

1 disparities.

2 Isn't that likewise true of like determining how to
3 apply the law to those different categories of people? How
4 does a law enforcement officer do that?

5 MR. ZARIAN: Well, starting with -- that doesn't
6 raise any vagueness concerns with biological sex. There might
7 be different people and different statuses of gender identity.
8 But biological sex, in all of nature, people are one or the
9 other. It's a binary term.

10 THE COURT: Right. But if their identification
11 coincides with their gender identity, how does an officer
12 enforce the law? How does the officer determine who is in the
13 wrong bathroom, assuming that this law were effective and they
14 had to enforce it?

15 MR. ZARIAN: I see, so you're talking about the
16 arbitrary enforcement angle of this. So the case that we cite
17 that explains -- it completely resolves this concern. This
18 case, *FCC vs. Fox Television Stations*, and it discusses a case
19 called *Williams*. And the plaintiffs did not respond at all to
20 this case when it was cited in our brief, but it says, "A
21 regulation is not vague because it" at times -- "it may at
22 times be difficult to prove an incriminating fact, but rather
23 because it is unclear as to what fact must be proved."

24 So the question here is only do I know which bathroom
25 to go into, not what is hard for law enforcement to find out

1 if I violated the law. So in *Williams*, they were talking
2 about, I believe it was, is this intended for child
3 pornography or something. It dealt with the mental state of
4 an actor. And the claim there in *Williams* was, well, how do
5 you prove someone's mental state? How would you ever have
6 evidence of that? It's only going to be their word. And the
7 court said that's not the problem. The problem we're worried
8 about here is that it has to be so standardless that it
9 invites arbitrary enforcement. I don't know what falls in and
10 out of this category.

11 I think a good example in the Ninth Circuit, I think
12 this has been held unconstitutionally vague, but of things
13 like crime of moral turpitude. This is going to depend on
14 every person's personal proclivity. There's no standard to
15 know what is a crime of moral turpitude.

16 THE COURT: But is it possible that you would have an
17 officer in one county who asked for identification, got
18 identification that indicated somebody was a woman when, in
19 fact, they were assigned a male at birth, and that would be
20 good enough for that law enforcement officer; whereas another
21 one might look at somebody and say, well, you appear to have
22 features of a man and so I'm not accepting your
23 identification? Like how do you unify the enforcement across
24 the state?

25 MR. ZARIAN: Well, that will go to the initial

1 determination that officers make. But when we talk about
2 arbitrary enforcement, we need to know that the problem is:
3 Is this in or out of proscribed conduct? And it would be
4 easy, at some point in this process, to prove biological sex
5 because there is DNA testing, for example. XX and XY will be
6 able to decide who falls in which biological sex; or if as
7 they presume biological sex means sex assigned at birth, at
8 some point in the process you'll be able to provide your
9 original birth certificate and describe the sex assigned at
10 birth, for example.

11 THE COURT: So is -- if you were to use DNA, I don't
12 know how long it takes to test DNA, and is that something that
13 the transgender person or other person who is believed to be
14 transgender has to consent to providing, their DNA?

15 MR. ZARIAN: Not necessarily. I mean, no one is
16 going to be asking -- I highly doubt people will be asking for
17 DNA on the spot. But the question here in the vagueness
18 concern is only will you know what is prohibited or not. And
19 so here, if we know what sex means, we now how the restroom is
20 indicated, we can connect the dots. And how that gets proved,
21 again, it's not vague because at times it may be difficult to
22 prove an incriminating fact or for an officer to verify an
23 incriminating fact on the spot. If anything, that would just
24 mean, unless the officer has some reasonable grounds to show
25 or to believe they can prove this beyond a reasonable doubt,

1 they wouldn't bring the claim.

2 But there are many ways in which somebody is -- you
3 know, their license might not say what their actual sex is or
4 might say something -- list a sex different than their
5 biological sex. And in Idaho, those -- such amendments
6 currently aren't allowed. So there will be ways this could
7 happen in certain circumstances where it's difficult for an
8 officer to tell, but that won't always be the case. But
9 still, knowing what is prohibited, we can connect those dots
10 and what will actually end up being criminalized fairly
11 simply.

12 Unless Your Honor has more questions about that, I'll
13 move to the exceptions if you'd like.

14 THE COURT: Yes.

15 MR. ZARIAN: So exceptions, just to begin with,
16 calling an exception vague won't provide grounds for striking
17 down the whole statute. And we've listed a couple of cases.

18 THE COURT: I think you're talking about the
19 severability doctrine; correct?

20 MR. ZARIAN: I think that's one way to communicate
21 it, yes, Your Honor.

22 THE COURT: Do you have a case citation for me where
23 the severability doctrine has ever been applied in a criminal
24 statute?

25 MR. ZARIAN: I haven't, but I can tell -- I don't