UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SANDER SABA, Plaintiff, v. ANDREW M. CUOMO, *in his official capacity as Governor of the State of New York*, and MARK J.F. SCHROEDER, *in his official capacity as Commissioner of the New York State Department of Motor Vehicles*, Defendants.	No. 20-cv-5859 (LJL)

PLAINTIFF SANDER SABA'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

Plaintiff Sander Saba ("Plaintiff" or "Mx. Saba") is a New Yorker attempting to perform what for most New Yorkers is a routine—indeed, required—task: changing their out-of-state license for an in-state license. Mx. Saba, however, has a nonbinary gender identity, meaning that they identify as neither exclusively male nor exclusively female. While their now-expired Pennsylvania license accurately recorded their gender as "X," Defendants Andrew M. Cuomo and Mark J.F. Schroeder (collectively, "Defendants" or the "State") have adopted a Gender Marker Policy that: (i) requires that nonbinary New Yorkers seeking drivers' licenses to falsely affirm that they have a binary gender when applying; (ii) lists that inaccurate binary gender designation in the DMV's computer system; (iii) disseminates that inaccurate gender designation to other agencies and third parties with access to the DMV's computer system; and (iv) prints that inaccurate gender designation onto the driver's license to display to the public at large.

The State does not contend that its Gender Marker Policy is legal. Nor has it made a clear and unequivocal commitment to change it, let alone with any haste. Instead, it takes the curious view that this Court must dismiss Mx. Saba's case as moot based on (i) a settlement offer whereby it would create a one-off driver's license for Mx. Saba alone and (ii) a representation that the State has hired a contractor to update its technological system to remove some alleged technical barriers that may, in the future, allow the State to address some of the Gender Marker Policy's legal shortcomings. Not only has the scope of the contracted work shifted even during the relatively short time this lawsuit has been active, but so has its anticipated completion date. Regardless of the actual scope and timing of its systems upgrade, however, the State's representations fall short of either removing the Gender Marker Policy, now or in the future.

Nor does the State's one-off settlement offer, whereby it would continue its Gender Marker Policy indefinitely, but offer Mx. Saba a manually altered license with an X marker, let

them off the hook. The State can no more moot Saba's challenge to the Gender Marker Policy by offering a one-time exemption than a State with a policy that a woman challenges as unconstitutionally infringing on her reproductive rights protected by the Fourteenth Amendment could evade a lawsuit by granting her a solitary exemption. The State's attempts to use the settlement negotiation process—a process encouraged by the Federal Rules—to snuff out Mx. Saba's case without even promising to *eventually* address the challenged Gender Marker Policy must fail.

Crucially, even under the proposed settlement, the State still misgenders Mx. Saba within the DMV's system—a system to which the DMV admits it gives access to private and public third parties, from insurance companies to law enforcement, for identity verification purposes. And without changing the Gender Marker Policy, the core dignitary harm protected by the Fourteenth and First Amendments under which Mx. Saba has sued cannot be remedied. Giving Mx. Saba a makeshift identification document that the State admits would require Mx. Saba to carry around a second authentication letter to (maybe) head off forgery accusations is no serious solution.

At bottom, Mx. Saba has challenged the Gender Marker Policy, which the State does not dispute remains its active policy. The State's efforts to update the DMV's apparently archaic computer system may be admirable, but the technological limitations of the DMV's current system are not before the Court on the State's motion to dismiss for mootness. And a state does not receive more latitude to evade its constitutional obligations when it writes an unconstitutional policy in its computer code instead of its legal code. There is, therefore, still relief this Court can grant, and the State's motion should be denied.

STATEMENT OF FACTS

A. Mx. Saba and Nonbinary Gender Identities

Gender identity is a core part of who a person is and is inextricably linked to a person's sex. *See* Compl. ¶¶ 25, 26, 34, 37-38; *accord Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1742 (2020) ("[T]ransgender status [is] inextricably bound up with sex."). It is based, in part, on biological factors, including brain chemistry. Compl. ¶ 28. A person's gender identity may include an identification as female, male, or neither. *See id.* ¶ 25. A person who identifies as neither male nor female has a "nonbinary" gender identity, based on the fact that "male" and "female" gender identities are sometimes referred to as the "gender binary." *See id.* ¶¶ 29-31. Because most people are assigned male or female as their sex at birth (their "birth-assigned sex"), that also means that nonbinary people have a gender identity that does not match their sex assigned at birth, and so are transgender. *Id.* ¶¶ 35-37; *see also* 9 NYCRR § 466.13(b)(2). There are an estimated 1.4 million adults in the United States who identify as transgender, approximately 35% of whom identify as nonbinary. Compl. ¶¶ 7, 39.

Mx. Saba is a nonbinary person. They were born in Staten Island, New York, and, starting from a young age, they did not specifically identify as either male or female, instead feeling that others prescribed gender roles onto them. *See id*. ¶¶ 62-65. Mx. Saba began to explore their gender identity in high school when, for example, they stopped adhering to gender-stereotyped grooming styles and clothing standards associated with their birth-assigned sex. *Id.*

As Mx. Saba started their legal education, they realized their gender identity did not match pronouns associated with their birth-assigned sex, with the way they had been presenting, or with the name given to them at birth. Compl. ¶¶ 69-70. In September 2018, they started seeing a therapist who specialized in LGBTQ-specific issues, including those related to sexual orientation and gender identity, and began undergoing medical treatment for gender dysphoria.

Id. ¶¶ 70-72. They were diagnosed with gender dysphoria, a condition in which the incongruence between a person's gender identity and their birth-assigned sex causes clinically significant distress, in the fall of 2018. *See id.* ¶¶ 43, 72. They began taking hormones and receiving other medically indicated treatment as they sought to align their lived experience with their gender identity. *See id.* ¶ 73.

In October 2018, Mx. Saba legally changed their name to Sander to align better with their gender identity. *See id.* ¶¶ 73-74. In January 2019, Mx. Saba updated their Pennsylvania driver's license to include a gender-neutral designation of "X" and updated their social security card to reflect their new legal name. *See id.* ¶¶ 75-76. In January 2020, Mx. Saba obtained a corrected New York City birth certificate with their accurate legal name and an accurate "X" gender marker designation. *Id.* ¶ 77. Correcting these identity documents were steps Mx. Saba took as part of their "social transition," and are "critical to the[ir] health and well-being." *Id.* ¶¶ 50-52. After Mx. Saba became a permanent resident of New York City in May 2020, however, they sought to exchange their Pennsylvania license for a New York license, as required under New York law. *See* N.Y. Veh. & Traff. Law § 250(5). That is when things began to go wrong.

B. The Gender Marker Policy

Unlike Pennsylvania (along with 17 other states and the District of Columbia), *see* Compl. ¶ 55, the State does not issue driver's licenses reflecting a nonbinary gender identity, instead forcing New Yorkers to choose between only two potential gender markers: "M" for male or "F" for female. *Id.* ¶¶ 4, 102-06; *see* Declaration of Gregory Kline (Dkt. 19) ("Kline Dec.") ¶ 3. This "Gender Marker Policy" enforced by Defendants consists of several parts.

To start the process, an applicant must fill out Form MV-44 (the "Application"). *See* Compl. ¶ 85. This Application requires an applicant to fill out a "GENDER" field, but only

provides two options—a "Male" box and a "Female" box. *Id.* Applicants attest that all information in the Application, including the gender marker, "is true and complete." *Id.* ¶¶ 86-87. That, however, is impossible for nonbinary New York residents, requiring them to commit perjury by falsely swearing to an inaccurate gender identity. *See id.* ¶¶ 108, 134, 154, 161.

As the State recently revealed, the gender identity chosen on the Application is not stored in a box in the basement of the DMV. Instead, it becomes a part of the "foundational core" of the computer identification system the State has created. Kline Dec. ¶ 5. The State codes the gender selection from the Application as either 0 for male or 1 for female, and inserts that number into a "client identification number," or "MI" number, in the DMV's computer system. *Id*. ¶ 3. That number is what the DMV uses to link a particular record in its system to the other information the State tracks such as vehicle registration, insurance status, and fines. *Id.* ¶ 5. The State suggests that the system the DMV has created can only function if a 1 or 0 is entered for an applicant's gender, *id.* ¶ 4, but fails to explain why, including whether the entire MI number is made up of binary 1's and 0's, or whether it includes other digits.

The State also uses the MI number to maintain records that are accessed by public and private third parties ranging from law enforcement to the U.S. Selective Service System, boards of election, insurance companies, and credit card companies. *Id*. ¶ 5. It is not clear from the State's evidence whether those records include the gender selected on the Application, or only the MI number that encodes the gender identity as "1" or "0."

Finally, the DMV uses the gender identity in the Application to print a license bearing the selected gender, which New York issues for license-holders to display to the public at large. Compl. ¶¶ 91, 107-08, 110-123, 151. Many public and private parties rely on state-issued driver's licenses to verify a person's identity. *Id.* ¶ 111. These can include employers seeking to

hire and onboard new employees, educational institutions enrolling new students, and the United States Department of Homeland Security clearing ticket-holders at airports to board commercial aircrafts. *Id.*; *accord* Kline Dec. ¶ 5. As discussed *infra*, the State has offered to provide Mx. Saba with a manually modified New York driver's license. But it has given no assurance that a manually modified New York driver's license will, in fact, serve as an adequate substitute for a driver's license issued in the normal course, such as meeting the federal government's REAL ID standards required to board commercial aircraft. Indeed, the State's suggestion that Mx. Saba carry around an additional authentication letter to supplement an identification document suggests that it will not. *See* Kline Dec. ¶ 6.

Each part of the DMV's Gender Marker Policy causes severe harm to nonbinary New York residents like Mx. Saba. Assigning a binary gender identity to nonbinary New Yorkers both in the DMV's system and on its licenses conveys a message from the State that there are only two valid gender identities—male and female—and that the DMV does not recognize Mx. Saba, or any other nonbinary person in the State of New York. *See* Compl. ¶¶ 52, 54, 113-114. And the requirement for nonbinary residents to falsely attest that they are male or female in the Application is even more pernicious, forcing them to participate in perjury and their own erasure. *See id.* ¶ 117. Moreover, when a nonbinary New York resident's appearance does not match the gender marker on their license or in their record, they can and do face intrusive questioning about whether their identification is authentic, leading to awkward and disturbing questioning by anyone who has access to the DMV's system or views Mx. Saba's license. *See id.* ¶ 119. Indeed, because of Defendants' enforcement of the Gender Marker Policy, Mx. Saba has been forced to allow their Pennsylvania license to expire. *See* Declaration of Sander Saba ("Saba Dec.") ¶ 17. That forces Mx. Saba to forego the benefits associated with a valid New York

driver's license, including access to public accommodations and legal authority to drive on public highways, and Mx. Saba will face difficulties, if not altogether exclusion from, entering secured buildings, courthouses, and airports. Compl. ¶ 124.

C. The DMV Attempts To Moot The Case Without Changing The Challenged Policy

After a few months of negotiations that ultimately failed, *see* Declaration of Attorney Carl S. Charles in Support of Plaintiff's Opposition to Defendant's Motion To Dismiss ("Charles Dec.") ¶ 13, the State moved to dismiss Mx. Saba's lawsuit. *See* Defendants' Memorandum of Law in Support of their Motion to Dismiss, ECF No. 20 ("Motion" or "Mot."). The State does not contest the merits of Mx. Saba's claim or defend its Gender Marker Policy on the merits. Instead, based on two declarations from Gregory Kline, the Deputy Commissioner for Administration at the DMV, *see* Dkts. 19, 27 ("Kline Supp. Dec."), it argues only that Mx. Saba's case has been mooted based on (i) several changes to the DMV's computer system that it claims are in progress and (ii) a proposed settlement offer, the specifics of which the State set out in its Motion. Mot. at 5-7.

Kline does not suggest that the State has actually modified the DMV's Gender Marker Policy. Rather, he admits that to receive a New York driver's license, applicants "must make [a] binary 'male' or 'female' gender selection." Kline Dec. ¶ 3. He attributes the State's policy to the way the DMV has programmed the MI numbers it uses in its computer systems. *Id.* Kline initially testified that the DMV was authorized in 2019 to replace its legacy computer system, and that new system "would . . . permit DMV to create a license record without reference to an [motorist identification ("MI")] number, and thus without the need for the applicant to make a binary "male" or "female" gender selection." *Id.* ¶ 6.

In addition to not promising to *change* the Gender Marker Policy, Kline could not assure

the Court when its systems update would actually be completed. Kline instead simply testifies that the update is "complex" and involves "multiple phases, including bidding, designing, developing, testing, training, and roll-out." *Id.* ¶ 7. Kline's testimony offers no hint of where the State was in that process, such as an indication that bidding has started, a system designed or developed, and so forth. Nor did Kline offer the Court a clear schedule and firm deadline. Instead, he simply testified that any new system "will likely not be operational until the fourth quarter of 2021, *or later*." *Id.* (emphasis added).

Two weeks later, Kline's story changed. Despite having supposedly been authorized to do its systems overhaul in 2019, Kline filed his supplemental declaration on November 10 stating that sometime between October 29 and November 10, the DMV decided to "modify its existing system rather than replace" it. Kline Supp. Dec. ¶ 3. Kline cited that this was so the State could focus on providing remote services in response to the COVID-19 situation, despite the fact that DMV offices have been closed or operating at reduced live capacity since *March*. Compl. ¶ 100 n.25 (emphasis added). This is the first time the State has suggested it could modify, rather than replace, its system. And despite the DMV's simplification of the overhaul, Kline still cannot provide any more detail regarding the timeline, though presumably the new scope of work would require modifications to anything the DMV has already completed. Kline Supp. Dec. ¶ 4 (noting modifications will be completed "on substantially the same timeline" as noted in Kline's initial declaration).

This is not the first time the State has changed its story. As set forth in the Complaint, when Mx. Saba contacted the DMV in June regarding their situation, the DMV could not answer whether the DMV's technical overhaul would permit them to receive an accurate gender marker on their license. *See* Compl. ¶ 104; *accord* Charles Dec. ¶ 6; Saba Dec. ¶¶ 3-4. Only after Mx.

Saba filed their lawsuit did the State have an apparent change of heart. On August 14, 2020, counsel for the State acknowledged for the first time that the systems upgrade would include a change of policy to make an "X" gender marker available to a driver's license applicant. Charles Dec. ¶ 5.[1] At this point, the State represented that it had already retained a vendor and that these updates would take at least 18 months, or until early 2022. *Id.* ¶ 7. Thereafter, the State informed Plaintiffs that it would need an additional six months to complete the system overhaul, moving the anticipated completion date to mid-2022. *See id.* ¶ 9. While the parties discussed various potential settlements, the State continued to insist that the applicant would have to make a binary selection for purpose of generating an MI number. *Id.* ¶ 11.

The State's final offer, which is articulated most completely in the Kline declaration, involved Mx. Saba submitting all the required documentation except leaving the gender identity question on the Application blank. Kline Dec. ¶ 9. The DMV would then assign Mx. Sander a binary gender marker for use in the DMV system, but would manually create a physical license that did not reflect the State's gendering of Mx. Sander in its internal system, instead using an "X" gender marker. *Id.* ¶ 12. "To avoid any confusion" by third parties, the State offered to issue a letter of authenticity for the license, *id.*, which Mx. Sander would presumably need to carry with them, in addition to the license, at all times. However, it is not clear how a printed piece of paper on DMV letterhead will actually be helpful to third parties as means to authenticate a modified form of identification. Furthermore, no such manually modified

[1] The State insisted that its negotiations be protected under Federal Rule of Evidence 408, and Mx. Sander conducted its negotiations on the assumption that such confidential information would not be introduced in court. Charles Dec. ¶¶ 3, 13. Because the State strategically disclosed the final offer the State made under the protection of FRE 408 to "disprove the validity . . . of a disputed claim," Fed. R. Evid. 408, Mx. Sander introduces the following information to correct the record.

identification is being offered to any other nonbinary New Yorkers. To the contrary, the State rejected any settlement arrangement that would be made available to all other nonbinary New Yorkers, Charles Dec. ¶ 14, so this unique and conspicuous form of identification is only being offered to Mx. Saba at the exclusion of all other New Yorkers, which will inherently lead to confusion and questions that Mx. Saba should not be expected to address on a routine basis. *See* Compl. ¶¶ 102-04.

STANDARD OF REVIEW

Rule 12(b)(1) provides for the dismissal of a claim when the federal court "lacks jurisdiction over the subject matter," Fed. R. Civ. P. 12(b)(1), such as when a case is mooted. *Doyle v. Midland Credit Mgmt., Inc.*, 722 F.3d 78, 80-81 (2d Cir. 2013) (dismissing mooted case). Mootness arises when "the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Tann v. Bennett*, 807 F. 3d 51, 52 (2d Cir. 2015) (state court adjudication did not moot pending federal claims) (internal citation omitted). But "as long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chevron Corp. v. Donziger*, 833 F. 3d 74, 124 (2d Cir. 2016) (internal citation omitted). It is sufficient that "a court still could grant effectual relief." *Hassoun v. Searls*, 976 F.3d 121, 128 (2d Cir. 2020) (holding the case was not moot where petitioner sought release from custody and "the government sought to continue detaining [petitioner] despite the district court's order that he be released."). A case is thus not moot unless "it is impossible for a court to grant *any* effectual relief whatever to the prevailing party." *Tanasi v. New All. Bank*, 786 F.3d 195, 199 (2d Cir. 2015), *as amended* (May 21, 2015) (unaccepted offer of complete relief does not moot case).

Defendants bear the burden of proof to demonstrate mootness. *Mhany Mgmt. Inc. v. Cty of Nassau*, 819 F. 3d 581, 603 (2d. Cir. 2016) (holding that the defendant bears the burden of

proving that a change of circumstances makes a case moot). In this context, its burden is both "stringent and [ ] formidable" and requires a "showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* at 603-04 (internal citation omitted). The Court "must take all uncontroverted facts in the complaint . . . as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014). Should there be any "disputed jurisdictional fact issues," the Court may examine "evidence outside of the pleadings, such as affidavits, and if necessary, hold an evidentiary hearing." *Zappia Middle E. Const. Co. v. Emirate of Abu Dhabi*, 215 F. 3d 247, 253 (2d Cir. 2000).

ARGUMENT

I. The State Did Not Moot Saba's Case with Its Incomplete and Unaccepted Offer.

The State has adopted a puzzling strategy to try to evade the demands placed upon it by the U.S. Constitution and its own laws: simultaneously refuse to guarantee any change the Gender Marker Policy while claiming Mx. Saba has received all relief that the Court can possibly grant Mx. Saba based on its settlement offer. The State's mootness argument relies on two interrelated steps: 1) the State "invited Plaintiff to apply immediately for an "X" gender license through a manual process and to skip the gender question on the application," and 2) the State is in the process of "replac[ing] DMV's legacy computer system with a new system that will allow DMV to issue an "X" gender driver's license through an automated process" when the offered manually altered license would expire. Mot. at 6. According to the State, those two actions supposedly give Mx. Saba "all the prospective relief" they requested. *Id.* Not so. The State's unaccepted settlement offer fails to address all of the burdens imposed on Mx. Saba by the Gender Marker Policy, and the State has failed to introduce evidence it will *actually and unequivocally* change the policy in the future. And even if it had, the change in policy came only

after Mx. Saba's lawsuit, and the State has failed to meet the high burden to establish that its voluntary cessation of the Gender Marker Policy is enough to moot Mx. Saba's claims.

A. The State's Proposed Actions Do Not Fully Remedy Mx. Saba's Claimed Harms.

In order to meet its burden to moot the case, the State must completely remedy all four illegal aspects of the Gender Marker Policy:

a) requiring that nonbinary New Yorkers seeking drivers' licenses falsely affirm that they have a binary gender on its Application, Compl. ¶¶ 87, 108, 134, 154, 161;

b) assigning that inaccurate binary gender to nonbinary New Yorkers in the DMV's computer system, Kline Dec. ¶¶ 4-5;

c) disseminating that inaccurate gender designation to other agencies and third parties with access to the DMV's computer system, Kline Dec. ¶ 5; and,

d) printing that inaccurate gender designation onto their driver's license to display to the public at large, Compl. ¶¶ 91, 107-08, 110-123, 151.

Because the State has failed to actually change any one of those four policies, and even its purported settlement offer fails to address all of the policy's flaws, its Motion fails.

1. The State Cannot Moot Mx. Saba's Lawsuit Through an Unaccepted Settlement Offer That Fails to Provide All the Relief Requested in Mx. Saba's Complaint.

Instead of addressing Mx. Saba's actual Complaint, the State tries to sidestep the challenge with a settlement offer to issue a manually altered license with an X marker. Mot. at 6. But an unaccepted settlement offer has no effect whatsoever and cannot moot a case, and certainly not one that fails to address most of the challenged Gender Marker Policy. Because the State's settlement offer does not prevent the Court from granting Mx. Saba "any effectual relief whatever," their case is not moot. *See Tanasi*, 786 F.3d at 199.

As an initial matter, binding authority from the U.S. Supreme Court and the Second Circuit establish that the State cannot meet its burden through an unaccepted settlement offer, and the State has offered no contrary authority. The U.S. Supreme Court has explained that "[a]n unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect," and so "[w]hen a plaintiff rejects such an offer—however good the terms—her interest in the lawsuit remains just what it was before. And so too does the court's ability to grant her relief." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 162, 165 (2016) ("An unaccepted settlement offer or offer of judgment does not moot a plaintiff's case."). Following this instruction, the Second Circuit has rejected efforts by defendants to moot cases by merely making a settlement offer. *See Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 850 F.3d 507, 512 (2d Cir. 2017); *accord Tanasi*, 786 F.3d at 199; *Kirkland v. Speedway LLC*, 260 F. Supp. 3d 211, 219 (N.D.N.Y. 2017). Thus, the State cannot rely on its settlement offer to establish mootness, without which its Motion cannot survive.

In any event, the State's proposed settlement does not provide Mx. Saba with the full relief they requested in their Complaint, leaving additional relief the Court could provide should their lawsuit succeed. First, the State's settlement offer does nothing to change the fact that it will still assign Mx. Saba an MI number based on a binary gender selection, assessing an inaccurate gender as the "foundational core" of the State's identification system. Kline Dec. ¶¶ 3-4. This proposal may well "disadvantage [Saba] to a lesser degree" than the status quo, but the State would still define Saba's gender inconsistently with Saba's own concept of their personhood in violation of their dignity and autonomy. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993) (holding that repeal of a challenged ordinance giving preference to minority-owned businesses did not moot the case

where it was repealed in favor of a related ordinance giving preference to a smaller class of businesses); *see* Compl. ¶¶ 94, 112-14, 144-46. The proposed settlement would continue to disadvantage Saba "in the same fundamental way" as the Gender Marker Policy, which it leaves in place, meaning this Court can still grant Saba effective relief. *Ne. Fla. Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 662; *see Fair Hous. Justice Ctr., Inc. v. Cuomo*, 2019 WL 4805550, at *1, 11 (S.D.N.Y. Sept. 30, 2019) (Broderick, J.) (amendments to discriminatory policy did not moot case when revised policy continued to "suffer[] from similar infirmities" as the original regulations); *Nat. Res. Def. Council v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 142 (S.D.N.Y. 2019) (Sweet, J.) ("replacement action [that] embodies the same flaws as the originally challenged action" does not moot case, even if it "limit[ed] the scope or harm of [the] original action"); *Edelhertz v. City of Middletown*, 2013 WL 4038605, at *4 (S.D.N.Y. May 6, 2013) (Briccetti, J.) (amendment altering a challenged residency requirement ordinance by broadening it by a ten-mile radius was "sufficiently similar to the repealed ordinance that it is permissible to say that the challenged conduct continues").

To make matters worse, the State's itself introduces evidence that under its proposed settlement, the State would make available to third parties the inaccurate gender it assigns to Mx. Saba, including law enforcement, the U.S. Selective Service System, organ donor registries, county boards of election, credit card companies, insurance companies, and more. Kline Dec. ¶ 5. Broadcasting that inaccurate gender designation to third parties without Mx. Saba's consent would lead to precisely the same "intrusive questioning" from third parties that Mx. Saba alleged occurs under the current Gender Marker Policy. Compl. ¶¶ 119-20; *see* Saba Dec. ¶¶ 10-11. Indeed, Mx. Saba's personal experience of transitioning suggests that third parties who access incorrect or outdated gender identity may save local copies of Mx. Saba's DMV profile, meaning

there may be no way to undo the disclosure of this false information, even should the State later rescind its Gender Marker Policy and remove any internal references to a false gender identity in its system. *See* Saba Dec. ¶ 12. After transitioning, Mx. Saba continued to find inaccurate references to their sex-assigned-at-birth in various parts of their school's systems even through graduation. *Id.* ¶ 13; *see Moore v. Consol. Edison Co. of N.Y.*, 409 F.3d 506, 508–10 (2d Cir. 2005) (effectual relief remained available where the court could still mitigate one of the alleged harms); *Begins v. Philbrook*, 513 F.2d 19, 20, 23 (2d Cir. 1975) (challenge to one-car limitation in welfare regulations not mooted by sale of second car because plaintiff experienced "continuing harm" in either loss of a second car or loss of welfare benefits).

Finally, the State's offer to provide Saba with a manually changed license is not comparable to the relief Mx. Saba requested: an official New York license that accurately reflects their gender. *See* Compl. Prayer for Relief (b)-(c). The State offers no evidence that every one of its agents will consider the idiosyncratic manually altered license it offers to print valid—relief well within the power of this Court to grant. *See* Fed. R. Civ. P. 65(d)(2) (authorizing courts to issue injunctions binding a party's "officers" and "agents"). And the State admits that an idiosyncratic identification document may in fact subject Mx. Saba to *additional* scrutiny from third parties such as law enforcement who may need to ascertain its authenticity. Kline Dec. ¶ 12; *accord* Saba Dec. ¶¶ 14-15. The offered authenticity letter, Kline Dec. ¶ 12, may not only cause further confusion as to whether the letter itself is genuine, but itself imposes an additional burden on Mx. Saba that binary New Yorkers need not face. *See Janakievski v. Exec. Dir., Rochester Psychiatric Ctr.*, 955 F.3d 314, 316, 320 (2d Cir. 2020) (case not moot when "ongoing restrictions on [the plaintiff's] liberty" constituted an ongoing "burden[]"). Indeed, the individualized nature of the solution offered is sure to create confusion and draw

suspicion when presented. *See* Saba Dec. ¶¶ 14-15. In all, the State's proposed solution is not only insufficient, but may make matters worse, resulting in further unconstitutional discrimination on the basis of Mx. Saba's gender identity that constitutes "[t]he gravamen of [Saba's] complaint." *See Ne. Fla.*, 508 U.S. at 662; *see, e.g.,* Compl. ¶¶ 118, 120, 122. That is not enough to meet the State's burden and moot this case.

Indeed, the fact that a one-off exemption cannot fully remedy Mx. Saba's harms is one reason why they have sought equitable relief enjoining the entire Gender Marker Policy, not just its application. *See* Compl. Prayer for Relief (b). Such injunctive relief against an unconstitutional government policy is entirely appropriate, as the State itself argued to this Court in another case. *New York v. U.S. Dep't of Justice*, Case No. 1:18-cv-06471-ER, Dkt. 57 (S.D.N.Y. Aug. 17, 2018) ("When agency action is invalidated, the ordinary result 'is that the rules are vacated—not that their application to the individual petitioners is proscribed.'" (quoting *Nat'l Mining Ass'n v. U.S. Army Corps. of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998)); *see City of Chi. v. Barr*, 961 F.3d 882, 928 (7th Cir. 2020) (enjoining unlawful conditions to entire program when a "program-wide application" required to afford plaintiff complete relief); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (affirming scope of injunction against state party that benefiting non-parties in part because policy "formulated on a statewide level" and "an injunction is not necessarily made overbroad by extending benefit or protection to persons other than prevailing parties in the lawsuit"). This is particularly true for the First and Fourteenth Amendment challenges alleged in this lawsuit. *See Hedges v. Obama*, 2012 WL 2044565, at *1 (S.D.N.Y. June 6, 2012) (finding of First and Fourteenth Amendment violation "has provided relief to both the parties pursuing the challenge, as well as third parties not before the Court") *rev'd on other grounds* 724 F.3d 170 (2d Cir.

2013). Indeed, this is consistent with the longstanding principle of *jus tertii*, under which the Court can exercise jurisdiction where "a party properly in court seeks to sustain its own opposition to a public act by invoking the interests of others"—especially when addressing allegations of discrimination or restrictions on expression. *Mahon v. Ticor Title Ins. Co.*, 683 F.3d 59, 67 (2d Cir. 2012) (Hall, J., concurring in the judgment) (emphasis in original) (quoting Wright & Miller, Fed. Prac. & Proc. § 3531.9); *see* Wright & Miller, Fed. Prac. & Proc. § 3531.9.2 ("Discrimination in other settings also entwines the interests of the immediate target with the interests — and standing — of others."); *Dickerson v. Napolitano*, 604 F.3d 732, 742 (2d Cir. 2010) ("[P]laintiff is allowed to challenge a law that may be legitimately applied to his or her own expressive conduct if the law has the potential to infringe unconstitutionally on the expressive conduct of others").

2. The State's Proposed Changes to Its Computer System in the Future Without Changing the Gender Marker Policy Does Not Moot the Case.

The State's mootness argument also fails because the State has not introduced evidence that it will, in fact, change its challenged Gender Marker Policy, the crux of Mx. Saba's Complaint. *See* Compl. Request for Relief (b) (requesting court "enjoin Defendants . . . from enforcing the Gender Marker Policy"). Contrary to counsel's representation to this Court at the pre-motion conference, the Kline Declarations do not suggest that the Gender Marker Policy has in fact been changed nor that it will be changed eventually. *See, e.g.*, Kline Dec. ¶¶ 6-7, Kline Supp. Dec. ¶ 4. The Declarations provide nothing more than a non-committal statement as to what *may* happen in the future.

Specifically, instead of addressing Mx. Saba's actual claims against the Gender Marker Policy, the State asks that Mx. Saba be satisfied with its assertions that 1) "[o]nce the [] system is operational, DMV will *be able to* offer and issue to self-certifying nonbinary applicants an 'X'

gender driver's license through an automated application procedure," Kline Dec. ¶ 7 (emphasis added), 2) that its project would "*permit* DMV to create a license record without reference to an MI number," *Id.* at ¶ 6 (emphasis added), and 3) that the State has a "goal to *allow* DMV to create a license record without the need for an applicant to make a binary 'male' or 'female' gender selection." Kline Supp. Dec. ¶ 4 (emphasis added). Each one of these statements fall short of a promise to *rescind* the Gender Marker Policy, and such lukewarm assurances cannot meet Defendants' burden here. *See Trinity Lutheran Church of Colum., Inc. v. Comer*, 137 S. Ct. 2012, 2019 & n.1 (2017) (directive to change challenged policy insufficient to moot the case); *Stieberger v. Heckler*, 615 F. Supp. 1315, 1381 (S.D.N.Y. 1985) (Sand, J.), *vacated on other grounds sub nom. Stieberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986) ("interim" change to a policy was insufficient to moot a case). Indeed, even if the State affirmatively promised to remedy Mx. Saba's harm in the future, that would still not moot the case. *See Gropper v. Fine Arts Hous., Inc.*, 12 F. Supp. 3d 664, 670 (S.D.N.Y. 2014) (Cote, J.) ("promises that [defendant] will fulfill in the future" to remedy "cannot . . . completely and irrevocably eradicate[] the effects of" defendant's alleged discrimination); *see also Hassoun*, 976 F.3d at 127–28 (case not moot even while government was in the process of actions that later mooted case).

Ultimately, Kline only testified about the State's "DMV computer system modernization project." Kline Dec. ¶ 1. But Mx. Saba did not bring a lawsuit over the State's archaic computer system; they challenged the State's Gender Marker Policy. Compl. ¶¶ 87, 91, 103-04, 107-08, 110-23, 134, 151, 154. Retaining any *one* of the Gender Marker Policy's four component parts would doom the State's Motion. *See Thomas v. Ariel W.*, 242 F. Supp. 3d 293, 295–98 (S.D.N.Y. 2017) (Swain, J.) (case was not moot where Defendant addressed some of the alleged discriminatory acts, but "at least some of Plaintiff's claims" remained). The State, however, has

chosen to retain all four. That is not enough, and it renders irrelevant the cases the State cites—each of which addressed situations involving a "significant amendment or repeal of a challenged [policy]." Mot. at 9 (alteration State's).

B. Voluntary Cessation Cannot Moot Mx. Saba's Case.

Even if the State had fully rescinded the Gender Marker Policy, its efforts are too late to moot Mx. Saba's case. The State agrees that its voluntary conduct can only moot this case if it "demonstrate[s] that (1) there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Clear Channel Outdoor, Inc. v. City of N.Y.*, 594 F.3d 94, 110 (2d Cir. 2010) (citation omitted and emphasis added); Mot. at 7-8. The State has failed to carry its burden on either prong. *See Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016) (noting "defendant [must] demonstrate" voluntary cessation); *accord Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (noting defendant "claiming that its voluntary compliance moots a case bears [a] formidable burden").

First, the State has failed to show that Mx. Saba has no "reasonable expectation" that its alleged violation will not recur. Here, the main action the State has already taken is to offer a one-off exemption to Mx. Saba. *See supra* Part I.A.1. But despite the fact that a DMV representative spoke to Mx. Saba's about their plight before Mx. Saba ever filed their lawsuit, *see* Compl. ¶ 104; Saba Dec. ¶ 4; Charles Dec. ¶ 6, the DMV only offered to cease its unconstitutional behavior after the lawsuit was filed—which alone is enough to deny the State's Motion. *Mhany Mgmt., Inc.*, 819 F.3d at 603 (defendant failed to show violation unlikely to recur when efforts to moot case tracked litigation progress); *United States v. N.Y.C. Transit Auth.*, 97 F.3d 672, 676 (2d Cir. 1996) ("[I]t is significant that the change of policy was instituted on the eve of the lawsuit."). Moreover, the State points to nothing that would stop it from

reinstituting its challenged policy and unilaterally deciding that the proposed one-off license it has offered to issue to Mx. Saba is no longer valid. *See, e.g.*, *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) (case not moot when "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision").

Nor is the State's supposed intent to upgrade its systems enough here, even if it has, in fact, already started implementing that change. *See N.Y. Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 327 (2d Cir. 2003) (implementation of parts of commitment letter addressing challenged behavior insufficient to moot case, despite being "indicative of a degree of good faith"); *Mhany Mgmt., Inc.*, 819 F.3d at 604 (county failed to show no reasonable expectation to occur even after county "authorized funding" and signed a contract to remedy the alleged legal violation). This is particularly true in light of the moving target the State has provided about the goals and scope of its systems upgrade. *See supra* at 8-9; *Am. Council of Blind of N.Y., Inc. v. City of N.Y.*, 2020 WL 6151251, at *25 (S.D.N.Y. Oct. 20, 2020) (case not moot when city had "not shown how and whether it has begun implementing the terms its new policy promises"); *Dunbar v. Empire Szechuan Noodle House Inc.*, 2020 WL 2132339, at *5 (S.D.N.Y. May 5, 2020) ("While it is true that the ADA violations Plaintiff complains of might be addressed in the renovation plans, Defendants have not presented evidence that there is no reasonable expectation that the alleged ADA violations will recur.").

In response, the State insists it is entitled to "deference" to its promise to voluntarily cease its illegal conduct based on its government status. Mot. at 9. But the State has never actually promised to rescind the Gender Marker Policy, *see supra* Part I.A.2, and as the Second Circuit has explained in this context, "deference does not equal unquestioned acceptance." *Mhany Mgmt., Inc.*, 819 F.3d at 604; *see Nat. Res. Def. Council,* 362 F. Supp. 3d at 141 ("Any

deference owed because DOE is a government entity is limited, as illustrated by the countless cases finding an executive actor's voluntary cessation insufficient to moot ongoing litigation."). And it is particularly inappropriate unless the agency made a "public commitment to the new rule," something the State has not done here. *Ciaramella v. Zucker*, 2019 WL 4805553, at *5 (S.D.N.Y. Sept. 30, 2019) ("The representations that have received such deference are ones where there has been an *unambiguous public commitment* to maintain the new policy." (emphasis added)). Nor is this a case where a *legislature* has amended a challenged policy. *Cf. Lamar Advert. of Penn, LLC v. Town of Orchard Park*, 356 F.3d 365, 377 (2d Cir. 2004) (cited by Mot. 8-9) (municipality repealed challenged statute); *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1526 (2020) (cited by Mot. at 9) (state passed legislation rendering city's challenged policy illegal). The other cases the State cites involved circumstances where the challenged policy was held unlawful in a separate proceeding, which is apposite here. *See Holland v. Goord*, 758 F.3d 215, 224 (2d Cir. 2014) (cited by Mot. at 8) (mooting case successful administrative appeal "elicit[ed] a determination" that government acted wrongly and "abandoned on appeal their argument that the conduct at issue was constitutional"); *Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 109 F. Supp. 3d 626, 630 (S.D.N.Y. 2015), *aff'd*, 815 F.3d 105 (2d Cir. 2016) (Mot. at 8) (finding it "unrealistic to believe" that agency "would return to" old policy after the Court found its application unconstitutional); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 61 (2d Cir. 1992) (Mot. at 9) (court preliminarily enjoined policy after intervening Supreme Court case called into question its constitutionality).

Finally, there are no new "intervening effects" that have "eradicated the effects of the alleged violation." As discussed *supra*, the State's settlement offer and technology upgrades

have not completely remedied the harm to Mx. Saba. *See Gluth v. Kangas*, 951 F.2d 1504, 1507 (9th Cir. 1991) (when a new "policy did not completely and irrevocably eradicate[ ] the effects of the alleged violation, the district court was not obligated to wait and see how the new policy worked out"). That is not enough to meet the State's burden.

II. The Eleventh Amendment To The U.S. Constitution Does Not Independently Bar Mx. Saba's Claims.

The State falls back on the Eleventh Amendment, which prohibits courts from ordering certain types of monetary damages. Mot. at 10-12. But the State's argument is based on the false premise that Mx. Saba's requests for prospective relief have been mooted. *Id.* at 10-11. As explained *supra* Part 1, they are not. In any event, the Eleventh Amendment is not a bar to Mx. Saba's requested relief under these circumstances.

As a general matter, "[w]here a suit challenges the constitutionality of a state official's actions . . . the Eleventh Amendment does not mandate dismissal," but merely "preclude[s] certain forms of relief, particularly damages." *Takeall by Rubinstein v. Ambach*, 609 F. Supp. 81, 84 (S.D.N.Y. 1985) (plaintiff's Fourteenth Amendment challenge to official action not barred by Eleventh Amendment). Courts narrowly construe what constitutes impermissible relief under the Eleventh Amendment, limiting it to remedies "impos[ing] upon the State a monetary loss resulting from a past breach of a legal duty." *Verizon Md., Inc. v. Public Service Com'n of Md.*, 535 U.S. 635, 646 (2002) (holding that although plaintiff's claim sought a "declaration of the *past*, as well as the *future*, ineffectiveness of the Commission's action," and that the "past financial liability of private parties may be affected," dismissal was not warranted). Indeed, courts may order relief that brings about monetary losses to state governments without violating the Eleventh Amendment, so long as they also order prospective relief such as changing an at issue policy. *Santiago v. N.Y. State Dept. of Corr. Servs.*, 945 F.2d 25, 29 (2d Cir. 1991)

(ordering a state to enact a program designed to remedy past discrimination did not violate the Eleventh Amendment). While the "line . . . will often be indistinct," it is not here, where Mx. Saba seeks relief that is both prospective *and* non-monetary. *See Papasan v. Allain*, 478 U.S. 265, 278-82 (1986) (Eleventh Amendment did not bar plaintiffs' equal protection claim because the claim involved an "ongoing constitutional violation" and plaintiffs were not asking for "an award for accrued monetary liability"); *see also Martinez v. Malloy*, 350 F. Supp. 3d 74, 89 (D. Conn. 2018) (finding plaintiff's claim alleging defendants were "violating the federal Constitution" not barred by the Eleventh Amendment).

Here, Mx. Saba does not seek damages or some other form of retrospective relief, but rather seeks to change the State's Gender Marker Policy. Compl. at 30-31. As discussed above, the State has not only failed to make the necessary changes to the Gender Marker Policy, but its settlement offer to Mx. Saba fails to address key aspects of Mx. Saba's claim. *See supra* Part I.A.1. This falls squarely outside the Eleventh Amendment, which does nothing to bar "federal courts from issuing an injunction against a state official who is acting contrary to federal law when such is necessary to vindicate the supremacy of that law." *Kraebel v. Com'r of N.Y. State Div. of Hous. & Cmty. Renewal*, 1995 WL 469707 at *1-3 (S.D.N.Y Aug. 8, 1995) (holding plaintiff's claim alleging that certain rental procedures were "violative of due process" was not barred by the Eleventh Amendment since "any monetary damages clearly [were] ancillary to the primary prospective declarative and injunctive relief sought."); *Ciaramella*, 2019 WL 4805553, at *11 (Eleventh Amendment arugment "without merit" when "[p]laintiffs seek prospective injunctive and declaratory relief"); *Martinez*, 350 F. Supp. 3d at 89; *N.Y. State Corr. Officers & Police Benev. Ass'n, Inc. v. New York*, 911 F. Supp. 2d 111, 128-29 (N.D.N.Y. 2012) (denying defendants' motion to dismiss plaintiffs' claims to the extent plaintiffs sought "prospective

injunctive relief" and an order declaring the state law unconstitutional.).

Indeed, even if Mx. Saba's request for prospective relief were mooted, the Eleventh Amendment would still not be a bar. As an initial matter, just as voluntary cessation of conduct does not moot a claim, *see supra* Part I.B, it also does not warrant dismissal of a claim under the Eleventh Amendment. *See K.P. v. LeBlanc*, 729 F.3d 427, 435-39 (5th Cir. 2013) (holding Eleventh Amendment did not bar lawsuit despite "a voluntary cessation of one effect" of challenged law). The State's contrary suggestion of a strict line between prospective and retrospective relief also misstates Eleventh Amendment law. "A declaration for past wrongs may be appropriate, since such relief does not seek to impose a monetary loss upon the State for past conduct." *Williston v. Eggleston*, 379 F. Supp. 2d 561, 578-79 (S.D.N.Y. 2005) (finding that requested relief involving declaration of past wrongs did not violate Eleventh Amendment). The fact that injunctive relief, which includes a declaratory judgment, "also remedies a past harm does not 'render[] an otherwise forward-looking injunction retroactive" in part "because the need for prospective relief often arises out of a past injury." *Marino v. City Univ. of N.Y.*, 18 F. Supp. 3d 320, 334 (E.D.N.Y. 2014) (citation omitted); *see also Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 495 & n.5 (10th Cir. 1998) (noting that defendants' refusal to admit plaintiff to the medical school did not "convert a prospective injunction into retrospective relief" because she sought prospective placement the school). Similarly, although Mx. Saba's claim arises out of the State's past failure to issue a driver's license with the appropriate gender marker, Mx. Saba seeks prospective relief in asking the State to change the Gender Marker Policy. This claim for relief does not impose any monetary liability on the State and appropriately includes a declaration regarding past wrongs.

This is unlike the cases Defendants cite which focus on whether the Eleventh

Amendment bars claims seeking retrospective monetary relief in the absence of any viable claim for prospective injunctive relief. Here, Mx. Saba only seeks prospective injunctive relief in asking the Court to require the State to make several changes to the Gender Marker Policy. That this relief includes a request for a declaration regarding the State's past wrongs does not render it wholly inappropriate under the Eleventh Amendment. Because the Eleventh Amendment does not bar Mx. Saba's claims, Mx. Saba requests that the Court deny Defendants' Motion.

CONCLUSION

For the foregoing reasons, Plaintiff Sander Saba respectfully requests that the Court deny Defendants' Motion to Dismiss in its entirety.

Dated: November 20, 2020

Respectfully submitted,

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.

Omar Gonzalez-Pagan
ogonzalez-pagan@lambdalegal.org
Carl S. Charles
ccharles@lambdalegal.org
120 Wall Street, 19th Floor
New York, NY 10005
Telephone: (212) 809-8585
Facsimile: (212) 809-0055

* Admitted *Pro hac vice*

O'MELVENY & MYERS LLP

By: /s/ Hannah Y. L. Chanoine
Hannah Y. L. Chanoine
hchanoine@omm.com
Amanda L. Genovese
agenovese@omm.com
Shane A. Hunt
shunt@omm.com
Times Square Tower
7 Times Square
New York, NY 10036
Telephone: (212) 326-2000
Facsimile: (212) 326-2061

Dimitri Portnoi*
dportnoi@omm.com
400 South Hope Street, 18th Floor
Los Angeles, CA 90071-2899
Telephone: (213) 430-6000
Facsimile: (213) 430-6407

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2020 a true and accurate copy of the foregoing motion was electronically filed using the CM/ECF system, which will automatically send email notification of such filing to all counsel of record.

/s/ Hannah Chanoine
Counsel for Plaintiff