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U.S. Magistrate Judge Ruling Dismisses All Federal Claims by Transgender Inmate While Calling for Reconsideration of 10th Circuit Precedent

Arthur S. Leonard

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LAW NOTES

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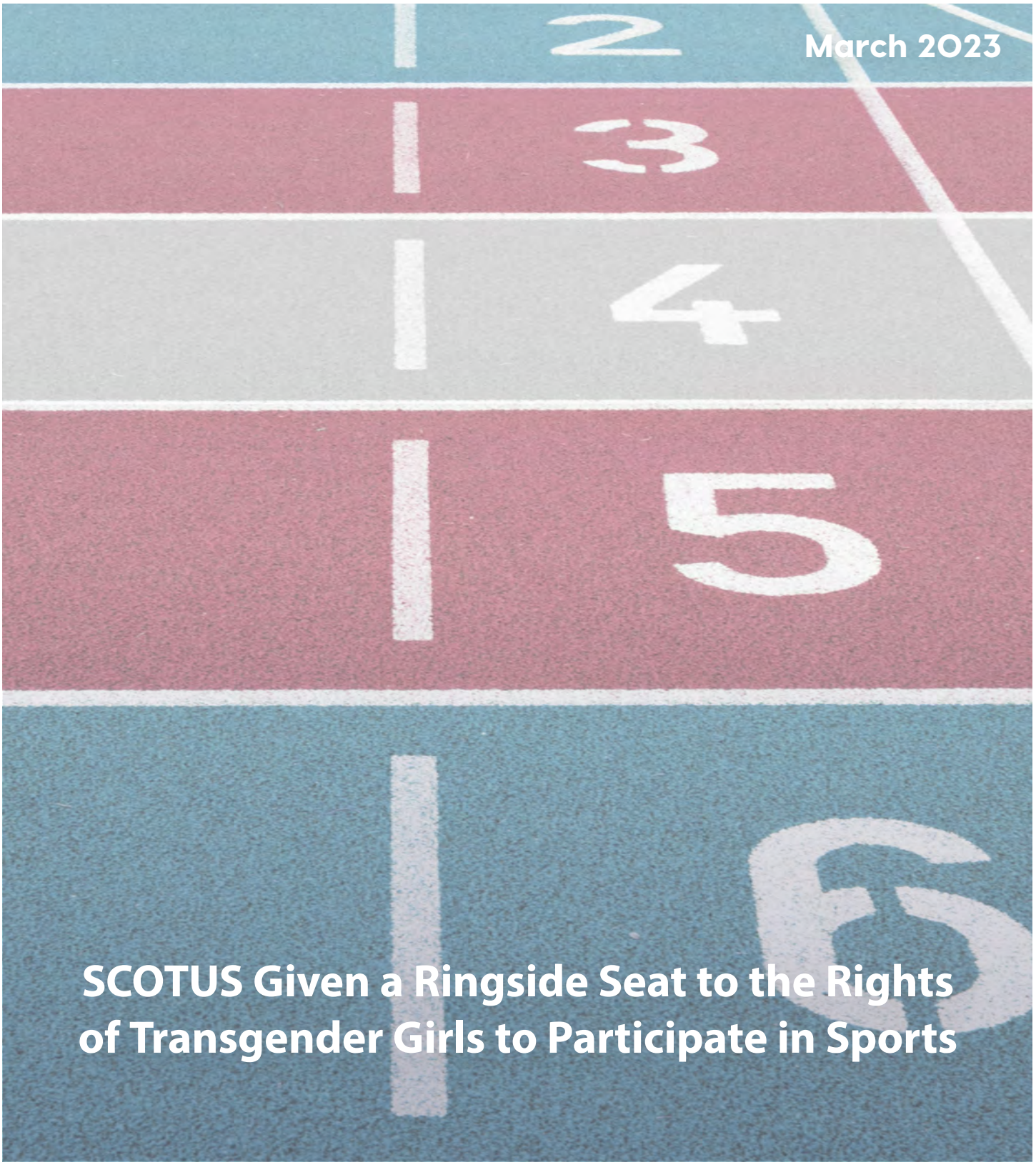

SCOTUS Given a Ringside Seat to the Rights of Transgender Girls to Participate in Sports

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LAW NOTES

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EXECUTIVE SUMMARY

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U.S. Magistrate Judge Ruling Dismisses All Federal Claims by Transgender Inmate While Calling for Reconsideration of 10th Circuit Precedent

By Arthur S. Leonard

Here's one for the record books. In *Griffith v. El Pas County, Colorado*, 2023 WL 2242503 (D. Colo., Feb. 27, 2023), U.S. Magistrate Judge N. Reid Neureiter, a case in which a transgender pretrial detainee and subsequently convicted inmate must suffer dismissal of all her federal and state law claims of a 16-count second amended complaint drafted for her by appointed counsel, despite finding that old 10th Circuit precedents on transgender status for equal protection purposes, although bounding, are totally out of step with recent jurisprudence, and that gender dysphoria – with which the plaintiff has been diagnosed – should be considered a disability under the Americans with Disabilities Act. The ultimate problem in the case, however, is that the antiquated 10th Circuit precedent, more than a quarter century old, is binding, and that the judge's conclusions regarding plaintiffs constitutional and statutory rights do not state firmly decided law, resulting in qualified immunity for those named defendants not otherwise dropped from the case due to insufficient allegations of personal involvement in the alleged discrimination against the plaintiff.

The decision could be an Exhibit A showcase for the failings of federal judicial process when applied to efforts to protect the civil rights of transgender inmates.

Although Darlene Griffith had been living as a woman for more than two decades, including changing her name, altering her physical appearance and dress, developing secondary sex characteristic as a result of hormone treatment, she had never obtained surgical alteration of her genitals, and thus under El Paso County policy, she had to be housed in male units upon her arrest, subjected her to repeated sexual harassment, sexual assault, and discrimination by jail staff and other inmates. Included in her complaints were strip searches conducted by male corrections officers, sometimes accompanied by discriminatory and abusive language, mis-gendering despite her feminine appearance, denial of commissary access to gender-appropriate apparel, and a continuing refusal to send her to alternative female inmate housing. Despite her warning to a prison mental health provider that "she would remove her penis herself as soon as she could figure out how to do it," nothing was done to prevent her subsequent unsuccessful attempt at self-castration. "Plaintiff has a long history of self-harm," wrote the judge, "including self-castration behavior, which worsens when she is not permitted to live in accordance with her gender identity and when she is subjected to sexual harassment and mis-gendering."

After an incident where she was groped and taunted by another inmate while laying on her bunk, she was finally moved to a female unit, effectively mooting part of her claim for injunctive relief.

Among her sixteen causes of action were claims under the 14th Amendment, equal protection and substantive due process, the Americans with Disabilities Act, the Rehabilitation Act, and Colorado civil rights laws.

The judge agreed with the defendants that her claim against El Paso County had to be dismissed, since Colorado law requires that suits against counties had to be brought as suits against the county commissioners. Furthermore, El Paso County and the El Paso County Sheriff's Office, which operates the county detention center, are separate entities, and the county as such as no role in running the detention center, so it is not a proper party, since the employees named as defendants are all employed by the Sheriff's Office. In addition, claims against several named defendants were dismissed because Griffith failed to allege their personal involvement in the discrimination about which she was protesting.

As to the equal protection claim, Griffith's claim that foundered on the 10th Circuit's decision in *Brown v. Zavaras*, 63 F.3d 967 (1995), in which the court of appeals relied on cases from other circuits holding that "transsexuals are not a protected class . . . because transsexuals are not a discrete and insular minority, and because the plaintiff did not establish that 'transsexuality is an immutable characteristic determined solely by the accident of birth' like race or national origin." The cited case was *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), a relic that used to be a principal case in employment discrimination casebooks of the last century. Wrote Judge Neureiter, "Subsequent unpublished Tenth Circuit opinions have confirmed that, 'to date, this court has not held that a transsexual plaintiff is a member of a protected suspect class for purposes of Equal Protection claims.' *Druley v. Patton*, 601 F. App'x 632, 635 (10th Cir. 2015); see also *Qu'etax v. Ortizm*, 170 F. App'x 551, 553 (10th Cir. 2006)." But, wrote the judge, "This Court has little trouble stating that the Tenth Circuit needs to revisit its holding in *Brown v. Zavaras*," observing that the cases from other circuits on which it relies have been effectively overruled and that much more recent rulings in several circuits have established that gender identity claims get heightened scrutiny, the same as sex discrimination claims. (The judge does not mention *Bostock v. Clayton County*, however.)

But, the judge wrote, even if Brown is not "good law in the normative sense," it is still binding, and a magistrate judge cannot ignore its precedential standing. Nonetheless, the judge went on to write that if the court applied the usual tests