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By Arthur S. Leonard

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Franciscan Health Crawfordsville in Indiana is among the hospitals affiliated with Franciscan Health, a hospital system that has targeted access to gender-affirming care under the Affordable Care Act in federal court.

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When Congress enacted the Affordable Care Act (ACA), it provided that health care organizations that receive money under the ACA may not discriminate on grounds prohibited by several federal anti-discrimination laws, including Title IX of the Education Amendments of 1972, which forbids discrimination because of sex. In 2016, the Obama administration's Department of Health and Human Services (HHS) adopted a rule that interpreted Title IX in the ACA context so that insurance plans and health care providers may not discriminate on the basis of "termination of pregnancy" or "gender identity," although leaving ambiguous in particular whether this meant coverage and performance of gender affirmation surgery for transgender individuals.

Franciscan Alliance, Inc., the Christian Medical and Dental Society, and Specialty Physicians of Illinois, organizations whose members are religiously-identified health care facilities and providers in Indiana and Illinois, sued the government, arguing that it violated their religious freedom rights to require them to perform abortions or "gender transition procedures." They

couldn't make a First Amendment religious free exercise claim because of a Supreme Court precedent from 1990 called Employment Division v. Smith, so they argued instead that the adoption of the rule violated the Administrative Procedure Act (APA) and the Religious Freedom Restoration Act (RFRA).

They filed suit in a particular courthouse in the Northern District of Texas because they wanted their case to be assigned its only District Judge, Reed O'Connor, a conservative George W. Bush appointee whose track record on these issues appeared to guarantee an outcome in their favor, and they were not disappointed. The American Civil Liberties Union intervened to defend the Obama administration's interpretation of Title IX and the ACA, playing a key role because the Trump administration was not going to defend its predecessors' interpretation.

O'Connor concluded that the rule violated the APA, as he interpreted the sex discrimination ban narrowly so as not to apply either to the issue of abortions or gender transition, and he held that it probably violated RFRA, because it burdened free exercise of religion by religiously-identified health care institutions, so he issued a temporary injunction banning the government from enforcing the ACA's sex discrimination ban against these plaintiffs. Subsequently, he granted a motion by 16 states to intervene as co-plaintiffs.

The government filed an appeal to the Fifth Circuit, but the change of administration sharply affected the case, as the Trump administration would not defend the Obama Administration's rule, and informed the court that it would be issuing a new rule in its place, so the injunction was stayed. In the spring of 2020, the Trump administration's new rule rescinded the Obama Administration's interpretation of Title IX and the ACA's sex discrimination ban, allowing those with religious objections to refuse to perform abortions or gender transition procedures.

By an interesting coincidence, the Trump administration announced their new rule just days before the Supreme Court ruled in June 2020 in Bostock v. Clayton County that Title VII's ban on sex discrimination includes discrimination because of "transgender status." Subsequently, federal courts began to apply that interpretation both to Title IX and the ACA. The Fifth Circuit had sent the case back to Judge O'Connor to reconsider in light of all these developments.

O'Connor dug in his heels. On August 9, he granted the plaintiffs' motion for summary judgment and a permanent injunction against government enforcement of the ACA's ban on sex discrimination against these plaintiffs. Since the Bostock decision had essentially undermined his original ruling that the Obama administration's rule violated the ACA, he turned his focus to RFRA, with particular attention to various actions by the Biden administration, which had taken the Bostock decision and applied it to Title IX and the ACA in various statements and interpretations.

O'Connor interpreted his mandate from the Fifth Circuit to decide whether he should "grant Christian Plaintiffs injunctive relief against the 2016 [Obama administration] rule and the underlying statute [the ACA]" by considering whether "they still suffer a substantial threat of irreparable harm under the 2016 rule" and "the subsequent developments." Despite opposition from the ACLU, arguing that the court should not rule because the plaintiffs have not suffered any concrete harm, O'Connor concluded that the case was ripe for a decision on the merits and that as long as a threat of enforcement of the ACA loomed, the plaintiffs met the "irreparable harm" standard for getting a pre-enforcement injunction.

"Here," he wrote, "Christian Plaintiffs contend that violation of their statutory rights under RFRA is an irreparable harm. The Court agrees and concludes that enforcement of the 2021 Interpretation [issued by the Biden administration] forces Christian Plaintiffs to face civil

penalties or to perform gender-transition procedures and abortions contrary to their religious beliefs — a quintessential irreparable injury. When the RFRA violation is clear and the threat of irreparable harm is present, a permanent injunction exempting Christian Plaintiffs from that religion-burdening conduct is the appropriate relief."

Judge O'Connor rejected the government's argument that enforcement of the 2021 Biden administration's interpretation of the ACA was consistent with RFRA, even though the 2021 Interpretation stated that it would comply with RFRA. What O'Connor omitted from his analysis was that RFRA does not absolutely forbid imposing rules that burden free exercise of religion; rather, it subjects them to strict scrutiny, asking whether there is a compelling government interest for the rule and whether the rule provides the least restrictive way in which to further the government interest. Many courts have agreed that gender-transition procedures can be necessary medical treatment for gender dysphoria, leaving the question of whether there would be a less restrictive way for the government to reach the goal of providing necessary health care.

Judge O'Connor rejected the defendants' argument that any injunction should be limited to the scope of the 2016 Obama administration rule, which, as noted above, was worded ambiguously on the key question of whether ACA required health care providers and insurers to provide and cover gender affirmation surgery. To O'Connor, it made no difference which version of the rule (2016 or 2021) was being attacked. Plaintiffs argued that HHS was requiring them "to choose between federal funding and their exercise of religion," which was the essence of the RFRA issue. "Plaintiffs repeatedly challenged that same RFRA violation — no matter HHS's Section 1557 interpretation du jour. To ignore this pattern would be to face the Neuralyzer," he asserted, somewhat obscurely. Thus, he granted a permanent injunction against the government enforcing Section 1557's sex discrimination rule against the Christian Plaintiffs, including any "insurers or third-party administrators in connection with such health plans."

O'Connor's RFRA ruling came less than two weeks after Senior US District Judge Deborah K. Chasanow, of the Maryland District Court, refused to dismiss a lawsuit by a transgender man who was denied a hysterectomy as part of his gender transition by a hospital that follows Catholic Directives, the University of Maryland St. Joseph Medical Center. (The University bought an economically failing Catholic hospital under a contract that obligated the University, a state institution, to operate it according to Catholic doctrine.) Judge Chasanow held that refusing to allow the surgery at the hospital violated the ACA. Because the case was brought by an individual, not the government, RFRA was not raised as a defense.

On the one hand, Judge O'Connor's ruling is narrow as it restricts the government from enforcing the anti-discrimination provision against the plaintiffs. This means it does not stop private individuals or plaintiff class-action groups from suing insurance companies or health care providers on their own, which is authorized by the ACA, and it does not affect the government's ability to enforce the ACA against institutions or individuals other than the Plaintiffs. Furthermore, although Franciscan Alliance and the other plaintiffs represent a large number of health care institutions and health care providers, their membership is concentrated in Indiana and Illinois. O'Connor has resisted efforts by the plaintiffs to get him to issue a nationwide injunction.

The Biden administration will surely appeal this to the 5th Circuit — a Circuit which tends to be sharply slanted against transgender legal rights and abortion rights, to judge by its history on the subjects — and perhaps ultimately to the Supreme Court.

The significance of this lawsuit is shown by the intervention of 16 states and active participation in defense of the Obama and Biden administration interpretations of Title IX by the ACLU's LGBT Rights Project and numerous ACLU state affiliate organizations.