

**UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO**

DANIELA ARROYO GONZÁLEZ; VICTORIA
RODRÍGUEZ ROLDÁN; J.G.; AND PUERTO
RICO PARA TOD@S,

Plaintiffs,

v.

RICARDO ROSSELLÓ NEVARES, in his official
capacity as governor of the Commonwealth of Puerto
Rico; RAFAEL RODRÍGUEZ MERCADO, in his
official capacity as Secretary of the Department of
Health of the Commonwealth of Puerto Rico; and
WANDA LLOVET DÍAZ, in her official capacity as
Director of the Registry of Vital Records and
Statistics of the Commonwealth of Puerto Rico,

Defendants.

Case No. 3:17-cv-01457

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS THE AMENDED COMPLAINT**

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Pursuant to Local Rule 7(b), Plaintiffs Daniela Arroyo González, Victoria Rodríguez Roldán, J.G. (together, the “Individual Plaintiffs”), and Puerto Rico Para Tod@s, (collectively “Plaintiffs”), hereby oppose Defendants’ Motion to Dismiss (the “Motion”).

STATEMENT OF FACTS

A. Sex and Gender Identity

A person’s sex is determined by multiple factors, including hormones, external and internal morphological features, external and internal reproductive organs, chromosomes, and gender identity. Amended Complaint (“Compl.”) ¶¶ 22, 24-25. Those factors may not always be in alignment. *Id.* Gender identity—a person’s internal sense of their own gender—is the primary factor in determining a person’s sex. *Id.* at ¶¶ 24, 26. It is a deeply felt and core component of human identity. *Id.* at ¶ 24. There is a medical consensus that gender identity is innate and that efforts to change a person’s gender identity are unethical and harmful to a person’s health and well-being. *Id.* at ¶ 24.

The phrase “sex assigned at birth” refers to the sex recorded on a person’s birth certificate at the time of birth. *Id.* at ¶ 23. Typically, individuals are assigned a sex on their birth certificate based solely on the appearance of external reproductive organs at the time of birth. *Id.* A cisgender person is someone whose gender identity aligns with the sex they were assigned at birth. *Id.* at ¶ 28. A transgender person is someone whose gender identity diverges from the sex they were assigned at birth. *Id.* at ¶ 27.

B. Plaintiffs

Plaintiffs are transgender persons born in Puerto Rico and an organization that represents lesbian, gay, bisexual, and transgender (“LGBT”) people and their families in their struggle for social inclusion, equality, and fairness in Puerto Rico. Compl. ¶¶ 1, 15-18.

Daniela Arroyo is a woman. *Id.* at ¶ 76. Her gender identity and expression is female (she looks, dresses, and expresses herself as a woman), but she was incorrectly assigned the sex of male at birth. *Id.* at 77-79, 85, 87. Likewise, Victoria Rodríguez Roldán is a woman. *Id.* at 102. Her gender identity and expression is female (she looks, dresses, and expresses herself as a woman), but she was incorrectly assigned the sex of male at birth. *Id.* at ¶ 103, 107. Finally, J.G. is a man. *Id.* at ¶ 120. His gender identity and expression is male (he looks, dresses, and expresses himself as a man), but he was incorrectly assigned the sex of female at birth. *Id.* at ¶ 121, 126.

Like many transgender persons, Daniela, Victoria, and J.G. have sought to correct their birth certificates and successfully corrected some of their other identity documents in Puerto Rico and elsewhere (such as, *inter alia*, their driver's licenses and passports) to accurately reflect who they are, consistent with their gender identity. *Id.* at ¶ 92-93, 110-11, 131-33. Unsurprisingly, they also wish to correct their Puerto Rico birth certificates to accurately reflect their true sex, as determined by their gender identity. *Id.* at ¶ 93, 98-101, 111, 115-19, 134-37, 142-44. However, they are prohibited from correcting the gender marker on their birth certificates, and from receiving a document that does not disclose their transgender status. *Id.* at ¶ 60, 70, 93, 112.

C. Puerto Rico's Birth Certificate Policy and its Harms to Transgender Persons.

The Vital Statistics Registry Act (the "Act") provides that all birth certificates must include, *inter alia*, a newborn's place of birth, place of residence, given name and surnames, the date of birth, parents' names, and sex. Compl. ¶ 65; 24 L.P.R.A § 1133 (2017). It is the practice and policy of the Commonwealth to determine the sex of newborns, for purposes of their birth certificates, based solely on external genitalia. Compl. ¶ 65; *Ex parte Delgado Hernández*, 165 D.P.R. 170, 198 (2005) (Rivera Pérez, J., concurring).¹

¹ A certified translation of *Ex parte Delgado* is enclosed as Exhibit A to the Declaration of Omar Gonzalez-Pagan in support of Plaintiffs' Motion for Summary Judgment.

Critically, no specific statute or regulation prohibits correction of the gender marker on a birth certificate in order to accurately reflect the sex of a transgender person. Nevertheless, the Supreme Court of Puerto Rico in *Ex parte Delgado* held that the Act, 24 L.P.R.A § 1231, enforced by Defendants, does not permit transgender persons to correct the gender markers on their birth certificates. 165 D.P.R. at 193-94 (“[I]t is not appropriate to authorize the change requested on the birth certificate of the petitioner to change petitioner’s sex, because the Demographic Registry Law does not expressly authorize it.”). And as Defendants concede, they enforce a policy and practice, based on that interpretation of the Act, which categorically prohibits transgender persons born in Puerto Rico from correcting the gender marker on their birth certificates to accurately reflect their sex, as determined by their gender identity. *See* Defs.’ Mot. to Dismiss (Dkt. No. 22) at 5-6 (“Defendants’ actions . . . [are based] on [the] Vital Statistics Registry Act of Puerto Rico.”); *id.* at 12 (“[T]he change in the sex marker in the birth certificate cannot be allowed by the ‘policies and practices’ of the Department of Health that the plaintiff challenges as unconstitutional.”); *see also* Compl. ¶ 70.

Furthermore, in issuing name changes on birth certificates, Puerto Rico’s practice is to show a strike-out line or redline through any information corrected, as delineated in 24 L.P.R.A. § 1231. Enforcement of this requirement on transgender persons, who commonly change their names to better match their gender identities, would disclose their transgender status on the face of the birth certificate and would expose them to harm. Compl. ¶¶ 166, 181. Taken in conjunction, these applications of the Act by Defendants are the Birth Certificate Policy challenged by Plaintiffs.

Indeed, Puerto Rico’s Birth Certificate Policy creates a barrier to full engagement in society by transgender persons and subjects them to invasions of privacy, prejudice, discrimination,

humiliation, harassment, stigma, and even violence. Compl. ¶¶ 58, 98-101, 114-19, 136-44. These concerns are particularly acute in Puerto Rico, where transgender persons face significant violence and stigma. *Id.* at ¶ 58. The Birth Certificate Policy forces disclosure of highly personal and sensitive information, such as a person’s transgender status and medical condition, to others whom one might not trust or wish to know such information. *Id.* at ¶¶ 53-57, 99, 116, 142.

For transgender persons who suffer from gender dysphoria,² being denied the ability to correct the gender marker on their birth certificates interferes with their medical treatment and increases their dysphoria and distress. *Id.* at ¶¶ 32, 36-41. Moreover, transgender persons, whether or not they suffer from gender dysphoria, are harmed when they are prevented from aligning their lived experience with their true sex, as determined by their gender identity. *Id.* at ¶ 40. The bar to having identification documents, such as a birth certificate, that accurately reflect a transgender person’s true sex not only stigmatizes them, but also inhibits their ability to self-define and express their identity.

STANDARD OF REVIEW

To survive a motion to dismiss under Rule 12(b)(6), a complaint must allege sufficient facts to “state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint may only be dismissed at the pleading stage if it fails to suggest “more than a sheer possibility that a defendant has acted unlawfully.” *García-Catalán v. United States*, 734 F.3d 100, 102–03 (1st Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The plausibility determination is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. Indeed, the complaint “may

² Gender dysphoria is the clinical distress often caused by the discordance between a person’s gender identity and the sex to which they were assigned at birth. Compl. ¶ 32.

proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.” *Twombly*, 550 U.S. at 556 (quotation marks omitted).

In making this determination, courts must “accept[] as true all well-pled facts in the complaint and draw[] all reasonable inferences in favor of plaintiffs.” *Plumbers’ Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 771 (1st Cir. 2011). A judge “may augment these facts and inferences with data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice.” *Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 44 (1st Cir. 2012) (quoting *Haley v. City of Bos.*, 657 F.3d 39, 46 (1st Cir. 2011)).

ARGUMENT

Defendants’ Motion does not raise any appropriate grounds on which to dismiss Plaintiffs’ claims. Plaintiffs have adequately alleged violations of: the Equal Protection Clause, Const. Am. XIV; Plaintiffs’ fundamental rights to privacy, liberty, dignity, and autonomy, as guaranteed by Const. Am. V and XIV; and Plaintiffs’ First Amendment rights to free speech. Plaintiffs also properly challenge Defendants’ policy and practice with respect to correcting birth certificates, including Defendants’ interpretation and application of Puerto Rico’s statutes. Additionally, Plaintiffs do not bring a facial challenge against the Act; instead, they challenge Defendants’ application of the Act to transgender persons born in Puerto Rico.

I. The Birth Certificate Policy Violates The Equal Protection Guarantee.

“The Equal Protection Clause contemplates that similarly situated persons are to receive substantially similar treatment from their government.” *Tapalian v. Tusino*, 377 F.3d 1, 5 (1st Cir. 2004); *see also Romer v. Evans*, 517 U.S. 620, 631 (1996); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Yet, because of the Commonwealth’s Birth Certificate Policy, transgender persons born in Puerto Rico, including Plaintiffs, “are being distinguished by

governmental action from those whose gender identities are congruent with their assigned sex.” *Evancho v. Pine-Richland Sch. Dist.*, CV 2:16-01537, --- F. Supp. 3d ----, 2017 WL 770619, at *11 (W.D. Pa. Feb. 27, 2017).

To establish an equal protection claim, a plaintiff must allege sufficient facts “from which a jury reasonably could conclude that, compared with others similarly situated, the plaintiff was treated differently because of an improper consideration.” *Kuperman v. Wrenn*, 645 F.3d 69, 78 (1st Cir. 2011). Here, Puerto Rico’s Birth Certificate Policy prohibits *only* transgender persons, including Plaintiffs, from having birth certificates that accurately reflect their sex, as determined by their gender identity. It treats transgender persons born in Puerto Rico differently from similarly situated cisgender persons, based on impermissible considerations, specifically sex and transgender status, as well as transgender persons’ exercise of their fundamental rights to privacy, liberty, autonomy, and free speech.

“[A]ll gender-based classifications . . . warrant heightened scrutiny.” *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quotations omitted); *see also City of Cleburne*, 473 U.S. at 440. Here, the Birth Certificate Policy warrants heightened scrutiny because a policy that treats transgender people differently “is inherently based upon a sex-classification.” *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-3522, 2017 WL 2331751, at *12 (7th Cir. May 30, 2017). The weight of circuit authority, including authority from the First Circuit, has recognized that discrimination based on transgender status or gender nonconformity is discrimination based on sex. *See id.* at *9; *Glenn v. Brumby*, 663 F.3d 1312, 1316-19 (11th Cir. 2011); *Smith v. City of Salem*, 378 F.3d 566, 573-75 (6th Cir. 2004); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000).

In addition, courts have also recognized that discrimination based on transgender status itself warrants heightened scrutiny. *See, e.g. Bd of Educ. Of the Highland Loc. Sch. Dist. v. U.S. Dept. of Educ.*, 208 F. Supp. 3d 850, 873-74 (S.D. Ohio 2016); *Evancho*, 2017 WL 770619, at *13; *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015).

In their Motion, Defendants do not even address Plaintiffs' well-pleaded claim that the Birth Certificate Policy is subject to heightened scrutiny, which fail even under a rational basis analysis. Instead, they (incorrectly) argue that rational basis is the only appropriate standard of review. Defendants further (incorrectly) contend that Plaintiffs have failed to show the requisite intent to discriminate under rational basis because all Puerto Ricans are prohibited from correcting the gender marker on their birth certificates. Not only does Defendants' argument oversimplify the Equal Protection analysis applicable here, but that argument has already been rejected. *See Loving v. Virginia*, 388 U.S. 1, 8 (1967); *Johnson v. California*, 543 U.S. 499, 506 (2005); *Latta v. Otter*, 771 F.3d 456, 483-84 (9th Cir. 2014) (Berzon, J., concurring). Defendants conveniently ignore the weight of authority, described *supra*, supporting the fact that disparate treatment of transgender persons is discrimination based on sex.

Critically, under heightened scrutiny analysis, Plaintiffs need not prove intent to discriminate because, as a matter of law, the burden of proof shifts to Defendants. *See Virginia*, 518 U.S. at 532-33; *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 136 (1994); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 267 (1989). It is "[t]he defender of legislation that differentiates on the basis of gender [who] must show 'at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Sessions v. Morales-Santana*, No. 15-1191, --- S. Ct. ----, 2017 WL 2507339, at *9 (June 12, 2017) (quoting *Virginia*, 518 U.S. at 533 (original alterations

omitted)). The burden under heightened scrutiny “is demanding and it rests entirely on the State . . . The justification must be genuine . . . not hypothesized or invented post hoc in response to litigation.” *Virginia*, 518 U.S. at 533. That burden of justifying the Birth Certificate Policy rests squarely on Defendants. They *must* demonstrate that “the classification [] substantially serve[s] an important governmental interest today, for ‘in interpreting the equal protection guarantee, we have recognized that new insights and societal understandings can reveal unjustified inequality . . . that once passed unnoticed and unchallenged.’” *Morales-Santana*, 2017 WL 2507339, at *9 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) (emphasis in original, original alterations omitted)). Moreover, Defendants *must* also show that the means used to discriminate are substantially related to achievement of that objective. *Virginia*, 518 U.S. at 524.

Defendants have not—in fact, cannot—identify an important government interest supporting the Birth Certificate Policy at issue. There is simply no government objective, important or otherwise, that could justify denying transgender persons born in Puerto Rico birth certificates with the correct gender marker in a manner that does not disclose their transgender status (as would be the case with a strike-through requirement).

For example, the Birth Certificate Policy cannot be justified by an interest in the integrity or accuracy of birth certificates. Indeed, rather than supporting and promoting the integrity and accuracy of the information on birth certificates, the Birth Certificate Policy as applied to transgender persons actually undermines such a goal by purporting to certify plainly inaccurate information with respect to transgender persons’ sex as determined by their gender identity. *K.L. v. State, Dept. of Admin., Div. of Motor Vehicles*, 3AN-11-05431-CI, 2012 WL 2685183, at *7 (Alaska Super. Mar. 12, 2012). Nor can the Policy be justified as necessary to capture some purportedly objective, enduring “fact” of a person’s sex. The gender marker on an uncorrected

birth certificate does not account for any sex-related characteristics other than a person's external reproductive organs at the time of birth. As the Seventh Circuit recently recognized, a designation of sex on a birth certificate determined from external genitalia alone is not "a true proxy for an individual's biological sex." *Whitaker*, 2017 WL 2331751, at *13.

Thus, even under the rational basis analysis that Defendants incorrectly purport to apply here, there is not even a legitimate government interest in prohibiting corrections to gender markers when balanced against inequity suffered by Plaintiffs. Accordingly, the Birth Certificate Policy fails under any constitutional scrutiny.³ Because Plaintiffs have adequately pleaded that the Birth Certificate Policy violates the Plaintiffs' constitutional right to equal protection, this Court should deny Defendants' Motion.

II. Puerto Rico's Policy Violates Plaintiffs' Due Process Rights.

The Fourteenth Amendment to the United States Constitution, enforceable pursuant to 42 U.S.C. § 1983 (2012), provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. "Legislation which involves . . . fundamental rights invites strict scrutiny." *Meloon v. Helgemoe*, 564 F.2d 602, 604 (1st Cir. 1977); *see also Rocket Learning, Inc. v. Rivera-Sanchez*, 715 F.3d 1, 9 n.6 (1st Cir. 2013).

Notwithstanding that Plaintiffs' Complaint is well-pleaded and alleges a colorable claim that Puerto Rico's Birth Certificate Policy impinges on their fundamental rights to informational privacy, Defendants argue that Plaintiffs' due process claim should be dismissed because "[a] federal constitutional right to 'informational privacy' does not exist." Motion at 16. Defendants are mistaken.

³ See Part III.D of the Mem. In support of Pls.' Mot. For Summary Judgment, filed concurrently with this opposition.

“That a person has a constitutional right to privacy is now well established.” *Daury v. Smith*, 842 F.2d 9, 13 (1st Cir. 1988). *See also Fournier v. Reardon*, 160 F.3d 754, 758 (1st Cir. 1998). As recognized by the Supreme Court, there are two distinct personal privacy rights recognized by the Fourteenth Amendment: “the individual interest in avoiding disclosure of personal matters,” and “the interest in independence in making certain kinds of important decisions.” *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977); *see also Vega-Rodriguez v. P.R. Tel. Co.*, 110 F.3d 174, 182–83 (1st Cir. 1997) (rights relate to “ensuring the confidentiality of personal matters” and to “ensuring autonomy in making certain kinds of significant personal decisions”); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457, 465 (1977). *Cf. Natl. Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134, 146 (2011).⁴ Both rights are implicated here.

The “constitutional right to privacy” “includes ‘the individual interest in avoiding disclosure of personal matters.’” *Daury*, 842 F.2d at 13 (quoting *Whalen*, 429 U.S. at 599).⁵ And the First Circuit has recognized a near consensus by other circuits that the “constitutional right of confidentiality is implicated by disclosure of a broad range of personal information.” *Borucki v. Ryan*, 827 F.2d 836, 846 (1st Cir. 1987). Indeed, the First Circuit has further recognized that the constitutional protection of informational privacy extends to “disclosure of medical, financial, and other intimately personal data.” *Vega-Rodriguez*, 110 F.3d at 183.⁶

⁴ Defendants acknowledge that the U.S. Supreme Court recognizes a substantive due process right to privacy in personal matters, Motion at 15-16, but then argue in contradiction that “a federal constitutional right to ‘informational privacy’ does not exist.” Motion at 16. However, Defendants’ latter argument only cites to *non-majority* opinions—essentially asking this Court to disregard controlling law.

⁵ This Court has had the opportunity to examine the right to privacy as it relates to disclosure of personal matters. *See Vargas v. Toledo Davila*, Civil No. 08-1527, 2010 WL 624135, at *6 (D.P.R. Feb. 17, 2010) (confirming that “an individual interest in avoiding disclosure of personal matters has been recognized as a constitutional right”).

⁶ The First Circuit did not decide in *Nunes v. Massachusetts Dep’t of Correction* that there is no constitutional right to confidentiality of medical information. *See* Motion at 16-17. Rather, the court in that case dealt with the more nuanced question of whether *prisoners*—who necessarily have a lower expectation of privacy—have a constitutional right to keep medical information private, and determined that where the Department of Corrections had a compelling need to centralize the dispensing of medication to prisoners, the carefully crafted policy did not offend the Due Process Clause. 766 F.3d 136, 144 (1st Cir. 2014) (“We need not decide in this case whether prisoners have a constitutional

Few areas involve as intimately personal and sensitive information as those pertaining to one's sexual orientation and gender identity. *See, e.g., Sterling v. Borough of Minersville*, 232 F.3d 190, 196 n.4 (3d Cir. 2000) (“disclosure of one’s sexual orientation” is “protected by the right to privacy,” as “such information is intrinsically private”); *Bloch v. Ribar*, 156 F.3d 673, 685 (6th Cir. 1998) (“Our sexuality and choices about sex . . . are interests of an intimate nature which define significant portions of our personhood . . . that we regard as highly personal and private.”); *Eastwood v. Dept. of Corrs.*, 846 F.2d 627, 631 (10th Cir. 1988). A person’s transgender status is particularly private, intimate personal information. *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (“The excruciatingly private and intimate nature of transsexualism, for persons who wish to preserve privacy in the matter, is really beyond debate.”); *Love v. Johnson*, 146 F. Supp. 3d 848, 856 (E.D. Mich. 2015) (“[R]equiring Plaintiffs to disclose their transgender status . . . directly implicates their fundamental right of privacy.”); *K.L.*, 2012 WL 2685183, at *6.⁷

Accordingly, the *forced* disclosure of a person’s transgender status through the government’s refusal to issue accurate identity documents violates the constitutionally-protected right to informational privacy. *See Love*, 146 F. Supp. 3d at 856; *K.L.*, 2012 WL 2685183, at *8 (“absence of any procedure for changing the sex designation on an individual’s [drivers’] license” “threatens the disclosure of this sensitive personal information” and “impermissibly interferes with [the] right to privacy”). By prohibiting the correction of the inaccurate gender marker on the birth certificates of transgender persons born in Puerto Rico, the Birth Certificate Policy infringes upon

right to keep medical information private.”).

⁷ The forcible disclosure of a person’s transgender status can also result in disclosure of private medical information. While not every transgender person suffers from gender dysphoria, many, including Plaintiffs, do. Therefore, disclosure of a person’s transgender status may also lead to the disclosure of private medical information, as gender dysphoria is associated solely with transgender persons. *Cf. United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (“Information about one’s body and state of health is a matter which the individual is ordinarily entitled to retain within the private enclave where he may lead a private life.” (quotations and citations omitted)); *Doe v. Town of Plymouth*, 825 F. Supp. 1102, 1107 (D. Mass. 1993).

transgender persons’, including Plaintiffs’, fundamental right to privacy with regards to intimately personal and sensitive information. Likewise, the strike-out line requirement, delineated in 24 L.P.R.A. § 1231, discloses a person’s transgender status and infringes upon the fundamental right to privacy with regards to intimately personal and sensitive information.

In addition to violating transgender persons’ informational privacy rights, Puerto Rico’s Birth Certificate Policy also infringes transgender persons’ fundamental rights to decisional privacy, liberty, dignity, and individual autonomy.⁸ “[T]here are certain areas of life so fundamentally important and private” that the government may not infringe upon them without burdening “an individual’s autonomy or freedom to make those decisions.” Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U.L. REV. 159, 171–72 (2015). *See also Vega-Rodriguez*, 110 F.3d at 183. Few decisions are as deeply personal and important as the decision by transgender persons to live consistent with their gender identity—which is rooted in the constitutionally-protected rights to liberty and autonomy—and whether or not to disclose their transgender status to others. Because the forcible disclosure of a person’s transgender status interferes with such a deeply personal decision, the Birth Certificate Policy also infringes upon transgender persons’ decisional privacy rights.

Defendants do not address, let alone move to dismiss, Plaintiffs’ due process claim as it pertains to Plaintiffs’ fundamental rights to decisional privacy, liberty, individual dignity, and autonomy. *See* Compl. ¶¶ 183, 184, 186. For that reason alone, the Court should permit Plaintiffs’ due process claim to move forward.

Because the Birth Certificate Policy burdens Plaintiffs’ fundamental rights, it is subject to strict scrutiny and may be upheld “only if the government can clearly demonstrate a compelling

⁸ *See also* Part III.B of the Mem. In support of Pls.’ Mot. For Summary Judgment (discussing how the Birth Certificate Policy violates Plaintiffs’ privacy, individual dignity, liberty, and autonomy).

interest incapable of being served by less intrusive means.” *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47 (1st Cir. 2003). As discussed *supra*, Section I, Defendants have not and cannot demonstrate a compelling interest, nor can they establish that any interest cannot be served by less intrusive means. Plaintiffs have adequately pleaded that the Birth Certificate Policy violates their due process rights, and Defendants’ Motion accordingly fails.

III. The Birth Certificate Policy Violates Plaintiffs’ First Amendment Rights.

Defendants’ Motion does not even address Plaintiffs’ claim for violation of the First Amendment, which is a separate claim from that asserted under the Due Process Clause. In any event, plaintiffs have properly pleaded a violation of their right to control when to speak and what to say—that is, a violation of their freedom from government-compelled speech. Puerto Rico’s Birth Certificate Policy violates the First Amendment because it forces transgender persons (1) to identify themselves through their birth certificates with a sex that was incorrectly assigned to them at birth, and (2) to disclose to third parties private, sensitive and personal information about their transgender status. Because both violations relate to the *content* of speech, they are subject to strict scrutiny. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) (“any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest.”). As discussed *supra*, Section I, Defendants have not identified, and cannot demonstrate, any compelling government interest.

Undeniably, the First Amendment “is multifaceted, preventing the government from prohibiting speech, and from compelling individuals to express certain views.” *Olivencia-de-Jesus v. P.R. Elec. Power Auth.*, 85 F. Supp. 3d 627, 630 (D.P.R. 2015) (citing *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001)). That is because “each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

Here, birth certificates are issued by the Commonwealth and required as identification by the government, thus forcing Plaintiffs to display a message with which they disagree. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977). In addition, the Birth Certificate Policy burdens the transgender speaker's right *not* to speak, because the speaker cannot avoid revealing his or her status as transgender when presenting a birth certificate during everyday transactions. *See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Bos.*, 515 U.S. 557, 573 (1995); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

There is no compelling, important, or even legitimate interest in the government compelling transgender persons to identify with a sex and identity that was incorrectly assigned to them at birth, nor is there a compelling, important, or even legitimate interest in the government forcing transgender persons to involuntarily disclose their transgender status to third parties whenever they present their inaccurate birth certificates. Plaintiffs have therefore appropriately pleaded a First Amendment violation.

IV. Plaintiffs' Amended Complaint Challenges The Constitutionality Of The Birth Certificate Policy As Applied To Transgender Persons, Including Plaintiffs, And Does Not Seek A Preliminary Injunction.

Incredibly, Defendants argue that their actions are not subject to review by this Court because they “are not based on a ‘policy and practice’, but on” the Act. Motion at 5-6. The fact that public officials claim a statutory basis for their actions does not render them immune from constitutional review. To the extent that the Birth Certificate Policy is based on an interpretation of L.P.R.A. § 1231, Plaintiffs have clearly alleged a challenge to the statute *as applied* to Plaintiffs by Defendants. Furthermore, neither the Birth Certificate Policy nor the provisions of the Act on which it is supposedly based may be “accorded a strong presumption of validity,” because as discussed *supra*, the Birth Certificate Policy is subject to heightened scrutiny as “a classification

. . . involving fundamental rights [and] proceeding along suspect lines.” *Heller v. Doe by Doe*, 509 U.S. 312, 319 (1993).

That Defendants claim they are properly applying the provisions of the Act, including the Puerto Rico Supreme Court’s statutory interpretation thereof, likewise does not shield the Birth Certificate Policy from review by this Court. *See* Motion at 9-10; *Ex parte Delgado Hernández*, 165 D.P.R at 189. Statutes and ordinances as applied by officials may be challenged as unconstitutional. *See, e.g., City of Cleburne*, 473 U.S. at 449. Therefore, whether the statute expressly permits “substantial changes” to correct a birth certificate has no bearing on whether the Birth Certificate Policy, as applied to Plaintiffs, is unconstitutional.⁹

Additionally, Defendants contend that because the Act limits the instances in which changes may be made to a birth certificate, Plaintiffs’ requested remedies should be denied. But Plaintiffs have not requested a preliminary injunction at this time; instead, they have filed a well-pleaded complaint alleging that the Birth Certificate Policy violates their constitutional equal protection, due process, and free speech rights. Defendants’ request for the denial of a preliminary injunction puts the cart before the horse. Moreover, the trial court “is vested with broad discretionary power” to shape equity decrees where the practical realities of a case require, *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973), and Plaintiffs’ requested remedies are appropriate.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court deny Defendants’ Motion to Dismiss Plaintiffs’ Amended Complaint.

⁹ Defendants’ discussion of gender confirmation surgery is a *non sequitur*. Sex is determined by a number of factors, of which the primary determinant is gender identity, *see* Compl. ¶¶ 22, 24, and transgender individuals may choose to align their outward appearance with that identity using medical intervention or not, *see* Compl. ¶ 44. Regardless, the Birth Certificate Policy applies with equal force to persons who have undergone confirmation surgery, *see In re Delgado*, and thus this discussion has no bearing on the adequacy of Plaintiffs’ Complaint.

Dated on this 26th day of June, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing with the Clerk of the United States District Court for the District of Puerto Rico via the CM/ECF system this 26th day of June, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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