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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

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

Plaintiffs,

v.

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

Defendant.

NO. 4:20-cv-00484-JAS

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. Plaintiffs Concede That Arizona's Vital Records Laws Are Not Unconstitutional in Every Conceivable Application, Which Defeats Their Claims.

Plaintiffs' decision to ultimately pursue only a facial challenge provides the Court a direct and simple path to grant summary judgment in favor of the Director. "[A] plaintiff can only succeed in a facial challenge by 'establishing that no set of circumstances exists under which the [law] would be valid,' i.e., that the law is unconstitutional in *all* of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (emphasis added). A "facial challenge must fail where the statute has a plainly legitimate sweep." *Id*. Plaintiffs' Response makes several concessions that prevent them from satisfying this "heavy burden" of proof and persuasion. *United States v. Peeples*, 630 F.3d 1136, 1138 (9th Cir. 2010).

Plaintiffs concede that: (1) "some transgender people (those who have undergone surgery) may apply to change their sex markers under [A.R.S. § 36-337](A)(3)" (Dkt. 245 at 6:23-24, 18:4-6; 18:13-15); (2) "not all transgender people share the same lived experience or face the same challenges" when pursuing a court-ordered amendment under A.R.S. § 36-337(A)(4) (*id*. at 19:25-26); and (3) transgender persons can secure a court-ordered amendment to change the sex field on their birth certificate (*id*. at 7:4-7, 8:20-9:1, 8:13-14, 15:11-12). Plaintiffs also do not dispute that (4) Arizona's vital records laws do not "force any transgender person to reveal their transgender status" (Dkt. 230 at 13:22-24, 15:16-17) or (5) "force them to undergo an unwanted medical procedure" (*id*. at 16:23-24). These concessions establish that Arizona's vital records laws do not—on their face—discriminate against transgender persons or deprive them of fundamental rights.

Plaintiffs claim in a footnote that *Salerno*'s facial challenge standard is "inapt" because that case "involved pre-trial detention procedures that the Supreme Court found 'fully comports with constitutional requirements.'" (Dkt. 245 at 18 n.7 & at 20 n.9.) But neither the facts nor the outcome in *Salerno* dictate whether its *standard* applies in this case. The Ninth Circuit has made clear that "*Salerno* is the correct standard in every context" (with exceptions inapplicable here). *S.D. Myers, Inc. v. City & Cnty. of San Francisco*, 253

F.3d 461, 467 (9th Cir. 2001). Thus, *Salerno* applies, and Plaintiffs cannot satisfy their burden because, as they acknowledge, transgender persons *can* utilize § 36-337 to obtain an amended birth certificate with a sex field that aligns with their gender identity, notwithstanding the impediments that they allege exist. *See Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (a facial challenge survives only if the law is "unconstitutional in every conceivable application"). Their contention that the laws "operate unconstitutionally under *some* conceivable set of circumstances is insufficient to render them wholly invalid." *Rust v. Sullivan*, 500 U.S. 173, 183 (1991) (emphasis added).

II. A.R.S. § 36-337 Is Not Unconstitutional in Any Circumstance.[1]

A. Arizona's Vital Records Laws Must Be Construed in Their Entirety.

Plaintiffs' constitutional analysis begins with a presumption that the "surgical requirement" in § 36-337(A)(3) is unconstitutional and concludes with the assertion that the "court-order" alternative in § 36-337(A)(4) cannot "cure[]" its "constitutional defects." (Dkt. 245 at 6:8-12, 6:17, 6:21-22, 6:28-7:2, 10:20-22, 19:6-7.) Plaintiffs also contend that the Director does not defend the constitutionality of the "surgical requirement" but "[r]ather" argues that the "court-order" alternative "absolve[s] her of legal responsibility." (*Id.*) As discussed in the Director's summary-judgment motion, and discussed more below, Plaintiffs' presumption is incorrect. (*See* Dkt. 230 at 11–23.) Moreover, Subsections (A)(3) and (A)(4) cannot be analyzed in a vacuum. When § 36-337 is analyzed in its entirety, as it must be, it is clear that the statute is constitutional to begin with.

It is a well-established canon of statutory interpretation that courts must consider all subsections and provisions of a law. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000) ("[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. … A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme[] and fit, if possible,

[1] Plaintiffs do not distinguish between § 36-337 and its implementing regulation, A.A.C. R9-19-208. In this Reply, references to § 36-337(A)(3) and § 36-337(A)(4) include their corresponding regulations—R9-19-208(O) and R9-19-208(B), respectively.

all parts into an harmonious whole.") (cleaned up); *Stambaugh v. Killian*, 398 P.3d 574, 575, ¶ 7 (Ariz. 2017) ("In construing a specific provision, we look to the statute as a whole ….") ; *Carrillo v. Houser*, 232 P.3d 1245, 1247, ¶ 10 (Ariz. 2010) (holding that a subsection in a statute "cannot be interpreted in isolation from the rest of the statute"); *Matter of Appeal in Yavapai Cnty. Juv. Action No. J-9403*, 762 P.2d 643, 644 (Ariz. App. 1988) (declining to "construe subsection A in isolation" and holding that the challenged statute was constitutional in light of another subsection). Plaintiffs ask the Court to ignore Subsection (A)(4), but the law is clear that Subsection (A)(3) cannot be analyzed in a vacuum.

Another bedrock tenet of statutory construction is that a court should endeavor to interpret a statute in a way that avoids rendering it unconstitutional. *See Blodgett v. Holden*, 275 U.S. 142, 148 (1927) ("[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same."); *Hooper v. People of State of Cal.*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to in order to save a statute from unconstitutionality."); *AZ Petition Partners LLC v. Thompson ex rel. Cnty. of Maricopa*, 530 P.3d 1144, 1150, ¶ 29 (Ariz. 2023) ("[W]e can and should construe statutes to avoid rendering them unconstitutional where the language makes it plausible to do so."); *Hayes v. Cont'l Ins. Co.*, 872 P.2d 668, 676 (Ariz. 1994) ("[I]f possible this court construes statutes to avoid rendering them unconstitutional.").

Plaintiffs' request to disregard Subsection (A)(4) and construe Subsection (A)(3) in isolation contravenes these precepts. The statute must be considered in its entirety and with an eye toward constitutionality. Plaintiffs contend that the Court has "already rejected" any reliance on Subsection (A)(4), citing its August 5, 2021 Order denying the Director's Rule 12(b)(6) motion to dismiss. (Dkt. 245 at 10:24-12:5.) But Plaintiffs read too much into that Order, which merely restated what "Plaintiffs' allegations reflect." (Dkt. 83 at 12 n.9; *see also id.* at 2 n.4 ["The … discussion herein is drawn from Plaintiffs' Amended Complaint."].) The Court did not rule as a matter of law or otherwise "find[] that Subsection

(A)(4) did not render the Surgical Requirement constitutional," as Plaintiffs contend (*see* Dkt. 245 at 11:17-19). Nor could it have. The Court was addressing the sufficiency of the factual allegations in the Amended Complaint, applying Rule 12(b)(6)'s liberal standard (Dkt. 83 at 1–2 & n.4); it was not resolving the merits of Plaintiffs' constitutional claims. *See City of Oakland v. BP PLC*, 969 F.3d 895, 910 (9th Cir. 2020) ("[A] motion under Rule 12(b)(6) … is not a procedure for resolving … the substantive merits of the plaintiff's case."); *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) ("The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.").

In addition, the Court entered the August 5, 2021 Order nearly 30 months ago before the Director filed her Answer and the parties engaged in any discovery. The posture and complexion of the case was significantly different: (1) the Court did not consider any evidence or the extensive legislative history and framework of Arizona's vital records laws (*compare* Dkt. 54, *with* Dkt. 230 at 1–8 & Dkt. 231); (2) whereas the Amended Complaint included an as-applied challenge (Dkt. 47, ¶ 116), Plaintiffs now pursue only a facial challenge (Dkt. 153 at 3 & n.4), which is subject to *Salerno*'s standard; and (3) because the case had not been certified as a class action, the Court's focus was on Plaintiffs' individual allegations and the laws' impact on "transgender children," "transgender kids," "young kids," and "kids," who cannot or may not need to undergo a "sex change operation" (Dkt. 83 at 2:20, 3:17, 4:5, 4:22, 4:27, 5:14, 5:28, 6:3-4, 10:10, 10:14, 10:24, 11:2, 11:4, 11:16, 11:27), but now, the case has been certified and the class includes *all* transgender persons in Arizona, both minors and adults (Dkt. 181 at 4:8-12; Dkt. 214 at 2). *See Moser v. Benefytt, Inc.*, 8 F.4th 872, 877–78 (9th Cir. 2021) (holding that putative class members are not parties until certification). Therefore, the Court's prior Order does not bar the Court's examination and consideration of the evidence, the statute's legislative history and framework, and Plaintiffs' concessions, or its proper construction of the statute (in its entirety) and application of the appropriate standard (*Salerno*) to Plaintiffs' broad facial challenge. Doing so yields only one result: summary judgment in favor of the Director.

B. Plaintiffs' Collateral Attacks on § 36-337(A)(4) Are Futile.

To avoid this result, Plaintiffs attempt to undermine Subsection (A)(4), claiming it is "not an alternative" because state court judges have "imported the Surgical Requirement into Subsection (A)(4) and denied relief," it has "no standards," and it is "more burdensome" than Subsection (A)(3). (Dkt. 245 at 12–16.) As a threshold matter, none of these arguments render Subsection (A)(3) unconstitutional; Plaintiffs cite no authority to the contrary. Moreover, Plaintiffs do not allege or argue that Subsection (A)(4) is unconstitutional, and, as noted above, they concede (and the evidence shows) that transgender persons *can* secure an (A)(4) court order to amend the sex field on their birth record. (Dkt. 231, ¶ 7; Dkt. 245 at 7:4-7, 8:20-9:1, 8:13-14, 15:11-12.) That is enough to defeat Plaintiffs' facial challenge. *Salerno*, 481 U.S. at 745. Plaintiffs' attacks on Subsection (A)(4) are nonetheless unavailing.

1. Subsection (A)(4) Does Not Import Subsection (A)(3).

Plaintiffs argue that, in 2017, ADHS opposed a request for a court-ordered amendment on the grounds that the petition was not accompanied by an (A)(3) physician's statement, and ADHS has not publicly stated that it has reversed that position. (Dkt. 245 at 12–13.) They also point to the fact that the two state court judges who denied Helen Roe's and James Poe's amendment petitions did so because they did not submit (A)(3) documentation. (Dkt. 245 at 13–14.) Both arguments fail because nothing in the statute requires (A)(3) documentation to secure a court-ordered amendment under Subsection (A)(4). A facial challenge examines "only the text of the [law], not its application" in particular circumstances. *Calvary Chapel Bible Fellowship v. Cnty. of Riverside*, 948 F.3d 1172, 1176 (9th Cir. 2020). Plaintiffs argue that the Court must consider this evidence, (Dkt. 245 at 13 n.4, citing *Ward v. Rock Against Racism*, 491 U.S. 781, 795–96 (1989)), but Plaintiffs misconstrue *Ward* and omit relevant factual context.

Although ADHS's position *in 2017* was that an (A)(4) petition must be accompanied by an (A)(3) physician's statement, that is no longer ADHS's position. Once the Administrative Law Judge ("ALJ") ruled in the referenced case that (A)(3) documentation

was *not* required to secure a court order under Subsection (A)(4), the Director formally adopted that position and has since assisted with procuring and honored court orders to change the sex field on a person's birth record. (Dkt. 231, ¶¶ 7–8; Dkt. 231-2 at 280–285 & at 286–289.) The Director has also publicly made clear—in conjunction with this lawsuit, no less—that a physician's statement that a person has undergone a "sex change operation" is *not* necessary to secure a court order under Subsection (A)(4), and that an ADHS representative will attend a court hearing on a petition to amend a birth certificate and assist in securing an order. (*See id.*; *see also* Dkt. 23 at 6 n.6 & at 7, 10–11; Dkt. 23-1, ¶¶ 6–8; Dkt. 230.) Indeed, ADHS's Rule 30(b)(6) witness confirmed under oath that ADHS does not require a physician's statement to secure a court order.[2] (Dkt. 233-2 at 442–443.)

As for the two incorrect rulings in Helen Roe's and James Poe's particular cases, they are not evidence that *every* judge holds the same incorrect view or would rule the same way, *Salerno*, 481 U.S. at 745; in fact, judges, like the ALJ in 2017, *do* issue orders requiring an amendment to the sex field (Dkt. 23-1, ¶ 7; Dkt. 231, ¶ 7; Dkt. 245 at 7:4-7, 8:20-9:1, 8:13-14, 15:11-12), and if a judge refuses to issue an order absent (A)(3) documentation, the remedy is to appeal that ruling, not to strike down the statute as unconstitutional. The two trial judge rulings are also not pertinent. Arizona's appellate courts have made clear that judges cannot read into Subsection (A)(4) requirements or limitations that do not explicitly exist. *See In re Marriage of McLaughlin & Swanson*, 476 P.3d 336, 339, ¶ 10 (Ariz. App. 2020) ("No language in the regulation limits the court's discretion in ordering such changes to the field identifiers already used on ADHS forms."); *Beatie v. Beatie*, 333 P.3d 754, 760, ¶ 25 n.10 (Ariz. App. 2014) ("[W]e will not read into A.R.S. § 36–337 a requirement not within the manifest intention of the legislature as expressed by the statute itself."). These holdings, and ADHS's construction of Subsection (A)(4), are further evidence that Subsection (A)(3) is constitutional.[3] *See Forsyth Cnty. v. Nationalist*

[2] That ADHS has not issued a press release is of no moment (or required). ADHS has publicly stated its position as set forth above and has confirmed its position to Plaintiffs' (and class) counsel.

[3] Notably, *McLaughlin* was issued (in October 2020) after Plaintiffs' Roe and Poe

Movement, 505 U.S. 123, 131 (1992) ("In evaluating respondent's facial challenge, we must consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it."); *Ward*, 491 U.S. at 795–96 ("[I]n evaluating a facial challenge to a state law, a federal court must consider any limiting construction that a state court … has proffered.").

2. Subsection (A)(4) Provides Enough Guidance.

Plaintiffs next argue that Subsection (A)(4) "contains no standards for when transgender applicants may obtain a court-ordered amendment to" the sex field on a birth record. (Dkt. 245 at 16:6-17.) But Subsection (A)(4) does not place *any* limitation as to "when" a person can petition for an amendment or "what" amendment they can request. *McLaughlin*, 476 P.3d at 339, ¶ 10; *Beatie*, 333 P.3d at 760, ¶ 25 n.10. If a person wants to amend their birth record, they can petition for a court order. The statute does not need to spell out anything more (Plaintiffs cite no authority to the contrary). Arizona's appellate courts have also conferred wide discretion on judges to issue amendment orders, *McLaughlin*, 476 P.3d at 338, ¶¶ 9, 13–14, and if the person is not satisfied with the result, they can appeal. Plaintiffs do not argue that Subsection (A)(4) is unconstitutionally vague, and the odds of securing relief are no more uncertain than most judicial processes. Plaintiffs' insistence on a scripted path and preordained outcome is not legally required.

3. Typical Burdens Associated with the Judicial Process Do Not Render Subsection (A)(4) Unavailable.

Plaintiffs last argue that the process to secure a court order under Subsection (A)(4) is "more burdensome" than the process under Subsection (A)(3). (Dkt. 245 at 14–16.) But Plaintiffs provide no authority holding that a "burdensome" process renders the process unavailable or unconstitutional. The burden Plaintiffs describe under Subsection (A)(4) is

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received orders on their petitions (in January 2020 and March 2020, respectively). (Dkt. 236, Ex. 6 at 37 & Ex. 7 at 100–102.) Plaintiffs argue that "*McLaughlin* did not address the Surgical Requirement or changes to sex markers under Subsection (A)(4)." (Dkt. 245 at 14:15-16.) True, but its holding applies to *all* amendment petitions under § 36-337 and therefore necessarily includes requests to change the sex field. Moreover, *Beatie* addressed the "surgical requirement" in Subsection (A)(3) and held that it "does not require specific surgical procedures be undertaken." 333 P.3d at 758, ¶ 25.

no different than the burden facing any person hoping to secure judicial relief, whether it is a challenge to the constitutionality of a statute, an attempt to recover damages inflicted by a tortfeasor, or a petition to change their name. It can be complicated, expensive, and fruitless. That is the very nature of seeking judicial relief. The State is not required to provide non-judicial, non-burdensome, and guaranteed remedies for every grievance. It is not even required to provide a process for amending a birth record, much less a convenient one. Here, the State has provided multiple avenues for any person to correct or amend their birth certificate.[4] Those processes comport with (and are more liberal than) the NCHS's U.S. Standard Certificate of Live Birth. (Dkt. 231, ¶¶ 4–6.) *Compare Beatie*, 333 P.3d at 758, ¶ 25 (noting that Subsection (A)(3) is "more liberal" than Hawaii's comparable birth record amendment statute because it "only requires a 'written statement' rather than an 'affidavit' by a physician verifying a sex change operation"), *with Gore v. Lee*, 2023 WL 4141665, at *3 (M.D. Tenn. June 22, 2023) (upholding Tennessee's law that expressly prohibits amendment to the sex field as a result of "sex change surgery"), and *Fowler v. Stitt*, 2023 WL 4010694, at *3 (N.D. Okla. June 8, 2023) (upholding Oklahoma's law that expressly forbids amendment to the sex field on a birth certificate). Two of the Plaintiffs here availed themselves of the (A)(4) process and successfully changed their names to align with their gender identity. (Dkt. 236, Ex. 6 at 98–99 & Ex. 7 at 102–103.) Others have successfully secured court orders to change the sex field on their birth certificate. (Dkt. 231, ¶ 7.) Subsection (A)(4) is not unavailable. And when a petition to amend the sex field on a person's birth certificate is included in a petition for a name change, Subsection (A)(4) is no more burdensome than Subsection (A)(3).

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

Instead of showing the Court *how* the text of Subsection (A)(3) discriminates against transgender people, Plaintiffs contend that the Court has "already rejected Defendant's

[4] A petition to amend a birth certificate is not "a lawsuit against government entities." (Dkt. 245 at 16:13.) *See* https://superiorcourt.maricopa.gov/media/vm2h1ygn/cvab1z.pdf#, at Instructions, pg. 1 of 3.

arguments that the Surgical Requirement does not discriminate on sex and transgender status." (Dkt. 245 at 16:24-25, 17:6-12.) The Court made no such ruling. In fact, the Court stated in its August 5, 2021 Order that "the statue and regulation do *not* explicitly use the phrase 'transgender' or explicitly state that these laws are aimed directly at 'transgender' people." (Dkt. 83 at 9–10, emphasis added.) That is the end of the facial challenge inquiry. Although the Court stated that the laws "appl[y] nearly exclusively to transgender people," (*id*.), a facial challenge fails unless it is unconstitutional in *every* application, not "nearly" every application, *Salerno*, 481 U.S. at 745. The Court's commentary is not dispositive at the summary-judgment stage. The text of the statute controls, *Calvary Chapel Bible Fellowship*, 948 F.3d at 1176, and it very clearly applies equally to transgender and nontransgender persons. (Dkt. 230, § III.B; Dkt. 243, § IV.A.) *See* A.R.S. § 36-337(A)(3) (applying to any "person"); A.A.C. R9-19-209(O) (applying to any "individual"); *see also* A.R.S. § 1-214(C)-(D) (instructing that "[w]ords of the masculine gender include the feminine and the neuter" and "[w]ords of the feminine gender include the masculine and the neuter"). The availability of Subsection (A)(3) does not depend on a person's gender identity or sex. Indeed, the court in *Beatie* recognized that Subsection (A)(3) "permits the amendment of birth certificates for transgender[] persons." 333 P.3d at 759, ¶ 24.[5]

Plaintiffs also contend that the Court reiterated that the laws are based on transgender status in its order granting class certification when it stated that "the relevant injuries at issue in this case are [Plaintiffs'] constitutional injuries (via Arizona's 'sex change operation' requirement) stemming from the Equal Protection and Due process clause

[5] At the time the Court made its statement, the Court was also evaluating Plaintiffs' as-applied challenge (no longer at issue) and did not have before it the laws' legislative history or any facts. That history and the evidence in the record now show that: the sex field on a birth record is merely a recording of the child's external genitalia at the time of birth and is not a reflection of the child's gender identity (Dkt. 3-1, ¶ 19; Dkt. 230, § I.A; Dkt. 243, § I), and that individuals with an intersex condition, such as Congenital Adrenal Hyperplasia, may seek out one or more surgical procedures that would require or warrant an amendment to the sex field on their birth record pursuant to the "surgical requirement" in Subsection (A)(3) (Dkt. 231, ¶ 14). Plaintiffs' suggestion (Dkt. 245 at 18:9-13) that individuals with intersex conditions can only secure an amendment if their "chromosomal count" established their sex as different than on their birth record is belied by the undisputed evidence. (Dkt. 246, ¶ 14.) *See also Hecox v. Little*, 79 F.4th 1009, 1016 (9th Cir. 2023).

violations." (Dkt. 245 at 17:23-27, quoting Dkt. 214 at 6.) But that statement was the Court's basis for finding that the named Plaintiffs had Article III standing to *bring* their constitutional claims. (Dkt. 214 at 5–6.) The Court was not addressing the *merits* of their claims or whether the laws were discriminatory. Because the laws do not discriminate based on a person's transgender status, there is no "Equal Protection … violation" or "constitutional injuries" from which they are entitled to relief.

Plaintiffs last attempt to manufacture discriminatory treatment based on transgender status where none exists. They contend that: (1) "transgender people are not permitted to apply for a 'correction' to change their sex markers," but non-transgender people can; and (2) to "amend" their birth certificate, transgender persons are "first required to undergo [a sex change operation]," but nontransgender persons are not. (Dkt. 245 at 7:10-12, 9:11-12, 18:7-8.) These are misrepresentations of Arizona's vital records laws. Stated simply: (1) *all* persons (both transgender and nontransgender) can request a "correction" to their birth record, the process and proof is the same regardless of the person's gender identity, and a correction will only be granted (to transgender and nontransgender people alike) if the requested change corrects a typographical error in the person's original birth record; and (2) *all* persons (both transgender and nontransgender) can request an amendment to their birth record, the process and proof to amend the sex field is the same regardless of the person's gender identity (submitting either a court order or a physician's statement that the person has undergone a "sex change operation" or a chromosomal count that establishes their sex as different from that in their original birth record), and an amendment will only be granted (to transgender and nontransgender people alike) if the proper documentation has been submitted. (Dkt. 230 at 6–8, 11–13; Dkt. 243, § II.) *See* A.R.S. §§ 36-301(6), 36-323(C), 36-337; A.A.C. R9-19-207, R9-19-208. Arizona's vital records do not discriminate against transgender persons.[6]

[6] Plaintiffs do not take issue with Subsection (A)(3)'s application based on whether the person has undergone a "sex change operation" or has a chromosomal count that establishes their sex as different than in their birth record violates the Equal Protection Clause. Plaintiffs also confirm that they are not raising a disparate impact theory or alleging

D. Arizona's Vital Records Laws Do Not Deprive Transgender Individuals of Any Rights.

The Director's summary-judgment motion spent *six pages* explaining why Subsection (A)(3) did not deprive transgender individuals of any rights to privacy, gender autonomy, or medical autonomy. (Dkt. 230 at 10–17; *see also* Dkt. 243 at 11–15.) For instance, it explained that Subsection (A)(3) does not: require a person to disclose their birth certificate or reveal their transgender status; prohibit a person from being transgender; or force any person to undergo a medical procedure. (*Id.*) Most notably, an Arizona birth record undisputedly does not record a person's gender identity (Dkt. 246, ¶¶ 9–10), and therefore, a person who voluntarily shows a third person their birth certificate is not disclosing their (trans)gender status. A transgender person is (undisputedly) transgender regardless of what their birth certificate says. (Dkt. 244, ¶¶ 4–5.) Their birth certificate does not create, allow, or dictate a person's gender identity. (*Id.*) And just as a person can choose to disclose their birth certificate or gender identity to a third person (Subsection (A)(3) does not require them to do so), they can also choose whether to amend their birth certificate so that the sex field aligns with their gender identity. They can do so by securing a court order or, if they have undergone a "sex change operation," they can secure a physician's statement to that fact. A.R.S. § 36-337. Subsection (A)(3) does not require anyone to undergo a medical procedure.

Plaintiffs' Response, in conclusory fashion, is that the Director does not "dispute that the Surgical Requirement, on its own, violates those Due Process right. Rather, Defendant's only argument rests on the court-order process …. As discussed above, this argument fails." (Dkt. 245 at 19:3-9.) The Director certainly disputes that the "surgical requirement" in Subsection (A)(3) is unconstitutional on its own. (*See* Dkt. 230 at 11–23; Dkt. 243 at 11–15.) And as discussed above, the Court can—and must—consider Subsection (A)(4), which is further evidence that Plaintiffs are not deprived of any rights.

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discriminatory intent. (*See* Dkt. 245 at 18 n.8 [arguing that because Subsection (A)(3) "facially discriminates based on sex and transgender status," they need not show "animus or hostility toward transgender people when enacting Subsection (A)(3)"].)

Plaintiffs' Response also seemingly abandons their contention that Subsection (A)(3) violates their "right to choose to undergo a certain medical procedure." The Response does not respond to the Director's argument at all. (Dkt. 245 at 18–20.) The Response also does not substantively respond to the Director's argument that Subsection (A)(3) does not force anyone to disclose their birth certificate or their transgender status (right to privacy), and Plaintiffs do not dispute that an Arizona birth certificate does not reflect a person's gender identity. (Dkt. 3-1, ¶ 19; Dkt. 246, ¶ 9; Dkt. 230, § I.A; Dkt. 243, § I.) Instead, they reiterate the Court's statement, from its August 5, 2021 Order, that "transgender kids are involuntarily outed every single time they are forced to present their birth certificate to a complete stranger," and point to Plaintiffs' own concerns and their experts' general testimony about potential harm caused by third persons. (Dkt. 245 at 19:16-22, 20:3-11.) The Court's statement, which was taken from Plaintiffs' allegations, is not supported by the undisputed evidence that a birth certificate does not reveal a person's gender identity. (Dkt. 3-1, ¶ 19; Dkt. 246, ¶ 9; Dkt. 230, § I.A; Dkt. 243, § I.) Moreover, Plaintiffs do not dispute that *Subsection (A)(3)* does not force anyone to present their birth certificate. Although the Director understands Plaintiffs' concerns about the potential harm caused by *third parties* if they learn of a their transgender status, that potential harm does not derive from Subsection (A)(3). *See United States v. Buddenberg*, 2009 WL 3485937, at *3 (N.D. Cal. Oct. 28, 2009) ("[A] facial challenge cannot be based upon provisions of a statute which caused them no injury.").

Plaintiffs' only other argument is that "Defendant's enforcement of the Surgical Requirement has prevented [them] from obtaining accurate birth certificates, which has made them unable to live consistently with their gender identities." (Dkt. 245 at 19:13-16.) Putting aside the available opportunity to amend their birth certificate under Subsection (A)(4), this assertion is not enough to sustain a facial challenge to Subsection (A)(3) because Plaintiffs admit that "some transgender people (those who have undergone surgery) may apply to change their sex markers under Subsection (A)(3)," and that "not all transgender people share the same lived experience or face the same challenges." (Dkt. 245 at 18:4-6,

19:25-26; *see also id*. at 6:23-24, 18:13-15.) *See Salerno*, 481 U.S. at 745. In addition, this due process claim is grounded in the right to "autonomy," which "protects against intrusions on highly intimate and personal *decisions* relating to issues such as marriage, procreation, contraception, family relationships, and child rearing." (Dkt. 232 at 24:4-8, quoting Dkt. 83 at 8, emphasis added.) Subsection (A)(3) does not intrude on a person's ability to *be* transgender or to live consistent with their gender identity, which Plaintiffs contend is innate, immutable, founded in biology, and not subject to voluntary change. (Dkt. 233, ¶¶ 3–5.) The fields on a birth certificate—or the ability to change them—therefore do not restrict a transgender person's right to autonomy.

E. Arizona's Vital Records Laws Serve Important and Compelling Interests.

If the Court concludes that Subsection (A)(3) does not discriminate based on transgender status and that Plaintiffs were not deprived of a fundamental right, *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997), Plaintiffs do not dispute that rational basis review is appropriate on all claims. They dispute, however, that the holding in *Witt v. Department of Air Force*, 527 F.3d 806 (9th Cir. 2008)—requiring rational basis review for facial challenges—applies regardless of those conclusions. (Dkt. 245 at 20 n.10.) Plaintiffs argue that *Witt* "did not address what standard of review applies to a facial challenge" or "limit its holding to as-applied challenges." (*Id*.) But *Witt* held that heightened scrutiny "is as-applied rather than facial" because "it enables courts to avoid making unnecessarily broad constitutional judgments." 527 F.3d at 819 (quoting *City of Cleburn v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 447 (1985)). Regardless, Arizona's vital records laws satisfy either standard of review, notwithstanding Plaintiffs' counterarguments.

Plaintiffs agree that preserving "the integrity and accuracy of a birth certificate is a legitimate governmental interest" (and do not dispute that it is compelling), but they argue that the "surgical requirement" in Subsection (A)(3) does not advance that interest. (Dkt. 245 at 21:6-8.) Plaintiffs are incorrect. It is undisputed that the sex field in an Arizona birth record is a recording of the child's perceived external genitalia at the time of birth. (Dkt.

3-1, ¶ 19; Dkt. 83 at 9–10 & n.7; Dkt. 246, ¶ 9; Dkt. 230, § I.A; Dkt. 243, § I.) As Plaintiffs agree, Arizona has a compelling interest in confirming that amendments to the sex field on a birth certificate are accurate, to ensure the integrity and accuracy of the birth certificate. Subsection (A)(3) provides one method for changing the sex field recorded on a person's original birth record if it is no longer accurate.[7]

Regarding the State's interest in "preserv[ing] historical facts, including information acquired and observations made at the time of a child's birth," Plaintiffs contend that the Director "waived this purported justification" because it was not previously disclosed. (Dkt. 245 at 21:19-24.) Not so. Eleven days after Plaintiffs filed this lawsuit, the Director informed Plaintiffs that Subsection (A)(3) "serves the important governmental objective of maintaining an accurate statewide system of vital records." (Dkt. 23 at 13:16-19.) And in October 2022, the Director again stated that the state has an interest "in maintaining and ensuring the truthfulness, completeness, and correctness of information in vital records." (Dkt. 233-10 at 28.) "Maintaining" is "preserving" and "information in vital records" are "historical facts, including information acquired and observations made at the time of a child's birth." The Director also disclosed the Model State Vital Statistics Act, which states that an Office of Vital Statistics shall preserve vital records. (Dkt. 231-2 at 249, 258, 273.) And ADHS's Rule 30(b)(6) witness testified that ADHS bears the "responsibility to … preserve all vital records." (Dkt. 231-2 at 61:14-16; *see also id*. at 66:6.)

Nonetheless, these interests are apparent from—and even explicitly stated in—the statutes' legislative history and framework. *See*, *e.g.*, Rev. Stat. Ariz., Civ. tit. 41, § 4416 (1913) ("All births that occur in this state shall be immediately registered in the districts in which they occur."); *id*., §§ 4404, 4405, 4406, 4423 (charging the "state board of health" with "obtaining and preserving" "accurate" birth records and the "uniform and thorough

[7] Plaintiffs' reliance on other state and federal agency policies regarding "current identity documents" is "not analytically helpful" because changes to the sex designation in those documents do not undermine the State's interest in preserving the integrity and accuracy of Arizona birth records. (Dkt. 243 at 18; Dkt. 244, ¶¶ 64–65.) *See Gore*, 2023 WL 4141665, at **16–17.

enforcement" of the vital records laws); 1925 Ariz. Sess. Laws, ch. 37, §§ 14, 26 (7th Leg., Reg. Sess.) (H.B. 16) (legislative proclamation that the information included in a birth certificate was "necessary for the legal, social, and sanitary purposes subserved by registration records," and that "the preservation of the public peace, health and safety makes it necessary that the provisions of this Act shall become immediately operative"); *id*., § 14(3) (requiring the physician or mid-wife "in attendance" of birth to fill out the birth record); A.R.S. §§ 36-312(5) (local and deputy registrars charged with preserving vital records), 36-351(A) (Director charged with "safe, secure and permanent preservation of all vital records"). The Director did not need to additionally disclose these stated interests (even though she did).[8] Plaintiffs cannot claim any prejudice.

Plaintiffs do not dispute that preserving historical facts is a compelling interest, but they alternatively argue that Subsection (A)(3) does not advance that interest. (Dkt. 245 at 22:21-23:9.) But it plainly does. If a person's external genitalia, perceived and recorded at the time of their birth, is no longer accurately reflected on their birth record because they underwent a medical procedure or chromosomal count testing, that fact must be preserved nunc pro tunc, and Subsection (A)(3) allows the State Registrar to do that. Plaintiffs' reliance on *Gore* to undermine the Director's argument is puzzling. The Tennessee law at issue in *Gore* specifically prohibits an amendment to the sex field "as a result of sex change surgery." 2023 WL 4141665, at *3. Whereas Tennessee made the decision to "refus[e] to change the historical information on a birth certificate reflecting the person's sex (based on birth appearance)," *id*. at *12, Arizona progressively decided to allow such changes. If Tennessee's law survived equal protection and due process challenges, Subsection (A)(3) most certainly should as well.

Plaintiffs last argue that the Director waived her interest in "collecting evidence to

[8] The cases Plaintiffs cite for their waiver proposition involved the *plaintiff's* failure to disclose a *theory of liability* in the complaint. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291 (9th Cir. 2000) (disparate impact and disparate treatment theories); *Jimmie's Limousine Serv., Inc. v. City of Oakland*, 2005 WL 2000947, at *5 (N.D. Cal. Aug. 18, 2005) (disparate treatment theory).

support an application to amend a birth certificate … and deter fraud or other abuse." (Dkt. 245 at 23:10-13.) This is also not true. In November 2020, the Director informed that Arizona's vital records laws "ensur[e] that requests for birth certificate amendments that are not enumerated in A.R.S. § 36-337 and the supporting documents for those requests are properly reviewed by the court as a fact finder." (Dkt. 23 at 13:16-19.) The Director's October 2022 disclosure also specifically stated that, "[i]f a birth certificate … is not accurate, it opens the door to fraud and other forms of abuse/crimes." (Dkt. 233-10 at 28.) She further disclosed that "the Arizona Legislature ensured that certain safeguarding procedures are in place to prevent inaccurate and/or incomplete reporting by Arizona citizens seeking to abuse the birth certificate amendment process." (*Id*. at 29.) The statutes also make clear that the State has an interest in receiving truthful information and deterring fraud. *See*, *e.g.*, A.R.S. §§ 36-302 (Director charged with determining "acceptability and completeness" or records); 36-344(A) (making it a crime to knowingly submit "false information" to be used in the amendment of a birth certificate), 36-345 (declaring that a registered birth certificate "is prima facie evidence of the facts stated in the certificate"). These interests are not "hypothesized or invented post hoc in response to litigation." (Dkt. 245 at 23:18-23.) They are explicitly contained in the statute and pre-date § 36-337(A)(3). *See*, *e.g.*, Rev. Stat. Ariz., Civ. tit. 41, §§ 4408, 4427; Ariz. Rev. Code § 2740.

Plaintiffs alternatively argue that there is no evidence that Subsection (A)(3) "actually functions to prevent or deter fraud related," citing the testimony of ADHS's Fraud Manager that "she did not recall ever investigating or even seeing documents related to any alleged fraud related to sex markers." (Dkt. 245 at 23:23-24:6.) But birth certificate fraud is undisputedly real. (Dkt. 246, ¶ 18; Dkt. 246-2 at 34, 37, 40, 45.) *See also Gore*, 2023 WL 4141665, at *11 n.28 & at *15. That ADHS has prevented fraudulent amendments during her brief tenure (Dkt. 246, ¶ 6) does not render Subsection (A)(3) unconstitutional.

III. Conclusion.

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

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