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**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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**JANE DOE,**

**Plaintiff,**

**CIVIL ACTION NUMBER:**

**-vs-**

**3:16-cv-08640-MAS-DEA**

**VINCENT T. ARRISI, et al.,**

**MOTION HEARING**

**Defendants.**

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Clarkson S. Fisher United States Courthouse  
402 East State Street  
Trenton, New Jersey 08608  
August 15, 2017

**B E F O R E:** HONORABLE MICHAEL A. SHIPP  
UNITED STATES DISTRICT JUDGE

**A P P E A R A N C E S:**

PAUL R. FITZMAURICE, PC  
BY: PAUL R. FITZMAURICE, ESQUIRE  
On behalf of the Plaintiff.

TRANS RESOURCE FOUNDATION (a/k/a "Trans-Help")  
BY: JULIE CHOVANES, ESQUIRE  
On behalf of the Plaintiff.

OFFICE OF THE ATTORNEY GENERAL, DIVISION OF LAW  
BY: FRANCESCO FERRANTELLI, JR.  
On behalf of the Defendants.

KEVIN BARRY, ESQUIRE  
On behalf of the Amici parties.

Certified as True and Correct as required by Title 28,  
U.S.C., Section 753  
/s/ Cathy J. Ford, CCR, CRR, RPR

1 THE DEPUTY COURT CLERK: All rise.

2 (Open court begins at 1:00 p.m.)

3 THE COURT: Please be seated. Good afternoon,  
4 Counsel.

5 MR. FITZMAURICE: Good afternoon, your Honor.

6 THE COURT: We are here in the matter of Doe  
7 v. Arrisi, Docket Number 16-8640.

8 May I have appearances of counsel, please.

9 MR. FITZMAURICE: Your Honor, Paul  
10 Fitzmaurice, counsel for Plaintiff. And with me is  
11 Julie Chovanes, who has been admitted *pro hac vice* in  
12 this matter; and Kevin Barry, counsel for amici in  
13 this matter.

14 MR. FERRANTELLI: Good afternoon, your Honor.  
15 Deputy Attorney General, Francesco Ferrantelli,  
16 Junior. With me at counsel table is Vincent Arrisi,  
17 one of the named Defendants from the Office of Vital  
18 Statistics.

19 THE COURT: Good afternoon to you as well.

20 The Court scheduled oral argument on the  
21 Defendants' Motions to Dismiss. The Plaintiff brings  
22 a three-count action arising out of a New Jersey  
23 statute's requirement that individuals seeking to  
24 change the sex on their birth certificate must first  
25 undergo Sexual Reassignment Surgery. The three counts

1 are: (1) violation of the Fourteenth Amendment's Due  
2 Process Clause; (2) violation of the Fourteenth  
3 Amendment's Equal Protection Clause; and (3) violation  
4 of the Americans with Disabilities Act. Defendants  
5 have moved to dismiss all three counts, and the United  
6 States has intervened in this matter.

7 This is Defendants' motion so I'd like to  
8 first hear from Defense counsel, after I'll hear from  
9 Plaintiff's counsel with a chance to respond; then, if  
10 necessary, we'll have Defendants have a very short  
11 reply.

12 With that, Mr. Ferrantelli, the floor is  
13 yours.

14 MR. FERRANTELLI: Thank you, Judge. Shall I  
15 approach the podium?

16 THE COURT: Wherever you feel comfortable.

17 MR. FERRANTELLI: I'll stay here, then. Thank  
18 you, Judge.

19 Your Honor, the complaint should be dismissed  
20 for failure to state a claim. Plaintiff does not  
21 challenge the fact that in New Jersey birth  
22 certificates are records of birth that record the  
23 factual circumstances of a person's birth, nor does  
24 Plaintiff challenge the fact that birth records only  
25 record physical, anatomical sexual attributes and are

1 completely silent regarding gender identity.

2 Birth certificates are simply not expressions  
3 of a person's gender identity, which is distinct from  
4 their physical sex. And, that's --

5 THE COURT: Let's start by clarifying the  
6 distinction between the two.

7 MR. FERRANTELLI: Yes, your Honor.

8 The term "sex," refers to, like I said, it's a  
9 person's physical attributes. It's biological. It is  
10 determinable, in the vast majority of cases,  
11 immediately at birth. The birth attendant looks at  
12 the baby and makes a determination and checks a box  
13 based on what the child's physical sex is.

14 Gender identity is something different.  
15 Gender identity is usually ascertained later in life,  
16 and that is a social construct. And, certain people  
17 identify with one gender or another. If you happen to  
18 identify with a gender that is consistent with your  
19 birth sex, that is called, you're a cisgendered  
20 person. I identify as a male. And I happen to have  
21 been born as a physical male, so I am a cisgender.

22 If you happen to identify with the other sex,  
23 with the other gender, then you are a transgender  
24 person. So these two concepts, while some are  
25 related, are actually different. And they both convey

1 different information. So, a birth certificate is  
2 only proof of the former. It's proof of your  
3 physical, anatomical attributes. And yet, Plaintiff  
4 asked the Court to find unconstitutional as state law  
5 that merely ensures that the physical, anatomical  
6 attribute remains accurate. The statute here does not  
7 prohibit Plaintiff, or anyone from doing anything, it  
8 simply provides an administrative process for folks  
9 who undergo Sexual Reassignment Surgery to obtain a  
10 new version of their birth certificate that reflects  
11 the updated sex, physical sex after surgery.

12 The law was passed in 1984 as a way to help  
13 people who undergo this surgery. Before the law was  
14 passed, the only remedy for folks who underwent Sexual  
15 Reassignment Surgery was to obtain an amended birth  
16 certificate that said, female corrected from male or  
17 vice versa. This law was passed to help people to  
18 allow them to obtain a birth certificate that  
19 otherwise looks original that reflects the person's  
20 new sex.

21 So, it was passed --

22 THE COURT: Does the law and the statute in  
23 any way reference or allude to gender?

24 MR. FERRANTELLI: It does not, your Honor.  
25 The law only refers to physical sex. Gender cannot be

1 changed via surgery. And, I don't think Plaintiff  
2 will disagree with that. So necessarily, since the  
3 statute is only about Sexual Reassignment Surgery, it  
4 necessarily only refers to sex. Birth certificates  
5 only record sex, so the statute is completely silent  
6 on gender.

7 Plaintiff asserts two Constitutional claims  
8 here, your Honor. As you summarized: Due Process and  
9 Equal Protection; neither of which states a claim.

10 Under substantive Due Process, there's no  
11 fundamental right that is burdened here. We contain  
12 detailed arguments in our brief. I'm not going to  
13 cite them verbatim; but, as we argued, Plaintiff lists  
14 an exhaustive list of rights, but it doesn't assert  
15 facts alleging how any of them are actually burdened  
16 here.

17 I think at the heart of the complaint is the  
18 allegation that there is a right to what Plaintiff  
19 views as an accurate birth certificate. But as we  
20 argue, there has never been recognized a right to an  
21 accurate birth certificate, first of all; and, second  
22 of all, even if the right did exist, your Honor, this  
23 statute does not burden it. Because as I explained, a  
24 birth certificate has no expression of gender  
25 identity. So, even though Plaintiff may identify as a

1 male and the birth certificate says female, because a  
2 birth certificate is not proof of gender identity, the  
3 birth certificate is accurate. So there is no  
4 fundamental right that's burdened here.

5 In the opposition brief Plaintiff seemed to  
6 focus on this idea that birth certificates are used to  
7 obtain other identification documents. But nowhere in  
8 the complaint are there any facts alleged showing the  
9 Court, or us, how Plaintiff has been denied access to  
10 another identification document because of this  
11 statute. The complaint has no detail on that,  
12 whatsoever.

13 In fact, the complaint does allege that  
14 Plaintiff is free to obtain a driver's license and  
15 free to obtain a passport without undergoing surgery  
16 and without obtaining a new birth certificate, so  
17 Plaintiff's own complaint completely undermines the  
18 substantive Due Process argument.

19 And because there is no fundamental right  
20 implicated, rational-basis review applies. And I  
21 didn't really see a -- any real argument against  
22 rational-basis review in the opposition brief. The  
23 state's interest in ensuring its own records --  
24 because that's what a birth certificate is, it is  
25 state record, the state's interest in ensuring its own

1 vital statistics are accurate is really beyond doubt.

2 And also, the state's interest in making it  
3 harder for folks, not transgender folks, but anybody  
4 to -- with bad motives to obtain multiple versions of  
5 vital documents is also well recognized. So there is  
6 no substantive Due Process claim here, your Honor.

7 Plaintiff contains a procedural Due Process  
8 argument. And I didn't see it anywhere in the  
9 complaint, but they mentioned it in there their  
10 opposition brief. Again, it's not a -- the fact that  
11 there is no interest in an accurate birth certificate  
12 means there is no property interest so -- and, as I  
13 said, it hasn't been burdened here, so there is no  
14 procedural Due Process claim either.

15 Moving on to Equal Protection, Judge.  
16 Initially, Equal Protection is not even implicated by  
17 this statute. This statute, as I mentioned earlier,  
18 it does not prohibit Plaintiff from doing anything.  
19 It applies to everybody. And all it does is it  
20 ensures that every single person's sex on the birth  
21 certificate is accurate. Everybody. So it applies to  
22 everybody equally.

23 The only classification that the statute makes  
24 is between males and females. People who are sexually  
25 born as male and people who are sexually born as

1 female. That's the only classification. That is a  
2 biological classification. The Supreme Court has  
3 ruled that such classifications that go to the very  
4 essence of the difference between the sexes does not  
5 even implicate Equal Protection. So, for that reason,  
6 the Equal Protection analysis doesn't even apply.  
7 But, even if the Equal Protection analysis did apply,  
8 Judge, the complaint fails to state a claim.

9           The law is basically neutral, so the analysis  
10 is whether the law is unconstitutional as applied.  
11 And, in order to find -- to make that finding, the  
12 Court would have to find that the law is applied with  
13 a discriminatory purpose. That comes from the *Doe v.*  
14 *Lower Merion School District* case that we cited in our  
15 brief. But there's no allegations here in the  
16 complaint whatsoever that this law was passed with or  
17 implemented with any discriminatory purpose.

18           On the contrary, the law was passed, as I  
19 mention, with the express purpose to benefit  
20 transgender folks who do undergo Sexual Reassignment  
21 Surgery. And the implication of the law is simply, is  
22 a simple application of the statute. So there's no  
23 suggestion here whatsoever that this law was passed  
24 with the discriminatory purpose, or is being applied  
25 with the discriminatory purpose.

1           Finally, Judge, there is the ADA count in the  
2 complaint. There's been a lot of briefing on this  
3 issue by Amicus and by the Federal Government. I  
4 would initially urge the Court that a lot of the  
5 issues that were raised, including the interpretation  
6 of the ADA and whether the ADA itself was  
7 unconstitutional, those issues don't even need to be  
8 reached by the Court because the statute does not  
9 discriminate. The *prima facie* ADA claim, as alleged  
10 here, requires there to be some discrimination by the  
11 government. As we mentioned, the statute does not  
12 classify impermissibly, it treats everybody exactly  
13 the same. So, if the Court accepts the state's Equal  
14 Protection argument, there is no need to go into the  
15 thorny issues raised by Amicus and the Federal  
16 Government and the Plaintiff in this case with regard  
17 to the ADA itself.

18           If your Honor has any more questions about the  
19 ADA, I'd be happy to answer them. But, other than  
20 that, the Court should dismiss the complaint for  
21 failure to state a claim.

22           THE COURT: Thank you. Let me hear from the  
23 Plaintiff.

24           MR. FITZMAURICE: Your Honor, Julie Chovanes  
25 will be arguing the case on behalf of the Plaintiff.

1 MS. CHOVANES: Your Honor, I'd like to go up  
2 to the podium.

3 THE COURT: Feel free.

4 MS. CHOVANES: Good afternoon, your Honor.

5 THE COURT: Good afternoon.

6 MS. CHOVANES: Defendants' counsel started  
7 their argument by saying sex and gender are different.  
8 And they said, Plaintiff is seeking relief because of  
9 her gender status. We don't necessarily agree with  
10 that, but we do want to point out that gender-based  
11 classifications quote, unquote, "are subject to  
12 intermediate scrutiny." Courts have used the terms  
13 interchangeably. And in this case, it certainly fits  
14 if Defendant wants to call this a matter of gender.

15 THE COURT: Well, I'm interested in your  
16 definition and how you distinguish between your  
17 definition of "sex" versus "gender"?

18 MS. CHOVANES: I don't know if there is a  
19 difference even based on a physical attribute because  
20 trans people are immutable. This is immutable what  
21 trans people are, and it's based on brain  
22 neuroanatomy, as we have pled.

23 THE COURT: In your papers, you don't seem to  
24 -- in your papers, I read them as you pretty much  
25 almost agreeing that when we're talking physical

1 anatomy, you're talking sex.

2 MS. CHOVANES: Oh, when you're talking  
3 physical anatomy, you're talking transgender. Because  
4 what this is is a brain neuroanatomy; that's physical.  
5 What the Defendants are talking about is external  
6 anatomy. They keep conflating the two terms. But  
7 that's not what we plead --

8 THE COURT: I don't want to conflate the two.  
9 I want to speak to the statute. The statute that  
10 you're challenging uses the word "sex." And I'm  
11 asking you, if there is a difference between "sex" and  
12 "gender"?

13 MS. CHOVANES: For purpose of this motion, I  
14 don't know, your Honor, we haven't pled that. What we  
15 do want to point out is that the state has, in other  
16 forms, used the word "gender" as a synonym for sex,  
17 but that's beyond a 12(b)(6) motion, your Honor.

18 THE COURT: But, it's also beyond the statute  
19 that's at issue here. The statute that we're looking  
20 at and focusing on is the statute as it pertains to  
21 the biostatistics and driver's licenses, and more  
22 specifically, N.J.S.A. 26:8-40.12. And so, I'm only  
23 pertaining to that statute, the word "sex" is used.

24 MS. CHOVANES: The word "sex" is used, and to  
25 the extent that indicates external anatomical, sex

1 characteristics, basically, infant genitalia; because  
2 you can't tell if a woman has breasts or not or any  
3 secondary sex characteristics. But in this case, the  
4 state has used that term to mean external anatomical  
5 genitalia.

6 THE COURT: And, do you agree with that?

7 MS. CHOVANES: The state can define its terms  
8 anyway it want. We don't think the law defines them  
9 that way.

10 THE COURT: But, my question to you is, are  
11 you distinguishing, as it to pertains to this  
12 particular statute -- let me finish, the way the state  
13 has defined sex?

14 MS. CHOVANES: With regard to this particular  
15 statute, the state has defined sex in a certain way;  
16 and that is their definition. What we are also  
17 alleging is that there is no provision for gender in  
18 the birth certificates.

19 So, for example --

20 THE COURT: Are you suggesting that there  
21 should be a provision for gender?

22 MS. CHOVANES: Absolutely. All they have to  
23 do is change a checkbox. In other words, sex should  
24 mean gender at any particular point if a person  
25 applies to change their birth certificate.

1 THE COURT: But how would gender -- if I'm  
2 understanding the definition of gender, how would  
3 gender be assessed at birth?

4 MS. CHOVANES: Gender can only be assessed at  
5 birth due to the limitations of medicine based on  
6 external anatomical infant genitalia. And we feel  
7 that is an incorrect designation, perhaps accurate for  
8 the time of birth, but later in life, totally  
9 disregards the needs of a certain classification of  
10 people.

11 THE COURT: So then, perhaps, that's why it's  
12 not on the birth certificate?

13 MS. CHOVANES: I'm sorry, sir.

14 THE COURT: Gender is not on the birth  
15 certificate, right?

16 MS. CHOVANES: Correct, sir.

17 THE COURT: It's sex.

18 MS. CHOVANES: Correct?

19 THE COURT: So if we're asking sex, or what  
20 the designation of the sex is on the birth  
21 certificate, it means physical anatomy?

22 MS. CHOVANES: Correct, sir, external  
23 genitalia is all it means. It doesn't mean physical  
24 anatomy because that includes brain anatomy.

25 THE COURT: Okay. So external --

1 MS. CHOVANES: Infant genitalia, that's all it  
2 means. And at that point, the state can place a  
3 checkmark next to male or female when a baby is born.  
4 But the problem with that, of course, is that there is  
5 no recognition of a gender class. So, in  
6 contradiction to the Department of Health, the  
7 defendant here, specific instructions, the state is  
8 ignoring about 30,000 trans people a year and is  
9 claiming those are either male or female; but they  
10 aren't, they're trans. And the state makes no  
11 provision for counting them. We can't even tell how  
12 many there are. Because if the purpose --

13 THE COURT: I'm getting lost. I want to make  
14 sure I'm staying with you with this argument.

15 You're saying on the birth certificate, at the  
16 time of birth, there should be a space on the birth  
17 certificate to indicate gender?

18 MS. CHOVANES: There could be, but that's not  
19 exclusive. We're not exclusively -- I'm sorry.

20 THE COURT: What's your perfect world? What's  
21 your argument in terms of how you believe it should be  
22 on the birth certificate?

23 MS. CHOVANES: At the time of birth, it is  
24 certainly acceptable if that is the state's practice  
25 to count infant genitalia. What is not acceptable is

1 there is no provision for issuing a birth certificate  
2 that identifies the individual's gender. Such --

3 THE COURT: At the time of birth?

4 MS. CHOVANES: No, later in life. For people  
5 who have not had gender confirmation surgery --

6 THE COURT: This case is about birth  
7 certificates, right?

8 MS. CHOVANES: Yes, sir. And a birth  
9 certificate is a fundamental-identification document  
10 that follows an individual through its life. So that  
11 black mark that determines -- that limited and we feel  
12 unconstitutional determination of sex is wrong. And  
13 it's well supported recently in the *Bergfeld* case by  
14 the Supreme Court, as well as the *Pavan* case by the  
15 Supreme Court that a birth certificate has these  
16 functions. And we are asking the state recognize the  
17 birth certificate's sex function, which is  
18 identification later in a person's life.

19 THE COURT: Okay.

20 MS. CHOVANES: Gender identification.

21 But again, sir, just to emphasize this point,  
22 we do not feel the definition of "sex" or "gender" is  
23 relevant at this point, because it's a factual matter.  
24 The state produced one form saying "sex"; we produced  
25 another form saying "gender" by the state in the

1 papers. That evidence is --

2 THE COURT: This is where, again, I want to  
3 make sure we're staying on the same page. We're not  
4 talking about forms. We're talking about the statute.

5 Now, I understand there is a form that you're  
6 producing that indicates gender, but that's not what's  
7 in front of the Court. What's in front of the Court  
8 is whether or not a statute is unconstitutional.

9 MS. CHOVANES: Yes, sir. And what --

10 THE COURT: Forms are handled through the  
11 regulatory process and administrative law.

12 MS. CHOVANES: I understand, your Honor. But  
13 the state included that form in their response to --  
14 or in their motion as evidence that sex doesn't mean  
15 gender. And then we, in our response, produced the  
16 form that the state uses to change birth certificate,  
17 and we noted that in that form it says gender, it  
18 doesn't say sex. To the extent the state produces  
19 evidence that this is what birth certificates mean by  
20 sex, that is fine, if we're going to limit the birth  
21 certificate to the infant's birth, the moment of the  
22 infant's birth. Subsequently, as an individual gains  
23 consciousness or -- or as life goes on, it may well  
24 understand, as Plaintiff did here, that their gender  
25 identity is different. And if they have a document

1 that contradicts -- contradicts who they are, which is  
2 the birth certificate, and they can't change that  
3 because they can't afford GCS, which I'm using as SRS,  
4 it's a less objectionable term, sir, but they can't  
5 use that birth certificate because essentially they  
6 may have contradictory forms and identifications; so  
7 whatever the state wants to do with their form, that's  
8 fine. And if the purpose is to count people, that's  
9 fine, but the state is violating its own purpose,  
10 which by *Romer*, even under a rational-basis review is  
11 invalid and unconstitutional, even on a rational-basis  
12 level.

13 Your Honor, specifically again, we have no  
14 issue with the state counting anyone they want. We're  
15 just saying that we need a count of us, because the  
16 state violates its own policy, the state violates the  
17 law against discrimination in New Jersey. Governor  
18 Christie has shown animus towards trans people in  
19 Plaintiff's situation. Without counting, we're  
20 invisible people. And if the statute here doesn't  
21 count us, then we ask for such relief as the Court may  
22 deem appropriate, given the fact that we're uncounted.

23 THE COURT: Is there another way that this  
24 count can occur outside of the birth certificate?

25 MS. CHOVANES: Trans people have to hide, your

1 Honor. It's very difficult to find out anyone who is  
2 trans.

3 THE COURT: I'm not sure how even with the  
4 birth certificate, if it were amended, how you would  
5 still do this count? How would the count occur?

6 MS. CHOVANES: Well, if -- your Honor, if  
7 30,000 people a year -- I mean, if New Jersey has  
8 100,000 people a year born, males and females, let's  
9 assume 50 percent female, 50 percent male, that's  
10 50,000 people. Let's say 5,000 of them are trans.  
11 They're uncounted. And that's every single year.

12 THE COURT: Agreed. But how would the birth  
13 certificate and any change to the birth certificate,  
14 we're talking at the time of birth, be able to perform  
15 that function?

16 MS. CHOVANES: Because at the point -- at the  
17 time that a transgender person applies for a different  
18 birth certificate without --

19 THE COURT: That's not at the time of birth,  
20 though.

21 MS. CHOVANES: No, sir. That's later in life.  
22 So it has to be a dynamic thing. And in fact, that's  
23 what the vital records does now: death certificate,  
24 they match up with birth certificate. I mean, a birth  
25 certificate is not a dead document. It exists

1 throughout the bearer's life. And in this case, it  
2 gives the trans person a Scarlet letter A.

3 We have briefed much of this, as counsel  
4 stated. I want to emphasize a couple cases, though,  
5 your Honor, that defense didn't address in their  
6 reply, even though they should have. Because one of  
7 them contradicts the Defendants' citation of the  
8 *University of Pittsburgh* case in the Western District.  
9 There is a more recent case called *Evancho* from the  
10 Western District. It came out in March of this year.

11 And in that case, the judge specifically  
12 distinguished the Pittsburgh case on two grounds: (1)  
13 it was no longer good law, because of the Seventh  
14 Circuit's decision in another case; and the *Evancho*  
15 court also held that that the very limited aspects of  
16 *Johnson*, the *Pittsburgh* case should stay within that  
17 because the judge even in *Johnson* noted that in fact  
18 these things are changing. These things have come to  
19 new realizations of social injustice. And so, with  
20 regard to tran status, *Evancho* said, the *Pittsburgh*  
21 case, the *Johnson* case is wrong. It is an  
22 intermediate scrutiny level. And on that point --  
23 excuse me. Excuse me.

24 On that point, the Court noted that any court,  
25 when facing sort of a new classification, and in this

1 case our classification is gender, trans people,  
2 transgender people who have not had GCS, in this  
3 case -- and the Court said, well, you have to follow  
4 for four-factor test. And that *Evancho* case, most  
5 recently in *Pittsburgh*, followed exactly the analysis  
6 in that case.

7 The Southern District of New York case, which  
8 we cited in our brief, which found in fact that trans  
9 people are -- discrimination against trans people is  
10 subject to an intermediate scrutiny analysis. Excuse  
11 me, your Honor.

12 I also would like to point out, your Honor,  
13 that the state sort of attacks fundamental rights  
14 saying we haven't adequately pled them. I don't know  
15 what the state means by that. We've pled, certainly,  
16 the elements of Equal Protection, Due Process, and ADA  
17 violation. We have pointed out that the statute calls  
18 for us to undergo surgery of a most radical kind, that  
19 not all of us can do. It seems to me, your Honor,  
20 that the fundamental rights are well laid out in our  
21 complaint and in our brief. And most of them descend  
22 from direct Supreme Court precedent.

23 And again, your Honor, I want to note, even on  
24 the question of birth certificates, *Obergefell*, the  
25 Supreme Court case specifically addressed birth

1 certificates and how fundamental they are. And in  
2 fact, in *Obergefell* and *Pavan*, the birth certificate  
3 can change later in life precisely to recognize in  
4 those cases gay parents or other similar parents; and  
5 that's what we're asking for here.

6 The state has also alleged fraud. I don't  
7 know how this is fraudulent. The state has plenty of  
8 procedures. In fact, they go at length in one of them  
9 to change birth certificates for inaccuracies. That's  
10 precisely what this is. It's a change in a birth  
11 certificate because of an inaccuracy. In this case  
12 the inaccuracy is failing to recognize thousands of  
13 people in New Jersey. It's just not right.

14 As far as damages go, sir, I just want to  
15 touch on that, briefly. Both the Supreme Court  
16 noted -- the Supreme Court in the *Memphis v. Stachura*  
17 case, 477 U.S. 299; and in *U.S. v. Georgia*, 546 U.S.  
18 151, both of those cases stand for the proposition  
19 that in 1983 case, the *Memphis* case, damages,  
20 compensatory and punitive damages are a species of  
21 tort. I'm sorry. 1983 actions are a species of tort  
22 action and, therefore, damages are available.

23 And in the ADA, there's a specific statement  
24 as well in *U.S. v. Georgia*, that Title II creates a  
25 private cause of action for damages against the state

1 that violate the Fourteenth Amendment. And this is a  
2 Title II case. You're the ADA, your Honor. So we're  
3 arguing that damages do exist on the authority of the  
4 Supreme Court.

5 I have nothing else, your Honor.

6 THE COURT: Thank you.

7 Mr. Ferrantelli, you get the last word, it's  
8 your motion. Anything on reply?

9 MR. FERRANTELLI: Yes. Thank you, Judge. I  
10 just had a couple of points.

11 A lot of the opposition is focused on the  
12 nomenclature between sex and gender. And your Honor  
13 was absolutely correct to -- in stating that we need  
14 to remember that we're focused on the statute here  
15 that deals specifically in birth certificate context  
16 of what happens when a child is born. So we use the  
17 term "physical" really to describe the external  
18 genitalia. And that's what we consistently meant the  
19 entire time.

20 So I don't think that the fact that gender --  
21 the sciences involving on gender and, you know, may be  
22 linked to some biological processes in the brain,  
23 that's not what we're saying. We're saying that what  
24 the sex designation actually says on a birth  
25 certificate, it is a record of what the person was

1 born as, that's what we're saying. So whether you  
2 want to call it physical or external, it is what it  
3 is. And it's not the same as gender identity, which  
4 may be determined later in life.

5 Counsel said that --

6 THE COURT: Any credibility or any credence to  
7 counsel's argument that the birth certificate is used  
8 for something beyond merely recording birth, that it  
9 is in fact a form of identification upon which you get  
10 other forms of identification in which this has a *de*  
11 *facto* way of becoming a Scarlet letter, so to speak,  
12 for a person in the trans community?

13 MR. FERRANTELLI: I'm glad you mentioned that,  
14 Judge.

15 We've heard that many times, both in the  
16 briefs and here today, this conclusory statement that  
17 birth certificates are -- you know, follow people  
18 throughout their lives and that they somehow prohibit  
19 them from obtaining other documents.

20 What we don't have are any factual allegations  
21 showing that's the case. Plaintiff hasn't alleged  
22 that she tried to obtain some other identification and  
23 could not do so because her birth certificate said  
24 that she was born as a male. She never alleges that.  
25 What she does allege is that she can go and get a

1 driver's license. She can go and get a passport  
2 without obtaining a new birth certificate. And the  
3 reason for that is very simple. Birth certificates  
4 are not proof of a person's gender identity.

5 A driver's license might be. You know, when  
6 you get pulled over, you show a cop your driver's  
7 license and he looks at the picture and he compares  
8 the two, so there might be some value there to having  
9 the gender identity consistent. Because if the gender  
10 on the driver's license says female, but you look --  
11 you look to a lay person as a male, then that might  
12 create problems. So there is an interest there for  
13 people who want to obtain a gender-correct driver's  
14 license.

15 Same thing with passports. You go through  
16 airport security. They're looking at your picture.  
17 They're looking at what the gender on the passport  
18 says and they're comparing the -- you're standing in  
19 front of them, and they're looking at you.

20 A birth certificate is not like that. There  
21 is no allegation that a birth certificate is ever used  
22 in that way. It's simply not evidence of a person's  
23 gender identity, and it's not used that way. And  
24 there's certainly no allegations that that's the case.  
25 So without any allegations that, you know, explaining

1 that conclusory statement or showing that the right to  
2 express themselves is burdened in any way, the  
3 complaint fails to state a claim.

4 THE COURT: And then finally, too, another  
5 question, a point brought up by Plaintiff, is that,  
6 has the state conflated and used interchangeably the  
7 words "gender" and "sex" even in its own forms where  
8 one is supposed to submit pursuant to this very  
9 statute?

10 MR. FERRANTELLI: Judge, so the form being  
11 referenced is the REG 59 form that is on -- that is  
12 on the Department of Health's website. That's the  
13 form that's used pursuant to the statute if someone  
14 undergoes a Sexual Reassignment Surgery, they have to  
15 fill out this form and they submit it with the proof  
16 and then the state issues a new birth certificate.  
17 That's the form you're talking about, right?

18 THE COURT: The form says "gender."

19 MR. FERRANTELLI: The form uses the term  
20 "gender," but we can't forget the context on the top  
21 of it, it says, Sexual Reassignment Surgery, and it's  
22 talking about birth certificates. So, even though --  
23 it was a mistake on the form. It used the word  
24 "gender" improperly. The context is beyond clear that  
25 what it's really referring to is, again, that external

1 genitalia because that's the only thing that tends to  
2 change via surgery. And we're talking about birth  
3 certificates.

4 And one final note, Judge, we're actually glad  
5 that Plaintiff brought that to our attention, because  
6 we since amended the form. And if you go to the  
7 website now, it uses the proper terminology. It uses  
8 the term "sex" throughout.

9 So --

10 THE COURT: Do you care to respond to  
11 Plaintiff's argument about -- I guess it's somewhat of  
12 a census, of being able to count that gender, I guess  
13 should be somehow or another recorded either through  
14 birth certificate or otherwise?

15 MR. FERRANTELLI: Well, I think your Honor  
16 kind of, in your question, kind of touched upon it.  
17 When a person is born, there's simply no way of  
18 ascertaining what the person's gender is. So, birth  
19 attendants whether the nurse or doctor, they check off  
20 the box based on the person's genitalia. And that's  
21 how it's counted.

22 If a birth certificate is amended for any  
23 reason later in life, that's after the fact and that  
24 won't be counted with regard to the statistics for the  
25 births of any given year. So I don't really

1 understand the argument regarding counting. I'm not  
2 sure exactly how the census bureau counts. How they  
3 divide people up and whether they take -- I know they  
4 count people by sex. I don't know if they also count  
5 people by transgender. But that's a census bureau  
6 issue. And again, we can't forget the context here.  
7 This is a constitutional challenge to the statute.  
8 And all the statute says is, if you want to change  
9 your birth certificate, if you want to change what the  
10 birth certificate says about your physical external  
11 genitalia, then you actually have to change that  
12 physical external genitalia and give us some proof.  
13 That's all it says. So I don't really quite  
14 understand the point regarding the counting, but I can  
15 say that certainly it's not in the complaint; and the  
16 complaint does not allege any facts whatsoever showing  
17 that any rights have been violated.

18           And another point that just came to mind is  
19 that I'm not even sure if being counted as a  
20 transgender person counts as a fundamental right to  
21 begin with. So if that's not the case, then it really  
22 doesn't get Plaintiff anywhere in her argument.

23           Finally, Judge, there was a point made about  
24 fraud. And I just want to be clear that we're not  
25 suggesting that transgender people are going to commit

1 fraud if they can change their birth certificates back  
2 and forth. That is not at all what we're suggesting.

3 We know that there is a cottage industry out  
4 there of fraudsters who assume people's identities and  
5 steal people's identities and they exploit the system  
6 as much as they possibly can in order to do that, both  
7 to defraud government programs, both to defraud credit  
8 card companies, that's why the birth certificate  
9 statute require substantive proof before allowing any  
10 change. If you want to change the name on your birth  
11 certificate, you have to produce a court order showing  
12 that your name changed. You need to publish it in the  
13 newspaper. There is a whole system in place to  
14 prevent the creation of duplicate birth certificates  
15 for one person.

16 And that's what we're talking about here.  
17 We're not talking about transgender people committing  
18 fraud. We're talking about fraudsters committing  
19 fraud. And it can be anybody, and it can happen to  
20 anybody.

21 And, if your Honor has no further questions,  
22 we'll rest.

23 THE COURT: Okay.

24 MR. FERRANTELLI: Thank you.

25 THE COURT: With that counsel, I'm going to

1 take a short recess. It's 1:35. We're going to  
2 resume at 2 o'clock. At that time, I'll be back with  
3 my decision.

4 THE DEPUTY COURT CLERK: All rise.

5 (Recess at 1:35 p.m.)

6 THE DEPUTY COURT CLERK: All rise.

7 (Open court begins at 2:10 p.m.)

8 THE COURT: Please be seated.

9 We're back on the record.

10 Thank you for your arguments today, Counsel.  
11 The Court has considered the parties' submissions and  
12 today's oral arguments, and is prepared to enter a  
13 decision on the record.

14 For the sake of time, I am not going to read case  
15 references, footnotes, and citations.

16 When considering a motion to dismiss for  
17 failure to state a claim pursuant to Rule 12(b)(6), a  
18 district court conducts a three-part analysis.  
19 *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011).  
20 "First, the court must 'tak[e] note of the elements a  
21 plaintiff must plead to state a claim.'" *Id.* (quoting  
22 *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009)). Second,  
23 the court "must accept all of the complaint's  
24 well-pleaded facts as true, but may disregard any  
25 legal conclusions." *Fowler v. UPMC Shadyside*, 578

1 F.3d 203, 210-11 (3d Cir. 2009). Third, once the  
2 well-pleaded facts have been identified and the  
3 conclusory allegations disregarded, a court must  
4 determine "whether the facts alleged in the complaint  
5 are sufficient to show that the plaintiff has a  
6 plausible claim for relief." *Id.* at 211 (quoting  
7 *Iqbal*, 566 U.S. at 679). A complaint must contain  
8 sufficient facts to "put the defendant on notice of  
9 the nature of the plaintiff's claim." *In re Ins.*  
10 *Brokerage Antitrust Litig.*, 618 F.3d 300, 320 n.18 (3d  
11 Cir. 2010) (citing *Bell Atl. Corp. v. Twombly*, 550  
12 U.S. 544, 565 n.10 (2007)). It is the defendant's  
13 burden to show that no claim has been presented.  
14 *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir.  
15 2005) (citing *Kehr Packages, Inc. v. Fidelcor, Inc.*,  
16 926 F.2d 1406, 1409 (3d Cir. 1991)).

17 After hearing the parties' oral arguments, the  
18 Court notes that the issues raised today were somewhat  
19 different from the arguments articulated in the  
20 parties' papers and were different from what was  
21 specifically pled in the Complaint. Today's arguments  
22 certainly raised some important issues of policy. The  
23 Court, however, is bound by the allegations in the  
24 Complaint. Here, the Court finds that the Complaint  
25 does not adequately plead claims under the Due Process

1 Clause, Equal Protection Clause, and the Americans  
2 with Disabilities Act. Although Plaintiff pleads that  
3 the alleged injuries arise from Plaintiff's inability  
4 to amend the "gender" on the birth certificate, the  
5 Complaint does not plead whether the birth certificate  
6 lists Plaintiff's "gender," as opposed to Plaintiff's  
7 "sex." Although the Complaint generally references  
8 the deficiency in Plaintiff's birth certificate as  
9 relating to "gender," (see, e.g., Compl. ¶ 67), it  
10 does not appear to the Court that Plaintiff alleges  
11 that "gender" is the actual label for the category as  
12 stated on Plaintiff's birth certificate. Plaintiff's  
13 Opposition Brief similarly states that Plaintiff's  
14 birth certificate lists Plaintiff's "sex" and not  
15 "gender." (See Pl.'s Opp'n Br. 5 ("Jane Doe wants to  
16 change the sex listed on her New Jersey birth  
17 certificate from male (her sex at birth) to female.")  
18 (emphasis added).) Moreover, the statute that  
19 Plaintiff challenges, N.J.S.A. 26:8-40.12, governs the  
20 amendment process for changing the "sex" on the birth  
21 certificate and not the "gender."

22 Based on the Court's review of the Complaint  
23 and the parties' submissions, the Court finds that the  
24 Complaint does not contain adequate allegations  
25 supporting Plaintiff's argument that Plaintiff's

1 inability to "amend" the "gender" on the birth  
2 certificate, where currently only the "sex" is listed,  
3 constitutes a violation of the federal Constitution  
4 and the ADA. The Court does not reach a determination  
5 as to the legal definitions of "sex" and "gender."  
6 Rather, the Court finds that the Complaint does not  
7 adequately address the differences or similarities  
8 between the two terms in construing the challenged  
9 statute and Defendants' alleged conduct. Moreover,  
10 the Court does not reach the merits of Plaintiff's  
11 arguments under the Due Process Clause, Equal  
12 Protection Clause, or the ADA, but rather decides the  
13 matter based on Plaintiff's deficient pleadings. At  
14 minimum, the Complaint must indicate the specific  
15 contents of Plaintiff's birth certificate along with  
16 the precise terminology used, whether it be sex or  
17 gender. Further, especially given Plaintiff's  
18 acknowledgment of the difference between the two terms  
19 in the opposition papers and at oral argument,  
20 Plaintiff must identify the precise injunctive relief  
21 Plaintiff seeks as it relates to those two terms in  
22 order to provide Defendants with proper notice of  
23 Plaintiff's claims -- such as, whether Plaintiff is  
24 requesting an additional gender designation in  
25 addition to sex on the birth certificate, or whether

1 Plaintiff seeks to amend the "sex" designation.  
2 Further, if Plaintiff seeks to plead that the birth  
3 certificate's "sex" designation encompasses "gender"  
4 in some manner, Plaintiff must set forth the factual  
5 allegations that support Plaintiff's claim and may not  
6 amend the Complaint through opposition papers on a  
7 motion to dismiss. Here, Plaintiff attached numerous  
8 exhibits to the Opposition Brief, some of which  
9 consist of factual allegations that were never  
10 incorporated into the Complaint. (See Pl.'s Opp'n Br.  
11 Exs. A-E, ECF No. 17-2.) Parties, however, may not  
12 amend pleadings by way of opposition briefs. See  
13 *Stapperfenne v. Nova Healthcare Adm'rs, Inc.*, No.  
14 05-4883, 2006 WL 1044456, at \*3 (D.N.J. Apr. 17, 2006)  
15 (refusing to consider exhibits attached to the  
16 plaintiffs' opposition papers on a motion to dismiss).

17 For these reasons, the Court grants  
18 Defendants' Motion to Dismiss without prejudice as to  
19 all Counts and with leave to file an amended  
20 complaint.

21 An order consistent with this decision will be  
22 entered by the Court.

23 With that, Counsel, that is all that I have  
24 for today. Thank you.

25 MS. CHOVANES: Thank you, your Honor.

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THE DEPUTY COURT CLERK: All rise.  
(Court concludes at 2:17 p.m.)