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6th Circuit Panel Stays Preliminary Injunction in Tennessee Gender-Affirming Care Case

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LAW NOTES

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**More Setbacks in Gender-Affirming
Care for Minors**



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6th Circuit Panel Stays Preliminary Injunction in Tennessee Gender-Affirming Care Case

By Arthur S. Leonard

For the first time, some federal judges have suggested that constitutional challenges to state laws banning gender-affirming care for minors are unlikely to succeed and have stayed a preliminary injunction that the U.S. District Court issued on June 28 against operation of Tennessee's law. The case is *L.W. v. Skrmetti*, 2023 U.S. App. LEXIS 17234, 2023 WL 4410576 (6th Cir., July 8, 2023). The state's request to the trial judge, Eli Richardson, to stay his preliminary injunction pending an appeal had been denied by Judge Richardson. The state immediately filed an "emergency motion" to stay the preliminary injunction.

The three-judge 6th Circuit panel voted 2-1 that the district court's statewide preliminary injunction against the Tennessee law should be stayed as the case proceeds. However, acknowledging that their ruling contradicts the ruling of all federal courts that have addressed this issue thus far on the issues of due process and equal protection, the panel promised to expedite consideration of the state's appeal of the preliminary injunction, with the goal of issuing a decision by September 30.

Tenn. Code Ann. Sec. 68-33-101, scheduled to go into effect on July 1, authorizes state regulatory authorities to impose "professional discipline" on any physician providing gender-affirming care to minors, with a temporary carve-out until March 31, 2024, for continuing care to those already receiving the treatment. Thus, it would be professional misconduct in Tennessee for a licensed health care provider to start providing gender-affirming care to patients from the effective date of the law, or to continue providing such after next March 31 to persons who were receiving care as of July 1. The law also provides a right for an "injured minor" or a "nonconsenting parent" to sue health care providers for providing such care.

Judge Richardson (appointed by President Donald J. Trump) found that

the plaintiffs – three transgender minors and their parents – were likely to prevail on their argument that the law violated the constitutional rights of transgender minors on equal protection grounds and their parents on due process grounds. However, he found that they lacked standing to contest the ban on surgery, limiting his preliminary injunction to the ban on puberty blockers or cross-sex hormones, because none of the plaintiffs would be affected by that ban as of July 1.

The majority of the panel, Chief Circuit Judge Jeffrey Sutton (appointed by President George W. Bush) and Circuit Judge Amul Thapar (appointed by President Trump), found that Judge Richardson erred by recognizing a "new" fundamental right under the due process clause for parents to override state legislative judgments about access to particular medical treatments for their children. Judge Richardson had relied on cases recognizing, in general, the right of parents to make important decisions about the care and upbringing of their children. He found, based on the record before him, that the facts asserted by the Tennessee legislature in support of this measure were contrary to the weight of professional medical authority. The panel majority insisted that on a motion for preliminary injunction it was inappropriate for the trial court to substitute its judgment for the legislature's decision to "protect" minors from "experimental treatments" that could permanently affect their reproductive capacity. The panel majority was critical of the trial judge's deferral to the majority judgment of the medical profession, asserting that there was debate within the profession on the wisdom of using these medications on minors.

The panel majority also seized upon the fact that use of puberty blockers and cross-sex hormones for gender affirming care for minors was an "off label" use of those medications, as they

have not been officially approved by the Food and Drug Administration (FDA) for that purpose. Judge Richardson had found that "off-label" use of approved drugs is a widespread practice in the medical profession when the drugs have been deemed safe by the FDA, so he had not given weight to the state's argument that it was rational for it to prohibit such care on that basis.

The panel majority insisted that the Supreme Court has never specifically recognized the fundamental right claimed by the plaintiffs in this case, and had – most recently in the *Dobbs* abortion decision – shown great reluctance to apply substantive due process to recognize rights that were not recognized when the 14th Amendment was adopted in 1867. Indeed, the panel majority pointed out that the Supreme Court has not recognized any new fundamental rights in the past forty years, arguing that it was inappropriate for a federal trial judge to do so in deciding a pre-trial preliminary injunction motion. The panel majority stated that the Supreme Court's prior parental rights decisions (dealing with education and child custody issues) had not extended to health care, and the Supreme Court had even overridden parents' objections to a compulsory vaccination law more than a century ago.

The panel majority rejected Judge Richardson's conclusion that the plaintiffs were likely to prevail on their equal protection claim, which was based on the conclusion that banning gender-affirming care should be considered either discrimination on the basis of sex or of gender identity, in either case subject to heightened scrutiny. The panel majority argued that neither the Supreme Court nor the 6th Circuit has explicitly ruled that gender identity discrimination requires heightened scrutiny.

They also rejected the argument that banning gender-affirming care constitutes sex discrimination. In so

doing, they rejected the argument that the Supreme Court's reasoning in the *Bostock* case, holding that an employer discriminating against an employee because of their "transgender status" constituted sex discrimination, should be applied in a constitutional equal protection case. They argued that the *Bostock* decision applied to interpretation of Title VII of the Civil Rights Act of 1964, which applies only to employment discrimination, and that the Supreme Court had disclaimed ruling on any other aspect of gender identity discrimination in that case.

The panel majority instead embraced the simplistic argument that because the ban on gender affirming care applied equally to male and female minors, there was no discrimination because of sex. Such reasoning had been rejected by the Supreme Court in *Loving v. Virginia*, where the state defended its law against interracial marriage by arguing that both white and non-white persons were equally prohibited from engaging in interracial marriage so there was no discrimination *because of race*. The Supreme Court rejected that argument, finding that the interracial marriage ban was intended to maintain the "purity" of the white race, a racist concept. The panel majority countered with the Supreme Court's holding in *Dobbs* that laws banning abortion, an operation performed only on women, did not raise an equal protection issue.

Before getting to these substantive points, however, the full three-judge panel found that Judge Richardson should not have issued a statewide injunction, insisting that any preliminary relief should be limited to the plaintiffs in the case. They noted that this was not certified as a class action case, and that blocking the enforcement of a statute for the entire state could only be justified if plaintiffs were likely to prevail on a claim that there were no possible lawful applications of the statute, i.e., that it was invalid on its face for all applications.

Dissenting in part on the equal protection claim, Senior Circuit Judge Helene White (initially appointed by President Bill Clinton toward the end of his second term, but confirmed under a deal to break a deadlock in

confirming circuit court judges under which her name was resubmitted to the Senate by President George W. Bush) agreed that the statewide injunction was improper under a 6th Circuit precedent holding that "district courts should not issue relief that extends further than necessary to remedy the plaintiff's injury." However, she parted company from the majority on substance, finding that the 6th Circuit's precedents had recognized discrimination claims by transgender plaintiffs in several cases under Title VII, and that the 6th Circuit had specifically held in the past that "we review discrimination claims brought under the Equal Protection Clause using the same test applied under Title VII." She would have upheld the preliminary injunction but narrowed it to apply only to enforcement against the plaintiffs.

Plaintiffs are represented by the ACLU, Lambda Legal, and cooperating attorneys from Akin Gump Strauss Hauer & Feld, LLP. ■

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Seventh Circuit Affirms District Court's Application of Ministerial Exception to Bar Title VII Claim

By Corey L. Gibbs

Michelle Fitzgerald worked as a guidance counselor and acted as Co-Director of Guidance at Roncalli High School, a Catholic school run by the Archdiocese of Indianapolis. The school declined to renew Fitzgerald's employment contract because she was in a same-sex marriage. On July 13, the U.S. Court of Appeals for the Seventh Circuit ruled that the ministerial exception applied despite Title VII prohibiting this form of sex discrimination. *Fitzgerald v. Roncalli High School, Inc.*, 2023 U.S. App. LEXIS 17813; 2023 WL 4528081.

Fitzgerald worked for Roncalli High School for fourteen years. During her tenure at Roncalli, she received positive performance reviews. However, the school declined to renew her employment contract, because the school determined that her same-sex marriage went against the school's religious mission and the Catholic faith. Around the same time, Fitzgerald's Co-Director of Guidance informed the school that she was also in a same-sex marriage. Roncalli also declined to renew her employment contract. Fitzgerald and her Co-Director brought separate lawsuits against Roncalli alleging discrimination based on sex under Title VII.

Although there is no dispute that Roncalli discriminated against Fitzgerald based on her sex under Title VII, the issue before the court was whether the school's discriminatory act was protected by an exception. The First Amendment prohibits Congress from making a law that abridges the free exercise of religion. The Supreme Court has interpreted this language as barring employment discrimination suits when the employee was a "minister" and the employer was a religious entity.