SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PRINCESS JANAE PLACE, JULES DONAHUE, and JAIME MITCHELL, Plaintiffs, -against- OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE COMMISSIONER MICHAEL HEIN in his official capacity, NEW YORK STATE DEPARTMENT OF HEALTH, NEW YORK STATE DEPARTMENT OF HEALTH COMMISSIONER HOWARD ZUCKER in his official capacity, NEW YORK STATE, NEW YORK STATE GOVERNOR ANDREW CUOMO in his official capacity, NEW YORK CITY, NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES COMMISSIONER STEVEN BANKS in his official capacity, Defendants.	INDEX NO: 153065/2021

PLAINTIFFS' OPPOSITION TO STATE DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

In this case challenging New York State policies and practices that discriminate against nonbinary people, Plaintiffs have alleged that Defendants force them to lie under oath in order to receive emergency assistance and benefits and force them to repeatedly misidentify their sex in order to recertify benefits, resulting in profound humiliation, delays, denials, and instances of misgendering across a wide array of interactions with government agencies. Because these policies single out nonbinary people and subject them to worse treatment based solely on their identity, they violate state statutes prohibiting discrimination on the basis of sex, gender identity, and disability, and they also violate the equal protection and due process provisions of the state constitution.

Defendants' arguments for dismissal—arguments that minimize Plaintiffs' harms, misconstrue their claims, improperly rely on extrinsic evidence at the motion-to-dismiss stage, and are contradicted by clear case law—all fail. First, Defendants argue that Plaintiffs lack standing because—at some point in the future, but no earlier than late 2024—Defendants hope to begin the process of eliminating those discriminatory policies. By any logic and under binding case law, this argument must fail.

Second, and equally sweepingly, Defendants argue that the entire case should be dismissed as implicating a "nonjusticiable political question" on the bare assertion that one possible remedy would cost the State money and thus affect its budgetary decisions. The narrow legal doctrine on which Defendants rely does not support this broad assertion, which if accepted would immunize from judicial review any lawsuit with a potential price tag.

Third, Defendants argue for dismissal of Plaintiffs' statutory claims. Defendants assert that the mere provision of benefits should defeat a claim of discrimination—despite binding precedent that being forced to endure discriminatory *treatment* violates the law. They also argue that the

State's open-to-all-comers public benefits agency should not be considered a "public accommodation"—despite courts' repeated admonitions to broadly interpret that term and rejections of attempts to exclude government-run entities from the law's scope.

Fourth, Defendants make conclusory arguments challenging the sufficiency of Plaintiffs' constitutional claims. But Plaintiffs have pleaded more-than-sufficient facts to support an equal protection claim—specifically that Defendants' facially-discriminatory policies and practices target a "suspect class"—and a due process claim—specifically that those same policies and practices deprive Plaintiffs of their fundamental liberty interests in autonomy and privacy.

Finally, Defendants dispute whether certain Defendants are proper parties, but they rely on contested extrinsic evidence and inapposite case law. Overall, Defendants minimize and misrepresent Plaintiffs' straightforward allegations of system-wide facial discrimination and argue that this Court must trust Defendants' good intentions to someday eliminate that discrimination. Such arguments and misstatements of fact should fail at any stage, but they are particularly inappropriate at the motion-to-dismiss stage, where the Plaintiffs' well-pleaded allegations must be taken as true. For all these reasons, Defendants' motion should be denied.

SUMMARY OF COMPLAINT

Plaintiffs are two nonbinary people—that is, people who are neither male nor female, with government-issued IDs confirming this fact—who receive and rely on state-administered benefits, along with an organization whose membership includes nonbinary people in the same position. (Complaint ¶¶21, 37, 49, 55-58, 67.) As summarized below, Defendants subject nonbinary people to a series of humiliating, confusing, and burdensome obstacles to receiving and maintaining benefits, based solely on their identity and in contrast to the process applied to people who identify as male or female.

Jules Donahue applied for benefits at the height of the pandemic in 2020. (*Id.* ¶¶39-42.) They immediately confronted an application that *required* them to misidentify their sex as either "male" or "female" and swear under penalty of perjury the accuracy of inaccurate information, or else forego benefits. (*Id.* ¶¶43-48.) Faced with this choice, Mx. Donahue experienced severe distress (*id.* ¶¶38, 46, 52) but ultimately chose to complete the application and begin receiving emergency assistance (*id.* ¶¶47-49.) As a result, their sex is misidentified throughout the State's systems—including the Welfare Management System ("WMS"), New York's mechanism for administering benefits, as well as all other databases and systems that interact with WMS—and government workers with access to those systems routinely assume Mx. Donahue's sex based on what they see in the "sex" field. (*Id.* ¶50.) In order to recertify for benefits on which they rely, Mx. Donahue must regularly repeat the process and submit materials misidentifying their sex. (*Id.* ¶53.)

Jaime Mitchell, elated to have obtained a New York birth certificate that accurately records their sex as "X," sought to update their benefits records accordingly. (*Id.* ¶¶60-61.) Defendants' policy precluded such an update, and as a result Jaime's sex continues to be misidentified. (*Id.*) The consequent misgendering, coupled with the anxiety associated with recertifications that will require the same misgendering, is particularly harmful for Jaime, whose treatment for gender dysphoria requires having their identity acknowledged and respected in daily life. (*Id.* ¶¶56-64.)

Organizational plaintiff Princess Janae Place ("PJP") represents the interests of many members in the same position as Jules and Jaime. (*Id.* ¶¶65-67.) It also diverts significant resources to handling the fallout of Defendants' discriminatory policies: PJP must advise nonbinary people of the barriers to service they will face, help them navigate humiliating benefits processes, and assist those who are hesitant about coming out as nonbinary because of the harms they will be forced to endure. (*Id.* ¶¶68-72.)

The harms described above all flow directly from the policies and practices of Defendants.[1] New York, primarily through OTDA, created, maintains, and administers the system and policies through which New Yorkers receive benefits. (*Id.* ¶¶2, 9-14, 73-79.) Despite recognizing the existence of nonbinary people in other contexts—including by expanding the "sex" field on birth certificates to include "M," "F," and "X" (*id.* ¶25)—the State maintains a "sex" field in WMS that requires the selection of either "M" or "F" (*id.* ¶81). In response to nonbinary, intersex, and transgender advocates' pleas to address the discrimination that flows from these inaccurate options (*id.* ¶85)—and in response to years of NYC officials highlighting the ways in which this harms clients, mandates illegal discrimination, and delays emergency services (*id.* ¶¶85-93)—Defendants refuse to update WMS to recognize a nonbinary sex marker (*id.* ¶94). They indisputably can make the change, but they will not do so. (*Id.* ¶¶90-92.)

While this fundamental flaw in the WMS computer system—its lack of an "X" option in the sex field—is a major source of the harms Plaintiffs identify, it is by no means the only source. Knowing binary M/F options are insufficient, Defendants' have made a series of related but separate policy decisions, each of which exacerbates or fails to remedy the discrimination experienced by nonbinary people. Defendants *require* applicants to self-identify as "male" or "female" on their application (*id.* ¶¶44-47, 81-82), instead of making the field optional or eliminating it as an application question. Defendants further require applicants to swear under penalty of perjury that they are either "male" or "female" (*id.* ¶¶48, 83), instead of allowing nonbinary applicants to avoid lying under oath. Defendants make *re*-identifying as "male" or "female" a required part of recertifications (*id.* ¶¶53, 64, 83), instead of eliminating that question

[1] Plaintiffs refer collectively to "Defendants," who include all named State Defendants after Plaintiffs' voluntary dismissal of the City Defendants. (Notice of Discontinuance [NYSCEF 36].) Defendants have argued that certain Defendants are not proper parties (Br. at 8-11), and Plaintiffs address those arguments *infra* at 21-22.

after the initial application. Defendants make the content of WMS's "sex" field visible to various employees who come into contact with benefits recipients and consequently misgender nonbinary people (*id.* ¶¶53, 64, 83), instead of hiding or sealing the content of that field. And Defendants allow the content of the sex field to trigger eligibility for certain medical coverage (*id.* ¶¶84, 89), instead of relying on other criteria.

To remedy these harms, Plaintiffs filed suit seeking declaratory and injunctive relief. (*Id.* ¶5). Because various NYC entities are involved in the benefits process, in order to ensure that any potential remedy would be fully enforceable Plaintiffs named three City Defendants. (*See id.* ¶¶15-17). Pursuant to an agreement ensuring the City would comply with any Court-ordered remedy—and confirming the City's position that the State should update its policies and practices to include an "X" option for nonbinary applicants—Plaintiffs voluntarily dismissed those defendants without prejudice on June 14, 2021. (*See* Not. of Discontinuance [NYSCEF 36].)[2]

STANDARD OF REVIEW

When considering a motion to dismiss, courts must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) "A complaint should not be dismissed on a pleading motion so long as, when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." (*R.H. Sanbar Products v Gruzen*, 148 AD2d 316, 318 [1st Dept 1989]). If the four corners of the complaint make out a cause of action, a motion to dismiss the complaint must be denied. (*511 West 232nd v Jennifer Realty*, 98 NY2d 144, 152 [2002]).

[2] Because the City Defendants have been dismissed, Plaintiffs do not oppose that portion of Defendants' motion seeking dismissal of their city law claims (Br. at 16).

Seemingly based on CPLR §3211(a)(1), which permits a defendant to move for dismissal on the basis of "documentary evidence," Defendants have introduced a voluminous series of affidavits and exhibits in support of their motion. (*See* brief for defendants [*hereinafter* "Br."] [NYSCEF 15]; *see also* NYSCEF 16-32.) But §3211(a)(1)'s applicability is narrow and its burden is exceedingly high: the movant must show that "the documentary evidence utterly refutes plaintiff's allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]), and any documentary evidence must be "unambiguous, authentic, and undeniable" (*Granada Condo. Assn v Palomino*, 78 AD3d 996, 996-97 [2d Dept 2010]).

In support of their motion, Defendants submit affidavits, administrative directives, and screenshots of websites, among other things, which plainly do not meet this high standard. Affidavits that merely refute the complaint's allegations do not satisfy §3211(a)(1)'s standard. (*See Art & Fashion Group v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]*; Serao v Bench-Serao*, 149 AD3d 645, 646 [1st Dept 2017].) Likewise, the informational letter submitted by Defendants (Maura aff [NYSCEF 19] exhibit 1), administrative directives (*id.* exhibits 2-3), and examples of materials distributed to the public (*id.* exhibits 7-1–7-4) do not satisfy the standard (*see Lindsay v Pasternack*, 129 AD3d 790, 792 [2d Dept 2015] [letter from law firm to client did not meet standard]; *Amsterdam Hospitality Group v Marshall-Alan Associates*, 120 AD3d 431, 432 [1st Dept 2014] [finding letters not essentially undeniable and thus not documentary evidence]). Nor does Defendants' printout of the "myBenefits" online system (Maura aff exhibits 4-6) meet this standard. (*See Springer v Almontaser*, 75 AD3d 539, 540 [2d Dept 2010] [finding printouts of web pages were not of undisputed authenticity]; *Champion v Take Two Interactive Software*, 64 Misc3d 530 [Sup Ct, NY County 2019] [internet pages did not qualify, regardless of

pages' authenticity; also noting the range of documents to qualify as documentary evidence is "exceedingly narrow"].)

Regardless, as described below, even if the documents Defendants submit in support of their motion were admissible pursuant to §3211(a)(1)—if they were unambiguous and undeniable, which they are not—they only serve to support Plaintiffs' claims of discrimination: these documents confirm that nonbinary applicants and beneficiaries are forced to select an "M" or "F" when applying for and recertifying benefits and that Defendants have not updated their systems to create an "X" sex designation. Far from "utterly refut[ing]" Plaintiffs' allegations, Defendants' attempts to introduce voluminous contested evidence demonstrate the need for discovery rather than dismissal.

ARGUMENT

I. PLAINTIFFS HAVE STANDING, AND DEFENDANTS CANNOT DEFEAT STANDING WITH A NONBINDING ESTIMATE THAT RELIEF WILL VOLUNTARILY BE PROVIDED BEGINNING IN "LATE 2024."

Defendants' astonishing argument that Plaintiffs do not allege the "injury in fact" and "redressability" necessary to establish standing because Plaintiffs' requested relief may arrive by "late 2024" (Br. at 14-15) has no basis in law or fact. Plaintiffs allege multiple concrete harms—experienced in the application process, the recertification process, and in ongoing interactions with the benefits system—sufficient to establish "injury in fact," and they have plainly requested relief that would redress those harms. Defendants ignore these injuries, attempt to introduce evidence that—even if admissible and true—would in fact *support* Plaintiffs' standing, and provide no legal basis for the unprecedented argument that the state can immunize itself from suit with a nonbinding representation that things may get better by "late 2024."

First, regarding "injury in fact," Plaintiffs allege multiple ongoing "direct and personal injur[ies]" and "concrete" harms sufficient to confer standing. (*Silver v Pataki*, 96 NY2d 532, 540

[2001].) Plaintiffs allege they are neither male nor female, yet Defendants force them to select either "male" or "female" in order to receive emergency benefits, then lie under oath about the accuracy of their application, causing harm. (Complaint ¶¶1-4, 44-48, 64-67, 82-94.) They allege the same every time they recertify, causing harm. (*Id.*) They allege that being forced to misidentify their sex is inconsistent with their treatment for gender dysphoria, causing harm. (*Id.* ¶¶38, 56.) They allege that the "M" or "F" tagged in their file and visible to government workers leads to misgendering (*id.* ¶¶50, 62, 71) and that certain medical benefits are, by default, denied based on Defendants' classification of their sex (*id.* ¶¶84, 89), all causing harm.

Defendants concede some of the above, ignore some of it, and attempt to dispute some of it, breezily arguing that Plaintiffs "already enjoy the redress they request" because they receive benefits, because an optional "gender identity" field has been added to applications alongside the required "sex" field, and because the state has a generic nondiscrimination clause written into a policy directive. (Br. at 14).[3] But when Plaintiffs "allege injury in fact sufficient to survive the motion to dismiss," a court must "assume the truth of these allegations" and cannot "effectively require [plaintiffs] to prove the merits of [their] claim in order to withstand the motion to dismiss." (*Graziano v Albany*, 3 NY3d 475, 482 [2004].) Even if Defendants' factual submissions were admissible and unrefuted—which they are not—they in fact confirm the fundamental problem that

[3] Defendants appear to misunderstand or willfully confuse how the terms "sex," "gender," and "gender identity" are related in order to suggest, despite the clear wording of the Complaint, that the addition of an optional "gender identity" field with a nonbinary option—untethered to WMS and unable to prevent people from "misgender[ing] [Plaintiffs] based on that inaccurate WMS record" (complaint ¶50)—unilaterally satisfies Plaintiffs' requested relief of "a gender designation of 'X.'" (Br. at 14.) Plaintiffs plainly allege that, under any formulation of "sex," "gender," or "gender identity," they are nonbinary, and that their harm flows from Defendants' systems' *required* fields misidentifying that. (*See* complaint.) New York law is clear that a nonbinary person's "request for a change of gender to...X" means that they are seeking "a sex designation of X" in order to "conform the person's documents and records to the person's gender identity." (Pub Health Law §4138.)

nonbinary people are forced to misidentify their sex, then lie about it under oath, repeatedly. Defendants offer no case law—because there is none—suggesting that such concrete allegations of ongoing harm do not constitute "injury in fact."

Second, regarding whether Plaintiffs' alleged injuries are "likely to be redressed by the requested relief" (*Spitzer v Grasso*, 54 AD3d 180, 198 [1st Dept 2008]), Defendants appear to concede that all of the requested relief is directly related to redressing the alleged injuries. Defendants' argument instead relies on the factual assertion that "Plaintiffs already enjoy the redress they request." (Br. at 14). As described above, this statement is plainly false and not appropriately considered on this motion to dismiss.

Regardless, Defendants concede that they have not, in fact, updated their systems to "recognize 'X' as a valid option when placed in the 'sex' field." (Br. at 15.) But they go on to argue that, because any court-ordered remedy would arrive in "marginally less time than the *anticipated* pilot launch of [the new system with an updated sex field] *in late 2024 or early 2025*...the requested injunctive relief would not redress the injuries Plaintiffs allege." (*Id.* [emphasis added]). Defendants cite to no case law—because there is none—suggesting that the state can extinguish an injunctive claim with a nonbinding representation that partial relief may arrive voluntarily in four years. By any logic, this argument must fail.

II. THE CASE IS JUSTICIABLE, AND THE COURT DOES NOT LACK JURISDICTION BASED ON DEFENDANTS' REPRESENTATION THAT ONE POTENTIAL REMEDY WILL COST THE STATE MONEY.

Defendants seek to foreclose any possibility of judicial intervention based solely on their untested assertion that one aspect of compliance with the law would require state spending and the potential reallocation of funds—rendering the entire case "a fundamentally non-justiciable political question about the allocation of resources" that is immune from judicial review. (Br. at 11.) But a straightforward facial antidiscrimination suit brought by vulnerable New Yorkers is

plainly justiciable. Aside from violating basic principles of fairness, Defendants' position is completely unsupported by case law and misstates the issue before this Court.

Cases that involve the "enforcement of clear, nondiscretionary and easily definable statutes and rules" are justiciable (*Bruno v Codd*, 47 NY2d 582, 588 [1979]), as are cases challenging "systemic violations of constitutional guarantees" (*NYCLA v State*, 294 AD2d 69, 73 [1st Dept 2002]). Here, Plaintiffs seek a declaratory judgment that Defendants' facially discriminatory policies and practices are in violation of exactly such "clear, nondiscretionary" statutory and constitutional obligations, and injunctive relief bringing those policies and practices into compliance with the law. This relief—from simple application text revisions, to training updates, to potential WMS edits—falls squarely in the judicial ambit, and at this stage it is unclear which aspects of relief may have budgetary implications.

Defendants' reliance on *Jones v Beam* and its progeny for the contention that courts should not "direct how the vast municipal enterprise should conduct its affairs" (45 NY2d 402, 407) is entirely misplaced. (*See* Br. at 11-13). *Jones* involved consolidated cases with plaintiffs seeking to compel government entities in "fiscal crisis" to reallocate funds to address inadequate zoo animal care and care for ill patients, respectively, which the Court held to be nonjusticiable. (45 NY2d at 407.) Defendants also cite *Lorie C. v St Lawrence DSS*, which struck down a sweeping family court order rewriting a local agency's discretionary procedures and responsibilities relating to "juvenile delinquents" (49 NY2d 161 [1980]), and *Roberts v Health & Hosps. Corp.*, in which plaintiffs sought to enjoin "scheduled layoffs" by alleging generally that understaffed hospitals would be unsafe (87 AD3d 311, 322 [1st Dept 2011]). None of these cases involved discrimination claims, let alone allegations of facially discriminatory policies.

Plaintiffs' claims—which seek compliance with "clear, nondiscretionary" statutory and constitutional guarantees (*Bruno*, 47 NY2d at 588)—are nothing like those in the narrow line of cases cited by Defendants. And post-*Jones* decisions overwhelmingly confirm the narrow reach of that case's applicability. In *Klostermann v Cuomo*, the Court of Appeals explicitly limited *Jones*, holding that hospital patient plaintiffs challenging New York's violation of their "rights under the pertinent statutes" stated justiciable claims, and squarely rejected the state's argument that "any adjudication in support of plaintiffs will necessarily require the expenditure of funds and a concomitant allocation of resources." (61 NY2d 525, 536-37 [1984]; *see also People v Ohrenstein*, 153 AD2d 342, 411 [1st Dept 1989] [the invocation of "political overtones...or...internal affairs of the executive...branch" did not render case nonjusticiable]; *Jiggetts v Grinker*, 75 NY2d 411, 415 [1990] ["[C]ourts may compel obedience to a statutory command."]; *Dental Soc'y of N.Y. v Carey*, 61 NY2d 330, 335 [1984] [finding allegation that "administrative action violates applicable statutes" justiciable]). Even in claims explicitly focused on budget allocation decisions—far more similar to *Jones* than Plaintiffs' discrimination claims—it is "the responsibility of the courts to adjudicate contentions that actions by the...executive fail to conform to the mandates of the Constitution." (*Bd. of Educ., Levittown v Nyquist*, 57 NY2d 27, 39 [1982] [allegation that state's financing system violated equal protection was justiciable].)

Defendants ask this Court to ignore decades of justiciability jurisprudence and dismiss. But, as *Klostermann* and all the cases cited above confirm, the judiciary is the appropriate forum to adjudicate Plaintiffs' claims that Defendants are violating their clear statutory and constitutional rights with a facially discriminatory policy. If accepted, Defendants' position would allow officials to shield themselves from judicial scrutiny by merely claiming an attenuated budgetary

consequence and moving to dismiss. Such an outcome offends basic principles of the separation of governmental powers, and it fails on the law.

III. PLAINTIFFS HAVE ALLEGED DISCRIMINATION IN VIOLATION OF THE HUMAN RIGHTS LAW AND CIVIL RIGHTS LAW §40-C, AND DEFENDANTS ARE INCORRECT THAT THE MERE PROVISION OF BENEFITS DEFEATS A DISCRIMINATION CLAIM.

Citing no case law, Defendants argue that Plaintiffs have not asserted any discriminatory practices prohibited by the Human Rights Law ("NYSHRL") and Civil Rights Law §40-c ("§40-c") because Defendants "plainly have not refused, withheld from, or denied anything to Plaintiffs." (Br. at 20.) To the contrary, Plaintiffs have alleged that they do not "have equal access to State benefits and/or services" (*id.*) because Plaintiffs, unlike binary people, are forced to lie and misstate their sex in order to access those benefits and services, and they are frequently misgendered as a result. Such treatment constitutes unlawful sex, gender identity, and disability discrimination. (*See* Exec. Law §296[2][a]; Civ. Rts. Law §40-c[2]; 9 NYCRR §466.13(c) [clarifying discrimination on the basis of gender identity is sex discrimination, and discrimination on the basis of actual or perceived gender dysphoria is disability discrimination]; *see also Gordon v PL Long Beach*, 74 AD3d 880, 885 [2d Dept 2010] [§40-c discriminatory conduct is evaluated under the same standard as the NYSHRL].)

Treating people in a manner inconsistent with their gender identity is a form of prohibited discrimination. (*See Doe v New York*, 42 Misc3d 502, 507 [Sup Ct, NY County 2013] [NYSHRL claim stated where agency refused to update transgender woman's records to reflect her name and gender]; *Wilson v Phoenix House*, 42 Misc3d 677 [Sup Ct, Kings County 2013] [transgender woman stated claim for sex and disability discrimination, based in part on allegations that defendant classified plaintiff as a man]; *Doe v Bell*, 194 Misc2d 774 [Sup Ct, NY County 2003] [transgender woman stated NYSHRL claim by alleging she was forced to conform to male dress

code]; NYS Div. Human Rights, *Guidance on Protection From Gender Identity Discrimination* [Jan. 2020] ["Under the HRL, a covered entity...may not deliberately refuse to use an individual's requested name, pronoun or title"].[4] Beyond misgendering, Defendants also delay or outright deny benefits to nonbinary people who are unwilling or unable to falsely assert an "M" or "F" marker and lie under oath. In doing so, Defendants subject nonbinary people to barriers accessing lifesaving assistance based solely on a protected status. This constitutes discrimination in the purest sense.

Although Plaintiffs were ultimately able to receive public assistance, they experienced and continue to experience unlawful discrimination at every step of applying for and receiving benefits. If a person of color enters a restaurant, waits twice as long to be seated, is met with racial slurs by several employees, but is ultimately served a meal, that person has still experienced unlawful discrimination on the basis of race. (*See Heart of Atlanta Motel v U.S.*, 379 US 241, 292 [1964] [Goldberg, J., concurring] ["Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public..." [internal quotations omitted].) Defendants provide no support for their arguments otherwise, and Plaintiffs have therefore sufficiently alleged discrimination in violation of §40-c and the NYSHRL.

IV. THE STATE BENEFITS SYSTEM IS A PUBLIC ACCOMMODATION UNDER THE HUMAN RIGHTS LAW, AND DEFENDANTS ARE ENTITIES SUBJECT TO CIVIL RIGHTS LAW §40-c.

Defendants' assertion that "*WMS* is not a place of public accommodation" under the NYSHRL (Br. at 18] [emphasis added]) is a mischaracterization of the issues presented. *OTDA*, a public benefits agency that provides services to thousands of New Yorkers, is a public

[4] https://dhr.ny.gov/sites/default/files/pdf/nysdhr-GENDA-guidance-2020.pdf.

accommodation, as courts have recognized in similar contexts with other benefits agencies. Defendants cannot reframe the problem so narrowly because the harms experienced by Plaintiffs are agency-wide, from application, to recertification, to ultimate receipt of benefits.

The NYSHRL explicitly defines "public accommodations" to include places owned or operated by a government. (Exec. Law §296[2][a] ["public accommodation…*shall include, regardless of whether the owner or operator of such place is a state or local government entity*…all places…dealing with goods or services of any kind"] [emphasis added].) Applying these express statutory terms, OTDA is subject to the NYSHRL because it is owned and operated by the state and provides services to the public at large. Public benefits agencies by their very nature are public accommodations, as several courts have noted. (*Lovely H. v Eggleston*, 235 FRD 248, 259 [SDNY 2006] [holding that NYC public welfare agency constitutes a public accommodation under the NYSHRL]; *Doe v New York*, 42 Misc3d at 505 [same].)

First, ignoring clear case law that an "executive agency responsible for the operation and administration of public assistance programs" is a public accommodation (*Lovely H.*, 235 FRD at 251), Defendants contend that "[t]he public accommodation provision…'does not extend to circumstances in which public entities are acting in their programmatic capacities to provide government services.'" (Br. at 19 [quoting Michael aff, exhibit A [*Smith v NYS, Workers' Compensation Bd.*, SDHR Case No. 10184030-16-P-D [Dec. 21, 2016]]].) The sole authority relied on by Defendants for this broad proposition—an agency report—is non-binding, unpublished, unreasoned, and distinguishable as it is focused solely on the administrative judicial functions of the Worker's Compensation Board. (*See id.*) Defendants here are not accused of discriminating in exercising their judicial functions; Plaintiffs allege that Defendants maintain a

facially discriminatory system that requires nonbinary applicants to misidentify their gender identity in order to receive benefits.

Second, Defendants argue that "WMS is neither a 'place' nor an 'accommodation' in the common understanding of those words…[because] [m]embers of the public cannot access or interact with WMS." (Br. at 18-19.) However, the question is not whether *WMS* is a public accommodation, but rather whether the defendant "executive agency responsible for…public assistance programs" (*Lovely H.*, 235 FRD at 251)—*i.e.*, the agency alleged to have offered services in a discriminatory manner—is one. The fact that WMS's inadequacies *cause* many of the harms Plaintiffs experience does not mean WMS itself must be shown to be a public accommodation.

It is well-established that "place of public accommodation" is to be "interpreted liberally" as "broad and inclusive language." (*Cahill v Rosa*, 89 NY2d 14, 21 [1996] [finding Legislature used "place of public accommodation" in "broad sense of providing conveniences and services to the public" and that list of examples in statute "is illustrative, not specific."].) OTDA provides such "services…to the public," and though individuals must be eligible to get access to certain services, the application process is unequivocally open to the public. Further, "place" is not limited to physical spaces, as it is a "term of convenience, not limitation." (*U.S. Power Squadrons v Human Rights Appeal Bd.*, 59 NY2d 401, 411 [1983].) While OTDA's services can be accessed through physical offices, the Court of Appeals has concluded that public accommodations need not be "supplied at fixed places" and "may discriminate...without denying individuals access to any particular place." (*Id.*) Here, Defendants are discriminating broadly in the provision of services to the public in multiple contexts, from the paper application, to the recertification process, to the very website applicants use to apply remotely. Even just focusing on OTDA's online myBenefits

application, courts regularly find that websites are places of public accommodation given the "NYSHRL's text, purpose, and precedent." (*Sullivan v BDG Media*, 71 Misc3d 863, 869 [Sup Ct, NY County 2021]; *Andrews v Blick Art Materials,* 268 FSupp3d 381 [2017] [retailer's website was public accommodation].) For these reasons, OTDA is plainly a "place of public accommodation" under the NYSHRL.

Finally, regarding Plaintiffs' §40-c claims, Plaintiffs need not establish that Defendants are a "public accommodation," since, unlike the NYSHRL, §40-c applies to a broader list of covered entities that explicitly includes Defendants. (§40-c[2] [prohibiting discrimination "by any other person or...by the state or any agency or subdivision of the state"].) Defendants appear to confuse §40-c with a completely different statute—Civil Rights Law §40, titled "Equal rights in places of public accommodation"— when they argue that "Section 40 of the Civil Rights Law" is limited to "public accommodations." (Br. at 19). Courts routinely find §40-c violations against defendants who are not public accommodations. (*See e.g. Kimmel v State*, 115 AD3d 1323 [4th Dept 2014] [state sued as employer]; *People by Abrams v Hamilton*, 125 AD2d 1000, 1001 [4th Dept 1986] [explicitly holding defendant was *not* public accommodation but was subject to §40-c]; *Pratt v Indian River Cent. Sch. Dist.*, 803 FSupp2d 135, 150 [NDNY 2011] [school sued as education institution].)

V. PLAINTIFFS STATE A CLAIM THAT DEFENDANTS VIOLATED THE EQUAL PROTECTION AND DUE PROCESS PROVISIONS OF THE STATE CONSTITUTION.

A. Equal Protection

Section 11 of the NYS Constitution—which guarantees "equal protection of the laws," mirroring the U.S Constitution and providing "coverage as broad" (*Brown v State*, 89 NY2d 172, 190 [1996])—can trigger scrutiny of state action in two ways: if the state "disadvantages a suspect class," or if it "burdens a fundamental right" (*People v Aviles*, 28 NY3d 497, 502 [2016]). Plaintiffs

have alleged more-than-sufficient facts to satisfy either criterion, first because Defendants facially discriminate on the basis of sex, a suspect class, and second because Defendants' policies burden Plaintiffs' fundamental rights to autonomy and privacy. They discuss the "suspect class" analysis below, and, for brevity's sake, refer the Court to the "fundamental right" discussion in the next subsection regarding due process claims, since those analyses overlap. (*See infra* at 19.)

Sex—including gender identity—is a suspect class, and discrimination "because of sex" is subject to heightened scrutiny, which means such discrimination must be struck down unless Defendants can show it is "substantially related to an important government interest." (*Windsor v United States*, 699 F3d 169, 185 [2d Cir 2012]; *see also Bostock v Clayton Cty.*, 140 SCt 1731, 1741-42 [2020] [discrimination on basis of gender identity is discrimination "because of sex"].) To state a "suspect class" equal protection claim, a plaintiff can allege the requisite "intentional discrimination...in several ways": that *either* (1) a "policy is discriminatory on its face" because "it expressly classifies persons on the basis of...gender;" *or* (2) a facially neutral policy "is applied in a discriminatory fashion;" *or* (3) a facially neutral policy "was motivated by discriminatory animus and…results in a discriminatory effect." (*Hayden v Nassau*, 180 F3d 42, 48 [2d Cir 1999].)

Here, Plaintiffs have alleged that Defendants' policy "is discriminatory on its face" because it "expressly classifies [them] on the basis of [their] gender." (*Id.*) The benefits application literally requires them to be "classified" based on "M/F" (complaint ¶¶1-4). Interactions with government employees become harmful based on how the state displays Plaintiffs' inaccurate sex classification in its system (*id.* ¶¶50, 62, 71), and certain medical benefits are initially denied based on Defendants' classification of sex (*id.* ¶¶84, 89). Plaintiffs have also alleged that facially neutral aspects of the application process are applied "in a discriminatory fashion" (*Hayden*, 180 F3d at

48), as where all applicants are required to swear under oath that their information is accurate but only nonbinary people are forced to lie under oath (complaint ¶¶1-4).

Required to show that such discrimination is "substantially related to an important government interest," Defendants identify *no* government interest served by misidentifying the sex of nonbinary people. Indeed they could not: New York already offers an "X" on birth certificates (*id.*), and Defendants argue vociferously that they intend to do so in the benefits context once they update their technology (Br. at 5-6). To the extent Defendants' brief suggests a generalized interest in saving money (*see id.*), that argument must fail on two counts. First, it ignores those aspects of Plaintiffs' relief that may cost nothing because they are not dependent on a change to WMS (*see supra* at 4-5). Second, "the Supreme Court has held that '[t]he saving of welfare costs cannot justify an otherwise invidious classification.'" (*Windsor*, 699 F3d at 186-87 [quoting *Graham v Richardson*, 403 US 365, 375 [1971]].)

Ignoring all these facts and the relevant legal standard, Defendants argue that "Plaintiffs fail to allege any discriminatory intent…which is a prerequisite to an equal protection claim." (Br. at 21). Defendants appear to confuse the required allegation of "intentional discrimination"—which, as described in *Hayden*, can be demonstrated by alleging a facially discriminatory policy (180 F.3d 42, 48)—with a universal animus requirement (*see* Br. at 22 [asserting Defendants are immune from equal protection claims because their "intent is to ensure equity in benefits...irrespective of gender identity"]).

No law supports Defendants' argument. The only two cases cited are inapposite and merely confirm that, when plaintiffs challenge the discriminatory effect of a facially *neutral* policy that does *not* target a suspect classification, animus is required. In *Aviles*, the plaintiff challenged an English-language policy that was facially neutral as to all suspect classes but alleged a disparate

impact based on race and ethnicity. (28 NY3d at 502.) The Court of Appeals held that the plaintiff "has not demonstrated that the challenged policy singles out members of a suspect class," but it explicitly confirmed that, if the policy *had* singled out a person "on the basis of his ethnicity," he would have stated a claim. (*Id.* at 503.) Similarly, in *Weinbaum v Cuomo*, the court rejected a challenge to a facially neutral policy distributing funds that the plaintiffs alleged had a "disparate impact" based on race (219 AD2d 554, 556 [1st Dept 1995]). In the *absence* of an allegation "that this is done in a facially discriminatory manner," the court held that the plaintiffs had not sufficiently alleged intentional discrimination. (*Id.*)

In contrast to both of those cases, Plaintiffs here have alleged that the State's policy facially discriminates on the basis of sex by explicitly classifying people based on sex and subjecting nonbinary people to disparate treatment based on that suspect classification. Based on these well-pleaded facts, Defendants' motion to dismiss the equal protection claims must fail.

B. Due Process

Plaintiffs have alleged facts sufficient to support a substantive due process claim because Defendants' policies infringe on two established "fundamental liberty interests": autonomy (*see Obergefell v Hodges,* 135 SCt 2584 [2015]) and privacy (*see Powell v Schriver*, 175 F3d 107 [2d Cir 1999]). The NYS Constitution's due process clause subjects such infringements to strict scrutiny (*see Johnson v Superintendent*, 36 NY3d 187, 199 [2020]) and is slightly "more protective of rights than its federal counterpart" (*Hernandez v Robles*, 7 NY3d 338, 362 [2006]). Defendants assert, with no explanation and citing no authority regarding substantive due process, that "Plaintiffs have not...identified a protected…liberty interest" (Br. at 21), but they are incorrect.

First, Plaintiffs have a fundamental autonomy right to accurately identify their sex based on the clear language of *Obergefell*. There, the Supreme Court held that due process establishes "a liberty that includes certain specific rights that allow persons…to define and express their

identity," and that constitutionally-protected liberty interests include those that implicate "individual dignity and autonomy" and "shape an individual's destiny" (135 SCt at 2593, 97, 99). Here, Plaintiffs allege that Defendants prevent them from "defin[ing] and express[ing] their identity" exactly as the Court described (*see e.g.* complaint ¶¶4, 35, 46, 60, 96), denying them an "intimate choice[] that define[s] personal identity" (*Obergefell*, 135 SCt at 2597). Because Defendants' actions deprive Plaintiffs of the ability to define and live consistently with their identity, they violate due process.

Second, there is a "zone of privacy" protected by due process. (*Whalen v Roe*, 429 US 589, 598 n23 [1977].) Because inaccurate sex markers can "out" aspects of a person's identity or history they do not wish to reveal, exposing them to harm, courts have held that the government violates a person's fundamental right to privacy when it fails to record their sex in a manner consistent with their gender identity. (*See Love v Johnson*, 146 FSupp3d 848, 856 [ED Mich 2015] [transgender plaintiffs challenging inaccurate driver's license markers stated due process privacy claim]; *K.L. v Alaska Dep't of Motor Vehicles*, 2012 WL 2685183, *8 [Alaska Super Ct 2012] [failure to correct gender marker on driver's license "impermissibly interferes with [the] right to privacy"].) The Second Circuit has confirmed that the "excruciatingly private and intimate nature" of gender identity "is really beyond debate." (*Powell*, 175 F3d at 111.) The disclosure of inconsistent information about gender can provoke intense "hostility and intolerance from others" (*id.*; *see also Adkins v NYC*, 143 FSupp3d 134, 139-40 [SDNY 2015] ["[M]ismatch between the gender indicated on the document and the gender of the holder calls down discrimination."]), and Plaintiffs here allege that Defendants force them into a mismatch that exposes them to similar dangers and indignities as the plaintiffs in those cases.

Because Defendants infringed on "a fundamental liberty interest," their actions trigger strict scrutiny and violate due process "unless the infringement is narrowly tailored to serve a compelling state interest." (*Johnson*, 36 NY3d at 199.) As described in the previous subsection, Defendants' actions do not survive any level of scrutiny (*see supra* at 16-19), let alone strict scrutiny. Accordingly, Plaintiffs have stated a claim that the challenged policies and practices are unconstitutional.

VI. EACH DEFENDANT IS A PROPER PARTY BECAUSE EACH IS IMPLICATED IN PLAINTIFFS' CLAIMS AND MAY BE NECESSARY TO IMPLEMENT THE REMEDY.

Plaintiffs challenge a multi-agency benefits system policy. They allege with specificity how the state or governor could take unilateral action to redress Plaintiffs' injuries—and that in fact they have done so in the birth certificate and license context (*see* complaint ¶25; *see also Saba v. Cuomo*, 2021 WL 1600496, at *11 [SDNY Apr. 23, 2021] [denying defendant Andrew Cuomo's motion for dismissal])—and how DOH is both an active participant in the challenged policies and a necessary party to implement requested relief (*see* complaint ¶¶11-12, 79, 84). Defendants rely on contested facts to seek dismissal of the State, Governor Cuomo, and DOH Defendants, but based on Plaintiffs' well-pleaded facts Defendants' arguments fail.

Regarding the State and Governor Cuomo, Defendants assert that Plaintiffs fail to "explain how any relief sought could be implemented by" them. (Br. at 9 [quoting *DRNY v NY*, 2019 WL 2497907, at *23 [EDNY June 14, 2019].) Unlike in *DRNY*, Plaintiffs confront a multi-agency policy and allege with specificity "how relief sought could be implemented by" those with control over the agencies. (*See* complaint ¶¶4, 25, 60, 88, 95.) All Defendants' additional cited cases are inapposite because they stand for the unremarkable proposition that the state and governor may be dismissed when plaintiffs seek to *strike down a statute*, not challenge a policy that Defendants have the power and obligation to change. (*See* Br. at 8-9 [citing cases].)

Regarding DOH, Defendants argue that it has "'no direct action or control over'" challenged policies and "'lacks tangential involvement or responsibility'" for them. (Br. at 10-11 [quoting *Montgomery-Costa v NY*, 26 Misc3d 755, 773 [Sup Ct, NY County 2009].) In addition to relying on contested affidavits disputing Plaintiffs' well-pleaded allegations (*see* complaint ¶¶11-12, 79, 84), this assertion is undermined by Defendants' own submissions. For example, one affidavit purports to explain that DOH would need to update its own "eMedNY" program to make a system-wide remedy possible. (*See* Thibodeau aff ¶¶11-12.) Thus, even accepting Defendants' facts, while DOH may not have full "control," it does have "direct action" over how the state's integrated systems function, input into changes central to Plaintiffs' remedy, and "involvement" that goes far beyond "tangential" in such remedy.

VII. PJP IS PERMITTED TO BRING A CLAIM UNDER CIVIL RIGHTS LAW §40-c.

An organization like PJP falls within the definition of a "person" under 40-c—which explicitly cross-references the NYSHRL's definition of that term and thus includes "one or more individuals, partnerships, associations, [or] corporations" (Exec. Law §292[1]; Civ. Rights Law §40-c[2] ["No person…as such term is defined in [§292]…). Accordingly, Defendants' argument that PJP is not a "person" under §40-c (Br. at 18) must fail. The Appellate Division has affirmed at least one 40-c claim brought on behalf of an entity instead of an individual (*Hamilton*, 125 A.D.2d at 1002 [affirmed §40-c claim brought on behalf of the state, noting "[r]emedial laws should be liberally construed to attain their objectives"]), and this Court should not depart from that interpretation.

Defendants' argument relies on an incorrect, non-binding federal court definition of "person" in §40-c, which erroneously conflates the statutory analysis of separate statutes (Civ. Rights Law §§40, 40-c, and 41), concluding that organizations are not "persons" under all sections despite §40-c's explicit language to the contrary. (*See Jews for Jesus v JCRC*, 968 F2d 286, 293-

94 [2d Cir 1992] [holding the "juxtaposition" between "person" and "corporation" in those laws precludes corporation's claims].) The subsequent cases cited by Defendants adopt this interpretation without further examining the analysis. (*See* Br. at 18 [citing cases].) This Court is not bound by precedents of federal courts on pure issues of state law (*Conergics Corp. v Dearborn Mid-W.*, 144 AD3d 516, 526 n9 [1st Dept 2016]), and it should instead follow the Appellate Division here.

CONCLUSION

For these reasons, Defendants' motion should be denied.

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New York, NY

Respectfully submitted,

NEW YORK CIVIL LIBERTIES
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CERTIFICATION

In accordance with Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court, I hereby certify that this memorandum of law contains 6970 words, exclusive of caption, cover page, table of contents, table of authorities, and signature block, as established using the word count function of Microsoft Word.

/s/*Robert Hodgson*
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