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U.S. Department of Justice building in Washington. Credit: ALM Media

Trump's DOJ Withdraws Opposition to Law Banning Trans Care for Minors

"The Department has now determined that SB1 does not deny equal protection on account of sex or any other characteristic," a top lawyer in the U.S. solicitor

general's office told the U.S. Supreme Court Friday.

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By Jimmy Hoover

The Department of Justice told the U.S. Supreme Court on Friday that the federal government no longer opposes a Tennessee law banning gender affirming care for minors following the change in administration, switching sides in this term's blockbuster clash between Republican state laws and LGBTQ rights.

President Donald Trump's DOJ announced the change of position in *U.S. v. Jonathan Skrmetti*, *Attorney General of Tennessee* with a letter to the court signed by Deputy Solicitor General Curtis E. Gannon.

In *Skrmetti*, the DOJ under former President Joe Biden had successfully petitioned the court to consider a constitutional challenge to the state statute, SB1, barring medical staff from providing puberty blockers and hormone therapy to trans minors. The law, the past administration argued, constitutes illegal sex discrimination under the Constitution's Equal Protection Clause.

Biden's U.S. solicitor general had presented that argument to the high court at a December hearing, but the justices have yet to announce their ruling in the case.

On Friday, Gannon stated that the DOJ—now headed by U.S. Attorney General Pam Bondi—has changed its position on the law. The acting U.S. solicitor general, Sarah Harris, is recused in the case.

Harris did not publicly disclose the reason for her recusal. However, her husband, Jeffrey Harris of Consovoy McCarthy, is part of the legal team helping Tennessee defend the law at the Supreme Court.

"Following the change in Administration, the Department of Justice has reconsidered the United States' position in this case," Gannon wrote. "The Department has now determined that SB1 does not deny equal protection on account of sex or any other characteristic. Accordingly, the new Administration would not have intervened to challenge SB1—let alone sought this Court's review of the court of appeals' decision reversing the preliminary injunction against SB1."

The DOJ's change in position was largely expected.

Notably, Gannon advised the court against dismissing the appeal, despite the change in the DOJ's position. Noting the law is also being challenged by trans minor plaintiffs and their families, Gannon wrote that the court may still resolve the constitutional question at issue and provide guidance to "many cases pending in the lower courts."

Before the change in administration, Biden-appointed U.S. Solicitor General Elizabeth Prelogar had argued that the law is a form of illegal sex discrimination that should be subject to the rigorous "strict scrutiny" standard of review, rather than the deferential "rational basis" standard the U.S. Court of Appeals for the Sixth Circuit applied to uphold the law. In doing so, the Biden administration had allied with a group of trans youth and their parents who sued to stop Skrmetti from enforcing the law.

The case is a major bellwether for the ongoing national legal fight over the rights of trans individuals, with Tennessee's being just one of over 20 similar medical care bans passed by Republican-led legislatures across the country. Tennessee and its "amicus" supporters have argued that the gender-affirming care for minors, like puberty blockers and hormone therapy, are "risky" and have questioned the evidence of the major medical organizations that have endorsed those interventions as standards of treatment for gender dysphoria in young people.

Flipping positions at the Supreme Court has become a common trend of incoming U.S. solicitors general, even if it tends to irk the justices.

“I think changing positions is a really big deal that people should hesitate a long time over, which is not to say that it never happens,” Justice Elena Kagan said in 2018.

Trump’s first solicitor general, Noel Francisco, changed the administration’s stance in several cases upon taking the office, prompting Justice Sonia Sotomayor to ask during oral arguments in 2018, “Mr. General, by the way, how many times this term already have you flipped positions from prior administrations?”

Prelogar would do the same as the Biden administration’s top Supreme Court lawyer, quickly reasserting the government’s defense of the Affordable Care Act that Francisco had abandoned in the case *California v. Texas*. Prelogar, then still serving as acting Solicitor General, also changed the government’s position in pending cases about unions, criminal justice reform and the First Amendment.

During Prelogar's confirmation hearing later in 2021, Republican lawmakers pressed her on some of those changes, including one that prompted a 9-0 defeat at the high court.

“Such flip-flopping impacts the credibility of the solicitor general,” said Sen. Charles Grassley, R-Iowa.

“I do think in more recent years you’ve seen a little bit more flip-flopping, especially on constitutional issues,” Chris Walker, a University of Michigan law professor, told the *National Law Journal* recently.

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