

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0572

SCARLET VAN GARDEREN, et al.,

Plaintiffs and Appellees,

v.

STATE OF MONTANA, et al.

Defendants and Appellants.

APPELLANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

On appeal from the Montana Fourth Judicial District Court, Missoula County
Cause No. DV 2023-541, the Honorable Jason Marks, Presiding

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Appellants State of Montana, Governor Greg Gianforte, Montana Board of Medical Examiners, Montana Board of Nursing, Montana Department of Public Health and Human Services, and Charlie Brereton submit this Notice of Supplemental Authority. Mont. R. App. 12(6). Appellants direct the Court to three recent authorities.

I. *Texas v. Loe*

On June 28, 2024, the Texas Supreme Court vacated a Temporary Injunction enjoining Tex. Health & Safety Code Ann. § 161.702, a law prohibiting certain medical treatments for children if administered ‘[f]or the purpose of transitioning a child's biological sex’ or ‘affirming the child's perception of the child's sex if that perception is inconsistent with the child's biological sex.’” *Texas v. Loe*, __ S.W.3d __, No. 23-0697, 2024 Tex. LEXIS 545, at *3 (Tex. June 28, 2024) (quoting Tex. Health & Safety Code § 161.702).

The Court held that “novel treatments for a novel condition are generally within the Legislature's power to regulate without facing heightened scrutiny.” *Id.* at *27 (citing *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (“[W]hen a legislature ‘undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.’” *Id.* (quoting *Jones v. United States*, 463 U.S. 354, 370, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983))); Appellants’ Op.Br.

at 47, 54; Appellants’ Rep.Br. at 12-17. The fact that puberty blockers, for example, are permitted for other disorders, yet prohibited for gender affirming care, was found to be unpersuasive. *Id.* at *30-31; *See* Appellants’ Op.Br. at 8, 28-29. The Court also rejected the claims of animus because of comments made by individual legislators. *Id.* at *31; *See* Appellants’ Op.Br. at 39-41; Appellants’ Rep.Br. at 6.

The Court did not find that the law discriminated against transgender children and their parents because of sex and transgender status. *Id.* at *38-39; *See Appellants’ Br.* at 28-35. Any reliance on *Bostock v. Clayton County*, 590 U.S. 644, 662, 140 S. Ct. 1731, 1742 (2020), was undermined because that case hinged on “the Supreme Court’s interpretation of Title VII, which focuses on but-for discriminatory acts by individual employers,” not equal protection. *Id.* at *41; *See* Appellants’ Op.Br. at 33-34. And finally, the Court declined to create a new protected class. *Id.*; *See* Appellants’ Op.Br. at 31 n.5, 32. “[R]espect for the separation of powers should make courts reluctant to establish new suspect classes.” *Id.* (quoting *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996)). The lower court was reversed. *Id.*

II. *Texas v. Becerra*

On July 3, 2024, the United States District Court for the Eastern District of Texas granted the motion by the States of Texas and Montana for a stay of a final rule promulgated by the Department of Health and Human Services (“HHS”). *Texas v. Becerra*, No. 6:24-cv-211-JDK, 2024 U.S. Dist. LEXIS 117573, at *1 (E.D. Tex.

July 3, 2024). “The rule would require healthcare providers and States to perform and pay for so-called ‘gender-transition’ procedures—or else lose federal funding.” *Id.* (citing Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024) (the “Final Rule”)). “In fact, both Texas and Montana generally exclude these procedures from their state Medicaid programs and prohibit providers from performing them on minors.” *Id.* at *1, *25 (citing Tex. Health & Safety Code Ann. § 161.702; Mont. Code Ann. § 50-4-1004(1)).

Becerra is relevant for at least two reasons. First, it shows that despite the persistent efforts by HHS, there has yet to be a lawful federal requirement that Montana Medicaid fund gender-affirming care. *Id.* at *4-5. Without any federal requirement, Montana is well within its powers to restrict how it disperses its limited funds through its Medicaid program. *See* Appellants’ Op.Br. at 21-22. Second, *Becerra* demonstrates the continued judicial resistance to expand *Bostock* beyond Title VII. *Becerra*, 2024 U.S. Dist. LEXIS at *17-20. “*Bostock* relied heavily on the phrase ‘because of’ in Title VII to impose a ‘sweeping standard’ of causation. *Id.* at *17 (quoting *Bostock*, 590 U.S. at 656). “Title VII, moreover, is concerned with discrimination in employment, where ‘[a]n individual employee's sex is 'not relevant to the selection, evaluation, or compensation of employees.’” *Id.* at *17-18 (quoting *Bostock*, 590 U.S. at 660). In sum, the Court rejected *Bostock*’s application outside

of Title VII, as is consistent with Appellants' position here. *Id.* at * 17; Appellants' Op.Br. at 33-35.

III. *TransActual CIC v. Secretary of State for Health and Social Care*

On July 29, 2024, the High Court of Justice in England dismissed, in its entirety, the claimants' (plaintiffs') application for judicial review of the Secretary of State for Health and Social Care's emergency prohibition that restricted access to puberty blockers prescribed to gender dysphoric minors. *TransActual CIC v. Secretary of State for Health and Social*, [2024] EWHC 1936 (Admin), ¶¶ 1-2, 6-9, 257 (**attached as Exhibit A**). In light of Appellants' repeated citations to *Bell v. Tavistock*, [2020] EWHC 3274 (Admin), (Doc. 77 at 14-16, 19, 20-21, 29 n.104); (Doc. 91); Appellants' Op.Br. at 8, 12), as well as Appellants' reliance on the revealing investigation into gender affirming care by the Cass Review (led by UK physician Hilary Cass), (Doc. 77 at 15, 21 n.4); (Docs. 93, 95); Appellants' Op.Br. at 9; Appellants' Rep.Br. at 14, 15 n.13-16. *TransActual CIC* further demonstrates the continued momentum away from gender-affirming care led by the United Kingdom and the value the High Court placed upon the Cass Review.

One of the three claims asserted in *TransActual CIC* is relevant here: whether the ban on puberty blockers for gender-affirming care was rational and essential to avoid serious danger to health. *Id.* at ¶ 6. The High Court disagreed with the claimants' argument that the Cass Review "did not provide a sufficient essential

basis” and found that it was an “intensive review” with the “best and most up-to-date scientific evidence available.” *Id.* at ¶¶ 189-90, 194. As the Cass Review indicated, “any benefits of puberty blockers were (save in one ‘very narrow’ respect) unproven or non-existent.” *Id.* at ¶ 195; *See also id.* at ¶¶ 196-199. The High Court noted the Review also found that “[b]locking the release of [] sex hormones could have a range of unintended and as yet unidentified consequences,” including “rewiring of neural circuits underlying executive function”s; “temporarily or permanently disrupted” brain maturation; and “bone density [being] compromised during puberty suppression.” *Id.* at ¶¶ 200(i)-(v). Moreover, “[a] known side effect of puberty blockers was to reduce psychological functioning.” *Id.* at ¶ 200. Importantly, “the evidence did not support the conclusion that gender-affirming treatment reduced suicide risk.” *Id.* at ¶ 202. Ultimately, due to the many serious concerns, puberty blockers would only be “offered under a research protocol.” *Id.* at ¶ 205.

The High Court found the Cass Review “amounted to powerful scientific evidence in support of restrictions on the supply of puberty blockers on the grounds that they were potentially harmful.” *Id.* at ¶ 210. The claims were dismissed, and the United Kingdom’s prescribing ban remained in effect. This decision is consistent with Appellants’ citation to and reliance on the full Cass Review, published on April 10, 2024. Appellants’ Rep.Br. at 15 n.13.

DATED this 1st day of August, 2024.

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