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Federal Judge Issues Injunction Against Tennessee Bathroom Sign Law

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US District Judge Aleta Trauger on July 9 blocked Tennessee's latest attempt to target trans and gender non-conforming and non-binary people in bathrooms.

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In May, Tennessee enacted a law intended to require operators of facilities with public restrooms who allow transgender people to use restrooms consistent with their gender identity to post a vividly colored large notice at the entrance to the restroom warning people about that policy. The law went into effect on July 1. On July 9, US District Judge Aleta Trauger issued a preliminary injunction banning its enforcement while a lawsuit challenges its constitutionality.

Despite the lack of any reported incidents in Tennessee of problems due to transgender peoples' public restroom usage, the Republican-controlled legislature, firmly enlisted in the current "red

state" war against transgender people, passed H.B. 1182/S.B. 1224, which amends the state's zoning laws regulating public property, to provide that any "public or private entity or business that operates a building or facility open to the general public and that, as a matter of formal or informal policy, allows a member of either 'biological sex' to use any public restroom within the building or facility, shall post notice of the policy at the entrance of each public restroom in the building or facility."

Lex Pe'er Horwitz, Thank You For Coming Out (While Staying In)

Thank You for Coming Out

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The law requires that the notice be posted "in a manner that is easily visible to a person entering the public restroom" and must be "at least eight inches wide and six inches tall" with a red and yellow color scheme designed to attract notice, and must use the precise wording specified in the statute, with its reference to "biological sex."

The ACLU represents Bongo Productions, a Nashville company that operates several coffeehouses and restaurants, one of which has a particular LGBTQ clientele and which employs several transgender people; and Sanctuary Performing Arts, which is described as "a performing arts venue, community center, and safe haven located in Chattanooga" which was "founded by a member of the transgender community" and which intends to operate a full-service café and thus will come under the requirements of the new law. Both Bongo and Sanctuary already provide multi-user restrooms. Under the zoning laws long in effect prior to the present controversy, any multiple-user restrooms have to be labeled for men or for women by words or symbols. Sanctuary has not labeled their restrooms by gender, but will be required to do so once they open the full-service café.

The owners of these facilities argued that the new law unconstitutionally compels them to post signs and communicate messages that they object to and that many of their customers will object to. They presented expert testimony on the unscientific and ambiguous terminology of the statute, with its reference to "biological sex," which was sufficient to persuade Judge Trauger, who devoted several paragraphs of her opinion to the testimony of a professor from Vanderbilt University Medical Center, Dr. Shayne Sebold Taylor, who explained the complexities of human sexuality. What seemed to most impress Judge Trauger was the evidence that asking a transgender man who is presenting as a man to use the women's room or a transgender woman who is presenting as a woman to use the men's room was likely to cause quite a commotion,

exactly the kind of social disruption that the proponents of the legislation claim to be trying to forestall by the prescribed notices.

In order to get a preliminary injunction, plaintiffs have to show that they have standing to sue, that the controversy is ripe for judicial resolution, that they have a reasonable probability of winning their case on the merits, that they will suffer irreparable injury if the act is enforced, and the government will not suffer irreparable injury if enforcement is blocked while the case is being litigated.

Judge Trauger was convinced that all the criteria were met, despite disingenuous arguments by the lawyers for the public officials who are being sued, the fire marshals in charge of Codes enforcement, and local district attorneys who would be responsible for enforcement activity.

Her opinion is really a delight to read. For example, on the issue of standing, they argued that nobody had brought an enforcement action against the plaintiffs, and one of the local DAs even told the press that he didn't intend to enforce the statute. "This might be quite a different case if each of the defendant officials had given the court a meaningful reason to expect that he will not enforce the Act," she wrote. "The defendants, however, seek to have it both ways — to pretend that no one knows how the act will be enforced, despite the fact that, of course, they know, because they will be among the ones doing the enforcing, and they are simply keeping their plans to themselves." In a footnote, she noted that a Republican legislator had sought an opinion from the state's attorney general about whether DA Funk could be subjected to disciplinary action or removal "for his apparent disinclination to enforce the Act" after news reports appeared stating that he would not enforce it.

As to the merits of the case, since the statute compels business owners to post signs with which they disagree, this is a content-based regulation of speech subject to strict scrutiny, which means the statute is presumed unconstitutional unless the state has a compelling interest and the law is narrowly tailored to avoid unnecessarily abridging freedom of speech.

Judge Trauger wrote that "there is simply no basis whatsoever for concluding that the Act is narrowly tailored to serve any compelling governmental purpose. Although at least one key supporter of the Act in the General Assembly justified its requirements in relation to supposed risks of sexual assault and rape, there is (1) no evidence, in either the legislative record or the record in this case, that there is any problem of individuals' abusing private bathroom policies intended to accommodate transgender and intersex individuals for that purpose and (2) no reason to think that, if such a problem existed, the mandated signs would address it."

Even if there was a legitimate interest to "let patrons of a business know its bathroom policies — which the court finds doubtful — then that purpose could still be served by simply requiring businesses to disclose that information when asked or to keep it filed away somewhere accessible," wrote the judge. "There would certainly be no need to dictate the precise language required for the notice, the precise size and location of the disclosure, or that the sign have a red-and-yellow, warning-sign color scheme, as if to say: 'Look Out: Dangerous Gender Expressions Ahead,'" concluding that there is "no plausible argument that this law would come anywhere close to surviving strict scrutiny."

She also rejected the argument that the sign, which does not use the terms transgender or gender identity, was merely communicating non-controversial information. "Courts, when considering First Amendment challenges, are permitted to exercise ordinary common sense to evaluate the content of a message in context to consider its full meaning, rather than simply robotically

reading the message's text for plausible deniability," she wrote, asserting that "of course the signs required by the Act are statements about the nature of sex and gender and the role of transgender individuals in society. Justice is blind, but the court does not have to play dumb."

"On the current record," wrote the judge, "the only way to argue that the message mandated by the Act is uncontroversial is to argue that the plaintiffs are simply lying about both the social realities they have observed and their own disagreement with the required message. But the court sees no evidence whatsoever that the plaintiffs have failed to tell the truth about that or anything else. To the contrary, the legislative history of the Act shows that it was devised, quite consciously and explicitly, as a direct response to social and political trends involving transgender people. It is only now, in the context of litigation, that officials of the State suggest otherwise."

The court concluded that the plaintiffs would suffer irreparable injury — a violation of their constitutional rights and potential harm to their businesses and the community they serve — if the public officials are free to enforce the statute. "Because the plaintiffs' evidence shows that the Act would be an invasion on private communities' power to define themselves and their norms in accordance with their own consciences, the plaintiffs have more than carried their burden of showing that irreparable harm would occur absent an injunction." And, given the patent unconstitutionality of the statute, an injunction would not irreparably harm the state or damage the public interest. "No legislature can enact a law it lacks the power to enact," wrote Trauger, "and the constraints on Tennessee's power that come along with the US Constitution were voluntarily assumed by the State of Tennessee by virtue of its entry into the federal system."

She labeled the law a "brazen violation" of the concept that public officials cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." She ordered defendants to "take no actions" to enforce House Bill 1182/Senate Bill 1224.

Those who followed the campaign for marriage equality some years ago may remember that it was Judge Trauger, who was appointed to the Court by President Bill Clinton, who issued an order in 2014 that the state must recognize the same-sex marriage performed out of state for plaintiffs in an important marriage equality case. She correctly predicted in her opinion then that the Supreme Court would eventually recognize a constitutional right to marry for same-sex couples.