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4th Circuit Panel Revives Preliminary Injunction to Let Transgender Girl Compete While West Virginia Case is Pending

Arthur S. Leonard

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LAW NOTES

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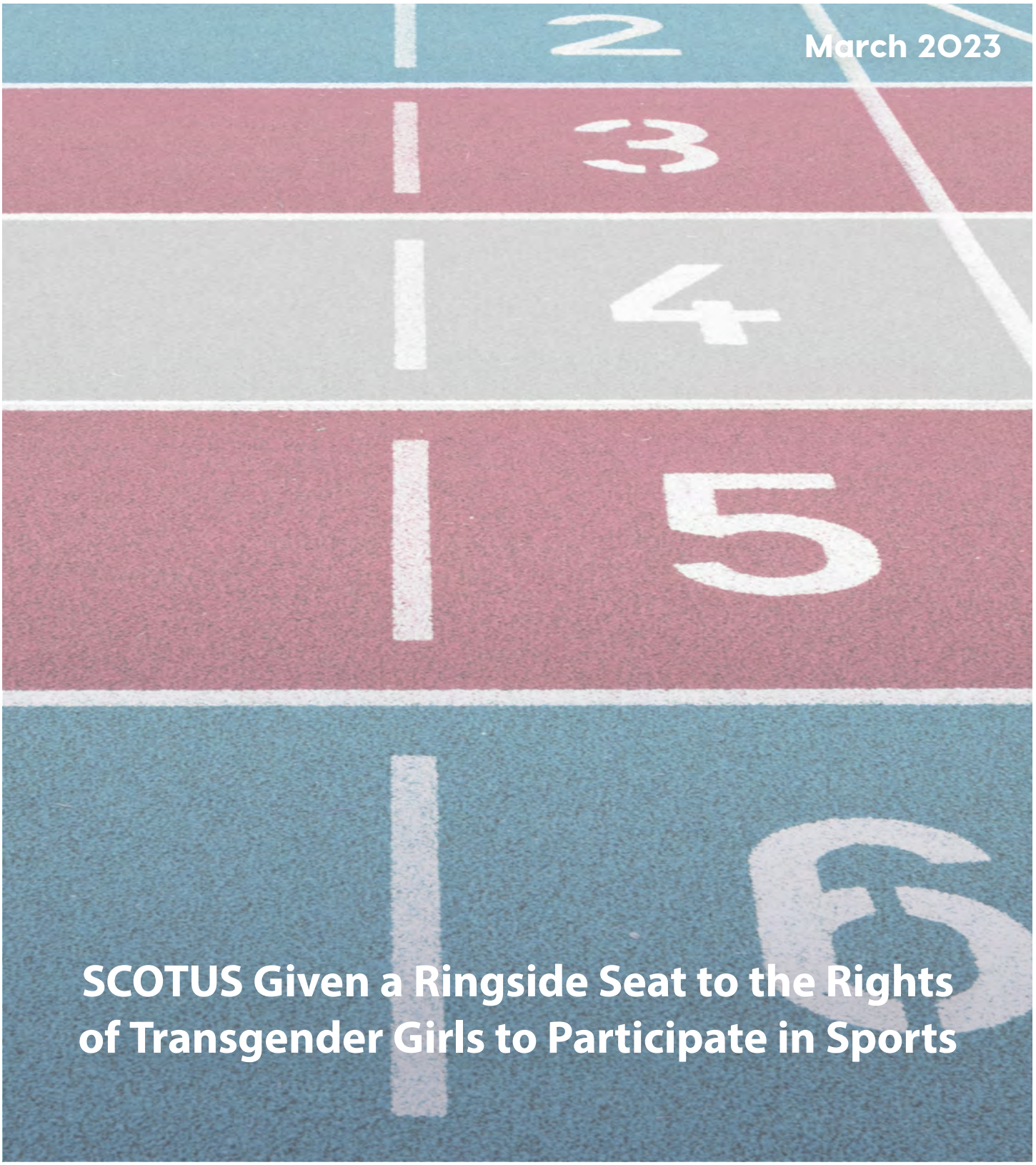

SCOTUS Given a Ringside Seat to the Rights of Transgender Girls to Participate in Sports

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LAW NOTES

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EXECUTIVE SUMMARY

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4th Circuit Panel Revives Preliminary Injunction to Let Transgender Girl Compete While West Virginia Case is Pending

By Arthur S. Leonard

A panel of the U.S. Court of Appeals for the 4th Circuit ruled on February 22 that B.P.J., a transgender middle school girl, can continue to compete in girls' sports teams at her school while she appeals an adverse ruling issued in January by District Judge Joseph R. Goodwin, who rejected her claim that barring her from participating on girls' teams violated her constitutional and statutory rights. *B.P.J. v. West Virginia State Board of Education*, No. 23-1078 (L) (U.S. Ct. App., 4th Cir.). [Defendants filed a "shadow docket" Application with the Supreme Court asking it to stay the 4th Circuit's ruling and to allow Judge Goodwin's order dissolving his preliminary injunction to go into effect, and counsel for B.P.J. filed a response as requested by the Court that was due by March 10. Full details of any action by the Supreme Court during March will follow in the April 2023 issue of *Law Notes*.]

Judge Goodwin had issued a preliminary injunction in July 2021, ordering the school to let B.P.J. try out for the girls' cross country and track teams. He pointed out that she had been taking puberty blockers and thus had not accrued physical advantages that would flow from going through male puberty, so she stood a good chance of proving that excluding her from the girls' teams would violate her rights to Equal Protection under the 14th Amendment and to be free from discrimination "because of sex" under Title IX of the Education Amendments Act. The judge also concluded that B.P.J. would suffer irreparable injury if denied the preliminary injunction, and that allowing her to play would not disadvantage other girls.

West Virginia had passed a law in 2021 forbidding transgender girls from competing on girls' sports teams. While B.P.J.'s lawyers claim that the law is facially invalid, the issue in terms of the preliminary injunction was whether the law was invalid as applied to her, not across the board, so the preliminary injunction was narrowly focused on her right to play and did not automatically prevent the application of the exclusionary law to other transgender girls.

By the time pre-trial discovery had been concluded and the parties had filed their arguments for summary judgment, Judge Goodwin had been persuaded in the opposite direction, concluding in *B.P.J. v. West Virginia State Board of Education*, 2023 WL 111875, 2023 U.S. Dist. LEXIS 1820 (S.D. W.Va., Jan. 5, 2023), that B.P.J. was *unlikely* to win her case on the merits. Reviewing the record on summary judgment, Judge Goodwin determined that transgender girls are not similarly situated to cisgender girls for purposes of sports competition, and that Title IX's ban on discrimination because of sex should be interpreted to apply to "biological sex," physical sex identified at birth, and not to gender identity. Having reached this conclusion, Judge Goodwin granted summary judgment to the defendants and ordered that his preliminary injunction be dissolved. *Law Notes*' full treatment of this opinion can be found in our February 2023 issue under the title "Sex, Biology, and Exceptional Athletes: West Virginia U.S. District court Upholds Biological Sex Interpretation of Title IX," by Corey L. Gibbs.

The district court's opinion seemed contrary to the 4th Circuit precedent of *Grimm v. Gloucester County School Board*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021), in which the 4th Circuit held that a Virginia school district violated both Equal Protection and Title IX by barring Grimm, a transgender boy, from using boys' restrooms at the county's high school. That 4th Circuit opinion followed the reasoning of the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which ruled in the context of Title VII that it is impossible to discriminate against somebody due to their gender identity without discriminating because of sex. Most courts consider Title VII precedents on sex discrimination to be heavily persuasive when interpreting Title IX's ban on sex discrimination in educational institutions.

Judge Goodwin had based his July 2021 decision heavily on the Grimm case, but now he had come to believe that sports competition was distinguishable from the restroom access issue, having accepted the defendants' argument that Title IX was focused on promoting fairness for girls in school athletics and that it would be unfair, in general, to require cisgender girls to compete with transgender girls, despite the facts of individual situations. He reached this conclusion even though he also concluded that allowing B.P.J. to play girls' sports was not unfair to the cisgender girls with whom she competed. He also emphasized that cross-country and track competitions were not "contact sports."

B.P.J.'s attorneys from Lambda Legal and the ACLU announced an appeal to the 4th Circuit and asked Judge Goodwin to stay his order dissolving the preliminary injunction. The judge refused that request in an opinion issued on February 7 (2023 U.S. Dist. LEXIS 26427, 2023 WL 1805883), forcefully restating his view that the West Virginia statute, as applied to B.P.J., violated neither the Constitution nor Title IX. This was issued *after* B.P.J. had been participating in girls' sports for a year and a half without incident, and would now suddenly be benched by judicial fiat despite the court's finding of no injury to others if his order was not stayed.

B.P.J.'s attorneys promptly submitted a motion to the 4th Circuit, urging that court to issue its own preliminary injunction staying Judge Goodwin's order by February 26, a crucial date in terms of B.P.J.'s ability to continue playing women's sports without interruption while her appeal is pending. On February 22, a three-judge panel voted 2-1 to grant her motion, staying the district court's January 5, 2023, order while the case is reviewed on the merits by the 4th Circuit.

This unpublished ruling on the plaintiff's motion, unaccompanied by any written explanation, may signal how the panel will rule on the merits, but is certainly not definitive as to that. Unsurprisingly, the judges on the panel who voted to grant the stay – Circuit Judges Pamela Harris and Toby Heytens – were appointed by Presidents Barack Obama and Joe Biden, respectively. Circuit Judge Steven Agee, appointed by President George W. Bush, dissented from the court's order. As of the end of February, the only publicly available version we could find of the 4th Circuit's February 22 order on-line was a one sentence summary on the district court's docket of the case on Westlaw.

Thus, by court order B.P.J. is allowed to continue participating in girls' sports teams at her middle school, but the preliminary injunction does not apply to other parties, since the scope of Judge Goodwin's original preliminary injunction, hereby revived, was limited to B.P.J. Goodwin had made no determination in in his July 2021 decision about whether the West Virginia statute was facially unlawful, postponing that issue until he ruled on the merits. [Early in March, as noted above, NBC reported that the defendants announced that they would file a motion in the U.S. Supreme Court seeking a reversal of this panel order, particularly focusing on the failure of the panel majority to explain why they were rejecting Judge Goodwin's conclusion that leaving the preliminary injunction in place was inappropriate in light of his conclusion that the plaintiff was unlikely to win on the merits. Since this is going to the "shadow docket" as there is no final appellate decision on the merits to review, there might be action by the Supreme Court in time to include in the April issue of *Law Notes*. If there is no Supreme Court action on this motion during March, we will provide coverage of the contents of the Application filed by defendants.]

Judge Goodwin, who was appointed by President Bill Clinton, is a former chief judge of the West Virginia district court. ■

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

Georgia Federal Court Rejects Teacher's First Amendment Claim That She Was Fired for Raising Issues Regarding Same-Sex Book

By Bryan Johnson-Xenitelis

Senior Judge William T. Moore, Jr. of the U.S. District Court for the Southern District of Georgia, Savannah Division, has denied a substitute teacher's motion for preliminary injunction and expedited hearing in a case where she was non-renewed after expressing her religious views about a book about same-sex families being presented to her children, in *Barr v. Tucker*, 2023 U.S. Dist. LEXIS 28558, 2023 WL 2139663 (S. Dist. GA, Savannah Div., February 21, 2023).

Lindsey M. Barr was a substitute teacher at one of her children's schools when she took notice of and sent to another parent a picture of a poster of two men with "a heart floating between them" and the caption "all adults have the right to marriage and to raise a family." In the next school year, she took issue with a "read-aloud program" presenting "All Are Welcome," a picture book containing "illustrations that picture same-sex couples with school-age children." Barr sent an "off duty" and "off the clock" communication that she wished to excuse her child from the read-aloud program. She also sent the picture taken the year before with an email summarizing her beliefs to defendants.

Afterwards, Barr found herself unable to access the system she used to obtain substitute teaching assignments. At a subsequent meeting with defendants, she was informed that there were concerns that Barr had shared biases that she was "bringing in with her and that were coming up during the times that she was working and substituting" and the issue was raised whether Barr would be able to support "a student that identifies as gay or has parents that identify as gay." Barr responded that she was expressing her concerns as a Christian mother, not a substitute teacher. Defendants informed Barr that she was removed as a substitute teacher.

Barr brought suit represented by the Alliance Defending Freedom seeking a preliminary injunction against defendants to reinstate her pending an ultimate ruling on the merits, and to refrain from taking further action against her, claiming defendants had retaliated against her for exercising her right to free speech and violated her right to free exercise of religion.

Judge Moore first ruled that there "is little dispute as to raw facts" and denied Barr's motion for an evidentiary hearing. He further noted that while there are four factors to establishing a preliminary injunction, since Barr clearly could not carry her burden of showing likelihood of success, the court would only address that issue.

With respect to Barr's free speech rights, Judge Moore found the court must balance that "a government employer may not demote or discharge a public employee in retaliation for speech protected by the First Amendment" against the well-settled idea that "public employee's free-speech rights are not absolute," pursuant to *Pickering v. Board of Education*, 391 U.S. 563 (1968).

The court examined the content, form, and context of Barr's speech to determine whether it was on a matter of public concern. With respect to content, Judge Moore found that Barr contends, and defendants do not dispute that the content of her speech – addressing sexual orientation and curriculum in public education – supports the conclusion that she spoke on a matter of public concern.

With respect to form, Barr argued that just because she chose to communicate privately rather than publicly "does not automatically relegate speech on a matter of public concern to speech on a private matter" but noted that "Plaintiff did not attempt to make her concerns public."

With respect to context, Barr argued the context of her speech shows she spoke