

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DARCY CORBITT, et al.,

Plaintiffs,

Vs.

CASE NO.: 2:18cv91-MHT

HAL TAYLOR, et al.,

Defendants.

* * * * *

MOTION HEARING

* * * * *

BEFORE THE HONORABLE MYRON H. THOMPSON, UNITED STATES
DISTRICT JUDGE, at Montgomery, Alabama, on Tuesday, July 30,
2019, commencing at 10:05 a.m.

APPEARANCES

FOR THE PLAINTIFFS:

Mr. Gabriel Arkles
Attorney at Law
AMERICAN CIVIL LIBERTIES UNION
125 Broad - 18th Floor
New York, NY 10004

Mr. Brock Boone
Mr. Randall C. Marshall
Attorneys at Law
ACLU OF ALABAMA FOUNDATION, INC.
Post Office Box 6179
Montgomery, Alabama 36106-0179

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES, continued:

FOR THE DEFENDANTS: Mr. Brad A. Chynoweth
Mr. Winfield J. Sinclair
Office of the Attorney General
Post Office Box 300152
Montgomery, Alabama 36130

* * * * *

Proceedings reported stenographically;
transcript produced by computer

* * * * *

(The following proceedings were heard before the Honorable
Myron H. Thompson, United States District Judge, at Montgomery,
Alabama, on Tuesday, July 30, 2019, commencing at 10:05 a.m.):

(Call to Order of the Court)

THE COURT: Court calls the case of Corbitt versus
Taylor, civil action number 18cv91.

Who do we have representing the plaintiffs?

MR. ARKLES: Gabriel Arkles for the plaintiffs.

THE COURT: What was the name?

MR. ARKLES: Gabriel Arkles, Your Honor.

THE COURT: Arkles?

MR. ARKLES: A-R-K-L-E-S.

THE COURT: You pronounce it Arkles?

MR. ARKLES: Yes, Your Honor.

THE COURT: Okay. Very good. Thank you.

And who do we have representing the defendants?

MR. CHYNOWETH: Brad Chynoweth and Win Sinclair, Your

1 Honor.

2 THE COURT: Okay. Is that Chynoweth?

3 MR. CHYNOWETH: Chynoweth, yes.

4 THE COURT: Okay. Would you both stand at the lectern,
5 please. I'm going to be asking you questions back and forth
6 rather than having you talk for an hour or half an hour or what
7 and then the other one stand up.

8 Now, I have cross motions for summary judgment, so I'm
9 really just going to ask some basic initial questions that would
10 apply across the board.

11 First of all, Mr. Arkles, are there any disputed issues
12 of fact?

13 MR. ARKLES: Your Honor, first of all, if I may, I
14 should have introduced Randall Marshall and Brock Boone, my
15 cocounsel, and Destiny Clark, who's one of the clients in this
16 case.

17 There are some very narrow disputed issues of fact, but
18 I don't believe there are disputed issues of fact that are
19 material to the outcome of the case.

20 THE COURT: Okay. Explain that to me.

21 MR. ARKLES: So for the most part, the parties agree as
22 to what the policy is, how the policy is enforced, and how it
23 has affected the plaintiffs in this case. There's potentially
24 some dispute as to exactly what happened when Ms. Corbitt, one
25 of my clients, went to the driver's license office in Opelika in

1 terms of whether she was publicly misgendered and referred to as
2 an it. I don't believe that that is material to the outcome of
3 this case.

4 There are also -- there is certainly a strong dispute
5 over the interpretation of some of Jane Doe's deposition
6 testimony in terms of how public she is about her transgender
7 identity. There's no dispute as to the actual facts or what she
8 said, but there appears that there may be some dispute as to
9 exactly what that means.

10 But, again, I think that while there may be some
11 relevance to the privacy claim, ultimately it can be resolved
12 regardless of how the Court --

13 THE COURT: Isn't there some dispute also about
14 whether -- and I'll just refer to it as the state rather than --
15 I think it's ALEA; is that right? Whether the state
16 consistently or inconsistently applies the policy at issue,
17 Policy Order 63?

18 MR. ARKLES: So as to each particular decision where
19 the defendants produced evidence about how they had applied the
20 policy, I don't think that there is dispute as to the decision
21 in each particular instance.

22 THE COURT: Well, I was more concerned about things
23 like when the policy was made public; how consistently the state
24 has applied the policy, not just to your clients, but in
25 general; whether those who allegedly administer the policy have

1 done so consistently; things like that.

2 MR. ARKLES: Your Honor, I'm having a difficult time
3 thinking of specific facts in the record that are actually in
4 dispute on that topic, although, again, I think the inferences
5 drawn from that are disputed and certainly how to apply the
6 facts to those -- how to apply the law to those facts.

7 THE COURT: Well, you know, I mean, it could be not
8 disputed that, you know, the weather was bad and you were going
9 too fast. And I could know your speed and I could know the
10 weather was bad, but the inference I would draw could be very
11 strongly disputed as to whether you were negligent or not. So
12 I'm trying to see whether I can draw from the record the way in
13 which the state has applied the policy and what inferences I can
14 draw, would those be disputed or not.

15 MR. ARKLES: Yes, Your Honor. There may be some
16 dispute as to how consistently the policy is in play, although I
17 think on the particular decisions that were made, there's no
18 actual evidence that's conflicting in the record.

19 THE COURT: Right. Are there any other areas that you
20 could think of that --

21 MR. ARKLES: I can think also in terms of the record of
22 how the policy has been applied. There's potentially some
23 difference in interpretation of the document where --

24 THE COURT: What about the issue of how the policy has
25 affected your clients? You know, I could say that, you know,

1 you could give me the facts, but the inferences I could draw
2 could be disputed; is that correct?

3 MR. ARKLES: Yes, Your Honor. However, the defendants
4 have not submitted any evidence that would dispute any of my
5 clients' testimony.

6 THE COURT: Right. What about the experts? Do both
7 sides concede that the experts meet the requirements of Daubert?

8 MR. ARKLES: Yes, Your Honor, although we would submit
9 that the testimony of Donald Leach should be limited to
10 correctional expertise rather than medical expertise, but I
11 think that's the spirit in which defendants are offering him.

12 THE COURT: Is that a Daubert issue?

13 MR. ARKLES: No, Your Honor. We believe he's qualified
14 on the issue of corrections.

15 THE COURT: But is it a Daubert issue as to whether his
16 testimony is relevant here?

17 MR. ARKLES: No, Your Honor. We concede that his
18 testimony may be relevant to the government interests in
19 correctional policies.

20 The experts, interestingly, contradict each other very
21 little, even though they have very different perspectives. And
22 their testimony to a large extent didn't overlap and, therefore,
23 didn't conflict. So the expert for the plaintiffs testified to
24 the meaning of sex, gender identity, and gender dysphoria, the
25 harmful and dangerous impact that the policy has on the health

1 of transgender people, and what an appropriate and
2 scientifically based policy would be.

3 The expert for the defendants, Donald Leach, testified
4 that there is an interest -- there is a correctional interest in
5 having a policy that indicates what sex means on driver's
6 licenses and that it is helpful to have a sex designation on
7 driver's licenses. But he did not express an opinion about
8 whether there should be surgery requirements, which is what the
9 plaintiffs are challenging.

10 THE COURT: Right. If the case were to go to trial,
11 how long would it take?

12 MR. ARKLES: Your Honor, we believe that the -- for the
13 plaintiffs' case, we would be able to put it on in two days,
14 possibly less.

15 THE COURT: Okay. What would be the plaintiffs'
16 position if the Court were to, say, take it under submission,
17 the evidence that you've presented, but it would not be on cross
18 motions for summary judgment? In other words, the Court could
19 resolve disputed issues of fact if there are any.

20 There are cases where -- well, let me put it this way.
21 There are actually three avenues you could take. You could do
22 it on cross motions for summary judgment, we could do it at
23 trial, and we could do it just by taking the case under
24 submission, but it's not on cross motions for summary judgment.
25 In other words, I would just be resolving the case as if I had

1 held a trial.

2 What would be the plaintiffs' position on that?

3 MR. ARKLES: Your Honor, the plaintiffs would be
4 amenable to that.

5 THE COURT: And if I had any issues, I could just
6 merely, you know, narrow them or bring them in, but it would --
7 so, in other words, I would not be bound by -- what is it? --
8 Rule 56?

9 MR. ARKLES: Yes, Your Honor.

10 THE COURT: The summary judgment rule.

11 MR. ARKLES: I should confer with my clients, but I
12 don't believe we would have any objection to that.

13 THE COURT: Mr. Chynoweth, I'm going to ask you the
14 same questions. Are there any disputed issues of fact here?

15 MR. CHYNOWETH: No, Your Honor, I do not believe there
16 are any disputed issues of fact that are material. I believe
17 that I agree with Mr. Arkles on that assessment.

18 THE COURT: Can the Court draw inferences about the
19 impact of Policy Order 63 on the plaintiffs from the record?
20 Would the Court be free to draw its own inferences about things
21 like that without having had the plaintiffs appear before the
22 Court?

23 MR. CHYNOWETH: Yes, I believe so, Your Honor, because
24 the plaintiffs testified in their depositions very clearly. I
25 asked each one of them, can you please testify in your own words

1 how Policy Order 63 has harmed you, and each plaintiff did so.
2 And the state does not have -- the injuries that the plaintiffs
3 testified to are -- I think could be characterized as
4 psychological injuries. And the state does not intend to offer
5 evidence to rebut that. It's more that this policy is not
6 intended to inflict psychological harm on transgender
7 individuals, in that the state interests that we have under the
8 relevant levels of scrutiny for each claim are constitutional.

9 THE COURT: What about the experts? Do you agree that
10 their expert meets all the requirements of Daubert?

11 MR. CHYNOWETH: Yes. We believe Dr. Gordon is
12 qualified to testify on the treatment of transgender individuals
13 as a general practitioner who specializes in that practice.

14 THE COURT: But don't you take issue with the
15 inferences the Court can draw from -- I believe it's -- is it
16 Dr. Gordon? Yes.

17 MR. CHYNOWETH: It's not so much -- it's not the
18 inferences so much as the legal relevance. When Dr. Gordon
19 testifies that in his opinion he thinks the most clinically
20 appropriate policy would be self-certification of gender, we
21 think that's simply not relevant.

22 THE COURT: I thought you took issue, though, with the
23 fact that Dr. Gordon had not actually examined the plaintiffs,
24 and therefore could not offer any opinions as to their
25 particular circumstances and how their particular circumstances

1 are affected in this case.

2 MR. CHYNOWETH: We think that was relevant to get on
3 the record. It does not appear that the plaintiffs have put any
4 particular medical condition they might have at issue, and I do
5 not understand them to be making any part of their claim based
6 on any particular medical issue.

7 THE COURT: Didn't all three plaintiffs testify that
8 they suffer from gender dysphoria?

9 MR. CHYNOWETH: They did. However, it's not in the
10 complaint that that is any basis for the relief they seek. And,
11 in fact, in response to the state's interrogatory, which is in
12 the record, the state directly requested that the plaintiffs
13 identify whether they had been diagnosed with gender dysphoria.

14 THE COURT: Is that evidence the Court can rely on?

15 MR. CHYNOWETH: I think that the fact that the
16 plaintiffs refused to answer that interrogatory on the grounds
17 that it was not relevant is certainly something the Court can
18 take into account. Again, had that been the principal issue,
19 that should have been pled. And the case was not built around
20 that. That came out, I think, as voluntary disclosures in
21 depositions.

22 THE COURT: Right.

23 MR. CHYNOWETH: So I think that Dr. Gordon's
24 testimony -- we don't dispute that he is offering opinion as to
25 what he thinks is clinically appropriate. We have not put on

1 contrary evidence that would say that Dr. Gordon is wrong. And,
2 in fact, we think that the experts are testifying about
3 different opinions, and those then serve as a backdrop to the
4 different legal interests that the parties are asserting.

5 So I believe that these are simply questions of law for
6 the Court to decide. It's not as if we have experts offering
7 conflicting testimony on the same subject. They're, frankly,
8 talking past one another.

9 THE COURT: What about resolving this case on the
10 record rather than on summary judgment?

11 MR. CHYNOWETH: I am not familiar with that from a
12 procedural standpoint.

13 THE COURT: It's pretty straightforward. It just means
14 you would just submit the case to the Court on the record that
15 you've formed, but I would not be bound by Rule 56 because
16 you-all agree that if there are disputed issues of fact, I can
17 resolve those.

18 MR. CHYNOWETH: I don't believe that the defendants
19 would have any objection to that, because our position is that
20 were we to have a trial --

21 THE COURT: Essentially, what you would be saying is
22 were we to have a trial, I would be hearing the same evidence.

23 MR. CHYNOWETH: Yes.

24 THE COURT: And therefore, Judge, just go ahead and
25 decide the case without us having to come back to court. But

1 you're not restricted by Rule 56. But that would mean I could
2 draw inferences which would be binding.

3 That doesn't mean I would necessarily still not want to
4 have a trial. Let me get that clear. But it's just another
5 avenue.

6 Do you want to think about it?

7 MR. CHYNOWETH: Yes. Yes, Your Honor.

8 THE COURT: Yes, what?

9 MR. CHYNOWETH: Yes, we would like to think about it.

10 THE COURT: How long would a trial take if we were to
11 go to trial?

12 MR. CHYNOWETH: I believe that it would take defendants
13 two days, approximately, to put on their case.

14 THE COURT: So it could be four to five days for both
15 sides.

16 MR. CHYNOWETH: Yes, Your Honor.

17 THE COURT: Okay. Now, Mr. Arkles, when can you let me
18 know about submitting the case on the record but not on cross
19 motions for summary judgment?

20 MR. ARKLES: I'm sorry, Your Honor.

21 THE COURT: I'm sorry. I'm asking Mr. Chynoweth this.
22 You've already agreed that you could do it.

23 MR. CHYNOWETH: I'm sorry?

24 THE COURT: When can you let me know you could agree to
25 submitting the case on the record?

1 MR. CHYNOWETH: Certainly by the end of the day.

2 THE COURT: By the end of the day? Okay.

3 MR. CHYNOWETH: Or perhaps even if we could take --

4 THE COURT: Do you want to take a moment and just talk
5 with your cocounsel?

6 MR. CHYNOWETH: Yes. Because I have general counsel
7 for ALEA here with us as well.

8 THE COURT: Why don't you take a moment? The easier
9 and the earlier I can dispose of this, the better. If you'd
10 like to confer, just confer. I'll let you do it right now.
11 Take a moment.

12 (Recess was taken from 10:21 a.m. until 10:27 a.m., after
13 which proceedings continued, as follows:)

14 THE COURT: Yes, Mr. Chynoweth.

15 MR. CHYNOWETH: Thank you. Thank you for letting us
16 have that time. I'm going to admit, you threw a curve ball at
17 us. We would like to place on the record that without waiving
18 our objection to the fact that in discovery they said that their
19 gender dysphoria diagnosis was not relevant, with our objection
20 being placed on the record, we consent to submitting the case to
21 the Court on the record.

22 THE COURT: Okay. Again, I want to emphasize that I
23 still might want to have -- to hear some evidence live, if not
24 all. But that puts us in a slightly different posture, then.
25 But let's talk about some of the issues.

1 Mr. Arkles, we've been talking about driver's licenses.
2 Does all of this argument also apply to nondriver license IDs?

3 MR. ARKLES: Your Honor, I believe that all of the same
4 arguments would apply. The policy itself only names driver's
5 licenses, but the same interests would appear to be relevant.
6 Certainly the same harms would occur as well.

7 THE COURT: I'm just raising it because some of the
8 identifications that are required -- some of the instances where
9 identification is required and you would use a driver's license,
10 you can quite often use a nondriver's license ID. And I just
11 wanted to make sure that the concerns that are raised here would
12 apply to -- I think they're called nondriver IDs or something
13 like that. Anyway, it's just a state ID, which you can get, I
14 understand.

15 MR. ARKLES: Yes, Your Honor. My clients each have
16 driver's licenses, but I believe the same arguments would apply
17 with the same force to a nondriver's license ID.

18 THE COURT: Does this policy, order 63, apply to
19 nondriver IDs?

20 MR. ARKLES: Your Honor, I don't believe we have that
21 in the record. The policy itself names driver's licenses, and
22 I'm not aware whether there's a separate policy for nondriver
23 IDs.

24 THE COURT: Do you know, Mr. Chynoweth?

25 MR. CHYNOWETH: I do not know, Your Honor.

1 THE COURT: Because if your clients can get nondriver
2 IDs, why wouldn't that resolve the problem?

3 MR. ARKLES: Well, Your Honor, they would still need to
4 carry and show driver's licenses any time when they're driving.

5 THE COURT: So that would restrict it to just when
6 they're driving, then. But --

7 MR. ARKLES: Yes, Your Honor. So that would -- that
8 would potentially limit the harm, which could be relevant in the
9 balancing test for privacy.

10 THE COURT: How can I find out whether Policy Order 63
11 applies to nondriver IDs? That cuts both ways. I mean, if --
12 well, let me just hear. Does it apply to nondriver IDs or not?

13 MR. ARKLES: Well, Your Honor, I believe we would need
14 to get evidence from the state agency on that issue, and the
15 plaintiffs don't have within their possession information on how
16 it applies to nondriver IDs.

17 THE COURT: Because all of the state's asserted
18 interests, why wouldn't it apply to both driver IDs and
19 nondriver IDs?

20 MR. ARKLES: I believe it probably would, Your Honor.
21 I'm also not certain, though, whether my clients, who already
22 have driver IDs, would be able to get --

23 THE COURT: Well, I'm not getting at your clients. I'm
24 trying to get at the state's interests now.

25 MR. ARKLES: Right.

1 THE COURT: In other words, a lot of people don't
2 drive, and they have nondriver IDs. Can you get your gender
3 changed on a nondriver ID if you don't drive? In fact, a lot of
4 people, getting back to the state's experts, who are in prison
5 don't have driver IDs. Sometimes they have nondriver IDs
6 because they can't get driver IDs, maybe, for various and sundry
7 reasons. Maybe got too many DUIs or something like that. Does
8 the state find it okay that you can easily change a nondriver
9 ID?

10 MR. ARKLES: It is true, Your Honor, that there are a
11 number of people who are arrested who don't have a driver's
12 license or certainly don't have an Alabama driver's license.
13 Some might not have any IDs at all. And the government is still
14 able to achieve its interests, despite that fact. And, in fact,
15 even --

16 THE COURT: I guess my question -- which maybe should
17 be for Mr. Chynoweth, but I guess I'd like to know the
18 difference -- if the state doesn't require this for nondriver
19 IDs, what's the reason for requiring it for license IDs?

20 MR. CHYNOWETH: Well, Your Honor, the statute that
21 references driver's license requires that there be a
22 description.

23 THE COURT: For a nondriver ID, doesn't it require a
24 description?

25 MR. CHYNOWETH: I'm not prepared to -- I am not sure

1 about the statutes governing nondriver IDs off the top of my
2 head. I have general counsel attempting to determine whether
3 Policy Order 63 applies to nondriver IDs.

4 Again, under the complaint that was pled, which applied
5 only to driver's license -- I understand the Court's concern
6 that it is evidence of the state's interests, but I don't have
7 any knowledge of that off the top of my head.

8 (Brief pause in the proceedings)

9 MR. CHYNOWETH: Defendants can stipulate that Policy
10 Order 63 does apply to nondriver IDs.

11 THE COURT: Oh, it does apply to nondriver IDs?

12 MR. CHYNOWETH: It does. Yes.

13 THE COURT: Okay. Does it say it applies to nondriver
14 IDs?

15 MR. CHYNOWETH: The policy uses the word driver
16 license. That's Exhibit 7 to Diane Woodruff's deposition. So
17 there's a 2012 version of the policy. The 2012 version uses the
18 words Alabama license, and the 2015 version says driver license.

19 THE COURT: Right. So how do you conclude that it
20 applies to nondriver IDs, then?

21 MR. CHYNOWETH: I've only just been told, Your Honor,
22 by general counsel that it does. Again, I'm not -- nothing in
23 the record is on that issue one way or the other.

24 MR. SINCLAIR: We don't even know if it's come up.

25 THE COURT: That's something I would like to know one

1 way or the other. Because it does -- I would like to know how
2 the state can justify it applying -- the policy applying to
3 driver's IDs and not applying to nondriver IDs. Seems to me, to
4 the extent they serve the purpose of identification, they serve
5 the same purpose. Anyway, we need to resolve that.

6 One other thing, Mr. Arkles. I know that we have
7 Plaintiff Doe in the complaint; is that correct?

8 MR. ARKLES: Yes, Your Honor.

9 THE COURT: You have no problems with using Ms. Corbitt
10 and Ms. Clark's names in anything I write; is that correct?

11 MR. ARKLES: That's correct, Your Honor.

12 THE COURT: You have information in the record about
13 the treatment of transgender people and certain violence and
14 hostility. Is any of your evidence specific to Alabama?

15 MR. ARKLES: Yes, Your Honor.

16 THE COURT: What evidence do you have that's specific
17 to Alabama?

18 MR. ARKLES: There are two primary types of evidence
19 that are specific to Alabama. One is my clients' own
20 experiences, like Jane Doe, who was told she would burn in hell
21 and denied services in a bank when she showed her driver's
22 license.

23 The other type of evidence is one of the studies that
24 was a national study did a breakout report specific to Alabama.
25 And that report talks about rates of discrimination and

1 violence, which are generally similar to the national rates.
2 The rates of transgender people in Alabama who have ID'd that as
3 consistent with their gender identity is much lower than
4 nationally.

5 THE COURT: What, now?

6 MR. ARKLES: I'm sorry. This is --

7 THE COURT: Say that again.

8 MR. ARKLES: So in general, the rates of discrimination
9 and violence that transgender people experience in Alabama
10 appears to be very similar to the national rates. There are
11 also some statistics in that report about how common it is for
12 transgender people to have ID that matches their gender
13 identity. Those rates are different in Alabama than nationally.

14 THE COURT: Oh, so you're saying for Alabama, it's
15 lower in what regard, now? What were you saying? You said
16 something was lower.

17 MR. ARKLES: Yes. So transgender people are able to
18 get an ID that matches their gender identity less frequently in
19 Alabama than other parts of the country. Which is not
20 surprising, given Policy Order 63.

21 THE COURT: But I could not infer, for instance, that
22 the hostility to transgender people is either higher or lower in
23 Alabama than elsewhere in the country.

24 MR. ARKLES: I do not believe we have evidence to
25 support that inference, Your Honor.

1 THE COURT: Okay. Now, I noticed that --

2 Would you agree with that, Mr. Chynoweth?

3 MR. CHYNOWETH: Agree that --

4 THE COURT: There's nothing specific to Alabama that
5 would indicate that the hostility towards transgender people is
6 higher or lower?

7 MR. CHYNOWETH: Yes.

8 THE COURT: Okay. Mr. Arkles, if I were to write an
9 opinion in your favor, but I could only write it on one of your
10 claims, which would you prefer it be and why?

11 MR. ARKLES: Your Honor, I think that the equal
12 protection claim is probably the one that I would choose.

13 THE COURT: Why?

14 MR. ARKLES: Because for transgender people not to have
15 access to driver's license that they can use safely and with
16 dignity without getting medical care that is unrelated to their
17 ability to drive treats them far less favorably than
18 nontransgender people. And it also indicates that the state can
19 make a policy deciding what your body type has to be to be a
20 real woman or to be enough of a man, which I think is abhorrent
21 to the equal protection clause which prohibits discrimination on
22 the basis of gender in the absence of an important government
23 interest that is substantially furthered by the policy. Here
24 the policy itself is simply about making a distinction on the
25 basis of gender and saying that most transgender --

1 THE COURT: Let's talk about making a distinction on
2 the basis of gender. What about the state's argument that
3 everybody is treated alike? In other words, all the state is
4 saying is that your driver's license should reflect what you
5 are -- what your genitals show, and that's true to both -- to
6 everyone across the board. There's no discrimination.

7 MR. ARKLES: Well, so, Your Honor, I think that there
8 is clearly discrimination. Because for transgender people, this
9 means that they can't have a license they can use safely or with
10 dignity and that discloses something that's exclusively about
11 genitalia rather than the sex that they live as, identity as, or
12 are typically perceived to be. And the reasoning is simply
13 because of a sense of what makes somebody the right kind of a
14 man or a woman. That reasoning is simply not adequate under the
15 equal protection clause.

16 THE COURT: I thought, though, that you made the
17 argument earlier that your equal protection claim is that
18 transgender people are treated differently. But how are they
19 treated differently if both transgender and what you call
20 cisgender and everyone else just requires that your driver's
21 license reflect your genitalia, that's it, case closed,
22 according to the state?

23 MR. ARKLES: Your Honor --

24 THE COURT: So where is the disparate treatment there?

25 MR. ARKLES: Your Honor, because transgender people and

1 transgender people alone are required to undergo a form of
2 genital surgery that results in permanent sterilization that is
3 irrelevant to their ability to drive before they can get an ID
4 that indicates who they are and that they can use without
5 putting themselves at risk of harassment, discrimination, and
6 violence, and because it is based specifically on whether the
7 state believes that transgender people are the right kind of
8 women or men.

9 It also imperfectly reflects genitalia. There are a
10 number of people for whom the driver's license actually won't
11 indicate their genital type. For example, transgender people
12 who are born in one of the roughly 25 U.S. jurisdictions where
13 you can amend your birth certificate without surgery and then
14 move to Alabama, the driver's license will not reflect whether
15 or not they've had genital surgery or what their genitals looked
16 like when they were born. And at any rate, a desire simply to
17 describe people's genitals in and of itself is not an important
18 government interest.

19 THE COURT: Let me ask you this, Mr. Chynoweth. What
20 would you do in the case where someone was transitioning? If
21 the driver's license is supposed to reflect their genitalia,
22 what happens when you're transitioning?

23 MR. CHYNOWETH: I think that our deposition testimony
24 was crystal clear on that point: That medical documentation had
25 to say that the sex reassignment surgery has been completed.

1 THE COURT: Well, suppose it's not completed. That's
2 what I'm saying. You're transitioning. Suppose you're just
3 taking hormones or suppose you're going through a point where
4 you're, I guess, arguably in between. I don't understand, how
5 would the state -- what would the state want then?

6 MR. CHYNOWETH: For the cases that --

7 THE COURT: Yeah. Where the person is transitioning.
8 Where they haven't -- it hasn't been what you would call
9 complete yet.

10 MR. CHYNOWETH: Then you cannot change your sex on your
11 license pursuant to --

12 THE COURT: But then it wouldn't reflect necessarily
13 your status, would it? Unless you're just saying, it has to be
14 completely trans -- complete, I guess, in the essence of your
15 genitals maybe?

16 MR. CHYNOWETH: I understand the Court's question.

17 THE COURT: Yes. But maybe I don't understand the
18 surgery itself. Maybe someone needs to enlighten me on exactly
19 what the surgery entails.

20 MR. CHYNOWETH: The state's interests in the policy is
21 identifying people based on sex described in physical terms for
22 law enforcement purposes. If I could add that all together with
23 hyphens as one interest, that would be the state's interest.

24 Now, I understand the Court has said, look. There can
25 be transitional stages. There can be indeterminate stages.

1 This is a bright-line rule. The state has chosen a bright-line
2 rule to define sex by reference to physical characteristics,
3 including genitalia. And it is a bright-line rule because it is
4 something that is simple for law enforcement officers and
5 corrections officers throughout the state to understand.

6 THE COURT: You said it's a bright-line rule, including
7 genitalia. What else other than genitalia is at issue here?

8 MR. CHYNOWETH: I believe there's testimony in the
9 record that top and bottom, to use a somewhat inelegant way of
10 describing it, but that is the way --

11 THE COURT: I see. You mean breasts?

12 MR. CHYNOWETH: Yes.

13 THE COURT: So what if someone has breast removal but
14 not necessarily genitalia change?

15 MR. CHYNOWETH: The way that the documentation has been
16 required, that would not be sufficient.

17 THE COURT: Even though if you're looking, as you put
18 it, top and bottom, the top may reflect one thing and the bottom
19 may reflect something else, but the state still says you're
20 stuck with the bottom.

21 MR. CHYNOWETH: Yes. Again, the policy choice is a
22 bright-line rule defined by complete sex reassignment surgery.
23 Because I think once you start saying, well, what about this
24 rather than that, there is a whole range of indeterminate,
25 intermediate conditions. And I think that it results in an

1 administrative burden to say, well, if somebody's had procedures
2 X and Y but not Z, can we change the sex on their license? I
3 think that part of the reason that Policy Order 63, that choice
4 was made, was administrative simplicity.

5 THE COURT: Do you want to respond to that?

6 MR. ARKLES: Your Honor, if the interest is
7 administrative simplicity, then a gender-identity-based policy
8 is far simpler and is actually something that both experts
9 agreed would work here.

10 In terms of the health care that people -- that people
11 may need, as Dr. Gordon testified, this is individualized care.
12 What people need can vary. Some people undergo hormone
13 treatment. Hormone treatment can cause changes in the genitalia
14 along with other parts of the body. Then there are wide
15 variety --

16 THE COURT: Does the record reflect these types of
17 changes? For instance, you said hormonal changes can bring
18 about a change in genitalia; right?

19 MR. ARKLES: Yes, Your Honor. Not the type of change
20 that it appears from Chief Pregno's testimony, penis or vagina,
21 that the state is looking for, but it does provide -- it does
22 create changes to a wide variety of body systems, including
23 changes to the genital area.

24 I can't quite recall what detail Dr. Gordon's testimony
25 got into this. But at the end of the day, also, it seemed to us

1 from Chief Pregno's testimony that she was defining it as penis
2 or vagina, because that's what she said.

3 It is also true that I believe Ms. Eastman testified
4 top and bottom surgery, which would actually mean that a
5 transgender woman who had had genital reconstruction surgery and
6 who had also grown breasts due to hormone therapy would still be
7 required to get breast augmentation surgery before she could
8 change the sex designation on her license.

9 If that's true, it cuts against any interest in having
10 consistent information about genitalia on a license. Which,
11 again, the government doesn't actually need. What the
12 government needs --

13 THE COURT: You're saying that under this policy, if
14 you were transitioning into -- if you were born a female -- no.
15 Maybe I have it backwards. You would have to get --

16 If you were born a male, you would actually have to get
17 breast augmentation for it to be complete; is that correct?

18 MR. ARKLES: So, Your Honor, that appears to be, from
19 what Mr. Chynoweth just said, what the state's position is. If
20 they're required both top and bottom surgery, then that's what
21 it means.

22 So even if you have female typical genitalia, even if
23 you have breasts, you would still need to get surgery on the
24 upper half of your body in some way. Or perhaps they mean
25 facial feminization surgery or a tracheal shave, which reduces

1 the size of the Adam's apple.

2 The state was never able to be very specific about what
3 it meant, even though it insists on this particular rule.
4 Really, the state should not be in the business of trying to
5 regulate what type of medical care people get.

6 THE COURT: I'll get to that in a minute. Right now I
7 just want to figure out what the state is requiring and what the
8 implications are. Now, what the state should be doing is
9 another question, and I'll get to that in a minute.

10 So what about the Adam's apple? What happens there,
11 Mr. Chynoweth? Does that need to be changed?

12 MR. CHYNOWETH: Again, ALEA doesn't enumerate specific
13 procedures that are necessary and sufficient when taken together
14 to constitute sex reassignment.

15 THE COURT: I'm just trying to understand your bright
16 line here. You said there's a bright line. The question is,
17 what is the bright line? Or is the line not so bright is
18 another question.

19 So does the Adam's apple need to be changed if you want
20 to have complete transition for someone who, say, wants to
21 transition to female?

22 MR. CHYNOWETH: ALEA relies on the statements provided
23 by the doctors who have performed these procedures that sex
24 reassignment surgery has been completed. And Jeanie Eastman
25 testified that no one had ever asked her, what do you mean by

1 sex reassignment? Do you mean this rather than that? And, in
2 fact, this is the way the medical unit follows up on a variety
3 of medical conditions. They use terms, and there has never been
4 any confusion as to what this meant. And there doesn't appear
5 to have been any confusion as to whether this disqualified
6 plaintiffs from receiving a sex designation change.

7 THE COURT: So what you're saying is all you need is a
8 doctor's statement saying it's complete, but you're not going to
9 challenge what complete means.

10 MR. CHYNOWETH: That the sex reassignment surgery has
11 been complete. Yes.

12 THE COURT: What if they had a statement saying it had
13 been complete, but there had been no genitalia change? Would
14 that be okay? Depends on what you mean by complete. You know,
15 maybe it's the person saying I want to complete, but I don't
16 want to lose my right to engage in reproductive activities, so
17 I'm not going to have my genitalia changed. But it's complete
18 otherwise. I'm a female or a male.

19 MR. CHYNOWETH: The understanding and the way the
20 policy has been interpreted in the medical unit is that it
21 applies to genitalia.

22 THE COURT: So just saying it's complete is not enough.

23 MR. CHYNOWETH: Correct. And I think that the modifier
24 complete should go before the word surgery as opposed to the
25 surgery being complete. Because, yes, saying that a surgery --

1 THE COURT: So if someone got breast augmentation but
2 didn't change the genitalia because they wanted to be able to
3 still have children, that would not comply.

4 MR. CHYNOWETH: That would not.

5 THE COURT: Okay.

6 MR. CHYNOWETH: Your Honor, can I respond to one point
7 Mr. Arkles made?

8 THE COURT: Yes.

9 MR. CHYNOWETH: On the administrative convenience
10 question, it is not that the state's only interest is in
11 administrative feasibility. The primary interest is physical
12 identification for law enforcement purposes. However,
13 administrative convenience by choosing what we contend is a
14 bright-line rule --

15 THE COURT: That's a pretty Draconian requirement by
16 the state to say that in order to transition, you have to give
17 up your right to reproduce. Your reproductive right. Not only
18 do you have to be changed, but you can't even have children
19 anymore.

20 MR. CHYNOWETH: The state does not require people to
21 give up the right to reproduce.

22 THE COURT: Yes, but to get this license, you do.

23 MR. CHYNOWETH: They have licenses, Your Honor. Two of
24 the three plaintiffs have their Alabama license --

25 THE COURT: Yes, but to get their licenses to

1 accurately reflect your gender, you have to give up your right
2 to have children.

3 MR. CHYNOWETH: And what the word accurately reflects
4 gender means really goes to the heart of the issue. The state
5 contends it is not making an ideological statement as to what
6 gender really means. It says the state of Alabama defines sex
7 as follows for law enforcement purposes. It is not imposing an
8 ideological message on the bearers of the license. It is just
9 like weight is measured in pounds rather than kilograms. And
10 this is -- it contains -- the state has to have the right to
11 control the meaning of the information that goes on a driver's
12 license.

13 THE COURT: Could I just get a clarification here,
14 Mr. Arkles? Am I correct that when you have the gender surgery,
15 you lose your reproductive capacity, or am I incorrect on that?

16 MR. ARKLES: It is correct for genital
17 reconstruction -- for any sort of genital surgery for
18 transgender women, it inevitably leads to permanent
19 infertility.

20 THE COURT: What about for the penis? If you -- same
21 thing?

22 MR. ARKLES: For transgender men, according to
23 Dr. Gordon's testimony, there is one procedure that is a more
24 limited procedure that can be performed without impacting
25 reproductive capacity. But he has never known anyone who has

1 gotten only that procedure and not other procedures that also
2 ended --

3 THE COURT: So for someone who was born male in
4 genital, there is a possibility of keeping a reproductive
5 capacity.

6 MR. ARKLES: I'm sorry. The other way. So for people
7 who are assigned male at birth and who identify as women, like
8 my clients, the only way to get genital surgery ends
9 reproductive capacity.

10 For people who are assigned female at birth and
11 identify as men, there is one procedure that could preserve it,
12 although it is not a common procedure. The vast majority do not
13 preserve it.

14 THE COURT: I had it backwards. Yes.

15 I know you say that you would prefer the Court to rely
16 on your equal protection argument, but you also have this
17 unwanted medical treatment claim.

18 MR. ARKLES: Yes, Your Honor.

19 THE COURT: What exactly is that claim?

20 MR. ARKLES: So that claim is that the government of
21 Alabama is conditioning a government benefit on undergoing -- on
22 giving up the right to refuse medical treatment. In this case,
23 for all transgender women and in general for transgender men as
24 well, that means also giving up the opportunity to be able to
25 have children. And that's a right that has been acknowledged by

1 the Supreme Court in a number of cases, and it has particular
2 importance in the context of sterilization.

3 If there was some connection to the ability to drive,
4 then it might make sense to have a medical requirement, which is
5 generally when the government has medical requirements related
6 to driver's licenses. It's about the ability to drive. But
7 certainly there are no allegations here that there's any
8 relevance to ability to drive.

9 THE COURT: Are you familiar with the unconstitutional
10 doctrine -- unconstitutional conditions doctrine?

11 MR. ARKLES: Yes, Your Honor.

12 THE COURT: Does that apply here?

13 MR. ARKLES: Yes, Your Honor.

14 THE COURT: How?

15 MR. ARKLES: Well, if the government can't condition
16 receipt of public assistance on giving up the right to -- the
17 right to refuse unreasonable searches, then the government also
18 can't condition access to a usable license, a license that
19 people can actually lose without endangering themselves and
20 contradicting their fundamental sense of self, on giving up the
21 right to refuse medical care. We're talking about
22 nonincarcerated, competent adults, and a type of medical care
23 that is profoundly intimate; that touches on one's identity,
24 one's relationships, one's reproductive capacity.

25 And it's an -- important for medical care for a number

1 of --

2 THE COURT: What about the argument that it's really
3 not applying a condition? You can get a driver's license. It
4 just doesn't necessarily accurately reflect your -- the gender
5 you would like it to reflect.

6 MR. ARKLES: The government has no business
7 conditioning anything on sterilizing surgery unless it has a
8 very good reason for it. And here it just doesn't.

9 In fact, functionally speaking, when a transgender
10 person presents a driver's license with the wrong sex
11 designation, they're sometimes met with hostility, sometimes
12 even violence. Sometimes they aren't believed that it could
13 actually be their license.

14 In situations where -- I mean, my client who's here
15 today, Destiny Clark, has been embarrassed and frightened when
16 it has suddenly outed her as transgender at an election site, to
17 a poll worker, and to a police officer on the side of the road.
18 There are situations where sometimes this actually rises to
19 violence.

20 It's not meaningfully available in the same way it is
21 available to other people to have a sex designation that
22 indicates a sex that's different from the sex you live your life
23 to be.

24 THE COURT: Mr. Chynoweth, do you want to respond to
25 that?

1 MR. CHYNOWETH: Yes. Thank you, Your Honor.

2 So in Count 2, there's a compelled medical treatment
3 claim. As I understand it, there's not even a contention that
4 we're physically forcing someone to receive medical treatment
5 they don't want. So I understand Count 2 to be an
6 unconstitutional conditions claim. That claim fails because
7 it's circular.

8 THE COURT: Because what?

9 MR. CHYNOWETH: Because it is circular. It has to
10 assume the truth of what it's trying to prove.

11 In the *LeBron* case, the unconstitutional conditions
12 case out of Florida, the policy was you will not receive public
13 assistance unless you submit to a suspicionless urine test.
14 That was an independent Fourth Amendment right those applicants
15 had that they were expressly required to waive on condition of
16 not receiving public assistance.

17 We don't condition receipt of the license, first of
18 all. It's not even a condition. But number two, what is
19 unconstitutional about it? We're not requiring people to have
20 surgery.

21 So the claim has to be, well, you are requiring to
22 receive a license that doesn't have the sex with which they
23 identify. And then the question is, well, why is that
24 unconstitutional? And that can only be answered by Counts 1, 3,
25 or 4. So which of those other three counts makes it

1 unconstitutional to have Policy Order 63 define your sex?

2 THE COURT: Let's maybe talk about that a little bit.

3 X is transgender. X presents a driver's license, but X
4 is dressed as -- and the driver's license says X is male, but X
5 is dressed as a female. Someone sees this.

6 And we deal with this in the real world. This is not a
7 hypothetical. We're not talking about the moon. We're not
8 talking about Mars.

9 Once someone sees that driver's license and sees X, you
10 automatically know they're transgender; right?

11 MR. CHYNOWETH: No, Your Honor. With respect to
12 Count 1 --

13 THE COURT: I'm talking about actually all four counts
14 in this sense. But the reality is that every time someone
15 presents a driver's license, you essentially are holding up a
16 banner that says "I'm transgender" because you're presenting
17 yourself as a female, and your driver's license is showing you
18 as a male. You might as well have a scarlet letter T on your
19 driver's license because you're presenting in one gender and
20 your driver's license is saying something else. Why isn't this
21 just purely a scarlet letter case?

22 MR. CHYNOWETH: Your Honor, we disagree with that
23 contention --

24 THE COURT: Okay. Why?

25 MR. CHYNOWETH: -- for two reasons. Number one, the

1 audience. It is essential to our case throughout all of these
2 counts that the state limits situations in which you must show a
3 driver's license, rather than any other form of identification
4 that you have discretion to choose, to law enforcement officers
5 and court personnel. So the --

6 THE COURT: Can you show a passport or something like
7 that? Is that what you're saying?

8 MR. CHYNOWETH: There are certain cases in which you
9 are not allowed to do that, very limited cases having to do with
10 traffic stops, law enforcement contacts.

11 THE COURT: Actually, I should say, why isn't a scarlet
12 letter case or German -- you know what I'm talking about --

13 MR. CHYNOWETH: Because it does not say transgender.

14 THE COURT: Well, yes, you are. You have this person
15 walk up, and you might as well be wearing a little patch on your
16 arm saying you're transgender, you know, and get beaten up.
17 Because you appear one way, and your driver's license shows
18 something else. Why isn't just -- you know, what the Germans
19 call wearing a pink -- I'm trying to remember the name of it
20 right now, but --

21 MS. CORBITT: Pink triangle.

22 THE COURT: Pardon me?

23 MS. CORBITT: It's a pink triangle.

24 THE COURT: Yes. A pink triangle.

25 Why isn't this just a pink triangle case?

1 MR. CHYNOWETH: Because first of all, the disclosure of
2 someone's transgender status is inferential.

3 Now, consider someone who's simply wearing a disguise.
4 Consider the case of somebody who's robbed a bank, and it's a
5 man who's simply cross dressing as a woman to disguise himself.
6 The fact that his license says "M" is valuable information to
7 law enforcement. It doesn't disclose he's transgender. He's
8 not transgender. He's disguising himself.

9 THE COURT: Well, that person may want to take the risk
10 of wearing a pink triangle, but what about people who don't want
11 to take the risk of wearing a pink triangle?

12 MR. CHYNOWETH: The defendants do not agree this is
13 analogous to a pink triangle for the reasons --

14 THE COURT: Why is it not analogous to a pink triangle?

15 MR. CHYNOWETH: Because limited disclosure. It is not
16 outward -- and this goes to the *Wooley v. Maynard* case under the
17 compelled speech. It's not like a driver's license where the
18 Supreme Court analyzed its case by saying, you are being forced
19 to use your car as a mobile billboard to broadcast the state's
20 ideological message. I think that sounds like a pink triangle.
21 This is not the case.

22 THE COURT: Well, that's different, because with the
23 license plate, it's just a license plate. Here your body is at
24 issue. You're presenting yourself dressed a certain way. You
25 are sending a message through your body. It's you. Not just a

1 driver's license. It's the driver's license in conjunction with
2 you. It's very privatized to you. It's not purely like a
3 license plate, which everybody has on their car. And it could
4 be your daughter. It could be your son driving the car. It
5 could be you.

6 Here this only takes meaning when you, the person who
7 is dressed a certain way, present a driver's license that shows
8 something else. So why doesn't this circumstance distinguish it
9 from the driver's license -- I mean from the car license cases?

10 MR. CHYNOWETH: So the information references a unique
11 individual; however, the information is defined in a uniform way
12 that applies to a transgender individual as equally as to
13 someone who is simply attempting to disguise himself. And
14 the --

15 Again, I think this is more of a compelled speech
16 thing. The question is, who is doing the speaking? And it's
17 more, how would an outside observer view that?

18 So, yes, I understand that is information that is
19 describing you. But is it you that's expressing the message or
20 wanting to be associated with the message, or is it the
21 government? And every reasonable person understands that the
22 descriptive things that appear on the face of a driver's license
23 are put there by the state and they're defined by the state.

24 THE COURT: I also want to inquire a little bit more
25 about your everybody's-being-treated-the-same argument. You

1 know, that might apply if we lived on the moon or if we lived on
2 Mars. But the everybody-being-treated-the-same argument doesn't
3 apply in the real world where transgender people are actually
4 subjected to violence and actually subjected to discrimination
5 if they reveal this disconnect between who they are and what's
6 on their driver's license.

7 So when you really say that everyone's being treated
8 the same, that might apply if we lived on another planet. But
9 on this planet we have to apply this in a world in which
10 transgender people are actually attacked and even killed because
11 of who they are. So how can you say that this law is neutral
12 and that it applies across the board?

13 MR. CHYNOWETH: Under the relevant Supreme Court
14 precedent and under the *Evans* case, which draws the distinction
15 between status and conduct with respect to transgender, the
16 answer is simply binding precedent. That --

17 THE COURT: Let's talk about status versus conduct.
18 Describe that distinction to me.

19 You're talking about Judge Pryor's distinction, aren't
20 you?

21 MR. CHYNOWETH: Yes. And, in fact --

22 THE COURT: Describe that distinction to me.

23 MR. CHYNOWETH: And I think it's also the holding of
24 that case, which was to remand to allow the plaintiff to replead
25 a gender nonconforming claim.

1 THE COURT: Right. Describe that distinction to me.

2 MR. CHYNOWETH: Yes. Status has to do with things like
3 one's disposition, such as sexual orientation or physical
4 nature. Conduct has to do with conduct. *Glenn v. Brumby* said
5 that gender nonconforming conduct is sex-based behavior and is
6 subject to intermediate scrutiny under the Fourteenth Amendment.

7 Policy Order 63 is clearly a status-based
8 classification. It is by reference to physical things, and it
9 does not say you're not allowed to have a license if you were
10 born biologically a male and wear a dress.

11 THE COURT: Wouldn't this case be more conduct than
12 status?

13 MR. CHYNOWETH: No, Your Honor, because the plaintiffs
14 could not satisfy Policy Order 63 by supplying the relevant
15 medical documentation described --

16 THE COURT: Well, it would be conduct in the sense
17 that -- I mean, it would be status in the sense that they might
18 be transgender, but it isn't conduct in the sense that they have
19 to present their driver's license showing that their driver's
20 license designation of gender doesn't match their appearance.
21 Isn't that classic conduct, not status?

22 MR. CHYNOWETH: I believe the relevant -- where we
23 apply the conduct/status-based distinction is to the face of
24 Policy Order 63: Is the classification status or conduct
25 based --

1 THE COURT: Do you want to respond to that, Mr. Arkles?

2 MR. ARKLES: Yes, Your Honor. This is -- to the extent
3 the status/conduct distinction actually matters -- which I'm not
4 convinced that it does, but to the extent that it matters --
5 this is a clear situation of conduct. Both in the sense that
6 the government is requiring people to take the action of getting
7 genital surgery in order to change the sex designation on their
8 license, and because it's precisely about this disjuncture
9 between somebody's genitalia and the traditional associations
10 with those genitalia, and somebody who expresses, presents,
11 identifies as a gender that is not traditionally associated with
12 those genitalia.

13 The state has decided that it is not okay with people
14 presenting themselves through their license as a sex that
15 doesn't match their genitalia. That is a distinction that is
16 exactly about the same type of issue as in *Glenn v. Brumby*.
17 There Brumby didn't like the fact that Glenn was saying that she
18 was a woman and was dressing in traditionally female ways and
19 had, according to Brumby's assumption, genitalia that was not
20 right for that.

21 That's exactly what the state is doing here. They're
22 saying, your body isn't right for the way you're presenting to
23 the world, or you need to change your body if you're going to
24 change the way you present yourself to the world.

25 THE COURT: Do you want to respond? Anything I haven't

1 heard?

2 MR. CHYNOWETH: Just briefly, Your Honor.

3 Again, it's not an ideological message. It's a
4 physical description. And second, *Glenn v. Brumby*, I think that
5 that was clearly an animus-based employment decision. That's
6 clearly not what's going on here. It's status based, as is
7 shown by the documentation of nonparties who have successfully
8 gotten license changes. Show me you can provide the medical
9 documentation, and we change it. Nothing like an employer
10 saying, you're wearing a dress. That's inappropriate. You're
11 fired.

12 THE COURT: Let me ask you this, Mr. Arkles. Why can't
13 it be characterized that what you're really seeking here is
14 really sort of an ADA claim? That is, you're seeking an
15 accommodation for your clients?

16 MR. ARKLES: Oh, an accommodation, Your Honor.

17 THE COURT: And why did you not?

18 MR. ARKLES: So, Your Honor, a couple of different
19 reasons. One, the ADA has written into it an exclusion for
20 gender identity disorders, which I think is unconstitutional,
21 but that would present a whole other path, and it seemed to me
22 not --

23 THE COURT: You decided not to take that on.

24 MR. ARKLES: Yes, Your Honor. And it seemed to me that
25 it wasn't crucial, because I think that these other claims are

1 exactly on point. There is a privacy violation, people -- as
2 courts in other cases that are comparable around the country
3 have found. People are forced to disclose that they are
4 transgender without any good reason for that. There is an equal
5 protection violation. There is an unconstitutional condition on
6 the right to refuse medical care. And it does compel speech.
7 It compels them to associate themselves with and say that they
8 are something that they aren't. Something that contradicts
9 their core sense of self and that they find abhorrent. And that
10 fits classically, I think, in the case law on all of those
11 different points.

12 THE COURT: What relief do you want from this Court?

13 MR. ARKLES: Your Honor, we would like a declaration
14 that the surgery requirement in Policy Order 63 is
15 unconstitutional, and we would like an order permitting my
16 clients to get access to driver's licenses with female sex
17 designations.

18 THE COURT: Now, the relief here would be restricted
19 just to your clients.

20 MR. ARKLES: The declaratory relief would, of course,
21 go further. Very early in this litigation the defendants
22 indicated that they would certainly be willing to comply with
23 any declaratory relief, so a permanent injunction is probably
24 not required in this case.

25 THE COURT: Let me ask you this, Mr. Chynoweth. If --

1 and I can't remember which one lived, I believe, in -- North --
2 South Dakota or North Dakota --

3 MR. CHYNOWETH: That was Plaintiff Corbitt.

4 THE COURT: Corbitt. Right.

5 MR. CHYNOWETH: She changed her license in North
6 Dakota.

7 THE COURT: If she had not lived in Alabama first and
8 just presented the Dakota license, Alabama would have taken
9 that; right?

10 MR. CHYNOWETH: Yes.

11 THE COURT: Without a problem.

12 MR. CHYNOWETH: Yes.

13 THE COURT: Just presented that North Dakota license,
14 which did not require any surgical change.

15 MR. CHYNOWETH: Correct.

16 THE COURT: But because she had had an Alabama
17 residence before, suddenly she can't get the designation; is
18 that correct?

19 MR. CHYNOWETH: That was correct. Yes.

20 THE COURT: So what's the distinction there? If she
21 had been born in -- if she had been born in North Dakota or just
22 simply had not gotten a driver's license, in fact, in Alabama,
23 but had just merely gotten the driver's license in --

24 Was it North or South Dakota? I can't remember.

25 MR. CHYNOWETH: It was North.

1 THE COURT: North Dakota.

2 But had simply gotten the driver's license in North
3 Dakota, presented it to the Alabama officials, she could have
4 gotten an Alabama license that reflected her gender as female;
5 right?

6 MR. CHYNOWETH: Correct, Your Honor.

7 THE COURT: So the real crux here is merely the fact
8 that she had gotten an Alabama driver's license early on.

9 MR. CHYNOWETH: Yes.

10 THE COURT: What's the point here? Where's the state's
11 interest any different?

12 MR. CHYNOWETH: As I --

13 THE COURT: I mean -- or if she presented a passport
14 that said that she was female. Where's the state's interest
15 served if that's the thin thread of the distinction?

16 MR. CHYNOWETH: I have two responses to that. The
17 first is there are two arguments against the state's policy, one
18 based on overinclusive and one based on underinclusive. And I
19 think it's just helpful to get them out on the table here. I
20 think this is -- I think what --

21 THE COURT: Put them out on the table.

22 MR. CHYNOWETH: What Your Honor is raising is an
23 overinclusive argument.

24 So you say, state, that the interest in Policy Order 63
25 is physical identification for law enforcement purposes, and

1 that's why you have a surgery requirement that tells someone
2 about the underlying change to that person's physical
3 appearance. Yes. So there is an overinclusiveness objection.

4 State, isn't it true that you accept out-of-state
5 documents that do not have -- from a state that maybe does not
6 have a surgery requirement? That is correct.

7 And the state has two responses to that. It really
8 goes to the level of scrutiny, though, whether that -- the
9 traction that that overinclusiveness objection gets depends on
10 what level of scrutiny applies. I will just say that. Of
11 course, that applies across the board to all of these arguments.

12 But the state's response to that is, again,
13 administrative convenience. Not that that's our only interest,
14 but it is an interest. Administrative convenience. We are not
15 going to research every single out of state. Number two, full
16 faith and credit to nonlitigation documents from other states.

17 Then there is an underinclusive objection.

18 THE COURT: Is the state required to give full faith
19 and credit to the North Dakota license to that extent, or is
20 that just a matter of convenience for the state of Alabama?

21 MR. CHYNOWETH: I believe that is -- I believe that
22 that is administrative convenience.

23 THE COURT: Okay.

24 MR. CHYNOWETH: So there's an underinclusive objection
25 here as well, which is, can't you be in the state of Alabama and

1 have surgery and not change your license? Now, so long as
2 you're not changing your name. If you change your name, you are
3 required to legally change your license. However, the state
4 doesn't ask people when they go to renew their licenses, have
5 you had a sex change reassignment?

6 That's an underinclusiveness; that is, you can have the
7 surgery and not have the sex change on your license. And the
8 state's response to that is that it is entitled to rely on the
9 fact that if somebody has taken the trouble to have sex
10 reassignment surgery, they are presumably going to go and have
11 the sex on their license changed.

12 And we think that under -- that the highest level of
13 scrutiny -- actually, I agree with Mr. Arkles that the action
14 here is on the equal protection claim. We believe that under
15 the highest level the scrutiny that would apply under any of
16 these claims, it would be intermediate scrutiny in that those
17 underinclusiveness and overinclusiveness type objections satisfy
18 substantial relations.

19 THE COURT: Let me see if I understand another scenario
20 here. If someone was born in Alabama and got a passport, and
21 the passport showed -- let's take Ms. Corbitt. If she had been
22 born in Alabama but never applied for an Alabama license, got a
23 passport and it showed her gender as female, and she presented
24 that to the driver's license folk here in Alabama, she could get
25 a license that reflected her gender as female.

1 MR. CHYNOWETH: I would have to review what --

2 THE COURT: All I'm saying is if someone is born in
3 Alabama and they get a passport showing their gender as
4 different from their birth, would the state accept that passport
5 and show their gender as -- or her gender as female?

6 MR. CHYNOWETH: I --

7 THE COURT: Or do you not know? Which is also an
8 important question.

9 MR. CHYNOWETH: There was testimony, I believe, in
10 Chief Pregno's deposition, and I can't recall that. I cannot
11 recall if you have to -- when you're applying for a license
12 initially, if you're required to show a birth certificate.

13 THE COURT: Apply for a license initially, present a
14 passport that shows you as female -- and use Ms. Corbitt. The
15 license shows you as -- pardon me. The passport shows you as
16 female. You hadn't applied before. Could you get a license in
17 Alabama that showed you as female?

18 MR. ARKLES: Your Honor, the passport is adequate under
19 the ALEA regulations -- I'm sorry -- the ALEA policy. It's
20 listed as a primary document, which is sufficient.

21 THE COURT: I thought that would be the answer. I just
22 wanted to make sure that's true.

23 MR. CHYNOWETH: Sorry my recollection on that was not
24 clear. I believe Chief Pregno did testify to that.

25 THE COURT: So why does the state recognize that

1 passport and not just, you know, a letter from her doctor just
2 saying she's female?

3 MR. CHYNOWETH: Again, I think under the highest level
4 of scrutiny we apply, that it would be a substantial relation
5 and that the state is entitled to rely on the fact that for the
6 most part, people use their Alabama documents; that in the vast
7 majority of cases, that's going to be the document that is used.

8 THE COURT: Okay. Anything else you-all want to say to
9 me? I would like to get a final disposition on the nondriver
10 ID, though. You can assure me that this policy applies to the
11 nondriver ID, or are you not sure? Even though the policy does
12 not mention nondriver ID.

13 MR. SINCLAIR: Let's research and get back to them.

14 MR. CHYNOWETH: Your Honor, it is applied.

15 MR. SINCLAIR: Let's get back to them.

16 THE COURT: Do you have evidence that it has ever been
17 applied to a nondriver ID or do you have anything -- do you have
18 any evidence that says that it does apply other than your
19 representation here in court? Because the policy doesn't say
20 that.

21 MR. CHYNOWETH: There's nothing in this record. I
22 can't --

23 THE COURT: Has that issue even come before you?

24 MR. CHYNOWETH: I cannot tell you, standing here.

25 Would the Court -- I guess my question would be, would the Court

1 like a supplement --

2 THE COURT: I want an answer to my question is what the
3 Court would like.

4 MR. CHYNOWETH: Would you like the parties to submit a
5 stipulation on that limited issue?

6 THE COURT: We'll see. Do you think you can -- well,
7 you can try, I guess. It won't hurt.

8 Why don't we take a brief recess, and I'll let you know
9 whether I have any more questions. Thank you.

10 MR. ARKLES: Thank you, Your Honor.

11 (Recess was taken from 11:18 a.m. until 11:29 a.m., after
12 which proceedings continued, as follows:)

13 THE COURT: Counsel, will you get something to me by
14 the end of the day on nondriver IDs, what the status of those
15 is?

16 MR. ARKLES: We will do our best, Your Honor. I
17 believe so.

18 THE COURT: Okay. Good. Thank you.

19 And let's talk about the upcoming pretrial. I don't
20 think we really need a pretrial, or at best we can do it by
21 phone. I'll just have to decide whether I want to rely just on
22 the record, since both sides have stipulated I can, or I want to
23 hold a trial. I may want to hold a trial, either in whole or in
24 part, but I'll let you know. But I don't think I really need a
25 pretrial.

1 I guess I really do need a pretrial order that just
2 sets forth the positions of both sides, but I don't -- when do
3 you think you can get that to me?

4 MR. ARKLES: Your Honor, I believe it's currently
5 scheduled to be due on August 6th, and we're prepared to meet
6 that deadline.

7 THE COURT: Okay, then. Why don't you get your
8 pretrial order to me that formalizes and updates the complaint
9 and the answer and all the other pending matters? And both
10 motions for summary judgment are denied, but that doesn't mean,
11 as I say -- in fact, that means I have two choices: Either to
12 hold a trial or just to consider the case on the current record.

13 Let's see. Do I need to take care of anything else?

14 I have one other little issue. And I guess it perhaps
15 is a side issue, but it's one that I noticed. Ms. Corbitt
16 claimed that forcing her to denote herself on her license as
17 male was against God's plan and, therefore, violated her
18 religion. Is that a viable claim?

19 MR. ARKLES: Your Honor, she has not made a free
20 exercise claim in explaining why this is important to her --

21 THE COURT: Right. I know she made it in her
22 deposition, but she was pretty vocal about it and she said that,
23 you know, having to do this is against -- she says it's against
24 God's plan for me. Why isn't that a violation of her right of
25 free exercise? Why isn't she just like the cake maker in the

1 other Supreme Court case? She's saying the state is forcing her
2 to say this, and it's against her religious views.

3 MR. ARKLES: Well, Your Honor, I think she is much like
4 the cake baker in that ultimately she is contending with what's
5 a generally applicable neutral-as-to-religion state law, and
6 therefore it would be subject only to rational basis review.
7 There would be heightened strict scrutiny or a balancing test
8 under the other claims.

9 THE COURT: Wouldn't that require strict scrutiny?

10 MR. ARKLES: Not if it's neutral and generally
11 applicable as to religion.

12 THE COURT: Do you want to respond to that,
13 Mr. Chynoweth?

14 MR. CHYNOWETH: I think that that is a compelled speech
15 claim, and so the defendants maintain that it fails for the
16 reasons already set out. It's government speech.

17 Your Honor, on the trial issue, we have one other
18 pretrial deadline, which would be witness and exhibit lists.

19 THE COURT: I'll let you know all about that. I think
20 the question for me first is going to come down to whether I
21 want a trial.

22 Let me say this. Those deadlines are all suspended for
23 now.

24 MR. CHYNOWETH: Okay. And except for the pretrial
25 order --

1 THE COURT: I would like the pretrial order.

2 MR. CHYNOWETH: -- August 6th. Okay.

3 THE COURT: All other deadlines, pretrial deadlines,
4 are suspended until you hear from me. I just -- no sense in
5 your going through all that until I make up my mind.

6 MR. ARKLES: Thank you, Your Honor.

7 THE COURT: Let's see what else.

8 Oh, one final big matter. Can you resolve this?

9 MR. ARKLES: Your Honor --

10 THE COURT: Do you think mediation would help since
11 this applies to your three clients?

12 MR. ARKLES: Your Honor, we would certainly be open to
13 discussing settlement, but it's been my understanding that the
14 state is not willing to change its policy and without a
15 change -- without a judicial order. And without a change to the
16 policy --

17 THE COURT: Well, Mr. Chynoweth, you've said that, you
18 know, if Ms. Corbitt had been under different circumstances, you
19 would have accommodated her. Are you just saying, then, there's
20 just no possibility of resolution of this informally through
21 mediation? Or you could even mediate changing your policy, for
22 all that matters. But I'm just asking the state, is it willing
23 to discuss it.

24 MR. CHYNOWETH: We have not seen alternative policies
25 that we have been willing to adopt.

1 THE COURT: Okay.

2 MR. CHYNOWETH: I have not -- we have not had any
3 discussions about whether an individual plaintiff should be
4 treated differently from any of the other plaintiffs based on
5 individual circumstances.

6 THE COURT: My question is very simple. Are you
7 willing to engage in mediation or not?

8 MR. CHYNOWETH: I do not think it would resolve the
9 issues --

10 THE COURT: I can't force you. This Court does not
11 have compulsory mediation. So my question for you is, are you
12 willing? All you have to say is yes or no, and that's the end
13 of it. It's the end of the discussion.

14 MR. CHYNOWETH: No, Your Honor.

15 THE COURT: No. Okay. Very good, then.

16 Anything else, counsel?

17 MR. ARKLES: Your Honor, just to very briefly clarify,
18 I do think that on the nondriver ID point -- and Mr. Chynoweth
19 certainly can correct me if I'm wrong -- that one can either
20 have a driver's license or a nondriver ID, but one cannot hold
21 both at once. Just to the extent that is relevant.

22 THE COURT: I do not know. Is that the law?

23 MR. SINCLAIR: Not quite.

24 MR. ARKLES: Oh, I'm sorry.

25 MR. SINCLAIR: But that's basically correct, Your

1 Honor. If your driver's license is suspended, for example, you
2 may have both a driver license and a nondriver ID. But
3 ordinarily, you cannot have a valid driver's license with a
4 nondriver ID as well.

5 THE COURT: Right. And this is Mr. Boone; right? No,
6 Mr. Sinclair.

7 MR. SINCLAIR: Yes, Your Honor.

8 THE COURT: Okay. Mr. Boone's over here.

9 But my real concern wasn't that. My real concern was
10 just how are nondriver IDs treated by the state. That's my real
11 concern here. That's what I would like for you to resolve for
12 me, whether the Policy Order 63 applies and, if so, how long --
13 well, let me ask. I'll pose all my questions. If it does
14 apply, how long does it apply? What documentation do you have
15 that it does apply, et cetera?

16 Anything else?

17 MR. ARKLES: No, Your Honor. Thank you.

18 THE COURT: Very good, then. Court's in recess.

19

20 (Proceedings concluded at 11:36 a.m.)

21 * * * * *

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript
from the record of the proceedings in the above-entitled matter.

This 14th day of August, 2019.

/s/ Patricia G. Starkie
Registered Diplomate Reporter
Certified Realtime Reporter
Official Court Reporter