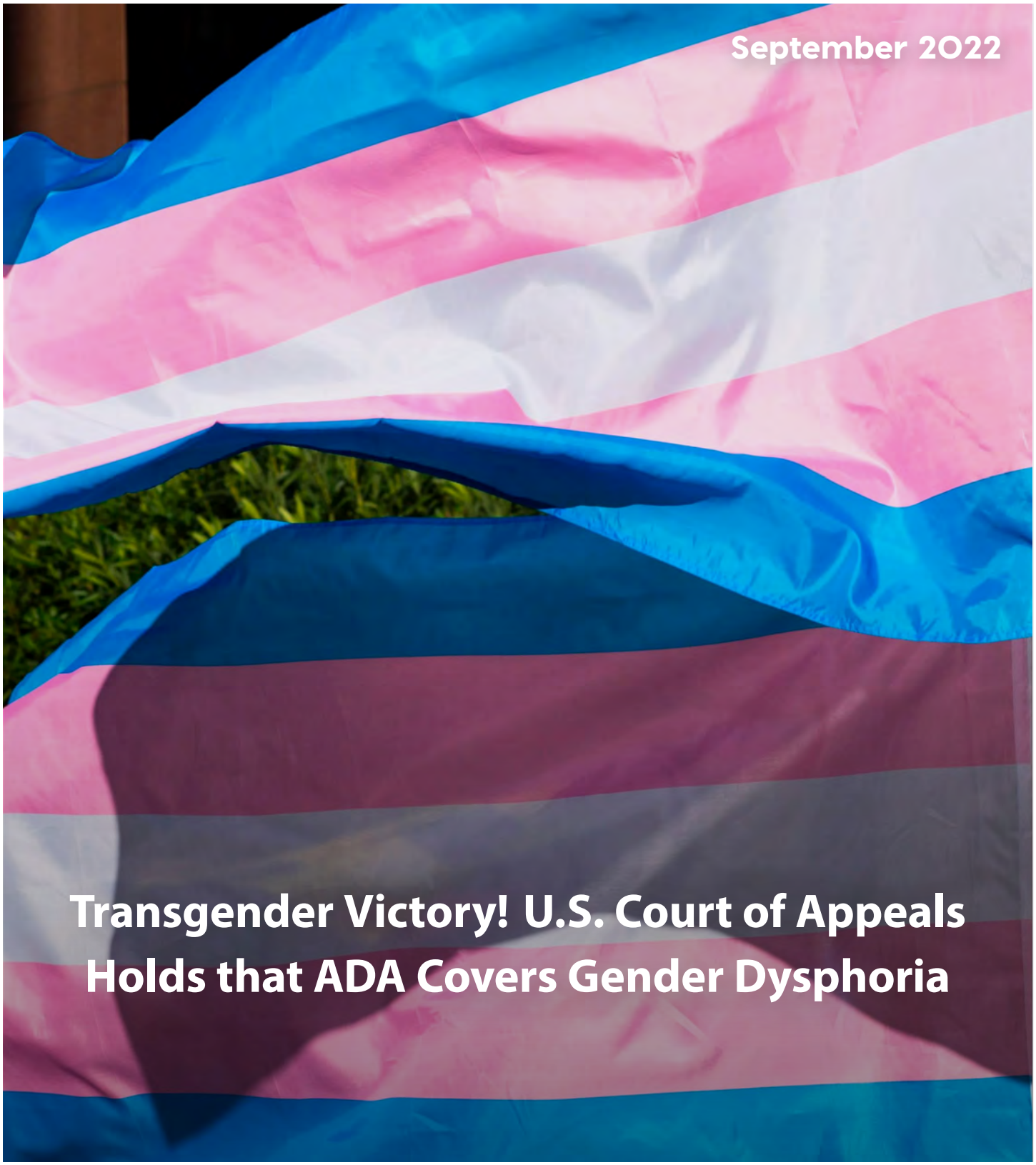
9-2022

Federal Appeals Court Affirms Injunction Against Biden Administration's Protection for Transgender People Under the Affordable Care Act

Arthur S. Leonard

LGBT LAW NOTES



September 2022

Transgender Victory! U.S. Court of Appeals Holds that ADA Covers Gender Dysphoria

L G B T
LAW NOTES

Editor-In-Chief

Arthur S. Leonard,
Robert F. Wagner Professor of Labor & Employment Law Emeritus
New York Law School
185 West Broadway
New York, NY 10013
(212) 431-2156
arthur.leonard@nyls.edu

Associate Editor

Prisoner Litigation Notes:
William J. Rold, Esq.

Contributors

Matthew Goodwin, Esq.
Ashton Hessee, NYLS '24
Bryan Johnson-Xenitelis, Esq.
Jason Miranda, NYLS '24
Eric Wursthorn, Esq.

Production Manager

Leah Harper

Circulation Rate Inquiries

LeGaL Foundation
120 Wall Street, Floor 19
New York, NY 10005
(212) 353-9118
info@lgbtbarny.org

LGBT Law Notes Podcast

Listen on iTunes (search "LGBT Legal") or Podbean at legal.podbean.com.

Law Notes Archive

http://bit.ly/LGBTLawNotes-archive

ISSN 8755-9021

If you are interested in becoming a contributing author to LGBT Law Notes, please contact info@lgbtbarny.org.

EXECUTIVE SUMMARY

33 Notes **55** Publications Noted

One other point, on which the court was unanimous, warrants a pause, because the decision could otherwise be misleading. The circuit remanded the dismissal of claims of deliberate indifference to serious health needs against Nurse Wang under the Eighth Amendment. Readers may wonder why a nurse is being held to account for a two-week delay, during which she sought medical verification. The Court of Appeals never refers to Wang as other than a "nurse," but the caption and pleading summary calls her a nurse practitioner. Nurse practitioners are regulated jointly by the Board of Nursing and the Board of Medicine under Virginia law. Wang is licensed as a nurse practitioner, with "autonomous practice" for "adult primary care," including "Rx authority." She was not a sick call nurse referring a patient to a physician for a prescription. She was herself able to diagnose and treat.

* * *

This case governs federal courts in Maryland, North Carolina, South Carolina, Virginia and West Virginia. There could be a call for the Fourth Circuit to "rehear" the case *en banc*, particularly with a dissent on the panel. The jail could also seek a writ of *certiorari* from the Supreme Court – although there is not yet a circuit split on the major points. This case is heartwarming, and frankly we do not see much of that from the judiciary these days.

Williams is represented by the Erlich Law Office, PLLC (Arlington, VA). *Amici* included American Civil Liberties Union; Black and Pink Massachusetts; GLBTQ Legal Advocates & Defenders; Lambda Legal; National Center For Lesbian Rights; National Center for Transgender Equality; National LGBTQ Task Force; Trans People of Color Coalition; Transcending Barriers (ATL); Transgender Legal Defense & Education Fund; disAbility Law Center of Virginia; and Disability Rights Vermont. ■

William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.

Federal Appeals Court Affirms Injunction Against Biden Administration's Protection for Transgender People Under the Affordable Care Act

By Arthur S. Leonard

A three-judge panel of the U.S. Court of Appeals for the 5th Circuit has affirmed a permanent injunction issued last year by U.S. District Judge Reed O'Connor of the federal court in Wichita Falls, Texas, barring the U.S. 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 5th Circuit opinion in *Franciscan Alliance v. Becerra*, 2022 WL 3700044, 2022 U.S. App. LEXIS 24142, affirming 533 F. Supp. 3d 361 (N.D. Tex., Aug. 26, 2021), was written by Circuit Judge Don R. Willett, an appointee of 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 and 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. Thus informed, Judge O'Connor put off ruling on the preliminary injunction motion, but eventually granted summary judgment to the plaintiffs on the merits, 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 issue 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*, 140 S. Ct. 1731, 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. *See Whitman-Walker Clinic, Inc. v. HHS*, 485 F. Supp. 3d 1 (D.D.C. 2020); *Walker v. Azar*, 480 F. Supp. 3d 417 (E.D.N.Y. 2020). 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 5th 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" (see 86 Fed. Reg. 27984 (May 25, 2021)), 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 (RFRA) 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 5th 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, (see HHS website: https://perma.cc/LX26-59QR), and then on August 4, announced a Notice of Proposed Rulemaking to be published in the Federal Register (see 87 Fed. Reg. 47824-01) 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 5th Circuit panel affirmed Judge O'Connor's decision to issue the permanent injunction protecting the plaintiffs from enforcement of Section 1557 against health care providers or insurers 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 rather to interpret 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 further discussion of this, the 5th 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 5th 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 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. Presumably this means that if the government petitions the Supreme Court to review the 5th Circuit's decision, the intervenor-defendants may be along for the ride.

The question now for the Biden Administration is whether to seek *en banc* review of the panel decision, but that seems unlikely to result in vacating Judge O'Connor's injunction, in light of the political/ideological balance of the very conservative 5th Circuit, whose 17 active judges include 6 Trump appointees, 4 Bush appointees, and 2 Reagan appointees. Of the other five judges, 2 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 in light of the Supreme Court's super-charged religious freedom majority. ■

Arthur Leonard is the Robert F. Wagner Professor of Labor & Employment Law Emeritus at New York Law School.