More than a year later, Kerr filed a motion with the district court to "re-open judgment" and for leave to file an amended complaint. However, she had earlier filed a new complaint with the court, alleging several of the claims from her earlier complaint, this time adopting the theory (by 2016 reasonably well-advanced in cases involving students and in developing case law under other federal sex discrimination statutes, such as the EEOC's 2015 ruling that sexual orientation claims could be asserted under Title VII) that her equal protection arguments should instead be considered under Title IX, and further elaborating her factual allegations. Defendants moved that the new suit should be dismissed under the principles of *res judicata* and the applicable statute of limitations. The district court dismissed the 2016 lawsuit in an order dated September 21, 2017. And, on February 26, 2018, the district court denied Kerr's motion to reopen the earlier-filed case. See *Kerr v. Marshall University Board of Governors*, 2018 WL 934614. Chief District Judge Thomas E. Johnston rejected Kerr's argument that the 4th Circuit's ruling on failure to state a claim "somehow equates to authorization for her to re-litigate the closed action." The district court decided that Kerr was acting in bad faith, stating: "Plaintiff has strategically drug Defendants through litigious waters for the better part of four years in two separately filed actions. Regardless of whether the proposed amendments would be futile, the Court is convinced that indications of bad faith coupled with the additional prejudice it would cause Defendants are reason enough to forbid Plaintiff from amending her Complaint at this exceptionally belated point in time."

Kerr appealed this ruling to the 4th Circuit, which summarily affirmed with a brief *per curiam* opinion, *see* 735 Fed. Appx. 827, issued on August 28, 2018. While denying the defendants' motion to deem her appeal frivolous, the court said it found that no reversible error had been committed by the district court in handling the two cases.

Kerr's petition focuses both on the underlying merits of her sex discrimination/equal protection claim and procedural issues. Noting recent court of appeals decisions in the 2nd, 7th and 11th Circuits on the question whether sexual orientation discrimination claims may be brought under Title VII, in her first question presented she asks the Court to take up the same question presented in the cert petitions filed last year in the 2nd and 11th Circuit cases, noting the split of circuit authority. The remainder of her four questions go to other issues peculiar to her case, including whether it was an abuse of discretion for the district court to deny leave to amend her first-filed complaint "when a non-frivolous First Amended Complaint is filed after 12(b)(6) judgment," and questioning whether the district court had properly handled the issue of "academic deference" in the context of a summary judgment motion.

If the Supreme Court grants review in *Altitude Express v. Zarda* (2nd Circuit) and/or *Bostock v. Clayton County Board of Commissioners* (11th Circuit), it seems unlikely that it would subsequently grant review in this case, with all its jurisdictional and procedural complications. And even if the Court decides to put off for now the Title VII question by denying review in both those cases, it would seem even more unlikely that it would seize upon this case as a new vehicle for addressing the question, inasmuch as the 4th Circuit did not address the issue on the merits in its published ruling affirming the district court's dismissal of Kerr's equal protection claim under 42 USC Sec. 1983. The 4th Circuit did not in that opinion pronounce anything on the question whether sexual orientation discrimination is actionable as sex discrimination. Rather, it focused on the shortcomings it saw in Kerr's factual allegations, which led it to affirm the district court's conclusion that she had not alleged facts sufficient to put into play the issue of discrimination because of sexual orientation. Thus, this case does not present itself as the sort of vehicle the Court would likely adopt to address that issue on the merits. ■

Obamacare Ruling Endangers Health Insurance Coverage for LGBTQ People

By Arthur S. Leonard

U.S. District Judge Reed O'Connor's decision in *Texas v. United States*, 2018 U.S. Dist. LEXIS 211547, 2018 WL 6589412 (N.D. Tex., Dec. 14, 2018), declaring the Patient Protection and Affordable Care Act (a/k/a Obamacare) unconstitutional as a result of Congress's action in 2017 reducing the amount of tax penalty for individuals who do not purchase health insurance to zero, received much press attention and outraged commentary from those supporting the continuation of Obamacare. Little noted in the press commentary, however, although mentioned in LGBTQ press coverage, was the impact that the loss of Obamacare would have on LGBTQ people, because during the Obama Administration the administrators of the program construed the statute's ban on sex discrimination by health insurance providers to include discrimination because of sexual orientation or gender identity.

The Trump Administration, speaking through former Attorney General Jeff Sessions in a memorandum issued in October 2017, disavowed the Obama Administration's broad interpretation of sex discrimination laws, but federal courts – including some courts of appeals – have already ruled in favor of those interpretations in enough cases to create circuit splits – thus the three pending cert. petitions before the Supreme Court in Title VII cases, one or more of which may be granted after the Court's January cert conferences.

Several courts have cited the Obamacare regulations in important rulings concerning the obligation to provide transitional health care for transgender insureds:

On September 18, 2018, U.S. District Judge William M. Conley ruled in *Boyden v. Conlin*, 2018 WL 4473347 (W.D. Wis.), that the state of

Wisconsin was required to provide such coverage for its transgender employees under its state employee Group Health Insurance program, noting that the court had previously issued a similar ruling in a case involving the state's Medicaid program, *Flack v. Wisconsin Department of Health Services,* 2018 WL 35748785 (W.D. Wis. July 25, 2018), where the court issued a preliminary injunction, having concluded that transgender plaintiffs were likely to prevail on their coverage claim. Because the *Boyden* case involved public employees, it was also based on the Constitution's Equal Protection clause, under which many courts have now ruled that transgender people enjoy protection against unjustified discrimination by the government.

On September 20, 2018, U.S. District Judge Donovan W. Frank, rejecting a private sector employer's motion to dismiss a similar suit under the employer's own self-insured health coverage for its employees, also found that denial of such coverage was likely to violate the ACA, in *Tovar v. Essentia Health*, 2018 WL 4516949 (D. Minn.). Judge Frank, in addition to citing the *Flack* case from Wisconsin, also cited two earlier decisions holding that the ACA's sex discrimination ban covered gender identity discrimination claims: *Prescott v. Rady Children's Hosp.-San Diego*, 265 F.Supp.3d 1090 (S.D. Cal. 2017), and *Rumble v. Fairview Health Services*., 2017 WL 401940 (D. Minn. Jan. 30, 2017). Because *Tovar* case involved a non-governmental employer, the Constitution's Equal Protection Clause did not apply.

Although gaps in coverage for LGBTQ individuals may be addressed by state and/or local insurance and anti-discrimination laws in some parts of the country, most states do not provide such protection, so the Obamacare regulations were of overriding importance, and their loss could be a significant setback.

O'Connor's much-criticized opinion turned on two crucial holdings. First, noting that in *National Federation of Independent Businesses v. Sibelius*, 567 U.S. 519 (2012), a majority of the Supreme Court's justices ruled that the "individual mandate" that persons must buy health insurance could not be sustained under the Commerce Clause, but could be upheld as a tax measure, Judge O'Connor found that Congress's decision in 2017 to reduce the tax penalty to zero knocked the props out from under the individual mandate. O'Connor focused on the reasons articulated by Chief Justice John Roberts for considering the penalty provision a tax measure, and found that they were rendered a nullity by the virtual elimination of the tax. It was not enough for Congress to leave the penalty provision intact, when it had removed its revenue-generating functions.

Second, O'Connor found that the individual mandate was such an essential and all-encompassing part of Obamacare – it did not make economic sense without it, in his view – that it was not severable, and thus the entire statute had to be struck. He harvested the legislative history and certain quotes in the statute to emphasize the idea that the individual mandate was an "essential" part of the law, such that it could not be removed without collapsing the entire house of cards. Commentators criticized this holding on several grounds. For one thing, by not repealing the penalty provision outright, but just reducing the amount of the tax to be levied for tax year 2019 to zero, Congress had signaled its intent to sustain Obamacare under the taxing power in response to the Supreme Court's decision. These commentators faulted O'Connor for prioritizing Congress's intent when it enacted Obamacare in 2010 over Congress's intent when it adjusted the tax rate as part of the 2017 tax cut bill. Had Congress intended to remove the penalty portion of the individual mandate provision in order to remove the mandate, it would have repealed the entire provision, they argued.

Otherwise, those who might concede that Congress's jurisdiction to enact or keep the mandate was destroyed by the 2017 tax cut law, nonetheless argued that Obamacare without the mandate could still be sustained, at least in part, by upholding those provisions regulating the practices of insurance companies that could themselves be sustained under the Commerce Clause – an issue that the Supreme Court did not address in its 2012 ruling, although four dissenting justices, not agreeing with Roberts' taxing power analysis, would have stricken the entire statute as beyond Congress's Commerce Clause power to enact. O'Connor had found these regulatory provisions to be non-severable because they relied in their economic theory on the revenue generated by the individual mandate, which was supposed to offset the added cost for insurers to issue policies without individual underwriting, to continue to carry insured's dependent children through age 26, and to provide the full menu of coverage deemed required under implementing regulations (including annual physicals without copays, for example, as well as reproductive health care, and, as it turns out, coverage for transgender health care). The purpose of the individual mandate was to significantly enlarge the number of healthy people who would be incentivized to buy insurance to avoid paying the penalty; the addition of large numbers of healthy people to the pool of insured would generate additional revenue for insurers to cover the added costs of complying with the Obamacare coverage mandates. Without the penalty, O'Connor asserted, the number of people buying insurance would fall, leaving those additional costs uncompensated. Furthermore, the penalty was supposed to generate revenue for the federal government, to help cover the costs of subsidizing states for expanding Medicaid eligibility and subsidizing individuals less prosperous individuals who did not qualify for Medicaid to purchase insurance on federal and state exchanges.

On its face, O'Connor's decision had a certain logic, but many asserted that he had exceeded the role of judicial decision-making in declaring the statute unconstitutional based on his own economic analysis. Because the Trump Administration – speaking through the tweeting president – hailed the ruling, the work of appealing the decision fell to Intervenor-Defendants – a coalition of states that were understandably concerned that the lawsuit, deliberately filed by Texas in the Fort Worth Division of the Northern District of Texas to place it before Judge O'Connor, the only District Judge who presides in that courthouse, would adversely affect

many of their residents who would have difficulty obtaining health insurance without the subsidies provided under the statute, and their own fiscal interests because, among other things, a successful challenge to Obamacare could end federal subsidies provided under the statute to states that had expanded eligibility for their Medicaid programs.

O'Connor granted partial summary judgment to the plaintiffs, declaring the individual mandate unconstitutional and the remaining provisions of the statute non-severable and therefore "invalid," but limited the relief to a declaratory judgment and did not issue the nationwide injunction against continued enforcement of the statute that some had feared. Perhaps he sensed that an emergency motion to the 5th Circuit for a stay of any such injunction pending a final ruling on appeal was likely to be granted – regardless of what a 5th Circuit panel might think of the merits. The opinion was issued just as the window for applying for coverage under Obamacare for calendar 2019 was closing in many states and under the federal exchanges, and there was some concern that uncertainty about the existence of the program would drive down last-minute enrollments, but in the event the number of enrollments seemed to be holding up, amidst news reports emphasizing that Obamacare would continue to function until an appellate process that might take years had run its course.

On December 30, Judge O'Connor issued a new 30-page opinion, granting a request by the Intervenor-Defendants to enter a final judgment on his summary judgment order so that it would be immediately appealable, and also granting a request for a stay until a final appellate ruling on the merits of his summary judgment is issued. While not expressing doubt about the correctness of his ruling, Judge O'Connor acknowledged that the timing of his ruling (on the last day for enrollment on the federal and some state exchanges for 2019 coverage) would make it awkward to allow his ruling to go into effect pending appeal, and that as people had enrolled for 2019 coverage, it would be very disruptive not to stay the effect of his ruling. ■

Federal Judge in Idaho Grants Preliminary Injunction for Confirmation Surgery for Transgender Inmate

By William J. Rold

Chief U.S. District Judge Barry Lynn Winmill ordered the Idaho Department of Corrections to provide transgender inmate Andree Edmo with "adequate medical care, including gender confirmation surgery," within six months – in a comprehensive decision reported at *Edmo v. Idaho Dep't of Correction*, 2018 U.S. Dist. LEXIS 211391, 2018 WL 6571203 (D. Idaho, December 13, 2018). Because Idaho has recently "updated" its policies and provides transgender prisoners with "gender-appropriate underwear, clothing, and commissary items," Judge Winmill denied injunctive relief on these requests, without prejudice. This is one of a handful of district court decisions – joining others reported in *Law Notes* from California (*Norsworthy*), Florida (*Keohane*), and Massachusetts (*Kosilek*) – that is essential reading for transgender prisoner advocates.

Judge Winmill found that gender confirmation surgery is "medically necessary under generally accepted standards of care." In so ruling, "the Court notes that its decision is based upon, and limited to, the unique facts and circumstances presented by Ms. Edmo's case. This decision is not intended, and should not be construed, as a general finding that all inmates suffering from gender dysphoria are entitled to gender confirmation surgery." Refreshingly, Judge Winmill recognizes that not all transgender people have dysphoria, which is a disorder that occurs when the "incongruity" between birth gender and gender orientation "is so severe that it impairs the individual's ability to function." Many transgender people "are comfortable living with their gender identity, role, and expression without surgery. For others, however, gender confirmation surgery, also known as gender or sex reassignment surgery ("SRS"), is the only effective treatment."

Over the last years, Edmo's hormone therapy has rendered her "hormonally confirmed – meaning she had the same circulating sex hormones and secondary sex characteristics as a typical adult female." Edmo has thus "achieved the maximum physical changes associated with hormone treatment." Nevertheless, Edmo "continued to experience such extreme gender dysphoria that she twice attempted self-castration." After the second attempt, the prison clinic could not staunch the hemorrhaging, and she was taken to a hospital emergency room.

Edmo sued officials of the Idaho Department of Corrections ["IDOC"] and Corizon, its contractual medical provider. Judge Winmill found that Edmo has a serious medical need and that the defendants, "[w]ith full awareness of [her] circumstances . . . have ignored generally accepted medical standards for the treatment of gender dysphoria." The opinion tracks the DSM-V and the World Professional Association of Transgender Health ["WPATH"] Standards at length. Judge Winmill notes that genital surgery is "often the last and the most considered step" in the treatment process – after the maximum physical effects of hormone therapy have been achieved, typically within 2-3 years. For some, surgery is "the only effective treatment and is medically necessary."

It is an irony of the current development of transgender civil rights law that transgender inmates who are psychologically well-adjusted may not have a "serious medical need" for surgery under the Eighth Amendment, since they do not have the diagnosed "inability to function" – yet, when it comes to the armed forces, the Trump Administration has turned the argument on its head. In its application to the Supreme Court for certiorari before judgment in the appeals of cases enjoining the ban on transgender people serving in the military (see lead articles in the December 2018 and January 2019 issues of *Law Notes*), the Government argues that "serious medical need" and