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Ninth Circuit Denies En Banc Rehearing in Washington Conversion Therapy Case, Setting Up Possible Supreme Court Review

Arthur S. Leonard

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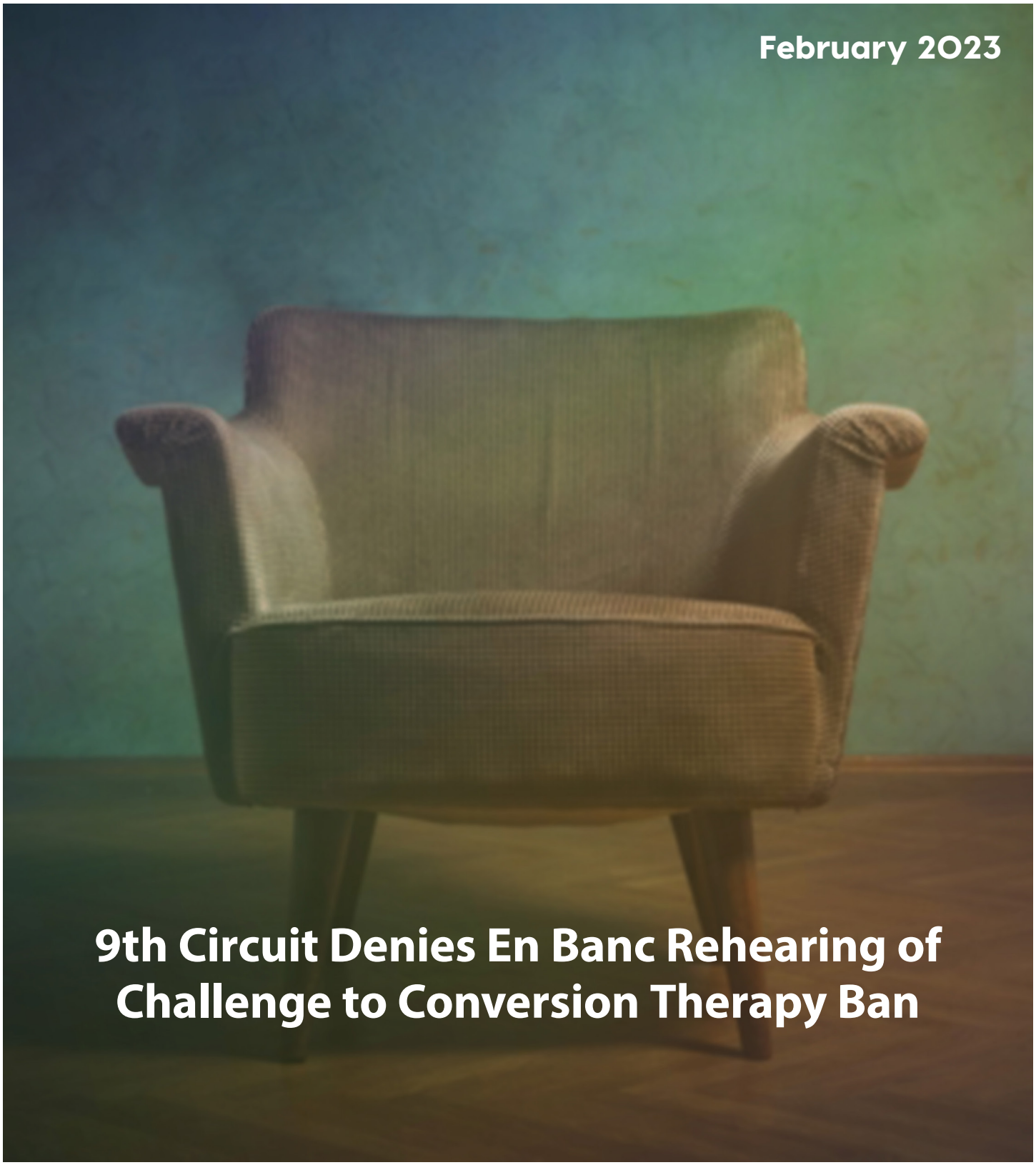
LAW NOTES



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9th Circuit Denies En Banc Rehearing of Challenge to Conversion Therapy Ban

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LAW NOTES

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EXECUTIVE SUMMARY

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Ninth Circuit Denies *En Banc* Rehearing in Washington Conversion Therapy Case, Setting Up Possible Supreme Court Review

By Arthur S. Leonard

On January 23, the U.S. Court of Appeals for the 9th Circuit announced denial of rehearing *en banc* in *Tingley v. Ferguson*, 47 F. 4th 1055 (9th Cir., September 6, 2022), in which a three judge panel, following 9th Circuit precedent in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), rejected a First Amendment free speech challenge to Washington's statute prohibiting licensed health care providers from performing "sexual orientation change efforts" (informally referred to as conversion therapy) on minors. Alliance Defending Freedom (ADF), the anti-LGBT religious litigation group, represented Brian Tingley, a licensed Washington therapist, in challenging the law. The National Center for Lesbian Rights (NCLR) represented Equal Rights Washington, a political group, as intervenor-defendant in the case. The announcement and attendant dissenting opinions are published at 2023 WL 353213, 2023 U.S. App. LEXIS 1632.

District Judge Robert J. Bryan granted a motion to dismiss in 2021, see 557 F.Supp.3d 1131 (W.D. Wash.), in light of the 9th Circuit precedent of Pickup. A three-judge panel of Circuit Judges Ronald Gould, Kim Lane Wardlaw and Mark J. Bennett, affirmed, restating the legal analysis of the Pickup decision, which held that the law was regulating professional conduct, only incidentally affecting speech, in an opinion by Gould joined by Wardlaw (Clinton appointees) with a concurrence by Bennett (Trump appointee).

It takes a majority of the 29 active judges of the circuit to grant *en banc* review by an eleven-judge panel. In announcing the denial of *en banc* review, the court released two dissenting opinions. Senior Circuit Judge Diarmuid O'Scannlain, a Reagan appointee who couldn't vote on the issue, nonetheless was moved to write about why he thought the 9th Circuit had to reconsider Pickup, and his dissent was joined by Circuit Judge Sandra Ikuta (George W. Bush appointee) and Circuit Judges Ryan Nelson and Lawrence VanDyke (Trump appointees). Circuit Judge Patrick Bumatay (Trump appointee) wrote a separate dissenting opinion.

O'Scannlain's dissent argued that Pickup was no longer good law. In *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018), a free speech case challenging California's law requiring clinics providing reproductive health services to advise patrons about the availability of abortion providers, the Court had rejected the proposition that "professional speech" receives less First Amendment protection than other speech, and Justice Clarence Thomas, writing for the Court, specifically mentioned the Pickup decision as having erred on this point. O'Scannlain wrote that "the Supreme Court has rejected Pickup by name . . . And other circuits have rejected Pickup's holding, concluding instead that therapeutic speech is – speech, entitled to some First Amendment protection." He argued that "the panel's defense of Pickup's continuing viability is unconvincing. We should have granted rehearing *en banc* to reconsider Pickup and so to resolve this circuit split." He also criticized the panel's discussion of a "long tradition" of regulating professional conduct in the health care field as somehow supporting the law.

However, the panel had distinguished *Pickup* from *NIFLA*. In the California statute at issue in *NIFLA*, the state was not regulating "therapeutic speech," but rather was requiring clinics to convey the government's message about availability of services that these clinics – which were devoted to dissuading pregnant women from terminating their pregnancy – did not want to provide. Thus, it was compelled speech, in the view of the Court, and it violated the First Amendment for the government to compel the clinics to convey this message. This is distinguishable from the conversion therapy statutes, which restrict licensed therapists from providing the therapy – which incidentally involves speech, although some may go beyond speech in their therapeutic methods – but do not restrict them from discussing conversion therapy with their clients/patients, or require them to state anything in particular about it. The 3rd Circuit, evaluating New Jersey's conversion therapy law in *King v. Governor of New Jersey*, 767 F.3d 216 (2014), differed from the 9th Circuit, holding that the law did raise free speech issues, but found that the state's legislative findings support a legitimate interest to sustain the law. *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020), which was subsequently denied rehearing *en banc*, rejected *Pickup* and struck down two local government bans on conversion therapy in Florida. Thus, the circuit split on the free speech issue.

Judge Bumatay wrote separately to assert that "conversion therapy is often grounded in religious faith," and that Tingley had alleged that "his practice of conversion therapy is an outgrowth of his religious beliefs and his understanding of Christian teachings." Bumatay developed this theme to conclude that this was actually a hybrid rights case, melding together free speech and free exercise of religion, which he insisted would require at least heightened scrutiny rather than the rationality approach taken by the panel in this case (and the panel in *Pickup*). He would vote to rehear the case *en banc* in order to incorporate this additional consideration in evaluating whether Washington State had a strong enough justification to support overriding the therapist's religious convictions.

He did concede that it is possible the court could find that the law survived heightened scrutiny depending on the strength of Washington's case.

ADF brings cases challenging LGBTQ rights laws as part of a broad agenda to get the courts to condemn such laws, usually on religious freedom grounds. Since it is a test case litigator, a cert petition is the next likely development in this litigation. Although the panel majority strived to distinguish the *NIFLA* case, Justice Thomas's dicta expressing disapproval of *Pickup* may stimulate the four votes on the Court necessary to grant certiorari. And the combination of free speech and free exercise suggested by Judge Bumatay is likely to appeal to the conservative majority on the current Court, which could spell the end of laws banning conversion therapy in the United States – at least to the extent that therapy is carried out solely through speech, as the plaintiff therapists have argued in challenging these laws.

Given the timing of all this, a cert petition filed in February or March could not be granted in time for a hearing to take place during the current term of the Court, but *Tingley v. Ferguson* may loom as a significant LGBT-related case on the Court's October 2023 calendar. ■

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Sex, Biology, and Exceptional Athletes: West Virginia U.S. District Court Upholds Biological Sex Interpretation of Title IX

By Corey L. Gibbs

In 2021, the West Virginia House of Delegates introduced and passed the "Save Women's Sports Bill." The bill requires that participation in sporting events that are segregated based on sex must be based on "biological sex." B.P.J., a transgender girl, sought to participate in the girls' cross-country and track teams. However, the law prevented her participation. B.P.J. alleged that the law violated the Equal Protection Clause and Title IX. Judge Joseph R. Goodwin of the U.S. District Court for the Southern District of West Virginia declared that the law was both constitutional and compliant with Title IX in *B.P.J. v. West Virginia State Board of Education*, 2023 WL 111875, 2023 U.S. Dist. LEXIS 1820 (January 5, 2023). B.P.J. filed an appeal in the 4th Circuit Court of Appeals on January 24.

When she prepared to enter middle school, B.P.J. expressed interest in trying out for a girls' sports team. Her mother asked the school if B.P.J. could join a girls' team, and the school expressed that B.P.J.'s membership depended on the outcome of the then-pending "Save Women's Sports Bill." The bill passed and the school informed B.P.J. that she would not be permitted to join a girls' team.

Judge Goodwin noted that the law was crafted with litigation in mind and that it mirrored Title IX. The legislators were aware of litigation involving transgender athletes elsewhere, particularly a case in Connecticut. When deciding to restrict the meaning of sex to "biological sex," the associated legislative findings acknowledged the broad interpretation of sex under *Bostock v. Clayton Count*, 140 S. Ct. 1731 (2020), and determined that broad meaning should not be used for purposes of sports. There was no doubt that the "Save Women's Sports Bill" was intended by the legislature to prevent transgender athletes from competing on teams that reflect their gender identities rather than their "biological sex."

B.P.J. filed suit against the West Virginia Board of Education, the Harrison County Board of Education, the associated Superintendents, and the West Virginia Secondary Schools Activities Commission. The State of West Virginia and a cisgender female college athlete joined the lawsuit through motions to intervene. B.P.J. requested a preliminary injunction that would allow her to compete pending the outcome of the case. Judge Goodwin granted her request, 550 F.Supp.3d 347 (2021), finding that she had a likelihood of success on the merits on both her constitutional and statutory claims and would be irreparably injured if required to await the eventual outcome of the case before obtaining relief. Each party moved for summary judgment.

West Virginia Secondary Schools Activities Commission argued that it was not a state actor in hopes of avoiding equal protection scrutiny, but this argument failed. A private actor could be subjected to equal protection scrutiny depending on the level of state involvement in its operations. Judge Goodwin characterized the Commission as only nominally private because of how entwined it was with public officials and institutions. West Virginia Secondary Schools Activities Commission's motion for summary judgment on this ground was denied.

Before diving into an analysis of the Equal Protection Clause and Title IX, Judge Goodwin addressed a few other topics that he believed were important to begin with. While B.P.J. noted a West Virginian Delegate's approval of cruel comments regarding transgender girls, she did not argue that the law was unconstitutional under the "animus