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Arthur S. Leonard

"qualified immunity" from personal liability for paying damages for their actions in office unless they are violating a clearly established right of which they had reason to know. "Any argument that Davis made a mistake, instead of a conscious decision to violate the law, is not only contrary to the record, but also borders on incredulous," wrote Judge Bunning.

The gay couples had not sought to have Judge Bunning rule on the amount of damages in their summary judgment motion, acknowledging that they had yet to provide the necessary evidence to document their injuries. Nominal damages (a small symbolic amount) would always be available for a constitutional violation, but their claims are more wide-ranging. They seek compensatory and punitive damages, pre and post judgment interest (for litigation that dates back to 2015), and costs and attorneys' fees, which are authorized under federal law for successful plaintiffs who sue to vindicate their constitutional rights. The compensatory damage claims are for "mental anguish, emotional distress, humiliation and reputation damages." Testimony by therapists would be provided to the jury to gauge the extent of the emotional damages.

In addition, Bunning wrote, "Based on the record before the Court, it seems plausible that Davis could have acted with reckless indifference to the constitutional rights of Plaintiffs," which means they could also win punitive damages, intended to punish Davis for violating her oath of office in way likely to cause injury to the plaintiffs.

The plaintiffs are represented by Rene B. Heinrich of Newport, Kentucky, and William Kash Stilz, Jr., of Covington, Kentucky. Davis is represented by Liberty Counsel and attorneys affiliated with that organization, which virtually guarantees that this ruling will be appealed to the 6th Circuit again, and that an ultimate ruling on the merits will have Davis knocking on the Supreme Court's door again. ■

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By Arthur S. Leonard

In February, Texas Attorney General Ken Paxton issued Opinion No. KP-0401 at the request of a state legislator, asserting that parents and health care workers who provide gender-affirming treatment for transgender minors are engaging in "child abuse" in violation of Teas penal law. Acting immediately on the letter, Governor Greg Abbott issued a written directive (in the form of a letter) to the Texas Department of Family and Protective Services (DFPS) on February 22, directing the Department to act consistently with Paxton's opinion to immediately begin investigating parents and others believed to be providing such treatment, and to bring criminal actions to enforce the "child abuse" statute. On the same date, DFPS issued a statement incorporating the Governor's directive. The speed with which all of this happens suggests a high degree of collaboration between Paxton, Abbott, and DFPS Commissioner Jaime Masters to act after proposed legislation to the same effect had not been approved by the legislature. "Jane Doe," an employee of DFPS, the mother of a transgender youth ("Mary Doe") who is receiving gender-affirming treatment, was immediately suspended from her job ("administrative leave") and subjected to investigation together with her husband, "John Doe." ACLU of Texas and Lambda Legal quickly swung into action with local counsel, filing suit in the Travis County (Austin) District Court challenging the constitutionality of Abbott's directive and DFPS's actions and seeking a temporary restraining order (TRO).

On March 2, Travis County District Judge Amy Clark Meachum granted the motion for a TRO by plaintiffs Jane and John Doe, parents of minor Mary Doe, and of co-plaintiff Dr. Megan Mooney, who provides gender-affirming care to minors, in *Doe v. Abbott*, Case No. D-1-GN-22-000977, 2022 WL 628912. The focus of Judge Meachum's short opinion, which was based on assuming the truth of plaintiff's allegations, was that plaintiffs "will suffer irreparable injury unless Defendants are immediately restrained from enforcing the Governor's letter and the DFPS statement, both issued February 22, 2022, and which make reference to and incorporate Attorney General Paxton's Opinion No. KP-0401." The court noted three aspects of irreparable injury for the Does: (1) Jane Doe being placed on administrative leave and at risk of losing her job; (2) the Does facing "imminent and ongoing deprivation of their constitutional rights, the potential loss of necessary medical care, and the stigma attached to being the subject of an unfounded child abuse investigation," and (3) the likelihood that Jane Doe, if placed on a child abuse registry, could lose the ability to practice her profession and (3) both Does could "lose their ability to work with minors and volunteer in the community." The court also found that Dr. Mooney "could face civil suit by patients for failing to treat them in accordance with professional standards and loss of licensure for failing to follow her professional ethics if she complies with Defendants' orders and actions," as well as possible criminal prosecution by the state "as set forth in the Governor's letter."

Judge Meachum issued a TRO limited in effect to the plaintiffs, which the state promptly appealed to the Court of Appeals of Texas in Austin. Meanwhile, Lambda and ACLU were receiving reports that investigations had been launched into other parents. On March 9, a three-judge panel of the 3rd Court of Appeals of Texas (Justices Byrne, Kelly, and Smith), issued a *per curiam* opinion granting a

motion by the appellees (the Does and Dr. Mooney) to dismiss the appeal for "want of jurisdiction." *Doe v. Abbott*, 2022 WL 710093, 2022 Tex. App. LEXIS 1607. The state argued that the district court did not have jurisdiction to hear this case or to grant temporary relief and that its grant of a TRO was necessarily a ruling rejecting the state's jurisdictional argument, which it could appeal. The Court of Appeals disagreed with this contention, asserting that "a court does not necessarily reach the merits of a party's claims by concluding that an applicant has made [the] preliminary showing and is entitled to a TRO." Alternatively, the state argued that the TRO was in effect a temporary injunction (Texas nomenclature for what is called a preliminary injunction in the federal courts), and thus appealable. The state argued that the TRO altered the "status quo," and was thus appealable. The Court of Appeals said, on the contrary, that the TRO was intended to preserve the status quo that existed before the controversy arose, pending a hearing on the motion for a temporary injunction. "The status quo," wrote the court, "is the 'last, actual, peaceable, non-contested status which preceded the pending controversy,'" quoting Clint Indep. Sch. Dist. V. Marquez, 487 S.W.3d 538 (Tex. 2016). The TRO just returned the parties to the status that existed prior to issuance of the Paxton, Abbott and Martin documents pending a ruling by the trial court on the plaintiffs' request for a temporary injunction, so it was not appealable as a temporary injunction.

Meanwhile, Judge Meachum quickly proceeded to a hearing on the request for a temporary injunction on March 11, and promptly issued an opinion from the bench granting the requested temporary injunction, followed up later that afternoon with a written order. *Doe v. Abbott*, 2022 WL 831383 (Tex. Dist. Ct., Travis Co.). Judge Meachum found: "Plaintiffs state a valid cause of action against each Defendant and have a probable right to the declaratory and permanent injunctive relief they seek. For the reasons detailed in Plaintiffs' Application and accompanying evidence, there is a substantial likelihood that Plaintiffs will prevail after a trial on the merits because the Governor's directive is ultra vires, beyond the scope of his authority, and unconstitutional. The improper rulemaking and implementation by Commissioner Masters and DFPS are similarly void." The judge found that "gender-affirming care was not investigated as child abuse by DFPS until after February 22, 2022," and that "Governor Abbott and Commissioner Masters' actions violate separation of powers by impermissibility encroaching into the legislative domain." She indicated that the temporary injunction, which goes beyond protecting the individual plaintiffs, is ordered to remain in effect "while this Court, and potentially the Court of Appeals, and the Supreme Court of Texas, examine the parties' merits and jurisdictional arguments."

Specifically, the temporary injunction restrains the state from "investigating reports in the State of Texas against any and all persons based solely on alleged child abuse by persons, providers or organizations in facilitating or providing gender-affirming care to transgender minors where the only grounds for the purported abuse or neglect are either the facilitation or provision of gender-affirming medical treatment or the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment." The restraint also extends to "prosecuting or referring for prosecution such reports" and "imposing reporting requirements on persons in the State of Texas who are aware of others who facilitate or provide gender-affirming care to transgender minors solely based on the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment."

Judge Meachum set a trial date on the merits of the case for July 11, 2022, exactly four months from the date of her order, which means a tight discovery schedule for the parties prior to trial. The state filed an immediate appeal the next morning with the 3rd Court of Appeals, with Paxton releasing a statement that the appeal "superseded" Judge Meachum's temporary injunction order, and he asserted that investigations would continue. The plaintiffs sought "emergency relief" from the Court of Appeals, asking it to reinstate the temporary injunction. The state argued in response that the Court of Appeals did not have jurisdiction to do so, but the court was not deterred, issuing another *per curiam* opinion, which was ordered to be published on March 21. *Doe v. Abbott*, 2022 WL 837956, 2022 Tex. App. LEXIS 1927.

The Court of Appeals, quoting prior Texas cases, said that the pertinent rule gives the court "great flexibility in preserving the status quo based on the unique facts and circumstances presented," and once again quoting the definition of "status quo" from its earlier, March 9, ruling (see above). "One of the orders we may issue under Rule 29.3 to maintain the status quo and prevent irreparable harm is an order reinstating a suspended injunction," wrote the court. After reviewing the requirements for the issuance of temporary relief, the court said: "In this case, the trial court reviewed the evidence and concluded that appellees had established a probable right to recovery on their claims. It further concluded that the appellees had made a sufficient showing that allowing appellants to follow the Governor's directive pending the outcome of this litigation would result in irreparable harm. Having reviewed the record, we conclude that reinstating the temporary injunction is necessary to maintain the status quo and preserve the rights of all parties. Therefore, without regard to the merits of the issues on appeal, which are not yet briefed to this Court, we exercise our discretion under Rule 29.3 to reinstate the injunction as issued by the district court on March 11, 2022."

The politics and timing of all this is noteworthy. The issue of gender transition for minors is being seized upon as a "wedge issue" by Republican social conservatives who did not get enough votes to push a measure on this through the Republican-controlled Texas legislature. At the time Paxton issued his Opinion, primary elections were looming for both Paxton and Abbott, during which the hard-core Republican social conservative

voters would likely determine the outcome, and both faced opposition for renomination. Abbott, in particular, was concerned about winning renomination in light of his loss of popularity due to pandemic measures he had ordered that ran contrary to the perceived views of his electoral base, as well as his feckless handling of widespread power outages due to the failure of the state to take steps to adapt its power grid to the vicissitudes of extreme weather as a result of climate change. (Despite extreme fires, heat, cold, flooding and snow and ice storms, Texas Republicans as a group apparently still contest whether anything unusual is going on that would require affirmative action by the state.) Abbott's highly publicized action in this case was calculated to fire up his base to turn out in the primary, and it apparently succeeded in that. He was handily renominated, as was Paxton. Some commentators harshly criticized Abbott and Paxon for using transgender youth and their parents as pawns in a political game to win renomination, but such criticisms evidently didn't cut much ice with the voters they were seeking to motivate.

Another aspect of the politics has to do with the political geography of Texas. Although Republicans have been winning statewide electoral contests and controlling the legislature statewide-elected Supreme Court for decades, there are pockets of progressive voters, especially in Austin, the capital of the state, Houston, and San Antonio. Suits against the governor and heads of state departments can be brought in Austin, where the local state courts tend to be populated by locally elected Democratic judges. That gave the plaintiffs a good head start in this case, as did the all-Democratic panel of the 3rd Court of Appeal. But all the justices of the Supreme Court are Republicans who were initially appointed by Rick Perry or Greg Abbott to fill vacancies and subsequently elected to full terms. What may happen if this case ends up in the Texas Supreme Court is anybody's guess.

But the Texas Supreme Court may not have the last word, as the Biden Administration has weighed in by pointing out that what Texas is doing here can be challenged under the 14th Amendment – Judge Meachum referred to constitutional rights in her findings on the TRO and temporary injunction rulings – so a grant of permanent injunctive relief by the trial court and/or the Court of Appeals, if reversed by the Supreme Court, could result in a petition for *certiorari* to the U.S. Supreme Court on issues of constitutional rights and federal preemption (Affordable Care Act, for example), assuming that plaintiffs will at all stages of the litigation assert federal statutory and constitutional claims as part of their case.

The Westlaw version of the Court of Appeals order of March 21 lists the following counsel for plaintiffs, some of whom are affiliated with ACLU or Lambda and others being local Texas counsel, but the opinion we obtained does not specify the organizations or firms with which each is affiliated: Maddy R. Dwertman, Chase Strangio, Karen L. Loewy, James D. Esseks, Brian Klosterboer, M. Currey Cook, Shelly L. Skeen, Paul Castillo, Camilla B. Taylor, Anjana Samant, Kathleen L. Xu, Nischay Bhan, Andre Segura, Nicholas Guillory, Derek McDonald, and Omar Gonzalez-Pagan. A protective order of March 11 shielding the identities of the Does was signed for plaintiffs by Brandt Thomas Roessler, a Texas state bar member with Baker Botts LLP. Evidently, it takes a village to litigate this case! ■

Supreme Court Denies *Certiorari* in Seattle's Union Gospel Mission, Evading Ruling on Expansive Ministerial Exemption Claim

By Arthur S. Leonard

On March 21, the U.S. Supreme Court denied a petition for *certiorari* filed by Alliance Defending Freedom (ADF) in *Seattle's Union Gospel Mission v. Woods*, No. 21-144, declining to review the Washington Supreme Court's ruling in *Woods v. Seattle's Union Gospel Mission*, 481 P.3d 1060 (Wash. 2021).

ADF has a long-term goal of getting the Supreme Court to hold that the 1st American Free Exercise Clause privileges religious organizations to discriminate against employees and applicants on any religiously-related ground, by getting the Court to agree to Justice Samuel Alito's contention that the so-called "ministerial exception" applies to all employees who are in any way involved in advancing the religious goals of the organization.

In this case, Matthew S. Woods, a lawyer who had volunteered for the legal services program for poor people operated by Seattle's Union Gospel Mission, inquired about a full-time staff position that had been announced as open. When he disclosed that he is bisexual and has a male partner, he was told his application would not be accepted because of SUGM's religious doctrine. He sued under Washington's anti-discrimination law, which includes sexual orientation as a forbidden ground of discrimination, but also has a broadly worded exemption of religious organizations. There is no dispute that Seattle's Union Gospel Mission is a religious organization, and it claims that its legal services program is just one aspect of its overall religiously-based mission to serve the poor and