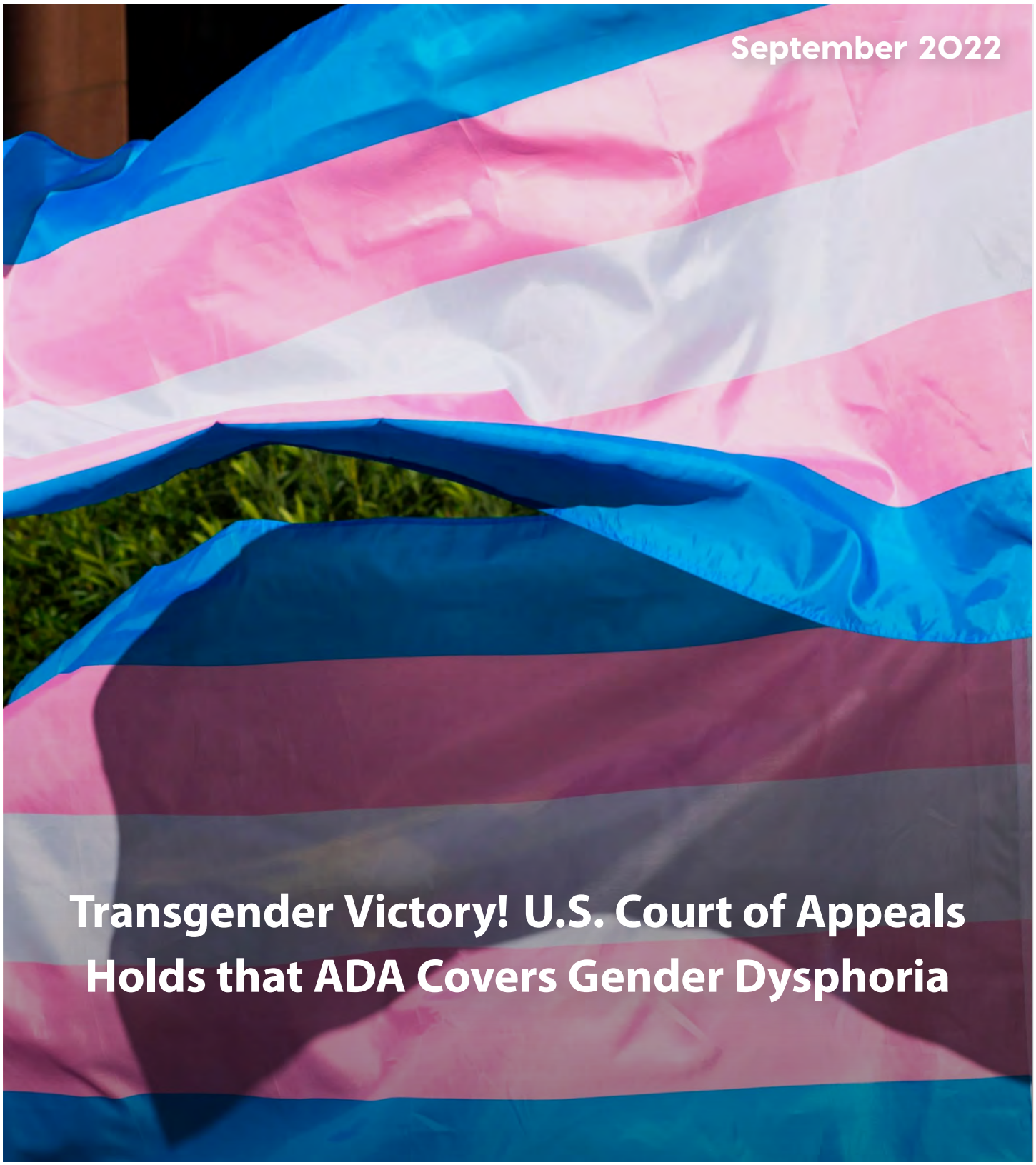
9-2022

8th Circuit Panel Affirms Preliminary Injunction Against Arkansas Law Banning Gender Transition Treatment for Minors

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

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ISSN 8755-9021

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EXECUTIVE SUMMARY

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8th Circuit Panel Affirms Preliminary Injunction Against Arkansas Law Banning Gender Transition Treatment for Minors

By Arthur S. Leonard

A three-judge panel of the U.S. Court of Appeals for the 8th Circuit unanimously affirmed a preliminary injunction issued by U.S. District Judge James M. Moody, Jr., last summer, blocking Arkansas's Act 626 from going into effect. *Brandt v. Rutledge*, 2022 WL 3652745, 2022 U.S. App. LEXIS 23888 (August 25, 2022).

Act 626, titled the "Arkansas Save Adolescents from Experimentation ("SAFE") Act," passed the Arkansas legislature in April 2021 over Governor Asa Hutchinson's veto. It was the first state law to prohibit doctors from providing "gender transition procedures" to minors.

Due to the "political" composition of the three-judge panel that issued the August 25 ruling, however, it seems likely that Arkansas Attorney General Leslie Rutledge's plan to seek *en banc* review of this ruling will be successful, which may lead to the U.S. Supreme Court confronting the question whether states can forbid such medical care as early as next year.

District Judge Moody was appointed by President Barack Obama and took the bench in 2014 after his father, James M. Moody, Sr., retired as a judge from the same court, the U.S. District Court for the Eastern District of Arkansas.

The decision for the three-judge panel was written by Judge Jane L. Kelly, the only judge of the 8th Circuit appointed by President Obama. Another member of the panel, District Judge Katherine M. Menendez of the U.S. District Court of Minnesota, was appointed by President Joe Biden, and was "sitting by designation." The third member of the panel, Judge James B. Loken, was appointed by President George H.W. Bush in 1990, and is a former chief judge of the circuit.

The 8th Circuit is probably the most conservative Republican-appointed circuit in the nation. Of the 11 active judges, five were appointed by President George W. Bush and four by President Donald J. Trump. Although President Bill Clinton appointed three judges to the 8th Circuit, all of his appointees died or have retired. There are also three semi-retired senior judges who still sit on panels to hear cases, all of whom were appointed by one of the Bushes. Thus, the three-judge panel that upheld Judge Moody's injunction is not "politically" representative of the circuit, and it will probably not be hard for Attorney General Rutledge to get a majority of the eleven active judges to vote to grant rehearing *en banc*. If such rehearing is granted, the three-judge panel decision is "vacated" and the eleven Circuit Judges will hear new arguments before rendering a decision. If they reverse Judge Moody's injunction, the law will go into effect unless either the 8th Circuit or the Supreme Court agrees to stay the *en banc* ruling while the plaintiffs, represented by the American Civil Liberties Union and cooperating attorneys from several law firms, petition the Supreme Court for review.

The practical result of the law going into effect would be for transgender minors who are receiving gender-affirming care or who seek to start such care to have to go out of state for their treatment, and their Arkansas doctors are prohibited by the statute from referring them to another physician for treatment. Insurance companies and the state's Medicaid program are prohibited from paying for such care. Doctors who performed prohibited procedures can be subjected to loss of their license to practice medicine in Arkansas, and they can be sued for damages, including enforcement actions by the state attorney general's office.

Judge Moody's decision, announced in court after a hearing on July 21, 2021, and supplemented by a written opinion on August 2, 2021, see 551 F. Supp. 3d 882, found that Act 626 most likely violates the equal protection rights of transgender minors, the due process rights of their parents, and the free speech rights of doctors who are prohibited by the law from making referrals.

Moody's equal protection ruling relied in part on the Supreme Court's 2020 decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, which held that discrimination based on transgender status is a form of sex discrimination, requiring the state to show an important interest to support the law. Judge Moody found the interests stated by Arkansas – to protect minors from "experimental" treatments and to regulate medical ethics – were pretextual, as amicus briefs submitted by medical associations showed a strong professional consensus that gender transition procedures provided to minors are safe and necessary to treat the serious condition of gender dysphoria. The due process ruling relied on the fundamental right of parents to provide appropriate medical treatment for their children, and the statute's restrictions on physician speech presented obvious freedom of speech issues. Judge Moody particularly noted that letting the law go into effect would disrupt the ongoing treatment of transgender minors, including some of the named plaintiffs in the case, causing them irreparable injuries.

Judge Kelly's decision for the appellate panel was brief and to the point. "Arkansas's characterization of the Act as creating a distinction on the basis of a medical procedure rather than sex is unpersuasive," she wrote. "The biological sex of the minor patient is the basis on which the law distinguishes between those who may receive certain types of medical care and those who may not. The Act is therefore subject to heightened scrutiny."

The court found that the record before Judge Moody "provides substantial evidence" to support his factual finding that "the Act prohibits medical treatment that conforms with 'the recognized standard of care for adolescent gender dysphoria,' that such

treatment 'is supported by medical evidence that has been subject to rigorous study,' and that the purpose of the Act is 'not to ban a treatment [but] to ban an outcome that the State deems undesirable.'" The court rejected Arkansas's argument that Moody failed to consider the medical evidence that the state presented, which contradicted the medical evidence presented by the plaintiffs. The court found no "clear error" by Judge Moody in his weighing of the evidence, which is the standard of review for a district judge's exercise of discretion in granting a preliminary injunction. Judge Kelly devoted two long paragraphs to summarizing the medical evidence supporting Judge Moody's conclusions.

"In light of those findings," wrote Kelly, "the district court did not err in concluding Act 626 is not substantially related to Arkansas's interests in protecting children from experimental medical treatment and regulating medical ethics, and Plaintiffs have demonstrated a likelihood of success on the merits of their equal protection claim."

The court of appeals panel did not discuss the other legal theories supporting Moody's preliminary injunction, as the equal protection analysis was sufficient to support his ruling, and noted particularly Moody's finding that "if Act 626 went into effect, Minor Plaintiffs would be denied access to hormone treatment (including needing to stop treatment already underway), undergo endogenous puberty – a process that cannot be reversed – and suffer heightened gender dysphoria. These factual findings are supported by Minor Plaintiffs' affidavits and are not clearly erroneous," wrote Judge Kelly. "The findings support the conclusion that Plaintiffs will suffer irreparable harm absent a preliminary injunction." The court noted that it is "always in the public interest" to vindicate constitutional rights.

Given the political sensitivities of the case, it is likely that the full circuit will move quickly to vote on Attorney General Rutledge's anticipated motion for rehearing *en banc*, so things are likely to move quickly.

Meanwhile, on August 4 Judge Moody issued a decision on a discovery dispute concerning legislative records that may be important evidence about the legislature's motivation in passing the law. *See, 2022 WL 3108795.* The state is attempting to shield internal legislative records under a "deliberative privilege," but such a privilege is not absolute, especially when the motivation of the legislature is a central issue in a lawsuit concerning the constitutionality of a statute. Judge Moody will be performing *in camera* screening of many of the documents for which the defendants claim privilege before releasing them to the plaintiffs. He has already ruled in this case that emails from legislators or their offices to non-legislative email addresses will not be deemed privileged.

On August 30, a few days after the 8th Circuit ruling, Judge Moody issued an opinion on plaintiffs' motion to exclude testimony by the defendants' proposed expert witnesses Dr. Patrick W. Lappert and Dr. Mark Regnerus, and on defendants' motion in limine to preclude questioning of the experts along certain lines. *See, 2022 WL 3908890.* Dr. Regnerus is a sociologist and Dr. Lappert is a plastic surgeon. Regnerus is fairly notorious as an expert witness in cases involving LGBTQ issues, especially concerning the impact on children of being raised in same-sex households, so it is not surprising that defendants were moving to preclude any questioning about the witness's religious beliefs or personal beliefs about individuals who are LGBT. Dr. Lappert's "expertise" concerning the issues in this case is not shown by professional publications or research, but is limited to having had some transgender patients. Judge Moody ruled, considering that this will be a bench trial, that these experts would not be precluded from testifying, but he refused to limit the questioning as requested by defendants, finding that these questions would be relevant to the issue of witness bias. He also noted that some of the defendants' requests merely called for him to apply various provisions of the federal Rules of Evidence. Presumably, these experts are offered to support the state's contention that it has a compelling interest to protect children who identify as transgender from being "subjected" to "experimental treatments" that could harm them. They should anticipate vigorous cross examination at trial.

The lead attorney for the plaintiffs is the ACLU's Chase B. Strangio, a nationally recognized transgender rights advocate who hailed the panel ruling in an interview with the *Associated Press.* "The Eighth Circuit was abundantly clear that the state's ban on care does not advance any important governmental interest and the state's defense of the law is lacking in legal or evidentiary support," he said. "The state has no business categorically singling out this care for prohibition."

Arkansas's enactment of the law inspired opponents of transgender rights in several other states. In Florida, at Governor Ron DeSantis's instruction, the state health department has issued guidelines against provision of such treatment to minors, and the state's Medicaid agency has announced that it will not cover these treatments. Similar steps were initiated by Governor Greg Abbott in Texas. The ACLU has indicated that all attempts by states to prohibit gender-affirming care for transgender minors will be challenged in court. ■