8-30-2022

Court Affirms Injunction Against Biden's Protections for Trans People Under ACA

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0 comments Posted on August 30, 2022

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A three-judge panel of the US Court of Appeals for the Fifth Circuit has affirmed a permanent injunction issued last year by US District Judge Reed O'Connor of the federal court in Wichita Falls, Texas, barring the US Department of Health and Human Services from using the anti-discrimination provision of the Affordable Care Act (ACA), Section 1557, to protect transgender people from discrimination by health care providers and insurance companies by three plaintiff organizations and their members with religious objections to gender transition. The August 26 opinion in Franciscan Alliance v. Becerra was written by Circuit Judge Don R. Willett, an appointee of former President Donald J. Trump. The other judges on the panel were Trump appointee Kurt D. Engelhardt and George W. Bush appointee Jennifer Elrod.

The plaintiffs are Franciscan Alliance, Inc. (a chain of Catholic hospitals in Indiana), Christian Medical, Dental Society (an organization of approximately 17,000 individual health care providers nationwide), and Specialty Physicians of Illinois, LLC (a group medical practice with numerous branches in the state of Illinois). The plaintiffs are represented by Becket Fund for Religious Liberty, a Catholic litigation group that sues to oppose laws that arguably impose a burden on religious liberty.

The lawsuit was originally filed in 2016 when the Obama administration issued a rule interpreting Section 1557, which forbids sex discrimination by health care providers, as requiring health care providers and insurers not to discriminate on the basis of "termination of pregnancy" or "gender identity." The plaintiffs, who are referred to collectively by the court as Franciscan Alliance, claimed that the adoption of this rule violated the Administrative Procedure Act (APA) because, they argued, the ACA did not forbid gender identity discrimination. They also argued that the rule violated the Religious Freedom Restoration Act when applied to health care providers that have religious objections to abortion and gender transition. The plaintiffs asked the court for a preliminary injunction against enforcement of the rule while the case was pending.

While Judge O'Connor was considering their motion for preliminary injunction, the Trump administration took office. HHS, under new leadership, informed the court that it did not intend to enforce the Obama administration rule, which it was "reconsidering" for future replacement. Judge O'Connor put off ruling on the motion, but eventually granted summary judgment to the plaintiffs, issuing an order to vacate the 2016 rule. Judge O'Connor did not issue an injunction, however, finding that the Trump administration's assurance, together with the court's order vacating the rule, was sufficient to protect the plaintiffs.

In June 2020, the Trump administration issued a new rule in place of the 2016 rule. This new rule eliminated the Obama administration's interpretation of "discrimination because of sex" but did not provide a new definition. It also stated that insurers were not covered by the anti-discrimination provision of the ACA, and removed various requirements that had been imposed on health care providers by the 2016 rule.

Just days after the Trump administration published its new rule, the Supreme Court ruled in Bostock v. Clayton County that Title VII, the federal law against sex discrimination in employment, applied to gender identity discrimination claims, which led to at least two lawsuits being filed attacking the Trump administration's 2020 rule and seeking to revive the 2016 rule protecting transgender people from discrimination. Federal district courts in New York and Washington, D.C., issued injunctions against various aspects of the 2020 rule, including its failure to include gender identity as a prohibited ground of discrimination. Both courts, and many other federal district courts, have accepted the argument that the Supreme Court's reasoning in Bostock — that it is impossible to discriminate because of gender identity without discriminating because of sex — meant that the ACA's ban on sex discrimination should be interpreted to extend to gender identity discrimination claims.

Franciscan Alliance had appealed Judge O'Connor's failure to issue an injunction. While its appeal was pending, the Biden administration issued an executive order upon taking office in January 2021 adopting the Bostock ruling and applying it to federal sex discrimination laws such as the ACA, and instructing agencies to consider whether existing rules needed to be modified to reflect that. The Fifth Circuit then sent the case back to Judge O'Connor to consider events that had occurred since his prior decision.

Meanwhile, in May 2021, the Department of Health and Human Services issued a "Notification of Interpretation and Enforcement" stating that it was interpreting Section 1557 to cover gender identity discrimination and would investigate and bring enforcement actions against health care providers and insurers who discriminated on that basis. Judge O'Connor rejected the government's argument that the lawsuit should be dismissed as "moot" since the 2016 rule was no longer in effect. He found that although the APA argument concerning the 2016 rule was moot, the lawsuit was not because the Biden administration was going to interpret Section 1557 to ban gender identity discrimination. He found that Franciscan Alliance's claim under

the Religious Freedom Restoration Act was valid and justified a permanent injunction protecting all the plaintiffs from future enforcement of Section 1557 as interpreted by the Biden administration.

The government appealed again to the Fifth Circuit in November 2021, arguing that it was inappropriate for Judge O'Connor to have issued a permanent injunction because the complaint filed in this case was addressed to the 2016 rule, which was no longer in effect. While this appeal was pending, HHS issued a "Notice and Guidance on Gender Affirming Care" in March 2022, and then on August 4, announced a Notice of Proposed Rulemaking to be published in the Federal Register that would effectively replace the Trump administration's 2020 rule with a new rule fully protective of transgender rights in health care under the ACA.

In its August 26 ruling, the Fifth Circuit panel affirmed Judge O'Connor's decision to issue the permanent injunction protecting the plaintiffs from enforcement of Section 1557 for refusing to perform or cover abortions or to provide gender-affirming care. Arguments about whether the Bostock decision should be interpreted to apply to federal anti-discrimination laws other than Title VII were not addressed, as the central focus of Judge O'Connor's 2021 order was to interpret the Religious Freedom Restoration Act (RFRA) to protect health care providers with religious objections from having to provide such care. Under RFRA, the government must show a compelling interest and a narrowly tailored rule if it is enforcing a federal law that burdens the free exercise of religion, and without any discussion of this, the Fifth Circuit panel affirmed Judge O'Connor's conclusion that the plaintiffs had a valid defense against enforcement based on RFRA.

The court rejected the government's argument that it should have been allowed to present new evidence about "narrow tailoring" in order to justify its anti-discrimination rule. This Fifth Circuit ruling affirming O'Connor's injunction likely predicts what will happen if the Biden administration publishes a final rule and religious health care providers seek new injunctions against its enforcement. Ultimately, the Supreme Court may be drawn in.

Early in this lawsuit, when the Trump administration informed the court that it would not enforce the Obama administration's 2016 rule, the court allowed the ACLU of Texas and River City Gender Alliance to intervene as defendants, since the government was no longer defending the 2016 rule. Although now the Biden administration is proposing a new rule that will restore and expand protection for transgender people, ACLU and River City remain as intervenor defendants in the case.

The question now for the Biden administration and the ACLU is whether to seek review of the panel decision by the full Fifth Circuit bench ("en banc review"), but that seems unlikely to result in vacating Judge O'Connor's injunction, in light of the political/ideological balance of the very conservative Fifth Circuit, whose 17 active judges include 6 Trump appointees, four Bush appointees, and two Reagan appointees. Of the other five judges, two were appointed by Bill Clinton and three by Barack Obama.) There are two vacancies, with one Biden nominee awaiting Senate confirmation. Whether to petition the Supreme Court to review this decision directly from the three-judge panel poses a huge strategic question for HHS and the ACLU, in light of the Supreme Court's super-charged religious freedom majority.