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**Arizona U.S. District Court Issues Preliminary Injunction Against  
Arizona's Ban on Transgender Girls Competing in Girls' Sports**

Arthur S. Leonard

# L G B T LAW NOTES

August 2023

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

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*Hosanna-Tabor Evangelical Lutheran Church & School v. E.E.O.C.*, 565 U.S. 171, 176-77 (2012). This ministerial exception could be a defense against Fitzgerald's employment discrimination suit, but Roncalli had to prove that Fitzgerald was a "minister."

To determine whether Fitzgerald was a "minister" for this purpose, the court had to consider Fitzgerald's formal title, the substance of that formal title, her use of that formal title, and the religious functions she performed for Roncalli. *See Id.* At 192. The court noted that Fitzgerald held a prominent position at the school. Circuit Judge Amy St. Eve wrote, "There is no genuine dispute that Fitzgerald played a crucial role on the Administrative Council, which was responsible for at least some of Roncalli's daily ministry, education, and operations." Additionally, the court found that Fitzgerald held herself out to be a minister.

Fitzgerald argued that her role on the Administrative Council was more logistical than religious, but the court found this to be unpersuasive. In *Our Lady of Guadalupe School v. Morrissey-Berru*, the Supreme Court determined that schools should be given deference when explaining ministry issues. 140 S. Ct. 2049, 2066 (2020). In keeping with Supreme Court precedent, the 7<sup>th</sup> Circuit panel extended that same deference to Roncalli, determining that Fitzgerald participated in a religious leadership position at the school.

In addition to her religious leadership position, Fitzgerald helped implement the Catholic Educator Advancement Program. This program evaluated guidance counselors to identify the ways in which they lived out the mission of the school. Fitzgerald contends that the religious components of the evaluation were included by the principal. The court viewed this as evidence that the principal believed guidance counselors, like Fitzgerald, had religious job responsibilities.

Finally, the court considered Fitzgerald's self-evaluation. In her evaluation, Fitzgerald stated, "I consistently use spiritual life and resources in my counseling conversations as well as sharing my

own spiritual experiences . . . I am faithful and have no problems sharing my beliefs and my love of God." Although Fitzgerald argued that she made exaggerations on this form to get a raise, Roncalli noted that her admission underscored its expectation that she perform religious tasks.

The court concluded that the ministerial exception should apply, and it affirmed District Judge Richard L. Young's decision to grant summary judgment in favor of Roncalli. In a concurring opinion, Circuit Judge Michael Brennan noted that a similar result could have been achieved through the religious employer exemption under Title VII. However, this exemption provided a pretext inquiry that could have mitigated concerns that religious employers have a license to discriminate if they can manufacture a religious reason.

President Donald J. Trump appointed both Circuit Judges St. Eve and Brennan. Completing the panel was Senior Circuit Judge Joel Flaum, who was appointed by President Ronald Reagan.

Michelle Fitzgerald was represented by Mark W. Sniderman and both Bradley Girard and Gabriela Hybel of Americans United for Separation of Church and State. Roncalli High School, Inc. and Roman Catholic Archdiocese of Indianapolis, Inc. were represented by Daniel Howard Blomberg, Benjamin Freshman, Luke William Goodrich, and Joseph Charles Davis of the Becket Fund for Religious Liberty. According to the website for Americans United for Separation of Church and State, this case is ongoing, which suggests they might seek *en banc* rehearing or file a cert petition. ■

*Corey L. Gibbs is a member of the New York Bar.*



## Arizona U.S. District Court Issues Preliminary Injunction Against Arizona's Ban on Transgender Girls Competing in Girls' Sports

*By Arthur S. Leonard*

The Arizona legislature passed a law in 2022, A.R.S. sec. 15-120.02, providing that public or private school athletic teams designated as being for girls may not include transgender girls. Two transgender girls who want to compete in girls' sports at Kyrene Middle School and The Gregory School filed a federal lawsuit on April 17, 2023, asking for declaratory relief that enforcement of the law violates their rights to Equal Protection (14<sup>th</sup> Amendment), Title IX of the Education Amendments Act, the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act. The plaintiffs then filed a motion for preliminary injunction to block enforcement of the law while the case is pending.

On July 20, U.S. District Judge Jennifer G. Zipps issued an order granting the motion for preliminary injunction, and specifically ordered that the law cannot be enforced against the two transgender plaintiffs, noting a stipulation to that effect by Kyrene Middle School and The Gregory School at the oral argument on this motion. *Doe v. Horne*, 2023 WL 4661831, 2023 U.S. Dist. LEXIS 125488. The state filed a notice on June 21 that it would appeal the preliminary injunction to the 9<sup>th</sup> Circuit.

The court's order granting the preliminary injunction did not specify whether it was effective against all enforcement of the law, or just prohibiting its enforcement against the transgender plaintiffs, identified in court records as Jane Doe and Megan Roe, although the

order specified that Thomas C. Horne, the state's Superintendent of Instruction, could not enforce the law "as to Plaintiffs" and that the statute "shall not prevent Plaintiffs from participating in girls' sports." Prior to the passage of the law, the Arizona Interscholastic Association (AIA), a non-governmental body that oversees interscholastic sports in Arizona, had adopted a policy of making an individual determination whether a transgender girl could participate in girls' sports based on a variety of factors considered relevant to whether the individual could fairly compete against cisgender girls. Judge Zipp held that the AIA transgender policy "complies with the terms of this preliminary injunction."

The court received voluminous evidence in the form of expert declarations submitted under oath by all parties. State legislators were allowed to intervene as co-defendants to defend the statute, which was passed during the prior Republican gubernatorial administration and would not likely be defended with equal enthusiasm by the present Democratic gubernatorial administration and attorney general. In a prior ruling, the judge granted the plaintiffs' motion to be allowed to sue under pseudonyms to protect their privacy as transgender minors, and the lead plaintiff is listed pseudonymously as Helen Doe, Jane Doe's mother.

The court made extensive findings of fact underlying its determination that plaintiffs were likely to prevail. The key findings were that "plaintiffs are transgender girls who have not and will not experience male puberty," that before the law was passed they "would have been allowed to play on girls' sports teams" under the policy that AIA had adopted in December 2018, that the statute "prevents them from playing on girls' sports teams at their schools," that "excluding plaintiffs from school sports causes very serious injury to plaintiffs," and – most significantly – that "transgender girls who have not undergone male puberty do not have an athletic advantage over other girls." Responding to a fatuous argument by the defendants that transgender girls are actually boys who can play on boys'

teams, the court specifically found that "plaintiffs cannot play on boys' sports teams." Indeed, because of gender-affirming care they have received, they would be at serious risk of injury competing with pubescent boys.

The court extensively discussed and analyzed the expert testimony supporting each of these findings. The opinion, reflecting extensive briefing and argument by the parties, explains why the court finds plaintiffs' evidence persuasive and defendants' evidence not, and on some points even irrelevant.

Applying 9<sup>th</sup> Circuit precedents, Judge Zipp found that "laws that discriminate against transgender people are sex-based classifications and, as such, warrant heightened scrutiny," which throws the burden on the government to justify the challenged policy. Defendants claimed that the purpose of the law is to protect girls from physical injury in sports and promote equality and equity in athletic opportunities. Judge Zipp found that, in fact, the statute did not advance these goals, but rather detracted from them. "The Court finds that Defendant Horne and Intervenor fail to produce persuasive evidence at the preliminary injunction stage to show that the Act is substantially related to the legitimate goal of ensuring equal opportunities for girls to play sports and to prevent safety risks," she wrote, concluding that plaintiffs "are likely to prevail" on their constitutional equal protection claim.

Similarly, as to Title IX, the judge took notice of a recent 9<sup>th</sup> Circuit opinion, *Grabowski v. Arizona Board of Regents*, 69 F. 4<sup>th</sup> 1110 (9<sup>th</sup> Cir. 2023), applying the reasoning of *Bostock v. Clayton County* (Title VII) to hold that gender identity discrimination claims can be brought under Title IX. "The Act's classification of all transgender girls as male and its prohibition of students who are 'male' from playing on girls' teams intentionally excludes all transgender girls, including Plaintiffs, from participating on girls' teams," she wrote, finding this was a "cognizable harm under Title IX," and again rejecting the defendants' arguments that because the schools offer teams for both boys and girls and transgender girls can compete as 'males', they have

not deprived transgender girls of the opportunity to participate in sports.

The judge found that if she did not grant a preliminary injunction, the plaintiffs would suffer "irreparable harm," and that the balance of public interest and equity favored the plaintiffs. She specifically found that the alleged harm to the defendants – "that biological girls will be forced to compete against transgender girls who allegedly have an athletic advantage" – was "unsupported by the record." Thus, issuing the preliminary injunction would not harm any defendant in this case.

The court saw this as a status quo injunction, restoring the situation to what it was before the challenged law was enacted and, as she observed, leaving in place the AIA policy, under which both of the transgender plaintiffs are entitled to participate in girls' sports at their schools.

Having granted preliminary relief grounded in Equal Protection and Title IX, the court did not rule regarding the plaintiffs' claims under the ADA and Section 504.

On July 7, in *Doe v. Horne*, 2023 U.S. Dist. LEXIS 117009 (D. Ariz.), Judge Zipp issued an order responding to an intervention motion by a group calling itself Arizona Women of Action (AWA), mothers of "biologically born girls" who are opposed to letting transgender girls compete with their daughters. The court noted some overlap in the interests of this group with the group of legislators who have intervened to defend the state law, and suggested that they coordinate their briefing to avoid redundant arguments. She gave two weeks to the plaintiffs to file a response to the AWA motion to intervene, and authorized AWA to file a reply to the plaintiff's response.

So far, courts have generally agreed with transgender rights advocates that transgender girls who began gender-affirming treatment before puberty should be allowed to compete in girls' sports, so this ruling is consistent with several other cases in which district courts have enjoined similar laws. Because most of the statutes banning such participation are very recent, there is not yet a significant body of appellate precedent, so it remains speculative

whether the courts of appeals will agree with the trial judges. Judge Zipp's opinion gives a detailed rationale for its conclusions and can be an important source of analysis and arguments as attorneys for transgender girls bring challenges in other states. How the case will fare in the 9<sup>th</sup> Circuit, at least initially, may well depend on the composition of the three-judge panel that first gets the case. In light of the number of such laws enacted and now being challenged in the courts, it seems likely that this issue will eventually rise to the Supreme Court.

Judge Zipp was appointed by President Barack Obama. ■



## 10th Circuit to Consider Oklahoma Case Denying Sex-Designation Changes on Birth Certificates

By Arthur S. Leonard

On June 8, U.S. District Judge John W. Broomes issued a decision dismissing a constitutional challenge to the refusal of Oklahoma to issue new birth certificates to transgender people with sex designations consistent with their gender identity. *Fowler v. Stitt*, 2023 WL 4010694, 2023 U.S. Dist. LEXIS 105481 (N.D. Okla.). On July 7, plaintiffs filed an appeal in the 10<sup>th</sup> Circuit Court of Appeals. Somehow, the district court decision eluded us in time for inclusion in the July issue of *Law Notes*.

The developments around this issue in Oklahoma are complicated. Before April 2022, an Oklahoma statute, 63 O.S. Sec. 1-321, authorized the state's Health Department to amend a birth certificate in the following situations: (1) to reflect a person's new legal name change; (2) to show paternity, if paternity was not shown on the original birth certificate; (3) to change the surname of a child born out of wedlock; (4) "in accordance with regulations adopted by the State Commissioner of Health." The regulations then in effect allowed for changes as follows: (1) "Name added to certificate if item blank"; (2) erroneous entries"; (3) to "correct an error or misstatement of fact as to any non-medical information." All other amendments were expressly prohibited. However, from 2007 until late in 2021, Oklahoma state courts and the Health Department had allowed more than 100 transgender people to get amended birth certificates showing a sex identification matching their gender identity, perhaps under the view that once a person had transitioned, the entry on their original birth certificate was "erroneous."

The origin of this lawsuit involved three transgender people who got state court orders to have their birth certificates amended incident to legal name changes, but a lawsuit involving a non-binary person seeking an X

gender marker, which had been settled by the Health Department to issue the requested birth certificate, had achieved sufficiently notoriety in local media that Governor Kevin Stitt got involved, issuing an executive order, noting that there was no statutory authorization in Oklahoma to change the sex designation on a birth certificate or use an X gender marker, and ordering that the Health Department stop its prior practices in this regard. When the three plaintiffs in this case presented their court orders to the Health Department, their request to change the sex designation on their birth certificates was denied, leading to this lawsuit.

The case was originally assigned to a different district judge, who denied the motion by one plaintiff to proceed anonymously. Then the case was reassigned to Judge Broomes, and the state filed a motion to dismiss. The lawsuit asserted that the current policy of the state violates the First Amendment Free Speech Clause and the Fourteenth Amendment Due Process and Equal Protection Clauses.

Judge Broomes ruled against the plaintiffs on all their theories. He found that the state's refusal to amend sex designations on birth certificates did not in any way impair the ability of transgender people to express their gender identity, and that it did not compel them to speak any message. Plaintiffs contended that by refusing to make the sex designation change, the state was compelling them to express or endorse the government's ideological position as to gender identity, but the court disagreed, embracing the state's argument that the contents of the birth certificate constituted speech by the state, not by the individual, and the state speech is not subject to the First Amendment. Furthermore, the court observed that the state continues to allow transgender people to get