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' REPLY MEMORANDUM IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Pursuant to Local Rule 7(c), Plaintiffs Daniela Arroyo González, Victoria Rodríguez Roldán, J.G. (together, "Individual Plaintiffs"), and Puerto Rico Para Tod@s, (collectively, "Plaintiffs"), hereby reply to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment (the "Opposition" or "Opp'n").

PRELIMINARY STATEMENT

Defendants' attempts to create a "genuine" issue of "material" fact with respect to Plaintiffs' claims fail outright. Defendants do not raise any dispute as to a material fact, and Defendants' arguments are nothing more than practically a word-for-word rehash of the equally unavailing positions expressed in their Motion to Dismiss. None of Defendants' arguments withstand scrutiny, and the Court should enter summary judgment for Plaintiffs.

Plaintiffs have demonstrated—as a matter of law—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. Defendants do not even address Plaintiffs' claims for violation of their fundamental rights to decisional privacy, liberty, dignity, and autonomy, let alone raise a dispute of material fact as to those claims. Nor do Defendants substantively engage with Plaintiffs' First Amendment claims. Additionally, Plaintiffs properly challenge Defendants' undisputed and restrictive interpretation and application of Puerto Rico's Vital Statistics Registry Act (the "Act") with respect to correcting birth certificates, as enforced through their policies and practices (the "Birth Certificate Policy"). And contrary to Defendants' assertions, Plaintiffs do not bring a facial challenge against the Act; instead, Plaintiffs challenge Defendants' application of the Act to transgender persons born in Puerto Rico. Finally, despite Defendants' continued misplaced efforts to defeat it, *see* Opp'n at 22-24, Plaintiffs do not seek a preliminary injunction at this time.

ARGUMENT

I. Defendants Have Failed to Properly or Substantively Respond to Plaintiffs' Motion for Summary Judgment And They Raise No Issue of Material Fact.

Defendants' Opposition and response to Plaintiffs' Statement of Material Facts In Support of Plaintiffs' Motion for Summary Judgment provide no substantive responses to Plaintiffs' arguments. Instead, Defendants merely repeat, mostly *verbatim*, the same meritless arguments previously presented in their Motion to Dismiss.

Defendants' purported response to Plaintiffs' Statement of Material Facts fares no better. Even a cursory review of that response makes clear that Defendants raise no issues of material fact (because none exist). Indeed, for the vast majority of the statements of fact presented by Plaintiffs, Defendants do not deny them and provide no substantive response thereto; instead, they apply a rigid linguistic analysis and admit to the facts insofar as the declarations submitted by Plaintiffs actually include the precise words or phrases used in the Statement of Material Facts. Defendants therefore have not identified any disputes of material fact, because there are none. Accordingly, Plaintiffs are entitled to judgment as a matter of law on their claims.[1]

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

Defendants argue, wrongly, that Plaintiffs' rights under the Equal Protection Clause have not been violated, despite the disparate treatment that transgender persons face under the Birth Certificate Policy. "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

[1] To the extent Defendants have asserted that some of Plaintiffs' undisputed material facts are unsupported by the record, filed with this memorandum is Plaintiffs' brief Reply Statement of Material Facts, amending the record citations for said facts, all of which remain undisputed and are supported by the record.

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.*, Civ. No. 2:16-01537, --- F. Supp. 3d --, 2017 WL 770619, at *11 (W.D. Pa. Feb. 27, 2017). As further detailed in Plaintiffs' Motion for Summary Judgment, the 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 thereby treats transgender persons born in Puerto Rico differently from similarly situated cisgender persons. That fact remains undisputed. *See* Resp. to Pl. Statement of Material Facts (ECF No. 31-1) at ¶¶ 56, 68.

Additionally, Defendants' contentions notwithstanding, the Birth Certificate Policy warrants heightened scrutiny because "all gender-based classifications . . . warrant heightened scrutiny," *United States v. Virginia*, 518 U.S. 515, 555 (1996) (quotations omitted), and 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.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *see also Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000). In addition, courts have recognized that discrimination based on transgender status itself warrants heightened scrutiny. *See*, *e.g.*, *Evancho*, 2017 WL 770619, at *13; *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); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015). Nevertheless, Defendants do not address the fact that the Birth Certificate Policy is subject to heightened scrutiny. Instead, they (incorrectly) contend that rational basis is the only appropriate standard. They further contend that Plaintiffs have failed to

show the requisite intent to discriminate under rational basis because, they say, all Puerto Ricans are prohibited from correcting the gender marker on their birth certificates. *See* Opp'n at 17-18.

Defendants' analysis is incorrect. *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). Plaintiffs need not prove intent to discriminate because, as a matter of law, the burden of proof under a heightened scrutiny analysis 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*, 137 S. Ct. 1678, 1690 (2017) (quoting *Virginia,* 518 U.S. at 533 (original alterations omitted)).

Defendants fail to respond substantively to the weight of authority, described in Plaintiffs' Motion for Summary Judgment, establishing that disparate treatment of transgender persons is discrimination based on sex that triggers heightened scrutiny. Pls.' Mem. in support of Mot. Summ. J. (ECF No. 27 at 8-10). Defendants also ignore the growing body of case law that establishes that discrimination based on transgender status alone warrants heightened scrutiny. *See id.* at 10-11. Moreover, "[c]ertain classifications . . . in themselves supply a reason to infer antipathy." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979); *see also*, *e.g.*, *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 82 (1st Cir. 2004). Here, there is no question that the Act, on its face, classifies on the basis of sex. *See* 24 L.P.R.A. § 1133(4).[2] Put

[2] Defendants admit that the correction of the gender marker in Plaintiffs' birth certificates "is not authorized by the Act" and "cannot be allowed by the 'policies and practices' of the Department of Health." Opp'n at 16. As a result, only transgender persons born in Puerto Rico are forced to have an incorrect gender marker in their birth certificates,

simply, while a "law itself [may] be fair on its face, and impartial in appearance, . . . if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

Defendants fail to identify even a legitimate government interest (let alone an important one) supporting the Birth Certificate Policy. Defendants only argue that birth certificates are an "historical X-ray of the person at birth, which records the . . . name of the parents, name and sex of the registered person." Opp'n at 13 (citing *Ex parte Delgado Hernández*, 165 D.P.R. at 187). But Puerto Rico's actions defy that logic. For example, under the Act, after adoption of a child, a birth certificate that reflects only the names of the *adoptive* parents must be substituted for the original registered birth certificate. 24 L.P.R.A. § 1136. As such, Puerto Rico "has . . . chosen to make its birth certificates more than a mere" historical X-ray document of the person at birth, but a document that should accurately reflect a person's identity. *See Pavan v. Smith*, 137 S. Ct. 2075, 2078–79 (2017) (discussing birth certificates for children of same-sex parents and noting birth certificates may contain names of parents other than biological parents). Accordingly, "[h]aving made that choice," Puerto Rico "may not" deny transgender persons born in Puerto Rico the ability to possess birth certificates that accurately reflect who they are. *Id.* at 2079.

There is simply no government objective—legitimate, important, or otherwise—that justifies denying transgender persons born in Puerto Rico birth certificates with the correct gender marker that do not disclose their transgender status (as would be the case with a strike-

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while similarly-situated cisgender individuals are not. It is thus Defendants' actions, both through their purposeful application and reaffirmation of *Ex parte Delgado Hernández*, 165 D.P.R. 170 (2005), which intentionally discriminate against Plaintiffs.

through). ECF No. 27 at 21-25. Thus, the Birth Certificate Policy fails under *any* constitutional scrutiny—including the rational basis test—and Plaintiffs are entitled to summary judgment.

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

As in their Motion to Dismiss, Defendants' only response to Plaintiffs' due process claims is that they should be dismissed because "[a] federal constitutional right to 'informational privacy' does not exist." Opp'n at 20. Defendants are mistaken. "[T]hat a person has a constitutional right to privacy is now well established." *Daury v. Smith*, 842 F.2d 9, 13 (1st Cir. 1988); *Fournier v. Reardon*, 160 F.3d 754, 758 (1st Cir. 1998). The Supreme Court has recognized two distinct personal privacy rights under 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"). *Cf. Natl. Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134, 146 (2011).[3] Both rights are implicated here, and Defendants have failed to respond to the weight of this authority.

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).[4] It is well-established that a person's transgender status is particularly private, intimate personal information. *Powell v.*

[3] As they did in their Motion to Dismiss, Defendants acknowledge that the U.S. Supreme Court recognizes a substantive due process right to privacy in personal matters, but nevertheless argue in contradiction that "a federal constitutional right to 'informational privacy' does not exist." Opp'n at 20. However, as Plaintiffs pointed out in their Opposition to the Motion to Dismiss, Defendants' latter argument cites only *non-majority* opinions—essentially asking this Court to disregard controlling law.

[4] 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").

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); *K.L. v. State, Dept. of Admin., Div. of Motor Vehicles*, 3AN-11-05431-CI, 2012 WL 2685183, at *6 (Alaska Super. Mar. 12, 2012). 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.

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 transgender persons', including Plaintiffs', fundamental right to privacy in connection with 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 similarly infringes upon the fundamental right to privacy with respect to intimately personal and sensitive information. Defendants have failed to point to any dispute relating to the fact that the Birth Certificate Policy forces Plaintiffs to divulge personal information. Indeed, Defendants admit that, based on declarations submitted by Plaintiffs, "[t]he forced disclosure of the transgender status of Plaintiffs and other transgender persons by way of an inaccurate birth certificates exposes them to prejudice, discrimination, distress, harassment, and violence" and "[t]he forced disclosure of a person's transgender status through inaccurate identification documents, such as a birth certificate, violates a transgender person's privacy." ECF No. 31-1 at ¶¶ 70, 77.

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. ECF No. 27 at 15-18. "[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. Because the forced disclosure of a person's transgender status interferes with the deeply personal decision of transgender persons to live consistent with their true sex as determined by their gender identity, the Birth Certificate Policy also infringes upon transgender persons' decisional privacy rights. Defendants do not even address Plaintiffs' due process claim—let alone identify any issues of material fact—as it pertains to Plaintiffs' fundamental rights to decisional privacy, liberty, individual dignity, and autonomy. They respond to those portions of Plaintiffs' Statement of Material Facts that refer to the fundamental importance of living consistent with one's gender identity with no substantive disputes, but rather admit or deny only that those precise statements are contained in the declarations submitted by Plaintiffs' with their Motion for Summary Judgment. ECF No. 31-1 at ¶¶ 13-20.

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 interest incapable of being served by less intrusive means." *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 47 (1st Cir. 2003). Defendants have not demonstrated a compelling interest, nor can they establish that any purported interest cannot be served by less intrusive means. Plaintiffs have demonstrated as a matter of law that the Birth Certificate Policy violates their due process rights, and Defendants' speculation to the contrary is insufficient to create a genuine fact dispute.

IV. The Birth Certificate Policy Violates Plaintiffs' First Amendment Rights.

Defendants do not even address Plaintiffs' First Amendment claim, which is a separate claim from that asserted under the Due Process Clause. In any event, Plaintiffs have

demonstrated as a matter of law 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.[5] Here, birth certificates are issued by the Commonwealth and are 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 transgender persons' right *not* to speak, because they cannot avoid revealing their transgender status 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). Defendants have fatally failed to identify any issues of material fact relating to Plaintiffs' First Amendment claims. ECF No. 31-1 at ¶¶ 70, 79.

V. Plaintiffs Challenge The Constitutionality Of The Birth Certificate Policy As Applied To Transgender Persons and Do Not Seek A Preliminary Injunction.

As they did in their Motion to Dismiss, Defendants contend 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]." Opp'n at 10.[6] But the fact that public officials claim a statutory basis for their actions

[5] 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"). Defendants have not identified, and cannot demonstrate, any compelling government interest.

[6] Defendants intimate that a policy or practice is not actionable under 42 U.S.C. § 1983. However, it is black letter law that "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy," is actionable under § 1983. *Bordanaro v. McLeod*, 871 F.2d 1151, 1155 (1st Cir. 1989) (quoting *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694 (1978)).

does not render them immune from constitutional review. To the extent that the Birth Certificate Policy is based on an interpretation of 24 L.P.R.A. § 1231, Plaintiffs challenge the statute *as applied* to Plaintiffs by Defendants. Furthermore, neither the Birth Certificate Policy nor the provisions of the Act on which Defendants claim it is based may be "accorded a strong presumption of validity," because 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. 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, Opp'n at 16, has no bearing on whether the Birth Certificate Policy, as applied to Plaintiffs, is unconstitutional. In their recycled argument, Defendants fail to identify any issues of material fact relating to their roles or actions that challenge the structure of Plaintiffs' claims. Rather, Defendants admit the critical roles that they play in applying the Act. ECF No. 31-1 at ¶¶ 58-60.

Finally, despite Defendants' insistence on arguing against a preliminary injunction, no such request is currently before the Court.

CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that this Court grant their Motion for Summary Judgment.

Dated on this 1st day of August, 2017.

Respectfully submitted,

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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 1st day of August, 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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