

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO

SOUTHERN DIVISION

F.V., et al,)	Case No. 1:17-CV-00170-CWD
)	
Plaintiffs,)	
)	Boise, Idaho
vs.)	February 1, 2018
)	9:30 a.m.
RICHARD ARMSTRONG, et al,)	
)	
Defendants.)	
)	
.)	

VOLUME I OF I
MOTION FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE CANDY W. DALE
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:	MS. KARA N. INGELHART MR. PETER C. RENN Lambda Legal Defense and Education Fund, Inc. 105 West Adams, 26th Floor Chicago, IL 60603-6208
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For the Defendants:	MR. W. SCOTT ZANZIG Office of the Idaho Attorney General, Civil Litigation P.O. Box 83720 Boise, Idaho 83720-0010
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COURT RECORDER:	TRANSCRIPTION BY:
A. TATE U.S. District Court	TAMARA A. WEBER, CSR P.O. Box 387 Caldwell, Idaho 83606

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1 (Recording begins.)

2 CLERK: -- and the Honorable Candy W. Dale presiding.

3 COURT: Please be seated.

4 CLERK: The Court will now hear Case CIV17-170-S-CWD,
5 F.V. versus Barron, et al. Counsel, please state your
6 appearances for the record beginning with the plaintiff.

7 MS. INGELHART: Good morning, Your Honor. Kara
8 Ingelhart on behalf of the plaintiffs. I'm here with my
9 co-counsel, Monica Cockerille and Peter Renn.

10 COURT: Thank you.

11 MR. ZANZIG: Good morning, Your Honor. Scott Zanzig on
12 behalf of the defendants.

13 COURT: Well, good morning. This is the time for the
14 Court to take up oral argument on the motion for summary
15 judgment filed by the plaintiffs and it is Docket No. 28. This
16 lawsuit was filed under -- alleging violations of the
17 Constitution and it's filed as an action under 42 USC Section
18 1983.

19 As I understand the Complaint and as I understand the
20 motion for summary judgment, there are three alleged violations
21 of the Constitution. Two under the equal protection clause --
22 or two under the 14th Amendment. One under equal protection --
23 violation of equal protection and also a violation of the due
24 process clause. And then plaintiffs also allege a violation of
25 the 1st Amendment. And all by virtue of what is described as

1 the State's birth certificate policy.

2 So I'll turn it to plaintiffs to present argument. Ms.
3 Ingelhart, are you presenting argument?

4 MS. INGELHART: Yes, Your Honor.

5 COURT: You may do so.

6 MS. INGELHART: May I ask will we have a time limit
7 because I would like to reserve time for rebuttal.

8 COURT: How much time do you think you would like in
9 total?

10 MS. INGELHART: Twenty minutes maximum but whatever
11 you'd like.

12 COURT: So why don't I say 30 minutes each side.

13 MS. INGELHART: Okay. I'd like to reserve five for
14 rebuttal.

15 COURT: Okay. Unlike Judge Winmill, I don't have the
16 lights up here so we'll just keep track.

17 MS. INGELHART: Fantastic. Good morning. I would also
18 like to say we have with us one of the plaintiffs, Ms. Dani
19 Martin, here with us today in the courtroom and we are here
20 today to ask the Court to enjoin defendants from refusing to
21 provide accurate birth certificates to transgender people that
22 match their gender identity and without information that would
23 disclose their transgender identity.

24 The Idaho birth certificate policy undisputedly causes
25 significant harm to transgender Idahoans. Not only does it

1 deprive them of an essential document they need to simply go
2 about their lives, but it burdens them with an inaccurate
3 document that risks disclosure of private information, robs them
4 of their dignity and undermines the State schools of verifying
5 their identity. The policy violates plaintiffs' basic rights to
6 due process, equal protection and freedom from compelled speech.

7 The State concedes that there's no rational basis for
8 the policy and, therefore, the defendant -- or plaintiffs are
9 entitled to summary judgment.

10 There are two remaining areas of dispute between the
11 parties. The first, whether defendants may impose conditions on
12 a remedy for their constitutional violation that lacks any
13 demonstrated relationship to an adequate government interest
14 which dovetails with the second, whether heightened scrutiny
15 should be applied to this challenged ban. I'll address each in
16 turn.

17 Although defendants concede that there's no rational
18 basis, they still wish to reserve the authority to in effect
19 extend this ban by imposing conditions apart from someone's
20 gender identity on the ability to access an accurate birth
21 certificate, some conditions that have not been shown to be
22 constitutional on the record.

23 COURT: How do we know that that's the case when there
24 isn't a policy, there isn't a procedure in place at this time
25 for anyone to change their sex on the birth certificate unless

1 it was an error at birth?

2 MS. INGELHART: Your Honor, the issue here today is
3 that transgender Idahoans cannot access an accurate birth
4 certificate. Not that they can't change one. They're similarly
5 situated -- for instance, transgender women are similarly
6 situated to non-transgender women who can access an accurate
7 birth certificate but transgender women cannot do so.

8 And specifically, the State has indicated that they
9 want to impose a permanent medical requirement that would
10 require transgender Idahoans to demonstrate to the government's
11 satisfaction that they have also undergone a permanent medical
12 treatment. This kind of permanent clinical change is nothing
13 more than a litmus test for whether someone is transgender
14 enough.

15 Crucially, there's no dispute that gender identity is
16 the critical determinate of sex and so, therefore, this
17 permanency requirement is simply gratuitous taking into account
18 defendants' own admissions.

19 COURT: In the permanency requirement, do you take that
20 from the Answer from the State defendants?

21 MS. INGELHART: Yes. From the Answer and from the --

22 COURT: Where they say that there's no rational basis
23 justifying a prohibition for transgender persons to change --
24 change their sex if they have had clinically -- or undergone
25 clinically appropriate treatment to permanently change one's

1 sex?

2 MS. INGELHART: Yes, Your Honor. That language from
3 the Model Vital Statistics Act.

4 Such a permanency requirement would risk an invasive
5 government intrusion into somebody's permanent -- into someone's
6 medical history without any demonstration that that bears on a
7 transgender person's legitimate need for an accurate birth
8 certificate. And in fact, courts have held that requiring proof
9 medical documentation of genital surgery in order to access an
10 accurate identity document was unconstitutional in Love in that
11 that policy lacked a sufficient rational basis -- or rational
12 relationship to any government interest. Such requirements of
13 permanency impose unconstitutional conditions on a transgender
14 person's constitutional rights.

15 The record here also recounts the painful experience
16 that F.V. endured when she went to present her birth certificate
17 to the Social Security Office and was then faced with epithets
18 from a perfect stranger in the waiting room. Similarly, Ms.
19 Martin had to debate with a government official whether or not
20 she was a woman and deserved to be treated as such.

21 People should be free from these indignities and that
22 should not -- that freedom should not rise or fall on whether
23 someone has had access to a particular surgery or a doctor's
24 note.

25 Defendants also argue that because they haven't

1 disclosed to the Court what conditions they'd want to place on
2 someone being able to access a birth -- an accurate birth
3 certificate beyond someone's gender identity, this question
4 isn't ripe for review.

5 But the Court doesn't need to evaluate the
6 constitutionality of a future policy. The plaintiffs have
7 already experienced concrete harms based on Idaho's current
8 birth certificate policy and they're merely asking for a remedy
9 that would be necessary to fully address and relieve the
10 constitutional violations that they are currently experiencing.

11 Plaintiffs therefore request the Court to enjoin
12 defendants from refusing to provide accurate birth certificates
13 to transgender people that would match their gender identity and
14 wouldn't include information that would disclose their
15 transgender identity. It's defendants that are asking the Court
16 to improperly narrow the scope so that they can retain the power
17 to impose limitations that they've not proven on this record to
18 be constitutionally permissible.

19 There is an undisputed constitutional violation here
20 and relief must fully remedy the constitutional violation. The
21 remedy can't just impose senseless barriers to (inaudible) of
22 someone's constitutional rights.

23 For instance, it would be patently inadequate if the
24 State told -- or if the Court told the State that you could no
25 longer refuse to provide marriage licenses to same-sex couples

1 but then the State turned around and required same-sex couples
2 but not different-sex couples to attend marriage counseling in
3 order to prove that they're truly committed to each other as a
4 condition for access to a marriage license.

5 So similarly, the remedy here needs to be crafted to
6 place similarly situated people, for instance, a transgender
7 woman and a non-transgender woman, in the position that they
8 would face the same substantive criteria for accessing an
9 accurate birth certificate. Here that they have the same gender
10 identity which is female.

11 And second, the Court can and should decide the proper
12 level of scrutiny to be applied to this challenged policy. The
13 government urges the Court to dodge that question as well but it
14 is fairly presented and the answer to that question bears
15 directly on the remedy appropriate for a constitutional
16 violation.

17 Under heightened scrutiny -- because under heightened
18 scrutiny, the government bears the burden of proving that its
19 action is constitutional, at a minimum, that action must be
20 substantially related to an important government interest. But
21 the government here wants to retain the power to impose hurdles
22 but they haven't shown that those hurdles have a substantial
23 relationship to any government interest.

24 COURT: So in terms of heightened scrutiny, I know you
25 argue that that applies to the -- under the equal protection

1 clause and your due process clause argument or are you arguing
2 strict scrutiny under due process and 1st Amendment?

3 MS. INGELHART: We are arguing both, Your Honor. So
4 courts have in fact ruled under heightened scrutiny and rational
5 basis in the context of discrimination against transgender
6 people in Karnoski (phonetic), Stone, Highland and Evancho and
7 that's because, quote, dodging the question, quote, of scrutiny
8 is not appropriate, quote, where an issue is fairly and squarely
9 presented, end quote. Evancho. The same has also been
10 repeatedly done in cases of discrimination against sexual --
11 against people based on their sexual orientation and that was
12 in -- that's been in Love, Golinski, Peterson, Perry, and
13 Baskin. And courts have done so. They have followed this
14 practice because the entire point of heightened scrutiny is to
15 establish a rule across many cases. Not just to resolve the
16 cases at hand.

17 In fact, there's no real dispute on the merits that
18 heightened scrutiny is required under each of plaintiffs'
19 claims. For instance, under equal protection, there are two
20 independent reasons that heightened scrutiny should be applied.
21 First, because discrimination against transgender people
22 constitutes a suspect class which requires strict scrutiny and
23 second because discrimination against transgender people is
24 inherently discrimination based on gender.

25 COURT: How do you get to that conclusion by looking at

1 Ninth Circuit precedent?

2 MS. INGELHART: Well, notably, yes, looking at Schwenk.
3 That held that discrimination against transgender people is a
4 form of sex-based discrimination and then many other district
5 courts in the Ninth Circuit have applied heightened scrutiny to
6 discrimination against transgender people like in Karnoski,
7 Norsworthy and Olive.

8 Also, defendants fail to cite any authority that would
9 limit the Court to ruling under rational basis. At most, they
10 show that you're not required to decide heightened scrutiny if
11 the government fails rational basis. But they don't establish
12 that there's a bar to the Court doing so.

13 Defendants cite two cases, Hooper and Zobel, in which
14 the Court declined to decide scrutiny for durational residency
15 requirement but there is a later case, Saenz, where the Court
16 did decide strict scrutiny for durational residency requirement
17 even when the government failed rational basis.

18 So the Court may of course reach heightened scrutiny
19 and it's also the typical approach as illustrated by case law.
20 There's a two-step process. First, the Court decides what kind
21 of discrimination is at issue and then what level of scrutiny
22 should be applied as explained by Freeman and Latta.

23 Your Honor, because this question of heightened --
24 because the question of scrutiny -- because the question of the
25 level of scrutiny is properly before the Court today, the

1 plaintiffs submit that it's appropriate for the Court to rule on
2 the issue.

3 Your Honor, the birth certificate policy here in Idaho,
4 it imposes significant burden and stigma on transgender people.
5 It excludes them from full and equal participation in society as
6 the men and women that they are. They shouldn't face a hurdle
7 more strenuous than I should face for an accurate birth
8 certificate. And as the government's concession illustrates,
9 this policy is constitutionally indefensible and should be
10 enjoined in full.

11 COURT: Would you basically state for me what the
12 remedy is that you are asking from the Court?

13 MS. INGELHART: Yes, Your Honor.

14 COURT: In other words, how would you phrase or what
15 language would you use in the declaration and the injunction
16 because you're seeking both.

17 MS. INGELHART: Yes, Your Honor. We're seeking for the
18 Court to enjoin defendants -- enjoin the State from refusing to
19 provide accurate birth certificates to transgender people that
20 match their gender identity without information that would
21 disclose their transgender status.

22 COURT: And what is the information that would disclose
23 the transgender status? Does that include the name change?

24 MS. INGELHART: Yes, Your Honor. The current policy
25 includes both the birth name and the new name on the birth

1 certificate and there are other instances in Idaho Vital
2 Statistics' execution of their duties where they do not include
3 the original birth name on a birth certificate. So there are
4 safeguards that could be applied here.

5 COURT: And the reason I ask that question, it wasn't
6 clear from the briefing and I'm not sure Mr. Zanzig on behalf of
7 the State addressed that specific aspect and on the risk of
8 trying to phrase my question is that it appears that a person,
9 yourself, even myself, I could request a name change. Go
10 through the process. Get an order from the court that shows
11 that I've changed my name and then I could take that order to
12 Vital Statistics and say I want my birth certificate changed to
13 my new name.

14 And if I do that, then there's going to be a note, a
15 marker as the plaintiffs call it or notation of the amendment
16 revision history, I believe that's what the State calls it, on
17 my new birth certificate that basically says that it's per order
18 of the court changing the name.

19 Now, how does a name change reflect transgender status?
20 I mean it can be obvious potentially but I could go down and
21 change my name to John Dale.

22 MS. INGELHART: You could, Your Honor, but in the
23 instance of transgender people, people are often changing their
24 name from a stereotypically -- in the case for instance of
25 transgender women, often from a stereotypically masculine name

1 to a stereotypically feminine name. So a birth certificate that
2 displays both names even with a corrected gender marker isn't so
3 much a remedy because that necessarily signals to the reader
4 that there could be a transgender person owning that birth
5 certificate.

6 COURT: So do you see the new rule if there is a new
7 rule from the State such that an order of a name change would
8 have to accompany the request to change the sex designation?

9 MS. INGELHART: I don't think those two are necessarily
10 tied to each other. I don't think that you need a name change
11 in order to change your gender marker.

12 COURT: That was my question. So thank you.

13 MS. INGELHART: I would like to hold any further
14 arguments for rebuttal.

15 COURT: Okay. Mr. Zanzig.

16 MR. ZANZIG: Thank you, Your Honor. I would like to
17 address two issues today that I think dovetail with what my
18 colleague just talked to you about and those are the proper
19 basis for liability in this case and the appropriate scope of
20 relief for the Court to provide.

21 This case is a bit unusual and that's because the
22 defendants here have not tried to throw up every defense to the
23 claims. They have tried to act reasonably and have conceded
24 that there is no rational basis for the birth certificate policy
25 in the sense that it was defined in the Complaint and that is

1 automatically rejecting a request from a transgender person to
2 have the sex designation changed on the birth certificate and to
3 reflect that sex change on the certificate when the law permits
4 others to keep that confidential under certain circumstances.

5 Now, I did not clearly understand the request to also
6 include the name statute also being affected but I can certainly
7 understand that that would defeat the purpose if you were to say
8 we're not going to reflect the change of your sex on your birth
9 certificate but in fact there is a change from a stereo-
10 typically male to female or vice versa name.

11 I don't believe that that would be a problem for us. I
12 don't think we would fight that. We would understand that that
13 too would be an issue to fairly provide a remedy here that in
14 the case of a transgender person who changes his or her sex
15 properly through an application to Vital Statistics could also
16 apply to not have that name change reflected and we would need
17 an order from the Court to say that the statute that requires
18 that name change to be reflected would not apply under those
19 circumstances. I don't believe it would be proper for the Court
20 to strike down that statute all together.

21 COURT: Right.

22 MR. ZANZIG: But in this narrow circumstance, I think
23 it's fair to say it's encompassed in what the relief sought is
24 here.

25 COURT: So that it perhaps would be wording such that

1 the application from a transgender person seeking to have a name
2 change and to -- I know the State says changing the sex. The
3 plaintiffs say accurately reflect their gender identity. But if
4 the application to change the name is part of the same
5 application, then the State would be willing to agree that that
6 should not be noted, the reason for the change?

7 MR. ZANZIG: I believe so. However, there are other
8 requirements for a name change in the statute. One is that you
9 need a court order to get your name changed. I don't think that
10 should be affected. That should be left as a requirement in
11 that statute. But the other part of the statute that says and
12 if you do that, we're going to show it on the face of the
13 certificate, the revision history, in this case, if the Court
14 felt like that was part of what the remedy should be -- and I
15 can't dispute that. I think it would fairly encompass what
16 they're trying to achieve here and that is don't put a marker on
17 the face of the certificate that defeats the whole purpose for
18 what we're doing. So that's not a problem.

19 And the Court mentioned that we use the term "sex" and
20 the reason why I use that is because that's -- if you look at a
21 birth certificate, that's what it says. It doesn't say gender
22 marker or something else. It says sex and it's either male or
23 female and that I think is the item that they're seeking to have
24 changed on the birth certificate.

25 COURT: But you can see there is case law out there

1 that says that sex and gender are interchangeable.

2 MR. ZANZIG: There certainly is and there's a lot of
3 research out there that tries to distinguish those two things in
4 certain circumstances as well. But I'm not -- I'm not trying to
5 have a semantic war over that. I'm just trying to be specific
6 because that is the marker on the birth certificate. It's
7 designated sex and I -- that's what's going to be changed.

8 COURT: It's designated that way at the time or right
9 around birth based on anatomical observations.

10 MR. ZANZIG: Absolutely. But given the defendants'
11 concession that there is no rational basis to defend this birth
12 certificate policy being challenged, that's all the Court needs
13 to resolve the case and to enter judgment. There's no need to
14 go further. I know the plaintiffs are strenuously arguing that
15 the Court should go further and render a decision on heightened
16 scrutiny and other constitutional provisions but it's not
17 necessary.

18 So the question is should the Court go further? We all
19 agree that there is -- this is not a jurisdictional limitation
20 on the Court's authority. The Court has the authority to go
21 further if it wants but this is a well established prudential
22 doctrine about what the Court should do in these circumstances
23 and I view it as a can versus should situation.

24 Here, how should the Court exercise its power wisely?
25 And the constitutional avoidance doctrine is something that has

1 grown up for many decades and has been very well established in
2 the Court's jurisprudence.

3 Basically, it says that a federal court should avoid
4 rendering an opinion on a constitutional question unless it's
5 absolutely necessary to decide a case. And we cited a number of
6 the more recent cases that apply that doctrine but I thought it
7 might be helpful to talk just a little bit about where that
8 comes from and the seminal case is a case called Ashwander
9 versus Tennessee Valley Authority from the 1930's and it's a
10 very famous concurring opinion from Justice Brandeis.

11 Interesting note. That concurrence has been cited more
12 than a thousand times since then so it's well established and
13 well accepted in the federal courts.

14 And what Justice Brandeis did in his concurrence was to
15 summarize a number of rules that the Court had developed over
16 time prior to that so that it wouldn't have to unnecessarily
17 address constitutional questions. And some of the rules that
18 Justice Brandeis set forth are that courts shouldn't anticipate
19 a question of constitutional law in the advance of the necessity
20 to decide it.

21 In other words, is it necessary to decide this case?
22 If so, the Court has a duty to address it. If not, you don't
23 need to go further than necessary. Courts shouldn't formulate a
24 rule of constitutional law that's broader than is required to
25 resolve the precise case before it. And courts should not pass

1 on a constitutional question even if it's properly presented in
2 the record if there's some other way to resolve the case.
3 Sometimes that's by interpreting a statute differently.
4 Sometimes it's by resolving one constitutional claim and not
5 having to go down the road of answering two, three, four claims
6 that might be asserted.

7 COURT: Well, let's walk through them. What is the
8 constitutional claim that you believe this Court can answer
9 based on the State's concessions in the Answer to the first
10 Amended Complaint and your briefing?

11 MR. ZANZIG: Certainly. The equal protection claim can
12 be decided on the rational basis standard because we've conceded
13 that there is no rational basis for the policy. That's the
14 easiest simplest route for the Court to resolve this case and to
15 provide all the relief that's been requested. Is there a
16 need --

17 COURT: But doesn't that -- doesn't that leave it to
18 the State to come up with a rule that may pass rational basis?

19 MR. ZANZIG: Well, it leaves it to the State to decide
20 how it's going to deal with the Court's ruling. What the
21 plaintiffs have asked you to do is to say, okay, here is the
22 legal structure that you're operating under now, Vital
23 Statistics. I'm going to strike that all down and say that's
24 not a barrier to you doing this anymore. You need to treat
25 these applications just like you do any other application. You

1 can't impose some burden beyond what you impose on others. And
2 so if someone who's transgender comes in and seeks an amendment
3 to a birth certificate, they shouldn't be subject to any higher
4 standard than any other person would be.

5 So, for example, there are a number of changes that
6 people seek where the rules require a court order. Name change,
7 adoption where you get a change of name and change of parents to
8 name a couple of them. If we say leave it up to a court to
9 decide whether this change is a valid change, we've done it to
10 other folks, that might be an appropriate way to deal with these
11 changes.

12 COURT: What is the -- I'd like to make sure I
13 understand the current structure or the current rule because it
14 wasn't clear in your Answer and the plaintiffs claim that
15 they -- that transgender individuals are categorically denied
16 the right to have changes made to their birth certificate. Is
17 that -- does the State concede that, that it's categorical to
18 transgenders?

19 MR. ZANZIG: It's categorical that the Department has
20 construed the law in Idaho to prohibit it from making a change
21 to the sex designation on a birth certificate. That is correct.
22 Because the way the Department views it, there's a statute,
23 Idaho Code 39-250. It says that no amendments to a birth
24 certificate will be made except as authorized by statute and
25 rule.

1 There is no statute that permits a change of that
2 designation and there's no rule that permits that change. And
3 so the way that the Department construes that law is to say we
4 don't have the authority to do that so if a person -- a
5 transgender person comes to the Department and inquires is there
6 a way that I can apply to have this changed, the answer is
7 consistently we're sorry. We don't have the authority to do
8 that. No.

9 And so what happens is if the Court -- and that's been
10 defined as the birth certificate policy.

11 COURT: Right.

12 MR. ZANZIG: If the Court says I'm going to enjoin you
13 from enforcing that policy, excuse me, and regardless of how you
14 view these rules or statutes that you think get in your way, to
15 the extent they are getting in your way, I'm saying they don't
16 anymore. You need to treat these applications just like you
17 would a different application from somebody else seeking another
18 amendment to a birth certificate.

19 Then it's going to be incumbent on the Department and
20 the Bureau to decide, okay, now we're left with a vacuum. In
21 all other changes that we processed, we have rules that tell us
22 what needs to happen so that, you know, we're certain that we're
23 making appropriate changes to a document that we view is
24 important in terms of being accurate and, you know, having some
25 integrity. We don't just change these -- a person can't just

1 come in and say I'd like to change this, that or the next thing
2 on my birth certificate without following some rules.

3 And so they're going to have to put in place some rule.
4 They haven't decided that yet, what that's going to be because
5 they haven't gotten to that point. But once the Court enters
6 judgment, they're going to have to do that and so we did cite --
7 just as an example of possibilities, my hands get a little --

8 COURT: That's okay. Microphones are everywhere.

9 MR. ZANZIG: -- a little wild. But we did cite just,
10 you know, as an example the Model Act that was recently revised
11 in 2011 and it provides that in order to get this change, you
12 need a court order and it goes further to say what the court
13 order should say and it says that a person has gone through
14 clinically appropriate treatment to make a permanent change.

15 I don't know --

16 COURT: So is that where the wording came from in your
17 Answer?

18 MR. ZANZIG: Yes.

19 COURT: Okay.

20 MR. ZANZIG: Yes, from the Model Act. Now, is that
21 what the Department or Bureau is going to do? I don't know that
22 they're necessarily going to say that's the way we want to go
23 and follow the Model Act but that's one possibility. It strikes
24 me that if that's the Model Act that is most recent and it's not
25 some dated item from the '90's which was the older version that

1 there's some indication that that's not an unfair requirement in
2 order to obtain this change.

3 But we're kind of putting the cart before the horse
4 because the Court would be issuing some sort of advisory opinion
5 about standards that don't apply if it were going to come in and
6 prescribe what the Department or Bureau must do when it receives
7 one of these applications.

8 And in their briefing, the plaintiffs admit that
9 they're not asking the Court to do that. They're not asking the
10 Court to prescribe the way that the State is going to administer
11 these applications. The plaintiffs acknowledge I think fairly
12 so that the State has some discretion in deciding how it's going
13 to administratively handle these but that hasn't -- that's not
14 before us yet. It hasn't been decided because we've been living
15 in a world where these applications just don't get to square
16 one. It's not as if we got some onerous policy in place and we
17 can say you got to back off that and come up with something
18 better. We've got a situation where there's just no policy in
19 essence.

20 And so when we look at the appropriate scope of a
21 remedy in this case -- and to move forward here, we believe that
22 the appropriate remedy should be what the Complaint seeks. Not
23 some broader prescription on how an application should be
24 treated but that we should be prohibited from automatically
25 refusing to consider an application from a transgender person

1 and that we should be prohibited from disclosing a change on an
2 amended certificate and as we've already discussed, that can
3 include the name as well as the sex.

4 But the Complaint here doesn't ask for anything more.
5 If we look at the Complaint -- the Amended Complaint in the
6 relief requested section on page 20, that's what it says.
7 "Declare this policy unconstitutional and enjoin the defendants
8 from enforcing it." And the Complaint itself defines what this
9 policy is and it says, "A policy and practice that categorically
10 refuses to change the gender markers on transgender individuals'
11 birth certificates to match their gender identity even where
12 transgender individuals have taken clinically appropriate
13 treatment for gender transition," and then the revisionist
14 history.

15 And so that should define what the Court's judgment
16 looks like. That is the request for relief. Nothing more.
17 Nothing saying, "State, you can't consider this. State, you
18 can't require a court order. State, you can't require some
19 level of proof for this amendment when it's requested."

20 And I just -- again, in the reply briefing at page 9,
21 the plaintiffs admit they're not asking for some sort of
22 prescriptive relief that would tell them how they have to handle
23 these applications. And as I mentioned, there are some statutes
24 cited here, 39-254 with the name change and 39-258 that deals
25 with adoptions, where a court order is one level of proof that

1 is sometimes required.

2 Again, I'm not saying that the Court needs to rule on
3 that but I want to be transparent about this so that everybody
4 understands what we're doing and we're trying to be open about
5 this and not make this a fight where we have tried to defend to
6 the last gasp a policy that my clients who I view as very
7 reasonable, decent people, not bigots trying to harm anyone.
8 They're trying to do their jobs. Two of them are here today.
9 James Ayodelotte and Elke Shaw-Tulloch are here. I respect
10 these people and they're trying to do their job. We're not
11 trying to make this a fight. We're trying to be open so that
12 everybody knows what we're doing but we're just not to the point
13 yet where there's some challenge to a new policy that's been put
14 in place.

15 COURT: So -- and I realize that the new policy is not
16 before the Court. I'm struggling with my responsibility or my
17 authority to -- I don't know -- prescribe isn't the right word
18 but to outline, to guide the process because I think there's a
19 risk of -- that that -- the more precise issue might come back
20 to the Court. It may or may not be me but in terms of a wise
21 use of resources. So maybe you can help me out on that.

22 MR. ZANZIG: Sure, and I understand.

23 COURT: Let me ask -- let me ask -- let me ask a couple
24 questions and it might help me. Can you go back to the slide
25 where you indicate -- there we go. The Amended Complaint

1 seeking for the Court to declare that the birth certificate
2 policy is unconstitutional. Aren't you -- is the State
3 acknowledging that their current policy is unconstitutional?

4 MR. ZANZIG: The State has conceded that there's no
5 rational basis for this policy and so yes, we're conceding that
6 on that basis that it's unconstitutional.

7 COURT: So implicit in that concession, aren't you
8 conceding that transgender individuals are a suspect class?

9 MR. ZANZIG: No. No. We're saying there's no rational
10 basis for what we do. We don't think you need to get that far.
11 We think that's going beyond what the Court should do and, you
12 know, we did cite the two cases -- the Supreme Court cases where
13 the Court said, look, if we find no rational basis, we shouldn't
14 go any further and start deciding on heightened scrutiny
15 grounds.

16 We fully agree that that is not a jurisdictional limit
17 on the Court. If the Court decides, hey, I want to venture out
18 and decide more issues than I need to, you have the power to do
19 that but because of the importance of the constitutional
20 avoidance doctrine and the reasons for it which include the
21 court's role in our society in government and the court's desire
22 not to make what are much more permanent changes to the
23 Constitution with a court judgment versus the way legislation
24 can affect the law and to show some deference to the other
25 branches including the states.

1 Those are the reasons why the court has that policy.
2 It's, again, not jurisdictional limitation. It's not as if, you
3 know, Article 3 doesn't let the court do that but the court has
4 taken its job pretty seriously and tried to figure out what's
5 appropriate and there's pretty strong messages from the Supreme
6 Court saying we shouldn't go any further than we have to and I
7 think in this case, there's really no reason to do it.

8 Especially -- in some cases, it may make more sense.
9 For example, you have cases where the government is fighting
10 strenuously to protect some law from attack and is trying to
11 advance a rational basis for that law.

12 If the court strikes down that law, it's probably going
13 to appeal it. Well, in that sense, as the Court says, sometimes
14 as a matter of efficiency, a court will go beyond just that
15 rational basis because, you know, rational basis is kind of in
16 the eye of the beholder --

17 COURT: The lowest level.

18 MR. ZANZIG: -- you know. It might be that some other
19 judge on the Ninth Circuit would say, no, that's a good enough
20 rational basis. There might be a reason in a case like that for
21 the Court to go further and say, you know what? I'm going to
22 also give you another ground for my ruling here. Here, that's
23 not necessary. We've conceded liability. We're not appealing
24 this. We couldn't. We got no basis for it. We've said there's
25 no rational basis.

1 So there's just no reason to go further down that path
2 and decide that some level of heightened scrutiny applies. You
3 know, on the --

4 COURT: Do you agree -- well, what's your response --
5 do you agree that something more than rational basis, scrutiny
6 would be required for the new rule?

7 MR. ZANZIG: No, I don't think that's -- I don't think
8 it's established. I will say this as to the current state of
9 the law. If as the plaintiffs say the Ninth Circuit has already
10 said heightened scrutiny applies to these claims, then there's
11 really no reason for this Court to say that heightened scrutiny
12 applies. It's already established in the Ninth Circuit.

13 I don't think it is. Schwenk didn't even deal with
14 equal protection. It dealt with the statute. But you know
15 there is some analysis in that opinion that lower courts have
16 looked at and said, you know, we can read the tea leaves pretty
17 well. We take that case. We take SmithKline. We look at these
18 things and say if we have to decide it, we think there's
19 probably going to be a higher level of scrutiny here whether
20 it's intermediate scrutiny because it looks like sex
21 discrimination or whether it's some higher standard which some
22 courts have said.

23 If it needed to be litigated and decided, would it
24 likely result in a higher level of scrutiny? Yes. I think if I
25 argued anything else, I wouldn't have any credibility. But my

1 point is we don't need to do that here and until -- unless we're
2 going to assume the worst and say that we don't trust the people
3 at the Bureau or at the Department of Health & Welfare to come
4 up with a fair rule that is no more onerous than any other
5 person who wants a change is going to have to deal with, unless
6 we think we can't trust them, there's no reason to say I think I
7 want to go beyond that and put in some prophylactic rule that we
8 don't really need here.

9 I just think given the response that my clients have
10 provided here, a reasonable approach, I think they're not going
11 to be people who are trying to stop a transgender person from
12 going through this process. They're just going to want to have
13 a fair process just like they do for anyone else.

14 I can't tell you as I say what that process will be
15 until -- until the Court clears the way for them to create one
16 but I trust them to be fair. And I will say whatever policy
17 comes in place, there is a statutory process that's prescribed
18 in Idaho law for dealing with applications.

19 If a person applies for a change to a birth certificate
20 and that application is denied, that person has a right to
21 petition a court for judicial relief and to overturn that
22 decision. Of course that's way beyond where we are today. None
23 of that's occurred. There haven't been any applications from
24 either plaintiff and we haven't argued somehow that that creates
25 an exhaustion problem or anything in this case because we admit

1 we didn't -- there was -- it would be futile for them to have
2 submitted an application under the current rules.

3 But once a rule comes in place, once the Court clears
4 the way for my clients to put a rule in place, then they will
5 have those rights and they'll have a right -- if the
6 Department's treating them unfairly, they've got a right to go
7 to court and petition and say I want judicial review of this
8 decision. I think it's unfair. But until we get there, there
9 is really no ripe claim about what form of application should be
10 required.

11 COURT: There's I guess some information -- or not
12 information. There's a process for changes of paternity in the
13 existing rules --

14 MR. ZANZIG: That's right.

15 COURT: -- which gives me something to look at.

16 MR. ZANZIG: There are two possible changes with
17 paternity in the existing statutes and rules. One is if there
18 is a dispute about paternity and a court determines what the
19 paternity is, which happens sometimes, that court order then is
20 used to change the father on the birth certificate.

21 The other process that is permitted is the affidavit
22 process where a person can submit an affidavit admitting
23 paternity in a case and then will be added to a birth
24 certificate.

25 COURT: And I notice that didn't require any sort of

1 proof beyond the statements in the affidavit.

2 MR. ZANZIG: That is true. That's the way it works --
3 that is based on federal law -- a requirement in federal law
4 that says states must have that process available because
5 obviously there's a national interest in not having deadbeat
6 dads avoiding obligations to children and so that's why that
7 statute's on the books and that process for an affidavit of
8 paternity exists.

9 COURT: The clerk indicated you've exceeded your 30
10 minutes but I'll allow it because I'm -- I've been asking
11 questions so please continue.

12 MR. ZANZIG: Well, I don't really have much more to
13 say, Your Honor. In conclusion, again, we think it's
14 appropriate for the Court to enter a declaratory relief
15 declaring that birth certificate policy unconstitutional for the
16 fact that we have admitted there's no rational basis that would
17 substantiate it under the equal protection clause and that
18 injunctive relief would be appropriate prohibiting us from
19 enforcing that policy. And as amended, as I have indicated here
20 in argument to include the fact that if an application is made
21 under these circumstances and the change is made that it would
22 also be appropriate to say the statute that requires the name
23 change wouldn't be reflected so that it wouldn't be basically
24 outing a person that way. We understand that that -- that's one
25 of the harms that we're trying to avoid here and we have no

1 problem with that.

2 COURT: And the reason I made -- one of the reasons I
3 made reference to the paternity process that is allowed is
4 because the statute itself indicates that the amendment must not
5 be noted on the birth certificate and so I'm interested on that
6 -- that part of the statute comes from looking at federal law?

7 MR. ZANZIG: I can't tell you if the entire statute
8 does. That process of someone acknowledging paternity through
9 affidavit is one that is prescribed by federal law. I don't
10 have the cite on the tip of my tongue but if the Court's
11 interested, in fact I happen to have another case that's dealing
12 with that issue and have cited it in that case and I can provide
13 the citation to the Court about where that comes from.

14 COURT: Yeah. I would be receptive to that and just as
15 a supplemental authority that I will consider and I'm not sure
16 how relevant it is but I think it's -- at least my thought
17 process to date, it may be relevant.

18 MR. ZANZIG: Thank you.

19 COURT: So if you could submit that within the next
20 five days?

21 MR. ZANZIG: Easily done.

22 COURT: And then if the plaintiffs would like a
23 response, you can just let me know. Let Ms. Henderson know and
24 we'll -- you can respond just to the supplemental authority that
25 I've asked for.

1 MR. ZANZIG: And if you're interested, the case is
2 Ayala versus Barron pending before Judge Winmill. Thank you.

3 COURT: Thank you. Ms. Ingelhart.

4 MS. INGELHART: Thank you, Your Honor. I think we'll
5 just need a few minutes. I have a few things I want to touch
6 on. First -- and you hinted at this. The Court needs to
7 explain why there's no rational basis for the current policy.

8 The reason is because if you have a trans woman whose
9 gender identity is female, there's no rational basis for denying
10 her a birth certificate. That reasoning dictates what scope of
11 relief is appropriate.

12 I'm just going to jump around a little bit.

13 COURT: That's fine.

14 MS. INGELHART: Regarding the paternity affidavit that
15 we just discussed, it's my understanding that there's no genetic
16 testing required for that affidavit. There's no doctor's note
17 required for that affidavit. It's just a signature.

18 And there was also a fair bit of discussion about not
19 requiring something more onerous for a change than what would be
20 required for anyone else. But like I discussed before, this
21 isn't so much about a change but a correction. A gender marker
22 or a sex designation on a birth certificate is nothing more than
23 a best guess at birth for what someone's gender identity will be
24 based on stereotypes associated with genitalia. And in the case
25 of transgender people, that best guess is incorrect and

1 therefore the birth certificate is incorrect and needs to be
2 corrected. Not changed.

3 And so in the same way that there should be nothing
4 more onerous for transgender people than anyone else, that would
5 mean, according to defendants' reasoning, that transgender
6 people shouldn't face anything more onerous than those people
7 similarly situated to them to access a correct birth certificate
8 and that for a cisgender women is just that they are cisgender.
9 Or non-transgender women. Sorry.

10 Do you have any other questions for me, Your Honor?

11 COURT: I don't think I do. You both have done a good
12 job of answering my questions and I really appreciate both of
13 you and I don't think we have any other questions.

14 MS. INGELHART: Okay.

15 COURT: So with that, we'll take the motion under
16 advisement and we'll get a decision out and look forward to -- I
17 suppose we could just look at the case that's upstairs but,
18 Mr. Zanzig, it's probably better if you provide supplemental
19 authority to me.

20 MR. ZANZIG: I think that would be easier. I'm happy
21 to do it.

22 COURT: Okay. Thank you.

23 MS. INGELHART: Thank you, Your Honor.

24 COURT: Anything further at this point, Ms. Ingelhart?

25 MS. INGELHART: I just want to reiterate that this

1 Idaho birth certificate policy is discriminating against
2 transgender Idahoans and they are inhibited from participating
3 fully in society and --

4 COURT: Well, actually I do have another question and
5 it's really for both of you.

6 MS. INGELHART: Sure.

7 COURT: You know, Mr. Zanzig has been very straight
8 forward saying, you know, the State Vital Statistics are going
9 to go to work on this new rule one way or the other. I mean I'm
10 not trying to put words in your mouth. How long does it take to
11 get a new rule in place, Mr. Zanzig?

12 MR. ZANZIG: I believe that the Department would have
13 authority to put a temporary rule in place fairly quickly. You
14 know, a more formal permanent rule requires submission to the
15 legislature and approval by the legislature. I don't know that
16 depending on when we would get a judgment here that that's going
17 to happen this session. My best guess is a permanent rule
18 wouldn't come into place at the earliest until next year's
19 session because the legislature obviously here in Idaho has to
20 pass on the rules. But there is the power to put a temporary
21 rule in place and that could probably be done fairly quickly as
22 soon as there's a judgment that clears the way.

23 COURT: Within weeks or within several weeks or a
24 month?

25 MR. ZANZIG: I would think so.

1 COURT: Okay.

2 MR. ZANZIG: That seems reasonable. I don't know of
3 any kind of legal barrier that would take longer than that for a
4 temporary rule.

5 COURT: Where I'm going with that question is -- and
6 I'm not sure -- so I'd like to hear from both of you. Would
7 this Court have the ability to retain jurisdiction or authority
8 out three months or something like that or 60 days in order to
9 review a proposed temporary rule without agreement by both
10 parties to that?

11 MS. INGELHART: Your Honor, plaintiffs would be
12 amenable to that if we could then brief on the proposed rule.

13 COURT: Mr. Zanzig? And you can talk to your clients
14 if you want. I'm not sure I have that inherent authority but
15 that was one of the many thoughts I had was if I retained
16 jurisdiction and then reviewed at least the temporary rule or
17 new rule that again that might -- again, I don't want to go
18 beyond though my authority in the case.

19 MR. ZANZIG: I'm always loathe to tell a judge that she
20 doesn't have authority to do something. I don't think we would
21 have a challenge to that and so if the Court were proposing to
22 do that, obviously it helps us. If the Court didn't decide
23 anything here and just let the case sit, you could retain
24 jurisdiction forever. But we need a judgment to open the way
25 for us to be able to create a new policy and put it in place.

1 So I wouldn't oppose the Court saying it's going to
2 retain jurisdiction until it sees what this new policy looks
3 like. I think for all parties concerned, it would be a lot more
4 efficient way to resolve it and I'm not going to argue the Court
5 doesn't have authority to do that.

6 COURT: Okay. Thank you. Anything further, Ms.
7 Ingelhart?

8 MS. INGELHART: No. Thank you, Your Honor.

9 COURT: Mr. Zanzig?

10 MR. ZANZIG: No. Thank you.

11 COURT: Okay. The motion is under advisement. And
12 thank you for your arguments and your briefing and the Court's
13 in recess.

14 CLERK: All rise. The Court is adjourned.

15 (Proceedings concluded.)

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I, court-approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/ Tamara A. Weber

3/8/18

Signature of Approved Transcriber

Date

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