related to
28 “collect[ing] evidence supporting amendment applications for necessary judicial oversight
[and] protection of vulnerable individuals (particularly minors).” (Opp. at 16.) As with her
“fraud” theory, she never asserted or developed “judicial oversight” or “protection of
vulnerable individuals” theories in this litigation and has thus waived them. Nor does
Defendant cite any evidence supporting these novel interests or explain how the Surgical
Requirement advances them.

1 document. (Br. at 21.) Accordingly, Defendant fails to establish that any of her purported
2 justifications allow the Surgical Requirement to survive any level of scrutiny.¹⁵

3 **III. CONCLUSION**

4 For the foregoing reasons, Plaintiffs request that the Court grant their Motion for
5 Summary Judgment and declare that the Surgical Requirement violates the Equal Protection
6 and Due Process Clauses of the Fourteenth Amendment.

7
8 Dated: January 17, 2024

OSBORN MALEDON, P.A.

9
10 s/Colin M. Proksel
Mary O'Grady (011434)
Colin M. Proksel (034133)
11 Payslie M. Bowman (035418)
OSBORN MALEDON, P.A.
12 2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
13 Telephone: (602) 640-9000
Facsimile: (602) 640-9050
14 Email: mogrady@omlaw.com
Email: cproksel@omlaw.com
15 Email: pbowman@omlaw.com

16 Rachel Berg (*Pro Hac Vice*)
17 NATIONAL CENTER FOR LESBIAN
RIGHTS
870 Market Street, Suite 370
18 San Francisco, California 94102
Telephone: (415) 343-7679
19 Facsimile: (415) 392-8442
Email: rberg@nclrights.org

20 Patrick Gunn (*Pro Hac Vice*)
21 COOLEY LLP
101 California Street, 5th Floor
22 San Francisco, California 94111-5800
Telephone: (415) 693-2070
23 Facsimile: (415) 693-2222
Email: pgunn@cooley.com
24

25
26 _____
27 ¹⁵ Defendant also argues that because Arizona vital records laws permit Plaintiffs to amend
28 their birth certificates through a court order and are therefore more inclusive than the laws
at issue in the cases Plaintiffs cite from Alaska, Idaho, Michigan, and Puerto Rico, the
Surgical Requirement survives rational basis and heightened scrutiny. For the reasons
discussed herein, this argument fails.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Barrett J. Anderson (*Pro Hac Vice*)
Jessica L. Taylor (*Pro Hac Vice*)
COOLEY LLP
10265 Science Center Drive
San Diego, California 92121-1909
Telephone: (858) 550-6000
Facsimile: (858) 550-6420
Email: banderson@cooley.com
Email: jtaylor@cooley.com

Attorneys for Plaintiffs and the Class

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

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

Plaintiffs,

v.

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

Defendant.

Case No. 4:20-cv-484-JAS

**[PROPOSED] ORDER DENYING
DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT (DKT. 230), AND GRANTING
OTHER RELIEF**

Having considered Defendant’s Motion for Summary Judgment (Dkt. 230), and
with good cause showing,

IT IS HEREBY ORDERED:

The Court DENIES Defendant’s Motion for Summary Judgment.

IT IS SO ORDERED.

**[PROPOSED] ORDER DENYING
DEFENDANT’S MOTION FOR
SUMMARY JUDGMENT**