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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JANE DOE,

Plaintiff,

-vs-

VINCENT T. ARRISI, et al.,

Defendants.

CIVIL ACTION NUMBER:

3:16-cv-08640-MAS-DEA

Telephone Conference

Clarkson S. Fisher United States Courthouse
402 East State Street
Trenton, New Jersey 08608
February 7, 2019

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: STEPHEN J. SLOCUM, Deputy Attorney General
On behalf of the Defendants.

Certified as True and Correct as required by Title 28, U.S.C.,
Section 753

/s/ Cathy J. Ford, CCR, CRR, RPR

1 (Telephone conference begins at 9:59 a.m.)

2 THE COURT: Good morning, Counsel.

3 COUNSELS: Good morning, your Honor.

4 THE COURT: This is the matter of Doe v. Arrisi,
5 Docket Number 16-8640.

6 Who's on the line for the plaintiff?

7 MS. CHOVANES: Julie Chovanes and Paul Fitzmaurice.

8 THE COURT: Okay.

9 MR. FITZMAURICE: As local counsel for plaintiff,
10 Jane Doe.

11 THE COURT: Okay. And who's on for the defendants?

12 MR. SLOCUM: Good morning, your Honor.

13 Deputy Attorney General --

14 (Court reporter asks for clarification.)

15 THE COURT: Mr. Slocum, would you enter your
16 appearance again. Keep your voice up. We're on the record.

17 MR. SLOCUM: Good morning, your Honor.

18 Deputy Attorney General, Stephen Slocum, on behalf of the
19 defendants.

20 THE COURT: And is there anyone else on the line
21 today?

22 Okay. Hearing no one.

23 Well, folks, look. I wanted to have this telephone
24 conference today to clarify exactly where we stand in this
25 matter and to make sure that we are all on the same page as to

1 what exactly is still open in this matter since the passing of
2 the New Jersey statute.

3 So what I'd like to do is just hear from both sides
4 as to where we are, and then let's talk about where we go from
5 here.

6 Let me start by hearing from counsel for the
7 plaintiff, and then I'll hear from defense counsel.

8 MS. CHOVANES: Good morning, your Honor.

9 Where we are, first of all, as a procedural matter,
10 is we've had three motions pending. There is the defendants'
11 motion to dismiss; there's our motion for a declaratory
12 judgement/summary judgment; and there's the *amici* motion
13 for -- to be heard. But that may not be accurate exactly.

14 So those are the three motions pending. The --

15 THE COURT: Okay.

16 MS. CHOVANES: Yes. Sorry.

17 THE COURT: But, I guess, my question is, after the
18 passing of the -- we had put this matter off pending the
19 legislative process. And I thought, to some degree, that the
20 legislation would make moot some of these pending motions, so
21 I'd like you to address that.

22 MS. CHOVANES: Okay. We do agree the legislation has
23 made moot the defendants' motion to dismiss. That was based
24 on a hypothetical now and based on an old statute.

25 The part of it that also could be denied on the

1 merits is the defendants' denial of the plaintiff's right to a
2 gender accurate birth certificate.

3 Because I took the letter from counsel of February 1
4 to the Court last Friday -- I think it's 102. We took that
5 letter to be a concession that plaintiff is to have -- is
6 supposed to have a gender accurate birth certificate.

7 That, in combination with the undisputed facts that
8 were the subject -- or that were attached to our motion to
9 dismiss and never objected to, means that our motion for
10 declaratory judgement and summary judgment should be granted.

11 So that's where we believe we are.

12 And, by the way, there are claims for damages
13 throughout the case. And counsel keeps saying there aren't,
14 but that's just wrong.

15 THE COURT: Okay. Well, first, let's talk about the
16 declaratory judgement and the summary judgment.

17 Tell me exactly, if the legislation has passed and
18 there is really no more dispute over the entitlement, what is
19 it that you are seeking with regard to the declaratory
20 judgement?

21 MS. CHOVANES: Your Honor, I'm going to refer to the
22 proposed order, which is Docket Number 98-3, that was attached
23 to our summary judgment motion.

24 THE COURT: Okay. Well, that's nice. But I'd like
25 to hear from you as to what it is that you want.

1 MS. CHOVANES: Right. I just -- well, what we want
2 is the first two paragraphs -- or first three paragraphs
3 granted.

4 Number 2 specifically reads: Plaintiff's motion for
5 declaratory judgements against defendants is granted, and
6 Plaintiff Jane Doe has the immediate right to a gender
7 accurate birth certificate and ancillary relief, and
8 defendants are to issue her such within five days.

9 Now that is established, right now, that she has that
10 right. But, oddly enough, your Honor, it's still under
11 dispute. It's still under dispute because their motion to
12 dismiss is still live, as is their opposition to our summary
13 judgment motion.

14 And, as you are aware, mootness, it goes -- they're
15 proposing mootness here goes to the whole case, which is
16 incorrect as well. And, frankly, it makes no sense, your
17 Honor.

18 What we're looking for is the establishment of a
19 right to have a gender accurate birth certificate. That's
20 been in our case since Day 1.

21 It's now established we have that right. It's not
22 moot because they're still protesting. They're still opposing
23 our right. So define "not moot."

24 THE COURT: Okay. Let me hear from defense counsel.

25 Mr. Slocum, let me hear from you.

1 MR. SLOCUM: Good morning, your Honor.

2 From defendants' position, and, candidly, it appears
3 the case is done. Plaintiff wanted the law changed; the law
4 is changed.

5 Plaintiff wanted the -- an amended birth certificate;
6 plaintiff is free to get that at any time. Provide the form,
7 confirm the address, confirm the -- what fees would apply.
8 There is no bar, at all, to plaintiff's submitting the form
9 and amending the birth certificate and receiving a changed
10 birth certificate.

11 So, from that -- as a starting point, it's very
12 unclear how the case can go forward.

13 With regard to the -- to counsel's claim that we're
14 still opposing, again, that simply isn't true. The law is
15 changed. Plaintiff can get an amended birth certificate by
16 submitting the form. There's no bar to that at all. The case
17 seems very clearly moot.

18 The relief sought in the declaratory judgement seeks
19 to declare prior statutory language that no longer exists, to
20 declare that language unconstitutional or unlawful. That is
21 basically moot.

22 THE COURT: Okay.

23 Let me move on and hear from you, Mr. --

24 MS. CHOVANES: Your Honor, could I --

25 THE COURT: Wait. Wait, Ms. Chovanes.

1 MS. CHOVANES: Okay.

2 THE COURT: Let me hear from you as it relates to
3 damages, Mr. Slocum.

4 MR. SLOCUM: Certainly, your Honor.

5 With regard to damages, it's been raised multiple
6 times in the briefs.

7 So in each of the motions to dismiss, there was clear
8 briefing on why, on the merits, plaintiff was not entitled to
9 any damages. I do not believe that the opposition to those
10 briefs has ever shown an entitlement.

11 But then, as to the issue of appearing to have waived
12 or abandoned the claim, again, this is in the motions noted --
13 in the motion for summary judgment, as counsel just noted,
14 Number 98-3, Docket Number 98-3, in that order, includes no
15 damages. We've noted that in our briefs: Their opposition
16 brief and reply brief. They didn't contest that fact. So
17 even if --

18 And, certainly, if plaintiff is asserting today that
19 no -- they have not abandoned their claim for damages, there's
20 still no entitlement to damages. There's still -- they still
21 haven't shown any entitlement to money damages.

22 If we want to proceed, then, with just the issue of
23 money damages, I don't believe there would be individual
24 standing for that, as the claims -- as, again, the claims to
25 the underlying change to the law or demand for which you use

1 the birth certificate, those are moot. There is no individual
2 standing for that, so how can there be money damages without a
3 case?

4 THE COURT: Okay.

5 Ms. Chovanes, you want to reply?

6 MS. CHOVANES: Yes.

7 On the damages, your Honor, if you look at 101, which
8 is our reply brief, we say there: Defendants also ignore the
9 plaintiff's previous arguments in cases, including *Memphis v.*
10 *Stachura, U.S. v. Georgia*, those holding that damages are
11 created by our pleading; and we have not waived damages.
12 We've constantly asserted their presence. The evidence in
13 damages we've even shown with regard to the undisputed facts,
14 deprivation of constitutional rights, and denomination that's --
15 that's appended to that.

16 But, as to the first point, your Honor, Mr. Slocum --
17 the State defendants would have your Honor see our complaint
18 as narrower than it actually is.

19 As I said in the beginning, our -- we seek the right
20 to have established here -- to a gender accurate birth
21 certificate. Mr. Slocum is trying to tie this to the statute
22 that previously existed, but it doesn't exist anymore. And
23 our complaint and amended complaint was not that narrow at
24 all.

25 THE COURT: Okay. I'm going to stop right here

1 because I am getting totally confused now, because I thought
2 that the statute provided the relief that you were seeking.
3 Now, if that's not 100 percent accurate, please let me know
4 where it falls short.

5 MS. CHOVANES: Yes. We want a declaratory judgement
6 that she has the right to a gender accurate birth certificate.
7 We're within our rights because that's a disputed matter right
8 now. They are still disputing this formally in the federal --

9 THE COURT: Wait. Wait.

10 MS. CHOVANES: They want to withdraw --

11 THE COURT: Wait. I'm sorry. So they're disputing
12 the right to what?

13 MS. CHOVANES: To a gender -- to a gender accurate
14 birth certificate. They are disputing Jane Doe's right to a
15 gender accurate birth certificate, and they're disputing that
16 Jane Doe's constitutional rights were violated because she
17 lacked a fundamental identification document as found in the
18 statement of undisputed facts, your Honor. She lacked that.
19 That was a violation of her constitutional rights. They're
20 disputing both of those claims still.

21 So we're entitled to a declaratory judgement motion
22 that she has that right. Because otherwise, your Honor, we're
23 faced with a position where -- in front of a federal judge,
24 they're denying her right, and they are still denying her
25 right to the birth certificate.

1 It has nothing to do with the statute. The statute
2 was a sub-issue. They're denying her fundamental right, which
3 is in the statement of undisputed facts here, that she has a
4 gender accurate birth certificate. That's what still exists,
5 your Honor.

6 THE COURT: Okay.

7 MS. CHOVANES: Because we're in a federal lawsuit
8 over that right. Now, we're asking the Court to dismiss -- or
9 enter a declaratory judgement, right now, and so we can have
10 direction to go and do the right thing here if the Court sees
11 it.

12 But we have the right to this document, and we have
13 the right to request the Court for a judgment because it's a
14 real controversy. They're still opposing it.

15 We have countless documents talking about their
16 opposition to her right to a gender accurate birth
17 certificate, starting with their motion to dismiss.

18 THE COURT: Okay.

19 Counsel, I'm going to ask you to hold on one second.
20 Let me just pull out a document here.

21 And I'm also going to ask you to refrain from
22 speaking while you're on hold because I think -- I don't want
23 any privileges to be waived here.

24 So please hold on.

25 (Off the record.)

1 THE COURT: Counsel, I just had to pull out the
2 papers here and take a quick look.

3 And, Ms. Chovanes, help me out with this because I
4 guess I was looking at this a little bit more narrowly than
5 what it is that you're arguing this morning.

6 Are you, in fact, arguing that this is even broader
7 than the New Jersey legislation that was passed and that
8 there's a fundamental right beyond that?

9 MS. CHOVANES: Yes, your Honor. In fact, in our
10 motion for summary judgment, pursuant to the rules, we
11 included a statement of uncontested facts. Indeed, those --
12 those facts were uncontested and, therefore, they are
13 established for purposes of the case.

14 One of those uncontested facts -- and I think it's
15 Number 48 -- talks about the defendants agree that plaintiff
16 should have a gender accurate birth certificate, but are still
17 actively opposing her request for one.

18 Defendants -- plaintiff has a right to a --

19 I'm sorry. I'm skipping through this. I lost where
20 I was.

21 The uncontested facts specifically establish that
22 there is a fundamental right to a gender accurate birth
23 certificate. That's right in there. And that -- and using
24 that as an uncontested fact in this case, we're entitled to
25 that declaration.

1 Yes, it has been in the case since the complaint.
2 And you can go back and relook at the complaint and then the
3 amended complaint. There have been a lot of -- a lot of
4 documents in this case, but, yes, sir.

5 And, also, I have damages, by the way, too. They
6 both -- I mean, these are fundamental rights we're talking
7 about. This is not a -- dealing with any horrendous procedure
8 that we also complained about. But these are fundamental
9 rights.

10 And, as you know, your Honor, they're not going away,
11 especially given -- I mean, even recently, in the trans
12 military, you know, case law. These are real issues.

13 And, yes, since the beginning, we've needed to
14 establish our fundamental rights because they are under
15 attack.

16 THE COURT: Okay. And the relief that you are
17 seeking is that -- is any of the relief that you're seeking
18 larger than what the defendants can even provide here? I
19 mean, is the sum of this even federal in nature and beyond the
20 State of New Jersey?

21 MS. CHOVANES: Well, what relief we're seeking before
22 the Court currently, in our motion for declaratory judgement
23 and summary judgment in the proposed order, is pretty much
24 summarized there. And I referred to it earlier, your Honor.
25 It's 98-3 on the docket.

1 And that declares she has the right to a gender
2 accurate birth certificate. And there's the issue. That's
3 certainly within your power for -- to issue a declaratory
4 judgement. That is precisely why we're here, as I keep
5 saying. They're opposing that.

6 And then, in the third one, we have -- to grant us
7 all four counts for -- that the -- that the State has violated
8 her right. And then what will remain after that, of course,
9 is the determination of damages. But we feel we have a pretty
10 strong case at this point given the State's actions. And, in
11 fact, now they're approaching on willful violation. And then
12 we have to start looking at aiding and abetting in terms of
13 who's helping them.

14 I mean, honestly, this is just far beyond where it
15 should be, your Honor. And -- but that's where -- we're
16 certainly -- because we're still here because they have live
17 papers filed before the Court denying our fundamental rights.
18 That's why we're still here --

19 THE COURT: Okay.

20 MS. CHOVANES: -- and that's why we request the Court
21 to enter this order.

22 THE COURT: Mr. Slocum, do you have anything further?

23 MR. SLOCUM: Yes, your Honor. Please.

24 One -- because counsel keeps stating that there are
25 uncontested facts and that they -- that they filed a document

1 that does not expressly say in the papers we disagree to
2 somehow establish those as facts --

3 (Court reporter asks for clarification.)

4 THE COURT: Mr. Slocum, I'm going to ask you to come
5 closer to the phone because the court reporter is having
6 difficulty hearing you.

7 MR. SLOCUM: Sorry. I'll try to speak up.

8 THE COURT: That's better.

9 MR. SLOCUM: I would like to address counsel's
10 repeated statement that there are uncontested facts, the
11 apparent position that their having filed a document which --
12 with facts that have been contested since the outset of the
13 case. And then to -- to then claiming there are statements
14 from the defendants -- there are positions from the
15 defendants, which, again, have been contested throughout the
16 case, have traced that as uncontested and creates established
17 facts, is basically absurd. And I would just like to clarify
18 that for the record.

19 Secondly, it remains very unclear, here, exactly how
20 this case can go forward. Apparently, now that the requested
21 relief, as I understand counsel's explanation, is a
22 declaratory judgement establishing a constitutional right --
23 for this Court to declare -- to declare a constitutional
24 right. It's no longer related to this case.

25 The case here involved this individual's rights and

1 this individual's ability to get to change the birth
2 certificate. That ability is unobstructed. Plaintiff is able
3 to change the birth certificate at any time. The change in
4 New Jersey law allows this.

5 There is no case in controversy as to this
6 plaintiff's inability -- this plaintiff's ability to change
7 and amend the birth certificate. There cannot be a case going
8 forward without that case in controversy. The request here
9 for a declaratory judgement establishing a right without a
10 case cannot -- cannot proceed.

11 THE COURT: Okay.

12 All right, folks. Here's how I'm going to proceed
13 here.

14 I need to go back to these papers and just to make
15 sure that now -- in light of the passage of this statute on
16 how it impacts the underlying matters and the motions that are
17 before the Court.

18 I thought that the legislation was going to resolve
19 the outstanding disputes, but apparently the plaintiff does
20 not believe that it does; so, therefore, I'm going to have to
21 rule on the motions. And I'll go ahead and make a judgment on
22 those motions as soon as I can get to it.

23 I don't think that there is anything else that we can
24 cover in the call today to help either clarify this or to go
25 any further.

1 I thank you for your time this morning, and we will
2 go ahead and issue a decision on the outstanding motions.

3 MS. CHOVANES: Thank you, your Honor.

4 (Telephone conference ends at 10:21 a.m.)
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| / | agree [2] - 3:22, 11:15 ahead [2] - 15:21, 16:2 aiding [1] - 13:12 al [1] - 1:6 allows [1] - 15:4 amend [1] - 15:7 amended [4] - 6:5, 6:15, 8:23, 12:3 amending [1] - 6:9 amici [1] - 3:12 ancillary [1] - 5:7 apparent [1] - 14:11 appearance [1] - 2:16 appearing [1] - 7:11 appended [1] - 8:15 apply [1] - 6:7 approaching [1] - 13:11 arguing [2] - 11:5, 11:6 arguments [1] - 8:9 ARRISI [1] - 1:6 Arrisi [1] - 2:4 asserted [1] - 8:12 asserting [1] - 7:18 attached [2] - 4:8, 4:22 attack [1] - 12:15 Attorney [3] - 1:19, 2:13, 2:18 ATTORNEY [1] - 1:18 aware [1] - 5:14 | 13:10, 14:13, 14:16, 14:20, 14:24, 14:25, 15:5, 15:7, 15:8, 15:10 cases [1] - 8:9 Cathy [1] - 1:22 CCR [1] - 1:22 certainly [4] - 7:4, 7:18, 13:3, 13:16 certificate [22] - 4:2, 4:6, 5:7, 5:19, 6:5, 6:9, 6:10, 6:15, 8:1, 8:21, 9:6, 9:14, 9:15, 9:25, 10:4, 10:17, 11:16, 11:23, 13:2, 15:2, 15:3, 15:7 Certified [1] - 1:21 change [5] - 7:25, 15:1, 15:3, 15:6 changed [4] - 6:3, 6:4, 6:9, 6:15 CHOVANES [18] - 1:17, 2:7, 3:8, 3:16, 3:22, 4:21, 5:1, 6:24, 7:1, 8:6, 9:5, 9:10, 9:13, 10:7, 11:9, 12:21, 13:20, 16:3 Chovanes [4] - 2:7, 6:25, 8:5, 11:3 CIVIL [1] - 1:4 claim [3] - 6:13, 7:12, 7:19 claiming [1] - 14:13 claims [4] - 4:12, 7:24, 9:20 clarification [2] - 2:14, 14:3 clarify [3] - 2:24, 14:17, 15:24 Clarkson [1] - 1:8 clear [1] - 7:7 clearly [1] - 6:17 closer [1] - 14:5 combination [1] - 4:7 complained [1] - 12:8 complaint [6] - 8:17, 8:23, 12:1, 12:2, 12:3 concession [1] - 4:5 conference [3] - 2:1, 2:24, 16:4 Conference [1] - 1:6 confirm [2] - 6:7 confused [1] - 9:1 constantly [1] - 8:12 constitutional [5] - 8:14, 9:16, 9:19, 14:22, 14:23 contest [1] - 7:16 contested [2] - 14:12, 14:15 controversy [3] - 10:14, 15:5, 15:8 Correct [1] - 1:21 Counsel [2] - 2:2, 11:1 counsel [9] - 2:9, 3:6, 3:7, 4:3, 4:13, 5:24, 7:13, 10:19, 13:24 counsel's [3] - 6:13, 14:9, | 14:21 COUNSELS [1] - 2:3 countless [1] - 10:15 counts [1] - 13:7 course [1] - 13:8 Court [10] - 4:4, 10:8, 10:10, 10:13, 12:22, 13:17, 13:20, 14:3, 14:23, 15:17 COURT [28] - 1:1, 2:2, 2:4, 2:8, 2:11, 2:15, 2:20, 3:15, 3:17, 4:15, 4:24, 5:24, 6:22, 6:25, 7:2, 8:4, 8:25, 9:9, 9:11, 10:6, 10:18, 11:1, 12:16, 13:19, 13:22, 14:4, 14:8, 15:11 court [2] - 2:14, 14:5 Courthouse [1] - 1:8 cover [1] - 15:24 created [1] - 8:11 creates [1] - 14:16 CRR [1] - 1:22 |
| 08608 [1] - 1:9 | | | |
| 1 | | | |
| 1 [2] - 4:3, 5:20 100 [1] - 9:3 101 [1] - 8:7 102 [1] - 4:4 10:21 [1] - 16:4 16-8640 [1] - 2:5 | | | |
| 2 | | | |
| 2 [1] - 5:4 2019 [1] - 1:10 28 [1] - 1:21 | | | |
| 3 | | | |
| 3:16-cv-08640-MAS-DEA [1] - 1:5 | | | |
| 4 | | | |
| 402 [1] - 1:9 48 [1] - 11:15 | | | |
| 7 | | | |
| 7 [1] - 1:10 753 [1] - 1:22 | | | |
| 9 | | | |
| 98-3 [4] - 4:22, 7:14, 12:25 9:59 [1] - 2:1 | | | |
| A | | | |
| a.m [2] - 2:1, 16:4 a/ka [1] - 1:16 abandoned [2] - 7:12, 7:19 abetting [1] - 13:12 ability [3] - 15:1, 15:2, 15:6 able [1] - 15:2 absurd [1] - 14:17 accurate [15] - 3:13, 4:2, 4:6, 5:7, 5:19, 8:20, 9:3, 9:6, 9:13, 9:15, 10:4, 10:16, 11:16, 11:22, 13:2 ACTION [1] - 1:4 actions [1] - 13:10 actively [1] - 11:17 address [3] - 3:21, 6:7, 14:9 | B bar [2] - 6:8, 6:16 based [2] - 3:23, 3:24 beginning [2] - 8:19, 12:13 begins [1] - 2:1 behalf [4] - 1:15, 1:17, 1:19, 2:18 better [1] - 14:8 beyond [3] - 11:8, 12:19, 13:14 birth [22] - 4:2, 4:6, 5:7, 5:19, 6:5, 6:9, 6:10, 6:15, 8:1, 8:20, 9:6, 9:14, 9:15, 9:25, 10:4, 10:16, 11:16, 11:22, 13:2, 15:1, 15:3, 15:7 bit [1] - 11:4 brief [3] - 7:16, 8:8 briefing [1] - 7:8 briefs [3] - 7:6, 7:10, 7:15 broader [1] - 11:6 BY [3] - 1:15, 1:17, 1:19 | 14:21 COUNSELS [1] - 2:3 countless [1] - 10:15 counts [1] - 13:7 course [1] - 13:8 Court [10] - 4:4, 10:8, 10:10, 10:13, 12:22, 13:17, 13:20, 14:3, 14:23, 15:17 COURT [28] - 1:1, 2:2, 2:4, 2:8, 2:11, 2:15, 2:20, 3:15, 3:17, 4:15, 4:24, 5:24, 6:22, 6:25, 7:2, 8:4, 8:25, 9:9, 9:11, 10:6, 10:18, 11:1, 12:16, 13:19, 13:22, 14:4, 14:8, 15:11 court [2] - 2:14, 14:5 Courthouse [1] - 1:8 cover [1] - 15:24 created [1] - 8:11 creates [1] - 14:16 CRR [1] - 1:22 | D damages [16] - 4:12, 7:3, 7:5, 7:9, 7:15, 7:19, 7:20, 7:21, 7:23, 8:2, 8:7, 8:10, 8:11, 8:13, 12:5, 13:9 days [1] - 5:8 dealing [1] - 12:7 decision [1] - 16:2 declaration [1] - 11:25 declaratory [13] - 3:11, 4:10, 4:16, 4:19, 5:5, 6:18, 9:5, 9:21, 10:9, 12:22, 13:3, 14:22, 15:9 declare [4] - 6:19, 6:20, 14:23 declares [1] - 13:1 Defendants [3] - 1:7, 1:19, 8:8 defendants [10] - 2:11, 2:19, 5:5, 5:8, 8:17, 11:15, 11:18, 12:18, 14:14, 14:15 defendants' [4] - 3:10, 3:23, 4:1, 6:2 defense [2] - 3:7, 5:24 define [1] - 5:23 degree [1] - 3:19 demand [1] - 7:25 denial [1] - 4:1 denied [1] - 3:25 denomination [1] - 8:14 denying [4] - 9:24, 10:2, 13:17 deprivation [1] - 8:14 Deputy [3] - 1:19, 2:13, 2:18 determination [1] - 13:9 difficulty [1] - 14:6 direction [1] - 10:10 |
| | C candidly [1] - 6:2 cannot [3] - 15:7, 15:10 case [22] - 4:13, 5:15, 5:20, 6:3, 6:12, 6:16, 8:3, 11:13, 11:24, 12:1, 12:4, 12:12, | | |

| | | | |
|--|---|--|--|
| <p>disagree [1] - 14:1</p> <p>dismiss [7] - 3:11, 3:23, 4:9, 5:12, 7:7, 10:8, 10:17</p> <p>dispute [3] - 4:18, 5:11</p> <p>disputed [1] - 9:7</p> <p>disputes [1] - 15:19</p> <p>disputing [5] - 9:8, 9:11, 9:14, 9:15, 9:20</p> <p>DISTRICT [3] - 1:1, 1:1, 1:11</p> <p>DIVISION [1] - 1:18</p> <p>docket [1] - 12:25</p> <p>Docket [3] - 2:5, 4:22, 7:14</p> <p>document [5] - 9:17, 10:12, 10:20, 13:25, 14:11</p> <p>documents [2] - 10:15, 12:4</p> <p>DOE [1] - 1:3</p> <p>Doe [3] - 2:4, 2:10, 5:6</p> <p>Doe's [2] - 9:14, 9:16</p> <p>done [1] - 6:3</p> | <p>12:19</p> <p>fees [1] - 6:7</p> <p>filed [3] - 13:17, 13:25, 14:11</p> <p>first [5] - 3:9, 4:15, 5:2, 8:16</p> <p>Fisher [1] - 1:8</p> <p>Fitzmaurice [1] - 2:7</p> <p>FITZMAURICE [3] - 1:14, 1:15, 2:9</p> <p>five [1] - 5:8</p> <p>folks [2] - 2:23, 15:12</p> <p>FOR [1] - 1:1</p> <p>Ford [1] - 1:22</p> <p>form [3] - 6:6, 6:8, 6:16</p> <p>formally [1] - 9:8</p> <p>forward [3] - 6:12, 14:20, 15:8</p> <p>FOUNDATION [1] - 1:16</p> <p>four [1] - 13:7</p> <p>frankly [1] - 5:16</p> <p>free [1] - 6:6</p> <p>Friday [1] - 4:4</p> <p>front [1] - 9:23</p> <p>fundamental [8] - 9:17, 10:2, 11:8, 11:22, 12:6, 12:8, 12:14, 13:17</p> | <p>hypothetical [1] - 3:24</p> | <p>4:17, 11:7, 15:18</p> <p>legislative [1] - 3:19</p> <p>letter [2] - 4:3, 4:5</p> <p>light [1] - 15:15</p> <p>line [2] - 2:6, 2:20</p> <p>live [2] - 5:12, 13:16</p> <p>local [1] - 2:9</p> <p>look [3] - 2:23, 8:7, 11:2</p> <p>looking [3] - 5:18, 11:4, 13:12</p> <p>lost [1] - 11:19</p> |
| E | G | J | M |
| <p>East [1] - 1:9</p> <p>either [1] - 15:24</p> <p>ends [1] - 16:4</p> <p>enter [3] - 2:15, 10:9, 13:21</p> <p>entitled [3] - 7:8, 9:21, 11:24</p> <p>entitlement [4] - 4:18, 7:10, 7:20, 7:21</p> <p>especially [1] - 12:11</p> <p>ESQUIRE [2] - 1:15, 1:17</p> <p>establish [3] - 11:21, 12:14, 14:2</p> <p>established [5] - 5:9, 5:21, 8:20, 11:13, 14:16</p> <p>establishing [2] - 14:22, 15:9</p> <p>establishment [1] - 5:18</p> <p>et [1] - 1:6</p> <p>evidence [1] - 8:12</p> <p>exactly [5] - 2:24, 3:1, 3:13, 4:17, 14:19</p> <p>exist [1] - 8:22</p> <p>existed [1] - 8:22</p> <p>exists [2] - 6:19, 10:4</p> <p>explanation [1] - 14:21</p> <p>expressly [1] - 14:1</p> | <p>gender [14] - 4:2, 4:6, 5:6, 5:19, 8:20, 9:6, 9:13, 9:15, 10:4, 10:16, 11:16, 11:22, 13:1</p> <p>GENERAL [1] - 1:18</p> <p>General [3] - 1:19, 2:13, 2:18</p> <p>Georgia [1] - 8:10</p> <p>given [2] - 12:11, 13:10</p> <p>grant [1] - 13:6</p> <p>granted [3] - 4:10, 5:3, 5:5</p> <p>guess [2] - 3:17, 11:4</p> | <p>Jane [4] - 2:10, 5:6, 9:14, 9:16</p> <p>JANE [1] - 1:3</p> <p>JERSEY [1] - 1:1</p> <p>Jersey [5] - 1:9, 3:2, 11:7, 12:20, 15:4</p> <p>judge [1] - 9:23</p> <p>JUDGE [1] - 1:11</p> <p>judgement [11] - 4:10, 4:16, 4:20, 6:18, 9:5, 9:21, 10:9, 12:22, 13:4, 14:22, 15:9</p> <p>judgement/summary [1] - 3:12</p> <p>judgements [1] - 5:5</p> <p>judgment [10] - 3:12, 4:10, 4:16, 4:23, 5:13, 7:13, 10:13, 11:10, 12:23, 15:21</p> <p>Julie [1] - 2:7</p> <p>JULIE [1] - 1:17</p> | <p>matter [6] - 2:4, 2:25, 3:1, 3:9, 3:18, 9:7</p> <p>matters [1] - 15:16</p> <p>mean [4] - 12:6, 12:11, 12:19, 13:14</p> <p>means [1] - 4:9</p> <p>Memphis [1] - 8:9</p> <p>merits [2] - 4:1, 7:8</p> <p>MICHAEL [1] - 1:11</p> <p>military [1] - 12:12</p> <p>money [3] - 7:21, 7:23, 8:2</p> <p>moot [7] - 3:20, 3:23, 5:22, 5:23, 6:17, 6:21, 8:1</p> <p>mootness [2] - 5:14, 5:15</p> <p>morning [8] - 2:2, 2:3, 2:12, 2:17, 3:8, 6:1, 11:5, 16:1</p> <p>motion [15] - 3:11, 3:12, 3:23, 4:8, 4:9, 4:23, 5:4, 5:11, 5:13, 7:13, 9:21, 10:17, 11:10, 12:22</p> <p>motions [9] - 3:10, 3:14, 3:20, 7:7, 7:12, 15:16, 15:21, 15:22, 16:2</p> <p>move [1] - 6:23</p> <p>MR [8] - 2:9, 2:12, 2:17, 6:1, 7:4, 13:23, 14:7, 14:9</p> <p>MS [17] - 2:7, 3:8, 3:16, 3:22, 4:21, 5:1, 6:24, 7:1, 8:6, 9:5, 9:10, 9:13, 10:7, 11:9, 12:21, 13:20, 16:3</p> <p>multiple [1] - 7:5</p> |
| F | H | K | N |
| <p>faced [1] - 9:23</p> <p>fact [5] - 7:16, 11:6, 11:9, 11:24, 13:11</p> <p>facts [13] - 4:7, 8:13, 9:18, 10:3, 11:11, 11:12, 11:14, 11:21, 13:25, 14:2, 14:10, 14:12, 14:17</p> <p>falls [1] - 9:4</p> <p>far [1] - 13:14</p> <p>February [2] - 1:10, 4:3</p> <p>federal [4] - 9:8, 9:23, 10:7,</p> | <p>hear [7] - 3:3, 3:7, 4:25, 5:24, 5:25, 6:23, 7:2</p> <p>heard [1] - 3:13</p> <p>hearing [3] - 2:22, 3:6, 14:6</p> <p>help [2] - 11:3, 15:24</p> <p>Help [1] - 1:16</p> <p>helping [1] - 13:13</p> <p>hold [3] - 10:19, 10:22, 10:24</p> <p>holding [1] - 8:10</p> <p>honestly [1] - 13:14</p> <p>Honor [22] - 2:3, 2:12, 2:17, 3:8, 4:21, 5:10, 5:17, 6:1, 6:24, 7:4, 8:7, 8:16, 8:17, 9:18, 9:22, 10:5, 11:9, 12:10, 12:24, 13:15, 13:23, 16:3</p> <p>HONORABLE [1] - 1:11</p> <p>horrendous [1] - 12:7</p> | <p>keep [1] - 13:4</p> <p>Keep [1] - 2:16</p> <p>keeps [2] - 4:13, 13:24</p> | <p>narrow [1] - 8:23</p> <p>narrower [1] - 8:18</p> <p>narrowly [1] - 11:4</p> <p>nature [1] - 12:19</p> <p>need [1] - 15:14</p> <p>needed [1] - 12:13</p> <p>never [1] - 4:9</p> <p>NEW [1] - 1:1</p> <p>New [5] - 1:9, 3:2, 11:7, 12:20, 15:4</p> <p>nice [1] - 4:24</p> <p>noted [3] - 7:12, 7:13, 7:15</p> |
| <p>lacked [2] - 9:17, 9:18</p> <p>language [2] - 6:19, 6:20</p> <p>larger [1] - 12:18</p> <p>last [1] - 4:4</p> <p>LAW [1] - 1:18</p> <p>law [6] - 6:3, 6:14, 7:25, 12:12, 15:4</p> <p>lawsuit [1] - 10:7</p> <p>legislation [5] - 3:20, 3:22,</p> | | | |

| | | | |
|--|---|---|---|
| <p>nothing ^[1] - 10:1 NUMBER ^[1] - 1:4 Number ^[6] - 2:5, 4:22, 5:4, 7:14, 11:15</p> | <p>privileges ^[1] - 10:23 procedural ^[1] - 3:9 procedure ^[1] - 12:7 proceed ^[3] - 7:22, 15:10, 15:12 process ^[1] - 3:19 proposed ^[2] - 4:22, 12:23 proposing ^[1] - 5:15 protesting ^[1] - 5:22 provide ^[2] - 6:6, 12:18 provided ^[1] - 9:2 pull ^[2] - 10:20, 11:1 purposes ^[1] - 11:13 pursuant ^[1] - 11:10 put ^[1] - 3:18</p> | <p style="text-align: center;">S</p> | <p>sum ^[1] - 12:19 summarized ^[1] - 12:24 summary ^[7] - 4:10, 4:16, 4:23, 5:12, 7:13, 11:10, 12:23 supposed ^[1] - 4:6</p> |
| <p style="text-align: center;">O</p> | <p style="text-align: center;">Q</p> | <p>second ^[1] - 10:19 secondly ^[1] - 14:19 Section ^[1] - 1:22 see ^[1] - 8:17 seek ^[1] - 8:19 seeking ^[5] - 4:19, 9:2, 12:17, 12:21 seeks ^[1] - 6:18 sees ^[1] - 10:10 sense ^[1] - 5:16 SHIPP ^[1] - 1:11 short ^[1] - 9:4 shown ^[3] - 7:10, 7:21, 8:13 sides ^[1] - 3:3 simply ^[1] - 6:14 skipping ^[1] - 11:19 SLOCUM ^[8] - 1:19, 2:12, 2:17, 6:1, 7:4, 13:23, 14:7, 14:9 Slocum ^[8] - 2:15, 2:18, 5:25, 7:3, 8:16, 8:21, 13:22, 14:4 soon ^[1] - 15:22 sorry ^[4] - 3:16, 9:11, 11:19, 14:7 sought ^[1] - 6:18 speaking ^[1] - 10:22 specifically ^[2] - 5:4, 11:21 Stachura ^[1] - 8:10 stand ^[1] - 2:24 standing ^[2] - 7:24, 8:2 start ^[2] - 3:6, 13:12 starting ^[2] - 6:11, 10:17 State ^[4] - 1:9, 8:17, 12:20, 13:7 State's ^[1] - 13:10 statement ^[4] - 9:18, 10:3, 11:11, 14:10 statements ^[1] - 14:13 STATES ^[2] - 1:1, 1:11 States ^[1] - 1:8 stating ^[1] - 13:24 statute ^[7] - 3:2, 3:24, 8:21, 9:2, 10:1, 15:15 statutory ^[1] - 6:19 STEPHEN ^[1] - 1:19 Stephen ^[1] - 2:18 still ^[18] - 3:1, 5:10, 5:11, 5:12, 5:22, 6:14, 7:20, 9:8, 9:20, 9:24, 10:4, 10:14, 11:16, 13:16, 13:18 stop ^[1] - 8:25 Street ^[1] - 1:9 strong ^[1] - 13:10 sub ^[1] - 10:2 sub-issue ^[1] - 10:2 subject ^[1] - 4:8 submitting ^[2] - 6:8, 6:16</p> | <p style="text-align: center;">T</p> |
| <p>objected ^[1] - 4:9 oddly ^[1] - 5:10 OF ^[3] - 1:1, 1:18 OFFICE ^[1] - 1:18 old ^[1] - 3:24 one ^[6] - 2:22, 10:19, 11:14, 11:17, 13:6, 13:24 open ^[1] - 3:1 opposing ^[5] - 5:22, 6:14, 10:14, 11:17, 13:5 opposition ^[4] - 5:12, 7:9, 7:15, 10:16 order ^[4] - 4:22, 7:14, 12:23, 13:21 otherwise ^[1] - 9:22 outset ^[1] - 14:12 outstanding ^[2] - 15:19, 16:2</p> | <p>quick ^[1] - 11:2</p> | <p style="text-align: center;">R</p> | <p>talks ^[1] - 11:15 telephone ^[2] - 2:23, 16:4 Telephone ^[2] - 1:6, 2:1 terms ^[1] - 13:12 THE ^[29] - 1:1, 1:18, 2:2, 2:4, 2:8, 2:11, 2:15, 2:20, 3:15, 3:17, 4:15, 4:24, 5:24, 6:22, 6:25, 7:2, 8:4, 8:25, 9:9, 9:11, 10:6, 10:18, 11:1, 12:16, 13:19, 13:22, 14:4, 14:8, 15:11 therefore ^[2] - 11:12, 15:20 third ^[1] - 13:6 three ^[3] - 3:10, 3:14, 5:2 throughout ^[2] - 4:13, 14:15 tie ^[1] - 8:21 Title ^[1] - 1:21 today ^[4] - 2:21, 2:24, 7:18, 15:24 took ^[2] - 4:3, 4:4 totally ^[1] - 9:1 traced ^[1] - 14:16 TRANS ^[1] - 1:16 trans ^[1] - 12:11 Trans ^[1] - 1:16 Trans-Help ^[1] - 1:16 Trenton ^[1] - 1:9 true ^[1] - 6:14 True ^[1] - 1:21 try ^[1] - 14:7 trying ^[1] - 8:21 two ^[1] - 5:2</p> |
| <p style="text-align: center;">P</p> <p>page ^[1] - 2:25 papers ^[4] - 11:2, 13:17, 14:1, 15:14 paragraphs ^[2] - 5:2 part ^[1] - 3:25 passage ^[1] - 15:15 passed ^[2] - 4:17, 11:7 passing ^[2] - 3:1, 3:18 Paul ^[1] - 2:7 PAUL ^[2] - 1:14, 1:15 PC ^[1] - 1:14 pending ^[4] - 3:10, 3:14, 3:18, 3:20 percent ^[1] - 9:3 phone ^[1] - 14:5 Plaintiff ^[5] - 1:4, 1:15, 1:17, 5:6, 15:2 plaintiff ^[13] - 2:6, 2:9, 3:7, 4:5, 6:3, 6:5, 6:6, 6:15, 7:8, 7:18, 11:15, 11:18, 15:19 plaintiff's ^[5] - 4:1, 6:8, 8:9, 15:6 Plaintiff's ^[1] - 5:4 pleading ^[1] - 8:11 point ^[3] - 6:11, 8:16, 13:10 position ^[3] - 6:2, 9:23, 14:11 positions ^[1] - 14:14 power ^[1] - 13:3 precisely ^[1] - 13:4 presence ^[1] - 8:12 pretty ^[2] - 12:23, 13:9 previous ^[1] - 8:9 previously ^[1] - 8:22</p> | <p>raised ^[1] - 7:5 reads ^[1] - 5:4 real ^[2] - 10:14, 12:12 really ^[1] - 4:18 receiving ^[1] - 6:9 recently ^[1] - 12:11 record ^[3] - 2:16, 10:25, 14:18 refer ^[1] - 4:21 referred ^[1] - 12:24 refrain ^[1] - 10:21 regard ^[4] - 4:19, 6:13, 7:5, 8:13 related ^[1] - 14:24 relates ^[1] - 7:2 relief ^[7] - 5:7, 6:18, 9:2, 12:16, 12:17, 12:21, 14:21 relook ^[1] - 12:2 remain ^[1] - 13:8 remains ^[1] - 14:19 repeated ^[1] - 14:10 reply ^[3] - 7:16, 8:5, 8:8 reporter ^[3] - 2:14, 14:3, 14:5 request ^[4] - 10:13, 11:17, 13:20, 15:8 requested ^[1] - 14:20 required ^[1] - 1:21 resolve ^[1] - 15:18 RESOURCE ^[1] - 1:16 rights ^[9] - 8:14, 9:7, 9:16, 9:19, 12:6, 12:9, 12:14, 13:17, 14:25 RPR ^[1] - 1:22 rule ^[1] - 15:21 rules ^[1] - 11:10</p> | <p style="text-align: center;">U</p> | <p>U.S ^[1] - 8:10 U.S.C ^[1] - 1:21 unclear ^[2] - 6:12, 14:19 unconstitutional ^[1] - 6:20 uncontested ^[8] - 11:11, 11:12, 11:14, 11:21, 11:24, 13:25, 14:10, 14:16 under ^[3] - 5:10, 5:11, 12:14 underlying ^[2] - 7:25, 15:16 undisputed ^[4] - 4:7, 8:13, 9:18, 10:3 UNITED ^[2] - 1:1, 1:11 United ^[1] - 1:8 unlawful ^[1] - 6:20 unobstructed ^[1] - 15:2 up ^[2] - 2:16, 14:7</p> |

| |
|---|
| V |
| VINCENT [1] - 1:6 violated [2] - 9:16, 13:7 violation [2] - 9:19, 13:11 voice [1] - 2:16 vs [1] - 1:5 |
| W |
| wait [4] - 6:25, 9:9, 9:11 Wait [1] - 6:25 waived [3] - 7:11, 8:11, 10:23 whole [1] - 5:15 willful [1] - 13:11 withdraw [1] - 9:10 |