

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

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

*Plaintiffs,*

v.

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

*Defendants.*

Case No. 3:17-cv-01457

**PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITIES**

NOW COME Plaintiffs, by and through their undersigned counsel, and respectfully submit this notice to notify the Court of the following recent decisions: (1) on March 5, 2018, the United States District Court for the District of Idaho issued a decision in a case challenging that state's policy disallowing gender marker changes on birth certificates that applies heightened scrutiny for transgender people and generally provides authority and guidance for the present case, *see F.V. v. Barron*, No. 1:17-CV-00170-CWD, 2018 WL 1152405 (D. ID. Mar. 05, 2018) (attached hereto as Exhibit A); (2) on March 7, 2018, the Sixth Circuit Court of Appeals held that discrimination based on transgender status constitutes discrimination because of sex and is therefore a prohibited form of sex-based discrimination under Title VII, *see Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 2:14-cv-13710, 2018 WL 1177669 (6th Cir. Mar. 7, 2018) (attached hereto as Exhibit B); and (3) on March 12, 2018, the United States District

Court for the District of Maryland issued a decision similarly finding discrimination based on transgender status to be a form of sex-based discrimination prohibited by Title VII and Title IX, and finding that discrimination based on transgender status is subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment, *see M.A.B. v. Bd. of Ed. of Talbot Cnty.*, No. CV GLR-16-2622, 2018 WL 1257097 (D. Md. Mar. 12, 2018) (attached hereto as Exhibit C). All of three of these decisions directly bear upon issues currently before this Court and lend further support to Plaintiffs' Motion for Summary Judgment (Dkt. No. 26).

In *F.V.*, two transgender women born in Idaho brought suit against state officials, challenging the state's policy prohibiting corrections to birth certificates to reflect an applicant's gender identity. Just as in the matter before this Court in relation to Puerto Rico's Birth Certificate Policy, the plaintiffs in *F.V.* argued that Idaho's policy violated the Equal Protection and Due Process clauses of the Fourteenth Amendment, and that it impermissibly compelled speech in violation of the First Amendment.

The defendants admitted that Idaho's policy violated the Equal Protection Clause and was unconstitutional because it bore no rational relationship to a conceivable government interest. *F.V.*, 2018 WL 1152405, at \*2. The defendants, however, urged the court to find that Idaho's policy was unconstitutional under minimal "rational basis" review. *Id.* Because of this unique posture, the district court elected to make its decision only on Equal Protection grounds. *Id.* at \*3. While the court agreed that Idaho's birth certificate policy did not survive rational basis, *id.* at \*8, it further concluded that a policy that differentiates based on transgender status must be evaluated under a heightened scrutiny standard, and that the new rule to be implemented after its decision would have to be evaluated under that standard. *Id.* at \*2.

In making this determination, the court found first that discrimination based on transgender status is discrimination based on sex. *Id.* at \*10. The court referred to a “medical consensus that gender identity plays a role in an individual’s determination of their own sex,” and noted that “to conclude discrimination based on gender identity or transsexual status is not discrimination based on sex is to depart from advanced medical understanding in favor of archaic reasoning.” *Id.* Therefore, discrimination based on transgender status is subject to the same standard of scrutiny as that for discrimination based on sex.

The court then went beyond that finding to hold that transgender status is a quasi-suspect class. It cited the development of case law related to gay and lesbian people, and noted that “[t]he pervasive and extensive similarities in the discrimination faced by transgender people and homosexual people are hard to ignore.” *Id.* at \*11. In particular, it pointed to “the long history of discrimination that continues to this day,” the fact that transgender status bears no “relation to or ability to perform or contribute to society,” that transgender status is an “obvious, immutable, or distinguishing characteristic,” and that transgender people are “unarguably a politically vulnerable minority.” *Id.* (quotations omitted).

The implications of the *F.V.* decision are clear for the present case. Just like the plaintiffs in that case, Plaintiffs have argued that Defendants’ Birth Certificate Policy warrants heightened scrutiny because it discriminates based on transgender status, both because the Birth Certificate Policy is a form of discrimination based on gender and because the Policy discriminates against a quasi-suspect class, which in itself requires heightened scrutiny. Also, like the plaintiffs in *F.V.*, Plaintiffs argue that the Birth Certificate Policy fails even rational basis review. On all of these points, *F.V.* provides guidance and persuasive authority.

Additionally, the *F.V.* court's observation that the new rule to be implemented after its decision must allow transgender people to obtain amended birth certificates that do not include any indications that the birth certificate has been amended, *id.* at \*2, is also relevant and applicable here because Plaintiffs have argued that the strikethrough policy in Puerto Rico similarly conflicts with the Constitution. Accordingly, the reasoning of the district court's decision in *F.V.* is particularly instructive in this case.

In *Harris Funeral Homes*, a transgender plaintiff employed at a funeral home was terminated after revealing to her employer that she intended to start living in accordance with her female gender identity and would dress and behave accordingly while at work. On appeal, the United States Court of Appeals for the Sixth Circuit reversed the district court's finding at the motion to dismiss stage that discrimination based on transgender status is not prohibited under Title VII. The Court held that "[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing [the plaintiff] because she is transgender and transitioning from male to female." *Harris Funeral Homes*, 2018 WL 1177669 at \*5. The Court noted that it is "analytically impossible to fire an employee based on that employee's status as transgender person without being motivated, at least in part, by the employee's sex." *Id.* at \*8.

Additionally, the Court noted that discrimination based on transgender status is "necessarily" a type of discrimination based on sex stereotyping. *Id.* at \*9. The Court explained: "[A]n employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to

disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.” *Id.*

Although *Harris Funeral Homes* was a Title VII case,<sup>1</sup> the court’s analysis has implications for the present case. Plaintiffs here have argued that discrimination based on transgender status is a form of discrimination based on sex, including that based on sex stereotyping. Thus, *Harris Funeral Homes*—which held that discrimination based on transgender status is necessarily discrimination based on sex stereotyping—supports Plaintiffs’ argument in this case.

In *M.A.B.*, a transgender high school student brought suit under Title IX, the Equal Protection Clause of the Fourteenth Amendment, and the Maryland Declaration of Rights against his high school based on the school’s refusal to allow him to use boys’ locker rooms and—for a time—boys’ restrooms. The district court noted that it was undecided whether transgender status was a protected trait under Title IX, and looked for precedent to Title VII, which Fourth Circuit precedent establishes should guide courts in evaluating Title IX claims. Although the Fourth Circuit has not yet ruled on the question of whether transgender status is a protected trait under Title VII, the district court noted the growing consensus on this point in other jurisdictions and followed “the First, Sixth, Ninth, and Eleventh Circuits, which have all recognized that . . . discrimination on the basis of transgender status is per se sex discrimination under Title VII [under a gender stereotyping theory].” *M.A.B.*, 2018 WL 1257097, at \*6. It then went on to find that the plaintiff had sufficiently alleged his claim under a gender stereotyping theory. *Id.* at \*7-9. As in *Harris*, this finding supports Plaintiffs’ argument in this case that discrimination based

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<sup>1</sup> The court in *Harris Funeral Homes* relied upon the reasoning of *Zarda v. Altitude Express*, No.1:17-CV-00170-CWD, 2018 WL 1040820 (2d Cir. Feb. 26, 2018) (*en banc*), to find that discrimination against transgender individuals is sex discrimination in violation of Title VII. In *Zarda*, the court engaged in statutory interpretation of Title VII and held that sexual orientation discrimination is motivated, at least in part, by sex, and is therefore a form of sex discrimination under Title VII. *Id.* at \*5.

on transgender status is a form of discrimination based on sex because it is a type of sex stereotyping.

Turning to the plaintiff's Equal Protection claim, the district court found that heightened scrutiny should be applied, for two reasons. First, it noted that the high school's "decision to bar M.A.B. from the boys' locker room cannot be stated without referencing sex because they decide which locker room M.A.B. may use based upon his birth sex—female," finding that this policy "subjects [M.A.B.] to sex stereotyping" and is therefore a sex-based classification. *Id.* at \*11 (quotation omitted). Additionally, it found that transgender people should be considered "at least a quasi-suspect class" because "transgender people have been historically subjected to discrimination," "transgender status bears no relation to ability to contribute to society," "transgender individuals exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group," and "transgender people are a minority or politically powerless." *Id.* at \*11-12 (quotations omitted). The court then found that the high school's policy failed to meet heightened scrutiny. *Id.* at \*14. The *M.A.B.* decision contributes to the ever-growing body of law supporting Plaintiffs' claim in this case that discrimination based on transgender status warrants heightened scrutiny both as a form of discrimination based on gender and because transgender people constitute a quasi-suspect class.

Dated this 15th day of March, 2018.

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Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 15, 2018, the foregoing was filed electronically using the Court's ECF system, which will provide electronic notice to all counsel of record.

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