IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

DANIELA ARROYO GONZÁLEZ, et al. Plaintiffs v. RICARDO ROSSELLÓ NEVARES, et al. Defendants	CIVIL NO. 17-1457 (CCC)

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM OF LAW IN SUPPORT THEREOF

TO THE HONORABLE COURT:

COME NOW, defendants, Hon. Ricardo Rosselló Nevares, Hon. Rafael Rodríguez Mercado and Wanda Llovet Díaz, in their official capacities, without submitting to this Honorable Court's Jurisdiction and without waiving any affirmative defense, very respectfully ALLEGE and PRAY as follows:

I. INTRODUCTION

On April 11, 2017, Plaintiffs filed the instant amended complaint challenging the Puerto Rico's Birth Certificate policy and practice.[1] Plaintiffs allege that the prohibition to transgender persons born in Puerto Rico from correcting the gender marker on their birth certificate violate its Fourteenth Amendment's right to privacy and equal protection, and its First Amendment right to freedom of speech. Plaintiff requests the Honorable Court to: (1) Enter a declaratory judgment that the actions of Defendants complained of herein, including the enforcement of Puerto Rico's Birth

[1] See Amended Complaint [Dkt. No. 15] ¶¶70-75, at pages 16-17.

Certificate Policy, are in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; the Due Process Clause of the Fourteenth Amendment of the United States Constitution; and the Free Speech Clause of the First Amendment to the United States Constitution; (2) Permanently enjoin Defendants, their agents, employees, representatives, and successors, and any other person acting directly or indirectly in concert with them, from enforcing Puerto Rico's Birth Certificate Policy, including from refusing to provide birth certificates to transgender persons that accurately reflect their sex, consistent with their gender identity; (3) Order Defendants, their agents, employees, representatives, and successors, and any other person acting directly or indirectly in concert with them, to permit transgender persons born in Puerto Rico to correct their birth certificates to accurately reflect their true sex, consistent with their gender identity, in accordance with the practice delineated in 24 L.P.R.A. § 1136, and without adhering to the practice delineated in 24 L.P.R.A. § 1231 of using a strike-out line to change one's name, or otherwise including any information that would disclose a person's transgender status on the face of the birth certificate; (4) Order Defendants to immediately issue corrected birth certificates to Plaintiffs Daniella Arroyo González, Victoria Rodríguez Roldán, and J.G. accurately reflecting their true sex, consistent with their gender identity, in accordance with the practice delineated in 24 L.P.R.A. § 1136, and without adhering to the practice delineated in 24 L.P.R.A. § 1231 of using a strike-out line to change one's name, or otherwise including any information that would disclose a person's transgender status on the face of the birth certificate; (5) Award Plaintiffs the costs and disbursements of this action, including reasonable attorney's fees; and (6) Grant such other and further relief in favor of Plaintiffs as this Court deems just, equitable and proper.

On June 26, 2017, Plaintiffs filed a Motion for Summary Judgment and a Memorandum in support thereof. For the reasons argued below, said Motion for Summary Judgment should be denied as a matter of law.

II. SUMMARY JUDGMENT STANDARD

The role of summary judgment in civil litigation is commonplace[2], "to pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required." McCarthy v. Northwest Airlines, 56 F.3d 313, 314 (1st Cir 1985) (citing Wynne v. Tufts University School of Medicine, 976 F.2d 791, 794 (1st 1992)). Thus, this "device allows courts and litigants to avoid full blown trials in unwinnable cases, thus conserving parties' time and money, and permitting the court to husband scarce judicial resources." McCarthy, 56 F.3d at 315.

Rule 56(c) Fed. R. Civ. P., which sets forth the standard for ruling on summary judgment motions, in pertinent part provides that they shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Sands v. Ridefilm Corp., 212 F.3d 657, 660-61 (1st Cir. 2000); Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 45 (1st Cir. 1999). Summary Judgment is appropriate only if the moving party "shows that there is no genuine dispute as to any material

[2] The use of summary judgment as a dispositive tool is encouraged in the federal courts by the United States Supreme Court. *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, 477 U.S. 242 (1986); and Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). *See also* Nieves Domenech v. Dymax Corporation, 952 F.Supp. 57 (D.P.R. 1996).

fact and the movant is entitled to summary judgment as a matter of law." Fed.R.Civ.P. 56(a). A dispute is considered genuine if a reasonable jury, drawing favorable inferences, could resolve it in favor of the nonmoving party." Ocasio-Hernández v. Fortuño, 777 F.3d 1, 4 (1st Cir. 2015)(citing Velázquez-Pérez, 753 F.3d at 270). But "conclusory allegations, improbable inferences, and unsupported speculation [] are insufficient to establish a genuine dispute of fact." Ocasio-Hernández, 777 F.3d at 4.

To succeed in showing that there is no genuine dispute of material fact, the moving party must direct to specific evidence in the record that would be admissible at trial. That is, it must, "affirmatively produce evidence that negates an essential element of the non-moving party's claim," or, using "evidentiary materials already on file … demonstrate that the non-moving party will be unable to carry its burden of persuasion at trial." Ocasio-Hernández, 777 F.3d at 4-5 (citing Carmona v. Toledo, 215 F.3d 124, 132 (1st Cir. 2000)). "[I]f the summary judgment record satisfactorily demonstrates that the plaintiff's case is, and may be expected to remain, deficient in vital evidentiary support, this may suffice to show that the movant has met its initial burden." Id.

For this purpose, an issue is "genuine" if it "may reasonably be resolved in favor of either party." Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990) (internal quotation marks omitted). A fact is "material" only if it "possess[es] 'the capacity to sway the outcome of the litigation under the applicable law.' " Vineberg v. Bissonnette, 548 F.3d 50, 56 (1st Cir. 2008) Cadle Co. v. Hayes, 116 F.3d 957, 960 (1st Cir. 1997) (quoting Nat'l Amusements, Inc. v. Town of

Dedham, 43 F.3d 731, 735 (1st Cir.1995)). In prospecting for genuine issues of material fact, we resolve all conflicts and draw all reasonable inferences in the nonmovant's favor. See Calvi v. Knox County, 470 F.3d 422, 426 (1st Cir. 2006); Garside, 895 F.2d at 48.

Although this perspective is favorable to the nonmovant, she still must demonstrate, "through submissions of evidentiary quality, that a trial worthy issue persists." Iverson v. City of Boston, 452 F.3d 94, 98 (1st Cir. 2006). Moreover, "[o]n issues where the nonmovant bears the ultimate burden of proof, [she] must present definite, competent evidence to rebut the motion." Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir.1991). These showings may not rest upon "conclusory allegations, improbable inferences, and unsupported speculation." Medina-Muñoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir.1990). But, the evidence offered by the nonmoving party "cannot be merely colorable, but must be sufficiently probative to show differing versions of fact which justify a trial." *Id.* See also Horta v. Sullivan, 4 F.3d 2, 7-8 (1st Cir. 1993) (the materials attached to the motion for summary judgment must be admissible and usable at trial.) "The mere existence of a scintilla of evidence" in the nonmoving party's favor is insufficient to defeat summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); González-Pina v. Rodríguez, 407 F.3d 425, 431 (1st Cir. 2005).

The summary judgment mechanism is regulated by a shift in the burden of production and persuasion. The moving party only needs to "aver an absence of evidence to support the nonmoving party's case." Maldonado-Dennis v. Castillo-Rodríguez, 23 F.3d 576, 581 (1st Cir. 1994). Once the moving party satisfies this requirement, the burden then shifts to the

nonmoving party to establish the existence of at least one genuine issue of material fact to affect the outcome of the litigation and from which a reasonable trier of facts could find for the non-moving party. *Id.*, at 581; Febus-Rodríguez v. Betancourt-Lebrón, 14 F.3d 87, 90-91 (1st Cir. 1994). The non-moving party, however, bears the ultimate burden of proof of the triable issues, and the non-movant cannot rely on the absence of competent evidence but must affirmatively point to specific facts which demonstrate the existence of an authentic dispute. Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990).

A plaintiff may not defeat summary judgment by merely asserting that the jury might, and legally could, disbelieve the defendant's denial. Lafrenier v. Kinirey, 550 F.3d 166, 167 (1st Cir. 2008); citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); see also, e.g., Sears, Roebuck & Co. v. Goldstone & Sudalter, P.C., 128 F.3d 10, 18 (1st Cir. 1997) ("A party cannot create an issue for the trier of fact 'by relying on the hope that the jury will not trust the credibility of witnesses.'" (quoting Dragon v. R.I. Dep't of Mental Health, Retardation & Hosps., 936 F.2d 32, 35 (1st Cir. 1991))); Moreau v. Local Union No. 247, Int'l Bhd. of Firemen, 851 F.2d 516, 519 (1st Cir. 1988); Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120, 129-30 (3rd Cir. 1998).

III. APPLICABLE LAW AND ANALYSIS

A. Section 1983 Framework

Section 1983 in itself does not create substantive rights, but merely provides a venue for vindicating federal rights elsewhere conferred. Graham v. M.S. Connor, 490 U.S. 386 (1989). It

creates a private right of action for redressing abridgments or deprivations of federally assured rights. Cox v. Hainey, 391 F.3d 25, 29 (1st Cir.2004); McIntosh v. Antonino, 71 F.3d 29, 33 (1st Cir.1995); Evans v. Avery, 100 F.3d 1033, 1036 (1st Cir.1996).

To establish liability pursuant to section 1983, a plaintiff must first establish that "the conduct complained of was committed by a person acting under color of state law." Parrat v. Taylor, 451 US 527, 535 (1981) (overruled on other grounds by Daniels v. Williams, 474 US 327 (1986); Gutiérrez Rodríguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989). Secondly, a plaintiff must allege facts sufficient to conclude that the alleged conduct worked a denial of rights secured by the Constitution or laws of the United States. *See* Cepero-Rivera v. Fagundo, 474 F3d 124 (1st Cir. 2005), Johnson v. Mahoney, 424 F. 3d 83, 89 (1st Cir. 2005) cited in Velez-Rivera v. Agosto-Alicea, *supra*. A section 1983 violation occurs when an official acting under color of state law acts to deprive an individual of a federally protected right. Maymi v. Puerto Rico Ports Authority, 515 F.3d 20, 25 (1st Cir.2008). Moreover, plaintiffs must show that defendant's actions were the cause in fact of the alleged constitutional deprivation. Gagliardi v. Sullivan, 513 F.3d 301, 306 (1st Cir.2008) (citing Rodriguez-Cirilo v. Garcia, 115 F.3d 50, 52 (1st Cir.1997)).

A plaintiff is required to allege personal action or inaction by each defendant within the scope of their responsibility that would make each of them personally answerable in damages pursuant to section 1983. *See* Pinto v. Nettleship, 737 F. 2d 130, 133 (1st Cir. 1984). Plaintiff must show that the defendants were involved in the alleged deprivation of their rights, that is who did what to whom. To impose liability upon a defendant, it is necessary that "the conduct

complained of must have been causally connected to the deprivation." Gutiérrez-Rodríguez v. Cartagena, *supra*, at 559 (1st Cir.1989).

This element of causal connection requires that the plaintiff establishes: 1) **that the defendants were personally involved in the violation**, see Monell v. Department of Social Services, 436 U.S. 658, 694 n. 58 (1978); Voutour v. Vitale, 761 F.2d 812, 819 (1st Cir. 1989); Medina Pérez v. Fajardo, 257 F.Supp. 2d 467 (D.P.R. 2003); and 2) that the defendants conduct was intentional, Simmons v. Dickhaut, 804 F. 2d 182, 185 (1st Cir. 1986), grossly negligent, or amounted to a reckless or callous indifference to the plaintiff's constitutional rights. *See* Clark v. Taylor, 710 F.2d 4, 36 Fed.R.Serv.2d 1202 (1983). A defendant is personally liable under federal law only for constitutional violations and not for mere negligence. See Daniels v. Williams, *supra*, at 330-33 ("Our Constitution … does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."); Estelle v. Gamble, 429 U.S. 97, 105-06 (1976); Acosta v. U.S. Marshals Service, 445 F.3d 509, 514 (1st Cir. 2006); Baker v. McCollan, 443 U.S. 137 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law."). "[T]he essential elements of actionable section 1983 claims derive first and foremost from the Constitution itself, not necessarily from the analogous common law tort." Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 4 (1st Cir.1995); cited in Burke v. McDonald, 572 F.3d 51, 58 (1st Cir. 2009). [Emphasis added].

Causation is an essential element of a section 1983 cause of action. A plaintiff cannot succeed in a civil rights action if he or she fails to demonstrate a causal connection between the state official's alleged wrongful action and the alleged deprivation. See Reimer v. Smith, 663 F. 2d1316, 1322, n. 4 (5th Cir. 1981).

To succeed in an action pursuant to section 1983, the plaintiff – who has the burden of proof – first must show official conduct, that is, an act or omission undertaken under color of state law. Roche v. John Hancock Mut. Life Ins. Co., 81 F.3d 249, 253 (1st Cir.1996). Secondly, the plaintiff must satisfy the "constitutional injury" requirement by making a showing of a deprivation of a federally-secured right. Baker v. McCollan, *supra*, at 142; Nieves v. McSweeney, 241 F.3d 46, 53 (1st Cir.2001) cited in Rogan v. City of Boston, 267 F.3d 24, 27 (1st Cir. 2001).

IV. THE DEPARTMENT OF HEALTH OF PUERTO RICO'S PRACTICE AND POLICY IS CONSTITUTIONAL.

At the outset, it must be underscored that Plaintiff is not challenging the constitutionality of a Puerto Rico law, but a policy and practice. Nonetheless, in an abundance of caution, Defendants will address Plaintiff's claims.

"A statute is presumed constitutional, [citation omitted] and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." Heller v. Doe, 509 U.S. 312, 320-21, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (internal quotations and citations omitted). A facial challenge to a legislative act, moreover, is considered "the most difficult challenge to mount successfully, since the

challenger must establish that no set of circumstances exists under which the Act would be valid." United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). To prevail on a facial challenge,[3] plaintiffs must therefore establish that "no set of circumstances exist under which the Act would be valid." McGuire v. Reilly, 386 F.3d 45, 57 (1st Cir. 2004)(quoting Salerno, 481 U.S. 739 (1987). "[T]his standard imposes a very heavy burden on a party who mounts a facial challenge to a state statute." McCullen v. Coakley, 571 F.3d 167, 174 (1st Cir. 2009); see also Williams v. Puerto Rico, 910 F. Supp. 2d 386, 392-93 (D.P.R. 2012).

Plaintiffs in this case challenge the constitutionality of the DOH's Birth Certificate Amendment policy and practice. Defendants' actions, however, are not based on a "policy and practice", but on Vital Statistics Registry Act of Puerto Rico, Act 24 of April 22nd, 1931 (hereinafter, "Vital Statistics Registry Act" or "Act 24"), as amended, in relevant part, by Act 204 of July 23rd, 1974, 24 L.P.R.A. §1231. As previously noted, Plaintiffs do not challenge the constitutionality of said Act, be it facial or as applied. Therefore, plaintiffs' facial constitutional challenge does not state a claim upon which relief may be granted. See Williams v. Puerto Rico, 910 F. Supp. 2d 386, 393 (D.P.R. 2012).

The Vital Statistics Registry Act, as amended, provides:

> The Secretary of Health shall prepare, cause to be printed, and furnish to the keepers of the Registers, all books, printed matter and forms to be used for the registration of births, marriages and deaths occurring or taking place in the Commonwealth of Puerto Rico, or which may be necessary to carry out the

[3] The Supreme Court has explained that facial challenges are inherently disfavored because they "rest on speculation," "raise the risk of premature interpretation of statutes on the basis of factually barebones records," "run contrary to the fundamental principle of judicial restraint," and "threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." Hightower, 693 F.3d at 76-77 (citing Sabri v. United States, 541 U.S. 600, 609, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004); Ashwander v. TVA, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed. 688 (1936); Ayotte v. Planned Parenthood of Northern New Eng., 546 U.S. 320, 329, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006)).

purposes of this part, and he shall prepare and distribute such detailed instruction, not in conflict with the provisions of this part, as may be necessary for the uniform application hereof and for keeping a perfect registration system; and for such purpose, no books, printed matter, or forms, other than those furnished by the Secretary of Health shall be used. Said Secretary shall cause the careful examination of the certificates received in his Department each month from the keepers of the Registers, and he shall request such additional information as may be necessary on those certificates appearing incomplete or defective, for which purpose, every person having knowledge of facts in connection with any birth, marriage, or death, shall be under the obligation to furnish said information when so required by the Secretary of Health in person or through his accredited representative, by mail, or through the district registrar; Provided, That omissions or defects appearing on any certificate before being registered in the Department of Health may be corrected by inserting in red ink the necessary corrections or additions in said certificate, but after the same has been filed in the Department of Health, no correction, addition, or amendment substantially altering it, shall be made thereon unless by virtue of an order of the District Court, which order, in such case, shall be filed in the Department of Health, reference to be made to the certificate to which it corresponds; Provided, however, That when the recognition of a natural child is made in a public document or in an affidavit, the presentation of said document or affidavit will be sufficient for the keeper of the Register of Vital Statistics to proceed to register the same, and, for that purpose, the corresponding certificate of registration shall be filled out; Provided, further, That in case the birth of such child has been previously registered, the additional information resulting from such recognition shall be entered on the certificate.

To obtain said order the interested party shall file, in the Part of the District Court of his domicile, a petition setting forth under oath and duly substantiating his pretension accompanied by the proper documentary proof in support of his petition. Copy of the petition and of any other documentary proof shall be transmitted simultaneously with his filing to the Prosecuting Attorney who shall take his standing within the term of ten (10) days.

After ten (10) days from the date of transmittal and notice to the Prosecuting Attorney, without his having made any objection, the court shall take cognizance and shall resolve the petition on its merits without a hearing or shall hold it in its discretion, if deemed advisable, and shall issue the proper writ.

The writ authorizing the rectification or amendment of an entry in the late Civil Registry shall be recorded by annotation made in due form on the margin of the rectified registration. The rectification addition or amendment of a certificate already filed in the General Registry of Vital Statistics shall be made by inserting

> therein the corrections, additions or amendments authorized by the court. The necessary scratches shall be made in such manner that the scratched word is always legible.
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> The change, addition or modification of a name or surname may be made only at the instance of an interested party, who shall file in any Part of the District Court, the proper petition, setting forth under oath the grounds for his pretension, accompanied by the proper documentary proof in support of his petition. Copy of the petition and of any other documentary proof shall be transmitted to the Prosecuting Attorney simultaneously with the filing.
> After ten (10) days from the date of transmittal and notice to the Prosecuting Attorney without his having made any objection, the court shall take cognizance and resolve the petition on its merits without a hearing or shall hold it in its discretion if deemed advisable, and shall issue the proper writ. The writ authorizing the change, addition or modification of a name or surname, shall be recorded in the late Civil Registry by annotation made in due form on the margin of the registration of the birth of the interested party and on the margin of his marriage certificate. The change, addition or modification of a name or surname, shall be made in the General Registry of Vital Statistics by crossing out in the birth certificate and in the marriage certificate of the interested party the original name or surname substituted, and signing the new name or surname authorized by the court. The scratches shall be made so that the name or surname eliminated is always legible." [Emphasis added].

24 L.P.R.A. §1231.

The Vital Statistics Registry Act creates a General Demographic Registry within the Department of Health. The purpose of the alluded Act 24 is to register, collect, guard, preserve, amend and certify vital facts of people born in Puerto Rico. 24 L.P.R.A. §1042(1). After 1931, the Demographic Registry became a formal and credible statistical registry that allows the study of vital statistics of our population.[4] It is the instrument that contains the official version of the existence, civil status and vital facts of the people born in Puerto Rico. The information that is contained in the Registry constitutes *prima facie* evidence of the fact to be proven. Ex Parte Delgado-Hernández, 165

[4] See Statement of Motives, Act Num. 220 of August 9, 1998.

D.P.R. 170, 187 (2005); Medina v. Pons, 81 D.P.R. 1, 8 n. 11 (1959); Bigas Surs. V. Comisión Industrial, 71 D.P.R. 336 (1950); Pueblo v. Ramírez, 65 D.P.R. 680 (1946); Mercado v. American Railroad Co., 61 D.P.R. 228 (1943).

In Ex Parte Delgado-Hernández, supra, the Puerto Rico Supreme Court interpreted the provisions of the Vital Statistics Registry Act of Puerto Rico in a controversy similar to the one in the instant complaint. The difference between both plaintiffs is that in Ex Parte Delgado, the plaintiff had changed its sex through surgery, becoming physically a member of the opposite sex (female), which the plaintiff in this case had admittedly not done. In Ex Parte Delgado-Hernández, supra, the Supreme Court expressed:

> The birth certificate is a document that reflects the vital data of the person at the moment of its birth. It is, therefore, a historical X-ray of the person at birth, which records the following information: date and place of birth, name of the parents, name and sex of the registered person. [Emphasis in original].
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> ...

165 D.P.R. at 187. The Supreme Court of Puerto Rico in Ex Parte Delgado-Hernández, supra, further conveyed:

> The Demographic Registry Act provides the procedure to amend the birth certificate, also as a manner of exception. The Act provides: The omissions or inaccuracies that appear on any certificate prior to being registered at the Department of Health can be corrected inserting the necessary corrections or additions in red ink on the certificate, but after being filed at the Department of Health, no rectification, addition or amendment can be made that substantially alters the same, but only by virtue of a Court Order, which shall be filed at the Department of Health making reference to the corresponding certificate. [Emphasis in original].
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> ...

As noted by the Puerto Rico Supreme Court, the Demographic Registry Act is complemented by section 1071-19 of the Regulation of the Demographic Registry, which provides:

> *Corrections or alterations after the inscription is made*- After the certificate has been accepted by the Registrar, it cannot be the object of any change, erasure or alteration, nor can the transcription made in the record book can be changed, without due process of law. The material errors that appear on any certificate presented for inscription or after being inscribed, consisting of a mistake in the name, last name, word or non-essential phrase, can be corrected writing them correctly with red ink, or inserting the omitted word or words. Necessary crossed out words will be made in a fashion that the crossed out word can be read. In order to make such corrections, the registrar will request the necessary proof, in a timely manner. [Italics in original].

Id. at 188.

Pursuant to the Vital Statistics Registry Act of Puerto Rico, as the Supreme Court expressed, there are only two processes for the correction of mistakes: one before the certificate is registered, and the other after the certificate has been registered at the Department of Health. In the first case, the Registrar can correct the "omissions or mistakes" in the inscription before the registration takes place, inserting the corrections in red ink. After the certificate has been registered, the Act prohibits that any change, correction or amendment that substantially alters the certificate, unless it is through a Court Order to that effect. The Supreme Court interprets the Vital Statistics Registry Act of Puerto Rico restrictively, concluding that any changes requested mush have been previously authorized by law. Ex parte Delgado Hernández, 165 D.P.R 170, 189 (2005); Ex Parte León Rosario, 109 D.P.R. 804 (1980); Ex parte Pérez Pérez, 65 D.P.R. 938 (1946).

The Vital Statistics Registry Act establishes, in a *numerus clausus* mode, the only times in which changes can be made to the vital data annotations in the birth certificate. Therefore, there is no margin for a liberal interpretation of its provisions.

The Vital Statistics Registry Act does not contemplate or authorize the change requested by the plaintiff. To the contrary, it expressly prohibits making changes in the original records of the birth certificate. The changes requested by the plaintiff affect the civil status of the person, the crux of the Demographic Registry. Therefore, we are before a substantial change, whose modification it is only for the Legislative branch.

It should be noted that in at least twenty-eight (28) states of the United States of America, have legislated to allow the amendment of birth certificates to reflect changes such as sex changes through sex reassignment surgery. See, e.g., Hill v. Commonwealth Registrar of Birth Records, 2016 U.S. Dist. LEXIS 83151, *2 (D. Mass. June 23, 2016). In Hill, the court noted that Massachusetts law, unlike in the Puerto Rico law, expressly provides that the birth record may be changed after "a person has completed medical intervention for the purpose of permanent sex reassignment", allowing for "a petition for a name change [to] be heard by the probate court in the county in which the petitioner resides."). Id. (internal citation omitted).

In some other states, the established procedure only requires a petition to the court for the change of the sex marker in the birth certificate; or, that a new certificate is issued.[5] Other states, nonetheless, require a sworn statement by a physician or surgeon that performed the surgery, in order for the Court to order the change in the birth certificate.[6] Other states, like Idaho, Kansas,

[5] Ex parte Delgado Hernández, supra, at page 193 n. 16. *E.g.*, Ala. Code. sec. 22-9A-19(d),Ark. Code. Ann. sec. 20-18-307(d)(4),California Health and Safety Code sec. 103425,Colo. Rev. Stat. Ann. sec. 25-2-115(4),Conn. Gen. Stat. Ann. sec. 19a-42,D.C. Code Ann. sec. 7-217(d),Ga. Code Ann. sec. 31-10-23(e),Md. Code Ann. Health-Gen.I sec. 4-214 (b)(5),Miss. Code Ann. sec. 41-57-21, Mo. Stat. sec. 193.215,Mont. Code. Ann. sec. 50-15-204, Nv. Adm. Code sec. 440.130,Or. Rev. Stat. sec. 432-235,Utah Code Ann. sec. 26-2-11,Va. Code Ann. sec. 32.1-269,Wisc. Stat. sec. 69.15 (1)(a).

[6] Ex parte Delgado Hernández, supra, at page 193 n. 16. E.g.,Ariz. Rev. Stat. sec. 36-337 (a)(4),Haw. Rev. Stat. sec. 338-17.7 (4)(b),410 Ill. Comp. Stat. Ann.sec. 535/7 (d), Iowa Code IV sec. 144.38,Ky. Rev. Stat. Ann. sec. 213.121 (5),La. Rev. Stat Ann.

Ohio, and Tennessee will not issue a birth certificate with a change in the sex marker. Moreover, Tennessee has an Act which explicitly prohibits the change in the sex marker in the certificate of birth.[7]

Being that the Vital Statistics Registry Act of Puerto Rico explicitly provides the specific instances in which changes to the birth certificate can be made, which do not include substantial changes like the one requested by plaintiff, the requested remedy should be denied. This is buttress by the fact that Plaintiffs have not even endured a sex-change surgery. Moreover, the Supreme Court of Puerto Rico in a case in which a similar request was made, while interpreting the Vital Statistics Registry Act of Puerto Rico, stated that any substantial changes to the birth certificate must be previously authorized by the Legislative Act through legislation. In the present case, the legislature, through the enactment of the Vital Statistics Registry Act, prohibited any change in the birth certificate that is not authorized in the Act. Therefore, the 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. Therefore, the instant complaint should be DISMISSED WITH PREJUDICE.

V. FOURTEENTH AMENDMENT CLAIMS

Equal Protection

The Equal Protection Clause of the Fourteenth Amendment "contemplates that similarly

40:62,Mass. Gen. Laws Ann. Ch. 46 sec. 13 (e),Mich. Comp. Laws sec. 333.2891 (9)(a),N.J. Stat. Ann. 26:8-40.12,Neb. Rev. Stat. sec. 71-904.01,N. M. Stat. Ann. sec. 24-14-25 (D),N.C. Gen. Stat. sec. 130A-118.

[7] Ex parte Delgado Hernández, supra, at 193 n. 16.

situated persons are to receive substantially similar treatment from their government." Tapalian v. Tusino, 377 F.3d 1, 5 (1st Cir. 2004). "To establish a claim for an equal protection violation by reason of 'selective enforcement' of law or regulation against the plaintiff, the plaintiff must show that '(1) the person, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" Febus-Cruz v. Sauri-Santiago, 652 F. Supp. 2d 140, 153 (D.P.R. 2009); see Rubinovitz v. Rogato, 60 F.3d 906, 910 (1st Cir. 1995).

Equal Protection Clause claims are reviewed under a rational basis standard when the state action does not burden a suspect class. See Heller v. Doe by Doe, 509 U.S. 312, 319, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). Under a rational basis review, plaintiff must show that there is no rational relationship between the disparity of treatment and any legitimate government purpose. See Id. at 320. A necessary element in an equal protection claim is proof of intent to discriminate. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977); Rivera v. Puerto Rico Aqueduct & Sewers Auth., 331 F.3d 183, 192 (1st Cir. 2003); Soto v. Flores, 103 F.3d 1056, 1067 (1st Cir. 1997).

In this case, the plaintiff fails to establish an Equal Protection claim since the second requirement has not been met. The previous discussion regarding the constitutionality of the Vital Statistics Registry Act clearly reveals that the specific instances in which changes to the birth certificate can be made, which do not include substantial changes like the one plaintiffs request. 24

L.P.R.A. §1231. Moreover, the Supreme Court of Puerto Rico, in a case in which a similar request was made and while interpreting the Vital Statistics Registry Act of Puerto Rico, stated that any substantial changes to the birth certificate must be previously authorized by the Legislative Act through legislation. And, the Puerto Rico legislature prohibited any change in the birth certificate that is not authorized in the Act. Therefore, the 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 being unconstitutional. This prohibition of substantial changes in birth certificates applies to ALL persons born in Puerto Rico, whose birth certificates have already been registered at the Department of Health. Plaintiff has failed to allege facts showing that others similarly situated were allowed to make substantial changes to their birth certificates, like the change requested here and denied.

Neither Department of Health nor the applicable laws provide for a selective treatment when persons born in Puerto Rico request a substantial change to a registered birth certificate, all such requests are denied, inasmuch as the Vital Statistics Registry Act does not allow such changes. Therefore, Plaintiff also fails to establish defendants' alleged intent to discriminate in violation of the Equal Protection of the Law, since any request to make substantial changes to birth certificates, regardless of the person making the request, is denied as prohibited by the Act.

Therefore, it is respectfully requested that Plaintiff's Equal Protection claim be DISMISSED WITH PREJUDICE.

VI. PRIVACY RIGHT UNDER FIRST AND FOURTEENTH AMENDMENTS

Plaintiffs claim an alleged violation of privacy rights by alleging that they are being forced to identify themselves through their birth certificate with a sex that was incorrectly assigned to them at birth, Puerto Rico's Birth Certificate Policy violates the First Amendment by compelling transgender individuals, like the Plaintiffs and the transgender members of Puerto Rico Para Tod@s, to identify with a sex and identity inconsistent with who they are. They also claim that, by forcing transgender people through their birth certificate private, sensitive, and personal information about their transgender status, gender identity, or medical condition, Puerto Rico' Birth Certificate Policy violates the First Amendment by compelling transgender persons, like the individual Plaintiffs and the transgender members of Puerto Rico Para Tod@s, to disclose private, sensitive, and personal information that they may not want to be publicly known or that may expose them to an invasion of privacy, prejudice, discrimination, harassment, distress, humiliation, and violence. However, Plaintiff failed to set forth a colorable First and substantive due process Fourteenth Amendments claims.

The Supreme Court has held that the Fourteenth Amendment encompasses a privacy right that protects against significant government intrusions into certain personal decisions. See Roe v. Wade, 410 U.S. 113, 152, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). This right of privacy "has some extension to activities relating to marriage, procreation, contraception, family relationships, and child rearing and education." Id. (citations omitted). Nevertheless, the Supreme Court has explained that only those rights that "can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." Id. (quoting Palko v. Connecticut, 302 U.S. 319, 325, 82 L. Ed. 288, 58 S. Ct. 149 (1937)).

The Supreme Court has long recognized that the *Due Process Clause* "bar[s] certain government actions regardless of the fairness of the procedures used to implement them . . . ." Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 665, 88 L. Ed. 2d 662 (1986). This "substantive component" of the Due Process Clause "includes not only privileges and rights expressly enumerated by the *Bill of Rights*, but [also] the fundamental rights 'implicit in the concept of ordered liberty.'" Roe v. Wade, 410 U.S. 113, 152, 93 S.Ct. 705, 726, 35 L. Ed. 2d 147 (1973) (quotations omitted). Two types of interests have been identified as protected "by the right to privacy that is rooted in [] substantive due process"- the interest in "independence in making certain kinds of important decisions," and the "interest in avoiding disclosure of personal matters." Whalen v. Roe, 429 U.S. 589, 599-600, 97 S.Ct 869, 51 L. Ed. 2d 64 (1977); Nixon v. Administrator of General Services, 433 U.S. 425, 465, 97 S. Ct. 2777, 53 L. Ed. 2d 867 (1977).

Plaintiff's claim implicates the latter interest, which the Sixth Circuit has described as the right to "informational privacy." Id. (quoting Bloch v. Ribar, 156 F. 3d 673, 683 (6th Cir. 1998). A plaintiff alleging a violation of its right to informational privacy must demonstrate that the interest at stake relates to a "fundamental liberty interest." Id. "Only after a fundamental right is identified should the court proceed to the next step of the analysis- the balancing of the government's interest in disseminating the information against the individual's interest in keeping the information private." Id.

A federal constitutional right to "informational privacy" does not exist. The Due Process Clause does not "guarante[e] certain (unspecified) liberties"; rather, it "merely guarantees certain procedures as a prerequisite to deprivation of liberty." NASA v. Nelson, 562 U.S. 134, 160, 131 S. Ct. 746, 178 L. Ed. 2d 667 (2011)(Scalia, J., Thomas, J. Concurring)(quoting Albright v. Oliver, 510 U.S.

266, 275, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (Scalia, J., concurring)). The Supreme Court has not decided whether the Fourteenth Amendment includes a right against public disclosure of private medical information, see Nat'l Aeronautics & Space Admin. V. Nelson, 131 S.Ct. 746, 756-57, 178 L. ED. 2d 667 (2011), and the question remains open in the First Circuit. Nunes v. UMass Corr. Health, 2013 U.S. Dist. LEXIS 143292, at *7 (D.Mass. Oct. 3, 2013)(citing Coughlin v. Town of Arlington, No. 10-10203-MLW, 2011 U.S. Dist. LEXIS 146285, at *42, 2011 WL 6370932, at *13 (D.Mass. Dec. 19, 2011)). The First Circuit in Nunes v. Mass. Dep't of Corr., 766 F.3d 136, 144, (1st Cir. 2014), relied on Nasa v. Nelson, and did not decide whether plaintiffs had a constitutional right to keep medical information private.

The Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." Id. at 161 (quoting Washington v. Glucksberg, 521 U.S. 702, 720-721, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)). Our due process precedents, even our "substantive due process" precedents, do not support *any* right to informational privacy. Id. First, we have held that a government act of defamation does not deprive a person "of any 'liberty' protected by the procedural guarantees of the Fourteenth Amendment." Paul v. Davis, 424 U.S. 693, 709, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). We reasoned that stigma, standing alone, does not "significantly alte[r]" a person's legal status so as to "justif[y] the invocation of procedural safeguards." Id., at 708-709, 96 S. Ct. 1155, 47 L. Ed. 2d 405. If outright defamation does not qualify, it is unimaginable that the mere disclosure of private information does. NASA v. Nelson, 562 U.S. at 162)(Scalia, J., Thomas, J. Concurring).

Therefore, being that Plaintiff is claiming a right for informational privacy, which is not constitutionally protected under the substantive due process clause of the Fourteenth Amendment, this claim should be DISMISSED WITH PREJUDICE.

VII. PRELIMINARY INJUNCTION

Rule 65 of the Federal Rules of Civil Procedure allows for the entry of a preliminary Order for a party to a lawsuit to perform or to abstain from performing a given act during the pendency of litigation. 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d, § 2941, at 33 (1995). The general purpose of injunctive relief is to prevent future acts or omissions of the non-movant that constitute violations of the law or harmful conduct. *United States v. Oregon Med. Soc.,* 343 U.S. 326, 333 (1952).

A preliminary injunction is an extraordinary and drastic remedy that is never awarded as of right. Peoples Federal Savings Bank v. People's United Bank, 672 F.3d 1, 8–9 (1st Cir. 2012). The Court of Appeals for the First Circuit has fashioned a four-part inquiry for determining whether it is appropriate to order preliminary injunctive relief. Under this formulation, the court must consider (1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, *i.e.*, the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest. See Ross-Simons v. Baccarat, Inc., 102 F.3d 12, 15 (1st Cir. 1996) (citing Weaver v. Henderson, 984 F.2d 11, 12 & n.3 (1st Cir. 1993) and Narragansett Indian Tribe v. Guilbert, 934 F.2d 4, 5 (1st Cir. 1991)). The standard for issuing a permanent injunction is substantially the same as that applied to a request for preliminary injunctive relief, except that the

plaintiff must prove actual success on the merits rather than the likelihood of success on the merits. See K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 914-15 (1st Cir. 1999). Though each factor is important, the *sine qua non* element of the four-part inquiry is the likelihood of success on the merits. If the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity. *New Comm. Wireless Servs., Inc.,* 287 F.3d at 9.

To demonstrate likelihood of success on the merits, a plaintiff must show more than mere possibility of success rather, he must establish a strong likelihood that he will ultimately prevail. *Respect Maine PAC,* 622 F.3d at 15 (citing *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 21 (2008)). Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1, 10 (1st Cir. 2012). (Emphasis provided).

As discussed throughout the instant motion to dismiss, Plaintiff failed to meet his burden of establishing the elements of the four-prong analysis, much less the *sine qua non* requirement of a strong likelihood of success on the merits.

The Vital Statistics Registry Act of Puerto Rico, 24 L.P.R.A. §1231, establishes the circumstances in which changes can be made to the birth certificate, mostly in cases where the certificate has not been registered. It also establishes the prohibition of amendments to all persons after the birth certificate has been registered, including making changes to the sex marker. Being that the prohibition of making changes to the birth certificate after it has been registered is to all persons equally, Plaintiffs cannot prevail in their Equal Protection violation claim.

Also, plaintiffs allege that they are forced to identify themselves with a "birth certificate with a sex that was incorrectly assigned to them at birth," and that they are forced to "disclose through

their birth certificate private, sensitive, and personal information about their transgender status, gender identity, or medical condition" as a violation to their privacy rights under the First Amendment. Plaintiffs make similar claims as to their Fourteenth Amendment's privacy rights. As discussed above, the Supreme Court has not decided whether the Fourteenth Amendment includes a right against public disclosure of private medical information, see Nat'l Aeronautics & Space Admin. V. Nelson, 131 S.Ct. 746, 756-57, 178 L. ED. 2d 667 (2011), and the question remains open in the First Circuit. Nunes v. UMass Corr. Health, 2013 U.S. Dist. LEXIS 143292, at *7 (D.Mass. Oct. 3, 2013)(citing Coughlin v. Town of Arlington, No. 10-10203-MLW, 2011 U.S. Dist. LEXIS 146285, at *42, 2011 WL 6370932, at *13 (D.Mass. Dec. 19, 2011)). The First Circuit in Nunes v. Mass. Dep't of Corr., 766 F.3d 136, 144, (1st Cir. 2014), relied on Nasa v. Nelson, and did not decide whether plaintiffs had a constitutional right to keep medical information private. Therefore, Plaintiffs have failed to establish the *sine qua non* element of the four-part inquiry is the likelihood of success on the merits, and the instant complaint must be DISMISSED WITH PREJUDICE.

VIII. CONCLUSION

WHEREFORE, the appearing Defendants requests that the Court, after considering the statement of uncontested material facts and supporting record citations, deny plaintiffs' motion for summary judgment, dismissing with prejudice the claims as above stated and the complaint in its entirety.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico on this 25th day of July 2017.

IT IS HEREBY CERTIFIED that on this same date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties.

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