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District Court Rejects Constitutional Challenge to Federal Hate Crime Prosecution in Anti-LGBTQ+ Bias Case

Arthur S. Leonard

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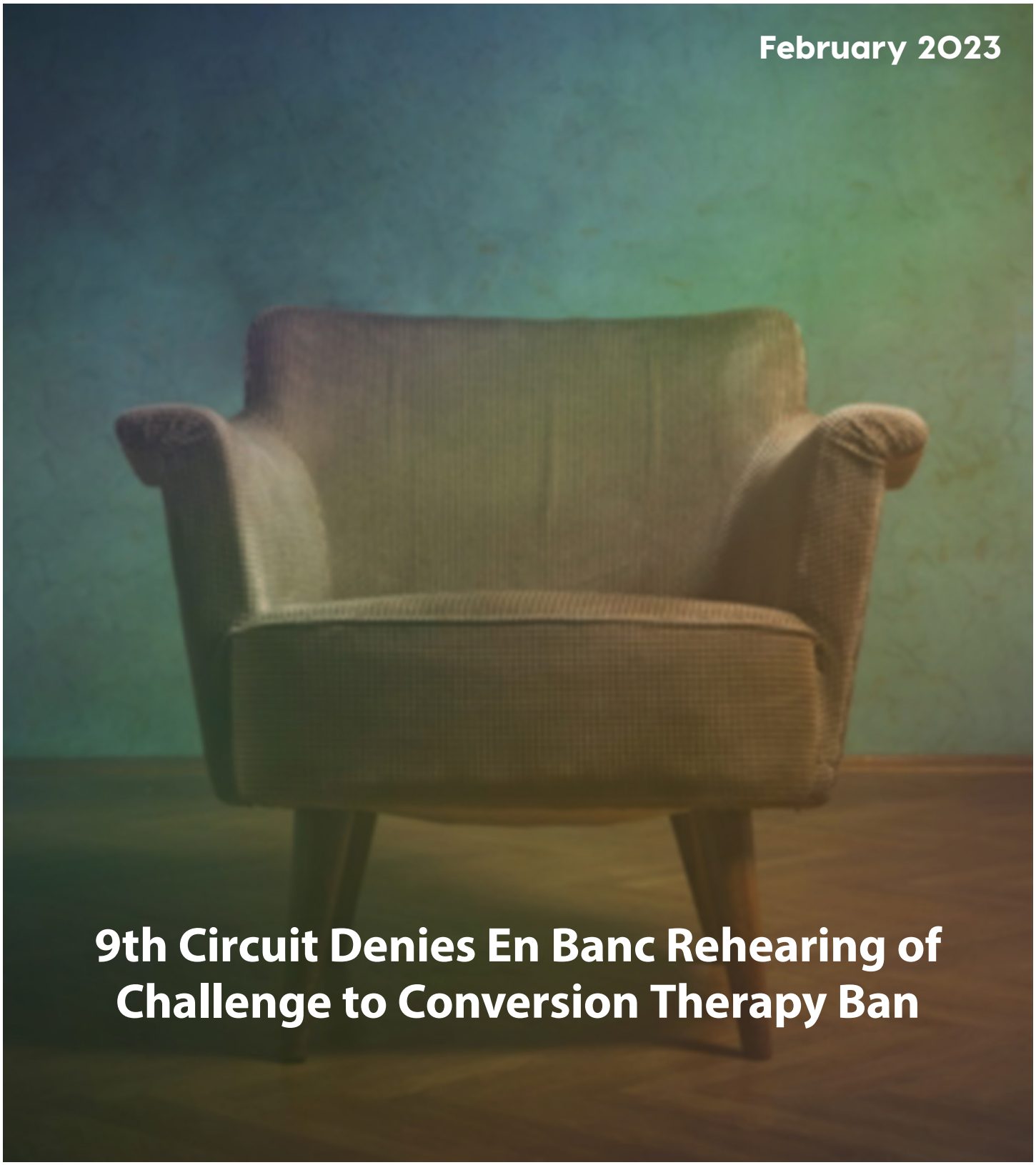
LAW NOTES



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

L G B T
LAW NOTES

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writing that there was a "difference in characterization of undisputed facts."

Additionally, the defendants seemed to try to argue that, while Hammons said he sought the hysterectomy for gender affirming care, he actually sought a hysterectomy for the purpose of sterilization—and St. Joseph refuses to perform sterilization hysterectomies on anyone. The judge rejected this, pointing to the statements of Dr. Cunningham that the procedure was cancelled because "it was a gender transition treatment."

Finally, the defendants argued that, even if they are not entitled to summary judgment, Hammons is not entitled to summary judgment against St. Joseph because St. Joseph is entitled to raise a RFRA defense at trial.

Wrote Judge Chasanow, "[b]ecause St. Joseph is a state actor, it simply may not assert this defense." "By the time Defendants sought to assert this defense, the court had ruled that they, as a single unit of three entities, were entitled to sovereign immunity as to § 1983 claims precisely because they were an instrumentality of the state. And St. Joseph has not sought reconsideration of that ruling."

Although RFRA is typically a defense reserved to protect against action by the Federal Government seeking to interfere with a person's exercise of religious belief, Judge Chasanow did discuss three circuit courts that have allowed a private defendant's RFRA defense in suits by private plaintiffs. She found that those cases were easily distinguishable and then went on to discuss how "multiple circuit courts have explicitly rejected the notion that RFRA can apply in a suit involving only private parties."

Judge Chasanow concluded, "[i]f St. Joseph were not a state actor, the growing weight of authority . . . would counsel in favor of finding that it could not assert RFRA in a case brought by a private party."

The Senior Director of Media Relations for UMMS provided the following statement to Professor Leonard following publication of his article on this case in *Gay City News*:

"The University of Maryland St. Joseph Medical Center and the University of Maryland Medical System are carefully reviewing the decision from Judge Chasanow. We dispute many of the conclusions that were reached in this decision and may be in a position to comment further after additional analysis of the ruling. Legal disagreements aside, we sincerely wish the very best for Mr. Hammons and we support his efforts to seek the highest quality healthcare. We may disagree on certain technical, legal points but compassion for the patients we serve remains foundational to our work. This legal claim stems directly from, and is traceable to, a surgeon mistakenly scheduling a procedure that could not be performed at UM SJMC. Although our offer to perform gender affirming surgery at a different location was declined by Mr. Hammons, the University of Maryland Medical System remains committed to meeting the unique medical needs of transgender individuals and patients who are routinely scheduled by physicians for appointments and procedures at UMMS member organizations."

[Editorial Note: Accompanying the above statement was an *assertion* that, contrary to the implication of its name, University of Maryland Medical System Corporation is not a part of the University of Maryland, but rather a separate non-governmental corporation. Presumably an appeal of this case would attempt to persuade the 4th Circuit Court of Appeals that Judge Chasanow was mistaken in labeling St. Joseph and UMMS as "state actors" that may not raise religious objections as a defense to a discrimination claim under the ACA.]

Hammons was represented by Abigail E. Marion, Andrew D. Cohen, Aron Fischer, Emily H. Harris, Jonah Knobler, of Patterson Belknap Webb and Tyler LLP, New York, NY; Daniel Mach, ACLU Foundation, Washington, DC; Jonathan S. Hermann, Patterson Belknap Webb and Tyler, New York, NY; Joshua A Block, Leslie Cooper, American Civil Liberties Union, New York, NY; Louis J Ebert, Rosenberg Martin Greenberg LLP, Baltimore, MD.

Senior Judge Chasanow was appointed by President William J. Clinton. ■

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District Court Rejects Constitutional Challenge to Federal Hate Crime Prosecution in Anti-LGBTQ+ Bias Case

By Arthur S. Leonard

Chief U.S. District Judge Brian Morris rejected John Russell Howald's argument that Howald could not be prosecuted for violating the federal Hate Crimes Prevention Act (HCPA), 18 USC Sec. 249 (a)(2), because, he argued, it exceeds Congress's power under the Commerce Clause to federalize criminal law. *United States v. Howald*, 2023 WL 35049, 2023 U.S. Dist. LEXIS 1435 (D. Mont., Jan. 4, 2023). Later in January, Judge Morris denied a second motion to dismiss, this time predicated on the argument that the predicate offense, a violation of 18 USC Sec. 924(c)(1)(A), does not require a "crime of violence." *See United States v. Howald*, 2023 WL 402509, 2023 U.S. Dist. LEXIS 12983 (D. Mont., Jan. 25, 2023). The court rejected this argument based on clear precedent involving the application of the HCPA.

Howald presents an egregious case, as the indictment was summarized by Judge Morris. John Russell Howald is a resident of Basin, Montana, who undertook a "self-described mission" to rid the town of its LGBTQ+ community, evidently one member at time, as he armed himself with three semi-automatic rifles on March 22, 2020, and carried them to the home of a lesbian in Basin, then firing at least seven shots at her home using an AK-47 style rifle. Luckily, nobody was injured, but police recovered one bullet from inside the house and located bullet holes in the fence, yard, deck and house. The indictment claims that Howald intended to kill the resident of the house because of her sexual orientation, and alleges that the rifle and its ammunition moved in interstate commerce, a jurisdictional element to invoke the HCPA. A bystander recorded

on a cell phone an "eight-minute rant" by Howald immediately after the shooting, in which he "made numerous derogatory and incriminating statements," including that he sought to "get rid of the fuckin' lesbians, and . . . fuckin' queers," that he "might have killed a fucking lesbian, I hope," and that "they are going to die, they are going to leave, and it's gonna be awesome again."

Howald was arrested the next day, and a search of his vehicle and camper turned up an arsenal of weapons. Howald was arraigned on June 29, 2021, and is represented by Federal Defenders of Montana. The jurisdictional motion to dismiss was accompanied by a motion *in limine* seeking to exclude evidence of prior convictions, including one conviction that "concerns the same underlying conduct as Howald's current federal criminal indictment."

The motion to dismiss on jurisdictional grounds was premised on some prior federal criminal cases in which other statutes were held invalid for failure to come within the Commerce Power, including some provisions of the Violence Against Women Act invalidated in *U.S. v. Morrison*, 529 U.S. 598 (2000), and a gun control provision struck down in *United States v. Lopez*, 514 US 549 (1995). Judge Morris found that Congress had learned its lesson from the prior cases, and had been sure to include an express jurisdictional element in the HCPA to cure the problem identified in the earlier cases. "Howald conceded during the December 19, 2022, motion hearing that he could not identify any valid case in which a federal court had invalidated a federal criminal statute containing an interstate commerce jurisdiction element," wrote Judge Morris. "Federal courts uniformly have upheld criminal statutes that regulate items traveling in interstate commerce on the basis that they contain similar jurisdictional elements to that in Sec. 249(a)(2)(B). The U.S. Supreme Court in *Scarborough v. Untied States* [431 U.S. 563 (1977)] determined that an illegally possessed firearm that previously had traveled in interstate commerce satisfied the constitutional nexus requirement." The court also pointed to the 9th Circuit's decisions in *U.S. v. Alderman*, 565 F.3d 641 (2009), and *U.S. v. Standard*, 849 F. App'x 649 (2021).

"The Court determines that the jurisdictional element contained in Sec. 249(a)(2) renders the statute constitutional on its face based on binding U.S. Supreme Court and Ninth Circuit precedent," wrote Morris. "The Court additionally recognized that bias-motivate violence itself impacts interstate commerce. As the Government highlights, violence against people based upon their actual or perceived religion, gender, race, or sexual orientation 'creates an atmosphere of fear that affects interstate commerce'" citing the government's brief on this motion. "Congress enacted the HCPA with this connection in mind. Congress expressly found that bias-motivated violence against 'members of targeted groups impedes their freedom of movement,' forces members of these communities 'to move across State lines to escape the incidence of risk of such violence,' and prevents them from 'purchasing goods and services, obtaining or sustaining employment, or participating in other commercial activity,'" citing the statute at Sec. 2(6)(A)(B). The 4th Circuit relied on this alternative ground in *U.S. v. Hill*, 927 F. 3d 188 (4th Cir. 2019).

The court then turned from Howald's facial challenge to his alternative as-applied challenge, finding it equally unpersuasive. Here Judge Morris found a lack of direct 9th Circuit precedent, but once against invoked the *Hill* prosecution from the 4th Circuit, in which the court of appeals reversed a district court ruling in an LGBTQ+ bias prosecution, finding, contrary to the district court, that "the assault 'interfered with ongoing commercial activity.'" Turning to the indictment in this case, Judge Morris wrote, "Howald's indictment specifically alleges that Howald used a firearm that had traveled in interstate commerce in commission of the charged offense and that his conduct 'otherwise affected interstate commerce.' The AK-style rifle found in Howald's possession included components manufactured in Romania. The ammunition used in the alleged offense was manufactured in Russia." He pointed out that at trial the government will have the burden of proving the jurisdictional element, but at this point the allegations in the indictment sufficed to defeat the motion to dismiss. "The Court declines to address whether the impact of bias-motivated violence itself on interstate commerce would suffice to establish jurisdiction over Howald in light of the determination that the jurisdictional element defeats Howald's as-applied challenge to Sec. 249(a)(2)."

On the motions *in limine*, the court granted one, pertaining to prior convictions that had no factual or logical relationship to the present case. But as to the prior hate crimes conviction, he wrote that he would defer judgment "regarding the admissibility of cross-examination evidence should Howald choose to testify. The Court also will defer judgment on the admissibility of testimony from the Government's intended witnesses as intrinsic evidence of Howald's motive, an element of the charged offense," he wrote. He directed that the parties confer on this issue and inform the court of they were unable to resolve any disputes as to admissibility of Government witness testimony.

The January 23 ruling, dismissing another dismissal motion, involves an extended exegesis on the meaning of "crime of violence" as one of the elements under the HCPA. Howald tried to argue that the definition of that term was overly broad and vague and potentially brought into play a variety of non-violent actions, leading to extended consideration of how courts have parsed the language in response to such arguments. The bottom line of the judge's analysis was that at trial the government must prove "beyond a reasonable doubt that Howald attempted to kill" the resident of the house in question, and that 9th Circuit precedents upholding the HCPA against the argument that Howald was making centered on the use of a deadly weapon that "reflects force that is capable of causing death or serious injury." Howald is charged with an "attempt to kill," which distinguishes his case from some others in which people were actually killed, but the court found that the logic rejecting challenges to the statute on this ground applied to both kinds of cases.

Chief Judge Morris was appointed by President Barack Obama. ■