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11th Circuit Will Likely Let States Ban Gender-Affirming Care for Minors

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The Ellen P. Tuttle Courthouse of the 11th Circuit Court of Appeals in Atlanta, Georgia.

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In two actions taken during the last week of August, the Republican-dominated U.S. Court of Appeals for the 11th Circuit, based in Atlanta and covering federal court appeals from Florida, Alabama, and Georgia, signaled the likelihood that states within that circuit can ban gender-affirming care for minors without violating the constitutional rights of minors or their parents.

A three-judge panel of the 11th Circuit ruled on Aug. 26 in Doe v. Ladapo that an injunction issued by U.S. District Judge Robert Hinkle against Florida's statutory ban should be "stayed" while the state presents its appeal to the 11th Circuit. Judge Hinkle had ruled on June 11 that the Florida law violated the "equal protection" rights of transgender minors in the state, finding after much discovery in a separate but related case pending before him that the Florida government was motivated by animus against transgender people when enacting the ban, which can never be a legitimate motivation for passing a law.

Judge Hinkle acknowledged in his opinion that a prior ruling by the 11th Circuit in a case challenging Alabama's ban on gender-affirming care for minors, Eknes-Tucker v. Governor of the State of Alabama, precluded him from applying strict or heightened scrutiny to the plaintiffs' equal protection claim. But he found in a detailed review of the legislative record that the ban was motivated by animus against transgender people, rather than by evidence in the legislative record that would justify banning the procedures on medical grounds, so he issued a permanent injunction against the law's enforcement, which the state is appealing.

When the Florida case was filed, Judge Hinkle quickly issued a preliminary injunction to prevent the ban from going into effect, which he converted into a permanent injunction when he ruled in favor of the plaintiffs on June 11. Upon filing its appeal, the state asked the 11th Circuit to "stay" this injunction and allow the law to go into effect while the appeal is being considered.

The effect of the Aug. 26 "stay" ruling is to allow the challenged ban to go into effect for the first time without any advance notice. Recognizing the impact this can have on transgender minors and their families in the state, the court ordered its clerk to set a short briefing schedule for the state's appeal and to schedule a hearing of the appeal as soon as possible.

In order to grant an injunction against the enforcement of a law, the trial judge has to determine that the plaintiffs are likely to win their argument that the law is unconstitutional. The 11th Circuit panel voted 2-1 that the state had presented sufficient evidence that it was likely to defeat the challenge to the statute. Noting that Judge Hinkle's opinion described this as a "close case," the panel majority found evidence in the record from which it claimed that legislators could have believed that the law was necessary to protect minors from being subjected to a potentially harmful procedure and was thus rational and constitutional.

Just two days later, the 11th Circuit took a further step which appeared to preview the likelihood that the Florida plaintiffs will not prevail in their campaign to strike down the Florida ban. The circuit court announced that it would not grant a petition for rehearing and en banc review (a review by the full 12-member bench of the 11th Circuit) of a three-judge panel decision that had unanimously overturned a preliminary injunction against Alabama's ban, overruling a decision to grant the preliminary injunction by District Judge Liles C. Burke, a Trump appointee. The full 11th Circuit has seven Republican-appointed judges (six by Trump) and five Democratic-appointed judges.

When a court of appeals denies a petition for en banc review, it usually provides no explanation, merely stating that the judges of the circuit had been polled and a majority had voted against granting en banc review. Sometimes, there will be a dissenting opinion arguing that the case deserves en banc review and perhaps being critical of the panel decision. In this case, unusually, four of the Circuit judges, all Democratic appointees, issued dissenting opinions, each of which was joined by one or more of the other judges.

Even more unusually, the Chief Judge of the Circuit, William Pryor, an appointee of President George W. Bush, issued a "statement" supporting the decision to deny en banc review, and Circuit Judge Barbara Lagoa, the author of the panel decision who was appointed by Trump, issued a much lengthier "statement" reiterating the panel's decision and contesting the criticisms voiced by the dissenters.

Although Judges Pryor and Lagoa were speaking only for themselves in their statements, which none of the other judges signed, it is quite possible that they are mirroring the view of the majority of the circuit.

These cases involve heated judicial debates about two provisions of the 14th Amendment: the Due Process Clause and the Equal Protection Clause. Plaintiffs challenging these state bans on gender-affirming care for minors argue that the parents of transgender minors have a right under the doctrine of "substantive due process" to provide for their children

medical care recommended by their doctors for treatment of gender dysphoria, and that the state bans unconstitutionally interfere with that right.

They also argue that by banning the kind of gender affirming care at issue in these cases — puberty blocking medication to prevent the minor from experiencing puberty and cross-sex hormones to help reconfigure their bodies to conform with their gender identity — the state is discriminating against them because of their sex and gender identity, since the bans do not apply to the use of these treatments when the purpose is to assist cisgender minors in avoiding premature puberty or to affirm their sex as identified at birth. Relying on Supreme Court and Court of Appeals constitutional precedents as well as the recent Supreme Court decision in Bostock v. Clayton County, which held that discrimination on the basis of "transgender status" is "discrimination because of sex" under Title VII of the Civil Rights Act of 1964, the plaintiffs argue that the state has the burden of proving that the laws substantially advance an important state interest.

Recent Supreme Court decisions have drastically altered the traditional approach to "substantive due process," and some members of the Supreme Court — most particularly Justice Clarence Thomas — have challenged it as an illegitimate doctrine, arguing that the text of the 14th Amendment's meaning would not support it. Chief Judge Pryor's "statement" explaining his vote against granting en banc review in the Alabama case takes up where Justice Thomas has left off, strongly arguing against substantive due process and its potential application in this case. Judge Lagoa is more restrained in discussing substantive due process, focusing instead on the question of how to define the claimed right, seizing upon Supreme Court rulings to define it narrowly and then subject it to a historical test, under which a right that was not well recognized in 1868 when the 14th Amendment was adopted would not be covered by the amendment today.

Judges Adelberto Jordan and Robin Rosenbaum, in their dissenting opinions, pointed out the drastic effect of using this historical approach to define rights protected under the due process clause. Wrote Judge Jordan, "The panel's decision necessarily means that the fundamental right of parents to obtain medical treatment for their children extends only to procedures and medications that existed in 1868, and not to modern advances like the polio vaccine (developed in the 1950s), cardiac surgery (first performed in 1893), organ transplants (first successfully completed in 1954), and treatments for cancer like radiation (first used in 1899) and chemotherapy (which started in the 1940s)." Judge Rosenbaum wrote, even more starkly, "In short, the panel opinion is wrong and dangerous. Make no mistake: While the panel opinion continues in force, no modern medical treatment is safe from a state's misguided decision to outlaw it, almost regardless of the state's reason. Worse still, if a state bans a post-1868 treatment, no parent has legal recourse to provide their child with that necessary, life-saving medical care in this circuit. And if an individual can't access a medical treatment because of their sex or transgender status, they are similarly without legal recourse."

In a concurring opinion in the Supreme Court's recent abortion decision, Dobbs v. Jackson Women's Health Center, Justice Thomas suggested that the court should reconsider its substantive due process precedents in light of the "historical" test, specifically mentioning Lawrence v. Texas and Obergefell v. Hodges, important LGBTQ

rights decisions involving gay sex and same-sex marriage. The statements by Pryor and Lagoa in connection with the denial of en banc review in the Eknes-Tucker case illustrate the lengths to which lower federal courts may follow Thomas's lead.

Elections have consequences, and one of the most important is that the election of the president and the Senate will decide who is appointing and confirming federal judges for the next four years. When it comes to cases involving LGBTQ rights, the debates about the meaning of "due process of law" and "equal protection of the law" may seem abstract and abstruse, but they have heavy "real world" consequences. It is well to bear in mind that Trump's appointments to the Supreme Court and the Courts of Appeals have built up solid conservative majorities that may last for many years.