

How 3 Big Law Firms Joined the Fight Against Anti-Transgender Laws

“We’re not just looking for bodies; we’re looking for smarts—help for thinking through the legal issues that we’re often confronting for the first time,” James Esseks, director of the ACLU’s LGBT and AIDS project, said.

BY MARCIA COYLE

Last summer, Elizabeth Prelogar, then a partner at Cooley, was living in Idaho when a federal judge there ordered in-person arguments in a lawsuit challenging the first state law to ban transgender athletes from playing school sports.

“It was serendipity,” said James Esseks, director of the American Civil Liberties Union’s LGBT and AIDS project who recruited a Cooley team, including Prelogar, to assist in its challenge to the Idaho law.

Prelogar successfully argued against a motion to dismiss the lawsuit and for a motion for a preliminary injunction blocking the law. This January, she left Cooley to become principal deputy solicitor general and acting U.S. solicitor general in the Biden administration. The Cooley team, led by partner Kathleen Hartnett, has stuck with the ongoing case, *Hecox v. Little*.

Cooley is one of a handful of major law firms partnering pro bono with civil rights organizations to fight the recent run of anti-transgender state laws. And they have been successful in these early stages, so far.

Just over a week ago, Cooley, the ACLU and Lambda Legal won a federal injunction halting West Virginia’s law barring transgender girls from participating in school sports. And a Sullivan & Cromwell team, led by partner Garrard Beeney, and the ACLU won a preliminary injunction against an Arkansas law prohibiting health care professionals from providing or referring transgender youths for gender-affirming treatment.

An Arnold & Porter Kaye Scholer team, led by senior counsel Rosalyn Richter, is working with the Human Rights Campaign challenging Florida’s law banning transgender women and girls from taking part in women’s sports.



Photo: Diego M. Radzinschi/ALM

Transgender flag.

Over the years, many national law firms have provided assistance, often at the appellate level, to organizations across the ideological spectrum. But help at the trial level through appeal, if needed, represents a strong commitment of time and resources. It is not always easy to persuade some firms to make that commitment, particularly if the issues are sensitive and cutting-edge.

The ACLU’s Esseks recalled contacting four or five firms when the organization was looking for help last year in fighting a lawsuit that sought to bar transgender athletes from girls’ sports in Connecticut.

The law firms that Esseks contacted all turned him down for a variety of reasons. “But the common theme was this is too far out there,” he said. “Cooley stepped up.”

Forming partnerships

The ACLU doesn’t use private law firms on all of its cases, but on the higher-profile cases, “we often try to leverage our own resources by bringing in firms, espe-

cially where there is a lot of discovery involved,” Esseks said. “We’re not just looking for bodies; we’re looking for smarts— help for thinking through the legal issues that we’re often confronting for the first time.”

Esseks first encountered Cooley’s Hartnett when she worked in the Obama White House counsel’s office. Hartnett later served as deputy assistant attorney general in the Obama Justice Department’s civil division. Esseks said he tracked her down soon after she joined Cooley and asked for her help with the Idaho case.

Hartnett was familiar with LGBT legal issues having worked on “don’t ask, don’t tell” in the Obama administration, she said. Cooley also had a long history of pro bono work on behalf of LGBT rights, she added.

“The great thing about working with these organizations is that it is a complete team effort,” Hartnett said. “We had people who interfaced with the clients. We all developed the legal arguments in the complaints. We also provided the firm’s infrastructure, help with deadlines, and we were very inclusive of our junior lawyers on all matters.”

In the Idaho case, the state appealed to the U.S. Court of Appeals for the Ninth Circuit, which recently remanded it to the district court for clarification of a standing issue. “We’ll be back up in the Ninth Circuit once that issue gets resolved,” Hartnett said. Based on the strong relationship it developed with the ACLU during the case and the recent passage of a series of anti-transgender laws, she said, “We offered ourselves up and the ACLU asked us to work with it and

Lambda Legal on the West Virginia case.”

The team also helped “moot” the Sullivan team in preparation for the Arkansas case, she added.

In the end, Hartnett said, “It’s really just about helping kids who need help.”

The power of a law degree

Sullivan’s Beeney, co-head of the firm’s intellectual property and technology group, has been involved in the firm’s LGBT work and with the ACLU for almost a decade. From challenging restrictions on students’ First Amendment speech to bans on gay adoptions and foster parenting, he has been a “wonderful” partner, according to Esseks.

The team in the Arkansas case, Beeney said, was able to provide “an awful lot of person power” to dig into many issues, from medical to social. “I think they relied on us to do the digging and to bring to the table a lot of litigation tactics,” Beeney said.

His and the firm’s involvement in these cases stems from the fact, Beeney said, that what is happening with these anti-transgender laws is “just plain old wrong.” For himself, he added, “I’m a straight male, an old, white, married guy. Maybe I’ve always thought it’s remarkable the power a law degree gives you. The ability to change people’s lives is just jaw dropping. To put that to use in what are still significant civil rights battles in our country is a very worthy pursuit.”

Arnold & Porter’s Richter agrees. Her firm’s involvement in the Florida lawsuit followed its work with the HRC in filing an amicus brief in the Idaho case in the Ninth Circuit. The Florida family of a middle-school student contacted HRC,

which, in turn, approached Arnold & Porter about acting as co-counsel. “We were delighted to say yes,” Richter recalled.

Richter, other partners and a team of associates have been doing research on the issues surrounding the Florida law, known as the Fairness in Women’s Sports. One of the challenges, Richter said, is getting the public to understand what the law does.

“So at first approach, one might ask why is a large law firm opposed to fairness in women’s sports,” she said. “What it means for individuals who are impacted by it, from our end, is certainly a challenge just because the name of the law alone creates some confusion.” But the legal issue is “very clear,” she added.

Another challenge involves working with a young person whose life is affected. “We’re not litigating in a vacuum,” Richter said. “When you’re litigating with young people, there has to be an extra sensitivity, particularly in this social media age.”

The Florida lawsuit was only recently filed. Richter and HRC are awaiting responses from the state and local school board. Also waiting, but on whether there will be appeals of the West Virginia and Arkansas preliminary injunctions, are the Cooley and Sullivan teams.

Richter said she has been impressed with the communication among the lawyers in all three cases.

“HRC is part of ongoing conversations with other national players and keeps us informed as to who is litigating where,” she said. “Each case is different, but there is good collaboration across the board.”

Correction: This story has been updated to correct Rosalyn Richter’s job title.