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Boon for Transgender Access to Health Care

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EXECUTIVE SUMMARY

Federal District Court Rules That Plan Administrator Can't Justify Gender Identity Discrimination Based on a Trump-Era Regulation

*By Ezra Cukor**

A transgender teen, C.P., and his parents defeated Blue Cross Blue Shield of Illinois's (BCBS's) motion to dismiss their challenge to a categorical exclusion of transgender-related health care under BCBS health insurance policy sold to Catholic Health Initiatives. *C.P. v. Blue Cross Blue Shield of Illinois*, 2021 WL 1758896 (W.D.W.A. 2021).

The plaintiffs are enrolled in an employer-provided Catholic Health Initiatives health care plan administered by BCBS. It is well established that puberty-blockers, chest reconstruction surgery, and other transgender-related health care, are medically necessary and effective treatments for gender dysphoria. Indeed, BCBS maintains medical policies providing coverage of such care for adults and minors for other purposes. Even so, the plan categorically excludes coverage for transgender-related health care. And as a result, BCBS refused to cover puberty blockers and chest surgery for C.P., a minor who receives coverage under a parent's employment-related plan.

The plaintiffs sued BCBS. They argued that the plan's categorical exclusion violated § 1557 of the Affordable Care Act (ACA), which prohibits discrimination on the basis of sex in health care. BCBS moved to dismiss on several grounds.

The court easily concluded that the plaintiffs stated a claim for sex discrimination in violation of the ACA. The court reasoned that the logic of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) — that discriminating against someone for being gay or transgender is necessarily sex discrimination — compels the conclusion that Title IX, and thus and in turn the ACA, also prohibit discrimination for against transgender insured. In addition to aligning with *Bostock*, this holding accords with precedent relying on Title VII to interpret Title IX. See, e.g., *Emeldi v. Univ. of Oregon*, 698 F.3d 715, 724 (9th Cir. 2012) (interpreting Title IX provisions in accordance with Title VII); *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714 (2d Cir. 1994) ("courts have interpreted Title IX by looking to . . . the caselaw interpreting Title VII.")

BCBS argued that its categorical exclusion of transgender-related care did not violate the ACA because HHS had promulgated a rule saying as much. The court rejected this argument. Its holding "does not depend" on HHS's regulations, but instead rests on the "plain unambiguous language" of the ACA itself. This section of the opinion relied on *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 957 (D. Minn. 2018), a pre-*Bostock* decision that the ACA prohibited discrimination against transgender people.

BCBS also raised a Religious Freedom Restoration Act (RFRA) affirmative defense. BCBS is not a religious entity. Instead, it claimed it should be afforded a permission slip to discriminate because it administered the plan for a religiously-affiliated employer. The court rejected the RFRA defense for two reasons. First, RFRA did not apply to this case because it affords relief against the government, and the government is not a party to this case. Second, even if RFRA were to apply, resolution at the motion to dismiss stage was inappropriate because the RFRA defense turns on questions of fact, including whether BCBS is covered by RFRA and whether its religious beliefs were burdened.

This decision is a boon for transgender people's access to health care. It illustrates an avenue of redress for categorical exclusions of transgender-related care, which are blatant sex discrimination. Moreover, it holds the insurance company directly accountable under the ACA, which is an important avenue of relief. Some people can use Title VII to challenge health plan exclusions of transgender-related care. Others cannot, for example because their health insurance is not through an employer, or because their employer is not covered by Title VII. Thus, it is important that the ACA also obliges insurers and plan administrators to cover transgender-related care.

Additional positive developments came in the wake of the decision. The rule BCBS relied on in its failed bid to defeat plaintiffs' claim had been propounded by HHS under the Trump administration to eliminate anti-discrimination regulations put in place by the Obama administration. The Obama-era regulations barred discrimination against not only LGBTQ people but also people who sought reproductive health care, including abortion. Moreover, they addressed access to health care for people with limited English proficiency as well as for people with HIV and other chronic conditions. LGBTQ people and community organizations challenged Trump's bid to eviscerate these anti-discrimination protections, and a federal court blocked the repeal of some of the protections for LGBTQ people, in *Walker v. Azar*, 2020 WL 6363970 (E.D.N.Y. 2020). Less than a week after *C.P. v. Blue Cross Blue Shield of Illinois*, HHS took initial steps to rescind the Trump roll-back rule and reinstate ACA regulations forbidding discrimination against trans and LGB people.

Lambda Legal represents C.P. through local counsel Eleanor Hamburger of Sirianni Youtz Spoonemore Hamburger, Seattle. Lambda attorneys on the case include Jennifer C. Pizer, from the Los Angeles Office and Omar Gonzalez-Pagan from the New York City office. ■

**The views contained in this article are my own and do not represent the opinions of my employer*

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5th Circuit Panel Affirms Dismissal of Title VII and ADA Claims by Transgender Plaintiff for Lack of Comparator Evidence

By Arthur S. Leonard

A panel of the U.S. Court of Appeals for the 5th Circuit ruled on May 12 that U.S. District Judge David Hittner (S.D. Texas) had correctly granted a motion by the defendant employer, to dismiss discrimination claims under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act (ADA) brought by Elijah Anthony Olivarez, a transgender man, in connection with his discharge on April 27, 2018. On May 14, the court withdrew its opinion and substituted a new one reaching the same conclusion but correcting errors in the first opinion concerning the applicable Supreme Court standard for deciding dismissal motions in employment discrimination cases. Writing for the panel, Circuit Judge James Ho asserted that Olivarez failed to state a discrimination claim under either statute because he had not alleged that any similarly situated employee (a "comparator") had received any more favorable treatment than Olivarez.

Olivarez began working as a retail store associate for T-Mobile in December 2015. He alleges that during the first half of 2016, a supervisor made "demeaning and inappropriate comments" about his transgender status, about which he complained to Human Resources. He alleges that T-Mobile retaliated against him for filing the complaint by reducing his hours to part-time from September 2016 to November 2016. Anticipating surgical gender confirmation, Olivarez "stopped coming to work" in September 2017 "in order to undergo egg preservation and a hysterectomy," and the following month he "applied retroactively" to Broadspire Services, with which T-Mobile contracted for administration of its leave programs, for medical leave to extend to December 2017. A mixture of unpaid and paid leave was granted through December 31, and extended at Olivarez's request to February 18, 2018, but a further extension of leave was denied in March 2018 and Olivarez was discharged on April 27, 2018. He filed charges with the EEOC, received a right-to-sue letter on August 15, 2019, and filed suit against T-Mobile and Broadspire on November 12, 2019.

At the time Olivarez filed suit, gender identity discrimination claims under Title VII were not recognized as such by the 5th Circuit – indeed, Judge Ho authored a relevant decision to that effect – and artful pleading would be necessary to state a claim suing sex stereotyping or gender non-conformity theories. Transgender law specialist Jillian T. Weiss is Olivarez's counsel in the 5th Circuit, but the opinion does not note whether his original Complaint was file *pro se*; in any event, a First Amended Complaint was filed on November 22, 2019. Judge Hittner entered a scheduling order on February 13, 2020, setting a deadline of March 13 for any further amendment of pleadings. At the time, of course, the *Bostock* case had been argued but was not yet decided (and ultimately would not be decided until June 15, 2020). Defendants moved to dismiss for failure to state a claim. Their motion was denied *without prejudice* on March 27, 2020, and Judge Hittner permitted Olivarez to file another amended complaint, which he did on April 16, followed by defendants' renewed motion to dismiss on April 30, which was granted by Judge Hittner. At the time the dismissal motion was granted, the Supreme Court had not announced its decision in *Bostock*. After the *Bostock* ruling was announced, Olivarez moved to file a new amended complaint, but the court denied his motion.

Of course, *Bostock* took away one of the defendants' key arguments, and a point of contention on the appeal was whether the facts as alleged by Olivarez in his last amended complaint were sufficient to state a claim under Title VII (and the ADA) in light of *Bostock*. The 5th Circuit panel decided they were not. Olivarez was not appealing the district court's dismissal of his retaliation claim, which had been found to be time-barred.

In his original opinion, Judge Ho focused on *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), as setting the standard for pleading a disparate treatment claim under Title VII in the absence of direct evidence of discriminatory intent. In the substituted opinion, he acknowledged that the pleading standard is now governed by *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). It is not necessary for the plaintiff to meet the standard of alleging a *prima facie* case, as described in *McDonnell Douglas*, but rather to allege facts sufficient to state claim. However, Judge Ho wrote, the *McDonnell Douglas* pleading standards (which go to the question of a *prima facie* case sufficient to shift a burden of production to the defendant) remain relevant, pursuant to the 5th Circuit's decision in *Chhim v. Univ. of Texas at Austin*, 836 F.3d 467 (5th Cir. 2016), where the court said that the plaintiff must "plead sufficient facts on all of the ultimate elements of a disparate treatment claim to make his case plausible." And, according to Judge Ho, Olivarez "has failed to plead any facts indicating less favorable treatment than others 'similarly situated' outside of the asserted protected class."

Judge Ho asserted that this pleading requirement was not altered by *Bostock*. "Olivarez contends that, after the district court granted the motions to dismiss, *Bostock* changed the law and created a lower standard for those alleging discrimination based on gender identity. T-Mobile and Broadspire argue that *Bostock* did no such thing. We agree with T-Mobile and Broadspire. *Bostock* defined sex discrimination to encompass

sexual orientation and gender identity discrimination. But it did not alter the meaning of discrimination itself." And, he concluded, "[at] the summary judgment stage, when the claim relies on circumstantial evidence, a Title VII plaintiff must identify a more favorably treated comparator in order to establish discrimination. *Bostock* does not alter either of those standards."

Actually, the assertion that failure to allege a more favorably treated comparator is necessarily fatal to a disparate treatment claim is controversial, a point that Ho appears to acknowledge in passing earlier in the opinion when he writes, "And comparator allegations aside, the complaint presents no other facts sufficient to 'nudge the claims across the line from conceivable to plausible.'" This seems to recognize that evidence other than comparator evidence might satisfy the pleading requirement at the motion to dismiss stage in order to state a plausible discrimination claim. In this case, Olivarez's previous experience with the supervisor who made "demeaning and inappropriate comments" about his gender identity and the subsequent alleged retaliation against him when he complained to Human Resources might be cited to support a claim of discriminatory motivation, but the court doesn't mention that, probably due to the lack of temporal proximity of those incidents to the discharge. Also, there is no mention in the opinion whether the supervisor who allegedly made those remarks had anything to do with the discharge decision.

Judge Ho insists that *Bostock* actually requires comparator evidence, focusing on Justice Neil Gorsuch's reasoning for finding that gender identity claims are covered under Title VII, which was based on hypothetical fact patterns involving comparators.

As to the ADA claim, the court found that Olivarez's complaint fell short by failing to allege facts that would support an inference that he was fired *because of* a disability. (There is disagreement among the federal courts about whether gender dysphoria is a disability within the meaning of the ADA, because of the Helms Amendment that added a provision stating that "homosexuality" and "transsexualism" are not disabilities for purposes of the statute. Some courts have opined that gender dysphoria, which is a condition distinct from "transsexualism," is not excluded from coverage by this language.) "At most," wrote Judge Ho, "Olivarez made a conclusory allegation that T-Mobile and Broadspire 'discriminated against [Olivarez] based on [a] disability.' But the Rule 8 pleading standard demands more than conclusory statements."

The court rejected Olivarez's argument that Judge Hittner should have allowed the filing of a new amended complaint after the *Bostock* decision was announced, but as the court rejected the argument that *Bostock* had changed the pleading standard to dispense with the necessity to allege comparator facts, it found that "there is no intervening change of law that warrants reconsideration" of the trial court's decision to dismiss the case. The judge also pointed out that Olivarez had several chances to amend his complaint if he could come up with comparator evidence, but he never did so.

Judge Ho's view of the case can be summed up by his brief characterization of it in the introduction of his opinion: "An employer discharged a sales employee who happens to be transgender – but who took six months of leave, and then sought further leave for the indefinite future. That is not discrimination – that is ordinary business practice."

Olivarez's next step could be a petition for rehearing *en banc*, but the odds against succeeding in the 5th Circuit are fairly long, as twelve of the seventeen active judges were appointed by Republican presidents, including two venerable folks appointed by Ronald Reagan in the 1980s who have not taken senior status despite their age. Donald Trump appointed six of the active judges. ■

Arthur S. Leonard is the Robert F. Wagner Prof. of Labor and Employment Law at New York Law School.

Fourth Circuit Rules Prisoners Have No Privacy Interest in Their HIV Information

By William J. Rold

Inmate Christopher N. Payne was in a medical dorm in a Virginia prison farm when the attending physician remarked that he had not been taking his HIV medication, within the hearing of other inmates, staff, and civilians – thereby revealing Payne's HIV status to others. Payne's claim for violation of privacy was dismissed by Senior U.S. District Judge Liam O'Grady (E.D. Va.) prior to service, on the ground that neither the Supreme Court nor the Fourth Circuit recognized a right to privacy in inmate medical information. Payne appealed *pro se*.

The Fourth Circuit assigned counsel, and it requested adversary briefing from defendants. The case was argued, and the decision took nine months. While the court pretends otherwise, the opinion in *Payne v. Taslimi*, 2021 U.S. App. LEXIS 15972 (4th Cir., May 27, 2021), is sweeping in scope: "We limit our decision today to the question before us: Did Payne have a 'reasonable expectation of privacy' in his HIV status while in a prison medical unit? We hold that he did not. When Dr. Taslimi disclosed his HIV status, Payne was in prison, a place where individuals have a curtailed expectation of privacy. Whatever expectations remain fail to include the diagnosis of or medication for HIV, a communicable disease. The judgment below is therefore AFFIRMED."

Circuit Judge Julius N. Richardson (appointed by President Donald J. Trump) wrote the opinion. He was joined by Circuit Judges Stephanie D. Thacken (appointed by President Barack Obama) and A. Marvin Quattlebaum (appointet by Trump). While the judges reject claims under the Health Insurance Portability and

Accountability Act of 1996, codified at 29 U.S.C. § 1181 et seq., it would be surprising if they held otherwise. The remainder of this article discusses their disposition of the constitutional privacy claim.

Judge Richardson's discussion begins with a lengthy dissertation about binding precedent (from the Supreme Court and the Fourth Circuit *en banc*), "horizontal" stare decisis (from other Fourth Circuit panels), dicta, and comity. It includes criticism of Supreme Court cases, which must be followed, even if "wobbly . . . and moth-eaten." It particularly criticized decisions, like *Whalen v. Roe*, 429 U.S. 589, 605 & n.32 (1977), and *Nixon v. Administrator of General Services*, 433 U.S. 425, 458 (1977), which "assumed without decision" that constitutionally protected privacy existed. Judge Richardson does not mention *Griswold v. Connecticut* – 381 U.S. 479 (*passim*) (1965) (referring to "privacy" 65 times in striking a state contraceptive prohibition on constitutional grounds) – or *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (where "privacy" as a liberty interest under the Fourteenth Amendment was one of the questions on which *certiorari* was granted and on which *Bowers v. Hardwick* was overruled, *see* 539 U.S. at 578). Noting that the Supreme Court's "prerogative alone" can change binding precedent, Judge Richardson's opening reads like an application for higher office.

Observing that the Supreme Court was still "assuming without deciding" that the Constitution has a "privacy" clause in the Fourteenth Amendment, Judge Richardson says the consideration of personal information sought in an employment questionnaire was not illuminating in *NASA v. Nelson*, 562 U.S. 134, 138 (2011). He says the Fourth Circuit has "gone beyond assuming" in *Walls v. City of Petersburg*, 895 F.2d 188, 189-90 (4th Cir. 1990). Walls established a two-part test: (1) is the information protected because there is a "reasonable expectation of privacy"; and (2) is there a compelling reason to disclose it? It answered yes to matters of public record in an employment questionnaire and no to financial information. Id. at 193-4.

He says *Walls* finds the "reasonable expectation of privacy" in "Justice Harlan's famous concurrence in *Katz v. United States*, 389 U.S. 347 (1967)." Actually, *Walls* never cites *Katz*, and *Katz* was a Fourth Amendment search and seizure case involving whether a warrant was needed to wiretap a telephone booth. The disclosure here has nothing to do with search and seizure or with the Fourth Amendment. Judge Richardson writes: "Because no subsequent panel could overrule *Walls* and the Supreme Court has done little to clarify the scope of the constitutional right to privacy, we follow *Walls*."

He holds for the court: "We decide that Payne lacked a reasonable expectation of privacy in his HIV medication and diagnosis. He thus lacked a right to privacy in that information." While the disclosure here occurred in a prison infirmary and was secondary (in that it was not intended for the earshot of others), the holding has no such limitation.

Judge Richardson relies on the Supreme Court's limitation of prisoner privacy in cells in *Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984), which permitted random searches without probable cause. This is another Fourth Amendment case. The doctor here was not "searching." Judge Richardson recognizes the Fourth Circuit's recognition of a "reasonable expectation of privacy" as violated when Corrections officials surgically removed a prosthetic testicle implant in *King v. Rubenstein*, 825 F.3d 206, 214-15 (4th Cir. 2016), but he writes that the intrusion in King also involved "bodily privacy and integrity."

Judge Richardson writes that, since an inmate has no privacy interest in disclosure of this HIV status to prison officials – citing *Dunn v. White*, 880 F.2d 1188, 1197 (10th Cir. 1989) (testing prison inmates for AIDS does not violate the Fourth Amendment) – "so too does he lack a reasonable expectation of privacy in the secondary disclosure of his diagnosis . . . . Where an inmate lacks a reasonable expectation of privacy, he lacks it for all purposes." He cites *United States v. Jeffus*, 22 F.3d 554, 559 (4th Cir. 1994), in support of this proposition. *Jeffus*, a Fourth Amendment case, never said that. It held that a prisoner who was subject to a valid "Terry" stop, and arrested for what was found, could not claim privacy in searches that later occurred at the jail.

Judge Richardson cites no authority for the proposition that disclosure of HIV information to medical staff justified disclosure to the inmate population. This is the first case so holding of which this writer is aware. It is contrary to all privacy standards governing prison medical information. See, e.g., National Commission on Correctional Health Care, P-A-09 (patient encounters); P-E-10 (security escorts); and P-H-2 (medical records).

Numerous federal circuits have held to the contrary. *See Doe v. Delie*, 257 F.3d 309, 316 (3d Cir. 2001) (Fourteenth Amendment right of privacy "especially strong" with respect to HIV status); *Powell v. Schriver*, 175 F.3d 107, 111-12 (2d Cir. 1999) (transgender patients); *A.L.A. v. West Valley City*, 26 F.3d 989, 9900 (10th Cir. 1994) (extending privacy to HIV information seized from arrestee's wallet, even though it was a false positive); *Williams v. Edwards*, 547 F.2d 1206, 1217 (5th Ci. 1977) (prohibiting use of inmates as medical records clerks); *Cody v. Hilliard*, 599 F.Supp. 1025, 1036 (D.S.D. 1984), *aff'd in part and rev'd in part on other grounds*, 830 F.2d 912 (8th Cir. 1987) (*en banc*) (same); but *cf. Jarvis v. Wellman*, 52 F.3d 125, 126 (6th Cir. 1995) (granting qualified immunity to prison officials because privacy of medical records was not "clearly established").

"The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personal without her consent." *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001). Federal courts also recognize a psychotherapist-patient privilege. *See Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (family of victim officer shot denied notes from officer's therapy sessions following incident). This privilege has

been applied to prison therapists. *In re Sims*, 534 F.3d 117, 134-41 (2d Cir. 2008).

Judge Richardson's opinion evinces both a misunderstanding of the claim of secondary disclosure and of HIV in general. Payne is not trying to keep his HIV secret from health staff as in *Anderson v. Romero*, 72 F.3d 518, 524 (7th Cir. 1995), which the judge improperly cites. Further, HIV is not spread by airborne particles, yet Judge Richardson writes: "The information Dr. Taslimi relayed to Payne dealt with his communicable disease and whether he was taking his medication, which is especially relevant in a prison where disease can spread rapidly (as seen by the COVID-19 pandemic)." He says that disclosure is therefore justified for institutional safety under *Hudson* (back to cell searches for contraband).

"In sum, Payne has a reduced expectation of privacy in prison and, as we conclude here, no reasonable expectation of privacy in his HIV diagnosis and treatment. No matter how much a prisoner subjectively would like to keep that information to himself, we must ask whether that expectation is 'one that society is prepared to recognize as reasonable,'" quoting Justice Harlan's concurrence again in *Katz*. Because there is no reasonable expectation of privacy, there is no need to proceed to the second step of balancing under *Walls*.

The decision could have held that a single, inadvertent disclosure at bedside where others could overhear was not actionable. Unfortunately, it remains for advocates to try to limit the sweeping language of the holding. This is the antithesis of strict construction.

Payne is represented by appointed counsel: Maguire Woods, LLP (Washington, DC; and Richmond). Consideration of a petition for *certiorari* seems both necessary and foreboding. ■

William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.

Minnesota Federal Court Rules Gay Mexican Detainee Entitled to Bond Hearing

By Bryan Johnson-Xenitelis

The U.S. District Court for the District of Minnesota ruled on May 5 that a gay Mexican man who sought withholding of removal as a gay man from Mexico where he would face torture is entitled to an individualized bond hearing and that the government will bear the burden of proving by clear and convincing evidence that his continued detention is necessary to protect the community or prevent him from fleeing. *Corchado-Perez v. Garland*, 2021 U.S. Dist. LEXIS 86092, 2021 WL 1783524.

Petitioner, a native and citizen of Mexico, entered the United States in 2004 at age 12. In 2010, he departed the United States for a family funeral and upon his return was apprehended by authorities and removed from the United States. Petitioner reentered the United States a few days later and remained until September of 2019, when an interaction with law enforcement related to a controlled substance charge brought him back before Immigration and Customs Enforcement (ICW), which reinstated his prior final removal order.

In "withholding-only" proceedings, Petitioner sought relief based upon his past persecution "by people who perceived [Petitioner] to be homosexual and others who had made threats on his life and actually harmed members of his family." An Immigration Judge concluded Petitioner credibly demonstrated past persecution and was "accordingly entitled to a presumption that his life or freedom would be threatened in the future if he were removed to Mexico" and that DHS "had not demonstrated by a preponderance of the evidence that a fundamental change in circumstances rebutted the presumption of future threats to Petitioner." DHS appealed the decision and Petitioner filed a Petition for Writ of *Habeas Corpus* requesting a bond hearing to end his detention pending a final decision on the DHS appeal.

A federal magistrate noted that courts were divided on which of two provisions of the United States Code applied to individuals like Petitioner who had been ordered removed, but whose removal is not "both removable legally and practically." The magistrate concluded that since Petitioner was detained for nearly a year, the length of his detention "necessitates that he receive a bond hearing regardless of the statutory basis for his detention." The government appealed the magistrate's decision and asked the District Court to clarify which party bears the burden of persuasion should the court find a bond hearing is required.

Chief U.S. District Judge John R. Tunheim wrote that arguments presented to and considered by a magistrate judge are reviewed for clear error. In deciding whether the magistrate erroneously concluded that Petitioner was entitled to a bond hearing, Judge Tunheim noted that the Third and Sixth Circuits found that detention during withholding-only proceedings is governed by 8 U.S.C. Section 1231(a), which does not explicitly provide for a bond hearing, but that U.S. Supreme Court precedent had recognized an implicit bond hearing requirement in detention of greater than six months. Finding Petitioner to have been detained "for more than 590 days without any resolution of the United States' appeal to the BIA or any clarity as to the timing of his possible removal," there was not "a significant likelihood of removal in the reasonably foreseeable future," so the Petitionerias entitled to an individualized bond hearing.

Judge Tunheim noted that no Eighth Circuit or Supreme Court caselaw mandated "a particular burden or standard of proof for the type of immigration bond hearing addressed here." He found that "due process

considerations weigh heavily on the question of burden and quantum of proof related to prolonged immigration detention," and found that an immigration detainee's "strong interest in liberty" outweighed "the private and public interests affected," noting that "although [Petitioner] has already been found to be removable and his liberty interest may therefore be slightly less than that of a person at the initial finding of removal stage, the same interest in freedom from prolonged detention is at stake."

Judge Tunheim accordingly ordered Petitioner to be granted a bond hearing within 14 days of his order, and that at the hearing the government would bear the burden of proving by clear and convincing evidence why Petitioner's detention is necessary to protect the community or prevent him from fleeing.

The Petitioner is represented by Bruce D. Nestor, of De Leon & Nestor, LLC; and by Paul Abraham Dimick and Teresa J. Nelson, American Civil Liberties Union of Minnesota, Minneapolis, MN. ■

Bryan Xenitelis is an attorney and an adjunct professor at New York Law School.

West Virginia Federal Court Refuses to Dismiss Challenges to West Virginia Medicaid and State Employee Insurance Plan Exclusions of Coverage for Transgender Health Care

By Joseph Hayes Rochman

On May 19, U.S. District Judge Robert C. Chambers denied defendant West Virginia state health insurance plan and Medicaid plans' motions to dismiss challenges to their policies which categorically exclude coverage to transgender beneficiaries for gender-affirming care. *Fain v. Crouch*, 2021 WL 2004793, 2021 U.S. Dist. LEXIS 95241 (S.D.W. Va.). Notably, the court made clear that the Residual Clause of Section 1557 does expressly waive Eleventh Amendment Immunity and that the futility doctrine applies to discriminatory health coverage policies excluding gender-confirming care. Accordingly, state health plan defendants may not claim immunity under the Eleventh Amendment for claims applying the nondiscrimination provisions of the Affordable Care Act (ACA). Also, transgender beneficiaries need not attempt to obtain coverage before filing suit when the challenged insurance policy expressly excludes coverage.

The plaintiffs, represented by Lambda Legal, Nichols Kaster PLLP, and The Employment Law Center, PLLC, filed a class-action suit on November 12, 2020, in the U.S. District Court for the Southern District of West Virginia challenging the discriminatory policies. Judge Chambers ruled only on the motions to dismiss and did not address the merits of the claims at this point in the litigation. The case is one of several filed by Lambda Legal around the country to challenge state discriminatory policies and practices of denying health insurance coverage for gender-affirming care.

Plaintiff Christopher Fain, representing the class of Medicaid participants, challenges the West Virginia Department of Health and Human Resources, Bureau for Medical Services' (WVDHHR) policy of categorically excluding gender-confirming care in its Medicaid Policy Manual. Fain also named WVDHHR Cabinet Secretary William Crouch and WVDHHR Commissioner Cynthia Beane in their official capacities. Fain contends that the discriminatory policies violate the Equal Protection Clause, the nondiscrimination clause under Section 1557 of the (ACA), the Medicaid Act's Availability and Comparability Requirements.

Plaintiffs Zachary Martell and Brian McNemar represent the class of state employees covered by health insurance plans provided through the West Virginia Public Employees Insurance Agency (PEIA) and eligible dependents and subclass of those employees enrolled in the Health Plan of West Virginia, Inc. (The Health Plan), a nonprofit Health Maintenance Organization (HMO) which provides coverage to state employees through the PEIA. Martell and McNemar also named Director of PEIA Ted Cheatham in his official capacity.

Martel and McNemar, representing the state employees and their dependents, are seeking declaratory and injunctive relief challenging PEIA and The Health Plan's policies and practices of categorically excluding coverage of gender-confirming care. Martell and McNemar contend that PEIA and The Health Plan's policies violate the Equal Protection Clause.

The WVDHHR defendants moved to dismiss first on January 11, 2021, for a partial dismissal of Fain's compensatory damages under Eleventh Amendment immunity and the sufficiency of Fain's

class action allegations. They filed a second motion to dismiss on February 2, 2021, challenging standing and ripeness and Fain's ability to represent the proposed class. The plaintiffs filed an unopposed motion for Leave to File Sur-reply on April 5, 2021. Likewise, on January 11, 2021, Defendant Cheatham moved to dismiss for lack of standing and contended that plaintiffs McNemar and Martell failed to state a claim under the Equal Protection Clause. The Health Plan of West Virginia's motion to dismiss was not addressed by the court in this opinion but will be in a subsequent opinion.

According to the Complaint, Christopher Fain is a 44-year-old transgender man. Fain studies nonprofit leadership at Marshall University while working at a clothing store in Huntington, West Virginia. Fain is a Medicaid recipient and has coverage under UniCare Health Plan of West Virginia, Inc., a subsidiary of Anthem. After Fain began hormone therapy to treat his gender dysphoria in March 2019, he was informed by his pharmacist that UniCare Health would not cover his hormone therapy. Further, because West Virginia's Medicaid plan excludes gender-confirming care, Fain does not have coverage for a bilateral mastectomy, a medically necessary treatment for his gender dysphoria.

WVDHHR submitted an affidavit that the agency does not have a policy of excluding hormone therapy, namely testosterone treatment, for gender dysphoria. Fain stipulated not to pursue that claim. However, WVDHHR's policy categorically excludes gender-confirming care—called "[t]ransexual surgery" in its Medicaid Policy Manual—from coverage. The same treatment (for different purposes, of course) are covered for cisgender Medicaid participants. West Virginia apparently does not deny that transgender West Virginians who rely on state Medicaid plans are categorically excluded from medical treatments that are covered for cisgender Medicaid recipients.

Zachary Martell is a transgender man who is married to Brian McNemar. Martell is a student at Mountwest College in Huntington, West Virginia. McNemar is an accountant at a West Virginia state psychiatric hospital. Martell and McNemar receive coverage through PEIA because of McNemar's state job. Martell, who started hormone replacement therapy, uses a binder to avoid the distress and embarrassment of being incorrectly identified as female because the state insurance plan excludes coverage for a bilateral mastectomy when it is for gender-confirming care.

According to the complaint, the PEIA plan excludes surgical or pharmaceutical treatment or other treatments for "sex transformation surgery." West Virginia state employees covered under PEIA or The Health Plan are categorically excluded from treatments covered for cisgender West Virginia state employees.

Addressing WVDHHR's motions to dismiss Fain's claims, the court first rejected their argument that Fain's claim for compensatory damages under the ACA is barred under Eleventh Amendment state immunity, because WVDHHR waived its immunity by voluntarily participating in Medicaid's federal spending program. At issue was whether the waiver was a clear and unambiguous condition of federal funding in Section 1003 of the Civil Rights Remedies Equalization Act of 1986 42 U.S.C. § 2000d-7(a)(1).

Defendants argued that Section 1003 did not expressly waive immunity under Section 1557 of the ACA under its Residual Clause, which states: ". . . or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." The court rejected WVDHHR's reliance on *Sossamon v. Texas*, 536 U.S. 277, 287 (2011), for its contention that the waiver must be "unequivocally expressed in the text of the relevant statute." Rather, the court agreed with Fain that Section 1557 is unambiguously a federal statute that prohibits discrimination by recipients of Federal financial assistance and that Section 1003 clearly and unambiguously incorporates Section 1557's nondiscrimination provision. The court stated that WVDHHR's reasoning would "lead to untenable results" and contradicts Congress's intent and a longstanding body of case law holding otherwise.

Second, and importantly, the court rejected all of WVDHHR's standing and ripeness arguments and accepted the application of the futility doctrine to discriminatory health coverage policies excluding gender-confirming care. Under the futility doctrine, an individual is not required to take an action that would be futile to achieve standing to challenging a policy in federal court. The court looked to a Southern District of New York case, *Cruz v. Zucker*, 116 F.Supp.3d 334 (S.D.N.Y. 2015), in support of extending the futility doctrine to policies discriminating against transgender beneficiaries, noting the express exclusion of coverage. Judge Chambers concluded that Fain's injuries were not speculative and, in fact, created a concrete injury.

The court agreed with Fain that a request for gender-confirming care from WVDHHR would be futile because "such a request would be nothing more than a formality . . . [and] [c]ourts do not require plaintiffs to perform such futile acts, especially when those acts could subject them to 'personal rebuffs.'" Further, the court found Fain's request was not futile if it could be denied on grounds other than the exclusionary policy, because WVDHHR did not contest that their explicit policy denies gender-confirming surgical care. Notably, the court pointed to an affidavit filed by WVDHHR to dismiss Fain's denial of hormone therapy claim, stating it was not their policy to enforce that exclusion, which reinforced it *was* their explicit policy to deny surgical care.

Lastly, WVDHHR argued that the Fain did not sufficiently allege a viable class action under Federal Rule Civil Procedure 23(c)(1)(A). Specifically, WVDHHR contended that the Fain could not meet the commonality requirement under Federal Rule Civil Procedure 23(a)(2). Defendant Cheatham argued that McNemar and Martell lacked standing and failed to state an Equal Protection Clause claim. The court rejected both arguments.

The court next turned to the motions to dismiss Martel and McNemar's claims. Cheatham, rather than challenging plaintiffs' injuries, argued that he did not have the authority to redress McNemar and Martell's injuries and that their injuries were not traceable to him. The essence of Cheatham's traceability claim is that the discriminatory policy is under the control of The Health Plan and not himself. The court rejected this argument because Cheatham is statutorily responsible for administering PEIA under W. Va. Code § 5-16-3(c). Likewise, § 5-16-3(c) provides Cheatham the same authority to redress plaintiffs' claims.

Lastly, the court rejected Cheatham's argument that McNemar and Martell failed to state an Equal Protection Clause claim because PEIA's policies survive heightened scrutiny. Cheatham vacuously attempted to rely on "important government interests" to dismiss the claims at the pleading stage, including the health and safety of the enrollees, maintaining medical standards, and saving taxpayer money for procedures that are not medically necessary. Judge Chambers saw right through Cheatham's groundless assertions, because they relied on facts outside the complaint and in fact the complaint demonstrated the opposite.

Fain makes clear that Federal district courts are taking discriminatory policies excluding transgender beneficiaries seriously. Although Judge Chambers' opinion did not address the merits, other federal courts have found that state exclusion of coverage for gender-confirming care violates Section 1557 of the Affordable Care Act, provisions of the Medicaid Act and Section 1557, and the Equal Protection Clause. In 2019, the U.S. District Court for the Western District of Wisconsin granted a permanent injunction against the enforcement of a Wisconsin law that denied coverage of gender-confirming care to transgender Medicaid participants. *Flack v. Wisconsin Department of Health Services*, 395 F.Supp.3d 10001 (W.D. Wis. 2019); *see also*, Arthur S. Leonard, *Federal Court Permanently Enjoins Wisconsin Medicaid from Enforcing State Statutory Exclusion of Coverage for Gender Transition*, 2019 LGBT L. NOTES 15 (2019).

Excluding coverage of gender-affirming care is a growing priority for conservative state legislatures. According to the Freedom for All Americans Legislative Tracker, there are twenty-two bills active in state legislatures that relate to anti-transgender medical care bans as of June 2021. *Legislative Tracker: Anti-transgender Medical Care Bans*, FREEDOM FOR ALL AMS., https://freedomforallamericans.org/legislative-tracker/medical-care-bans/. Most of the bills are aimed at healthcare for minors. Bills range from general coverage exclusions to criminalizing parental and medical providers aid in providing gender-confirming care for minors. For example, Texas House Bill 68, introduced in November 2020, would amend the Texas Family Code to make parental support of gender-confirming care, such as hormone treatment, a form of child abuse. New Hampshire House Bill 68, introduced in January 2021, does the same.

However, at the Federal level, President Joseph R. Biden, Jr., is reversing many of the anti-LGBTQ policies of the Trump administration, including that the Affordable Care Act's nondiscrimination provisions did not apply to transgender people. On May 10, 2021, the Department of Health and Human Services announced that it will enforce Section 1557 and Title IX's prohibitions on discrimination based on sex to apply to sexual orientation and gender identity. U.S. Department of Health & Human Services, *HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity*, (May 10, 2021), https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html.

Laws excluding transgender beneficiaries from state-run health insurance plans have both severe and broad impact. In 2019 the Williams Institute estimated that of the 1.4 million adults in the U.S. that identify as transgender, 152,000 are enrolled in Medicaid. Christy Mallory & William Tentindo, *Medicaid Coverage for Gender-Affirming Care*, UCLA SCHOOL OF LAW WILLIAMS INSTITUTE (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Medicaid-Gender-Care-Oct-2019.pdf. 51,000 of transgender Medicare beneficiaries have uncertain benefits and 32,000 live in states that expressly deny coverage. *Id*.

Lambda Legal also filed a case in November 2020 in the U.S. District Court for the Western District of Washington against Blue Cross Blue Shield of Illinois challenging an exclusion applied to a 15-year-old transgender boy as violating the nondiscrimination provisions of Section 1557 of the ACA. On May 4, 2021, the court denied Blue Cross Blue Shield's motion to dismiss, in which defendants had argued that the denial of insurance coverage based on transgender status was not sex discrimination under Section 1557. *Pritchard et al v. Blue Cross Blue Shield of Illinois*, No. 3:20-cv-06145, 2021 WL 1758896 (W.D. Wash. May 4, 2021)

Fain, Martell, and McNemar are represented by Avatara Smith-Carrington, Tara Borelli, Sasha Buchert, and Nora Huppert at Lambda Legal; Anna Prakash and Nicole Schladt at Minneapolis, MN-based Nichols Kaster PLLP; and Walt Auvil at Parkersburg, WV-based The Employment Law Center, PLLC. WVDHHR, William Crouch and Cynthia Beane are represented by Caleb B. David, Kimberly M. Bandy, Lou Ann S. Cyrus, and Roberta F. Green at Charleston, WV-based Shuman McCuskey & Slicer. Ted Cheatham is represented by Christopher K. Weed, David E. Rich, Eric Salyers, and Perry W. Oxley at Huntington, WV-based Oxley, Rich, and Sammons. The Health Plan of West Virginia, Inc. is represented by Aaron C. Boone and Stuart A. McMillan at Parkersburg, WV-based Bowles Rice. ■

Joseph Hayes Rochman is a law student at New York Law School (class of 2022).

Federal District Court Rules That Montana Violated Due Process and Equal Protection Guarantees by Forcing Gay Man to Register as Sex Offender for Consensual Teenage Sex

By Matthew Goodwin

U.S. District Judge Dana L. Christensen ruled on May 11 that plaintiff Randall Menges could not be required to register with, and his name should be removed from, Montana's sex offender registry. *Menges v. Knudsen*, 2021 U.S. Dist. LEXIS 89966; 2021 WL 189415 (D. Mont).

Menges, now 45, had consensual sex when he was 18 with two 16-year-old boys when he and they were living at a foster program at a ranch in Idaho. The age of consent in Idaho was 16. Menges had been a foster youth resident at the Idaho camp and stayed on as an employee there when he turned 18.

The police learned that Menges had sex with the two other teenagers while living at the ranch and he was charged with and plead guilty to "crimes against nature"—an anti-sodomy/anti-oral sex law principally used to target LGBTQ individuals—of the sort which *Lawrence v. Texas*, 539 U.S. 558 (2003), later held unconstitutional. Menges then served seven years in prison. Upon his release, he was placed on the sex-offender registry in Idaho and then in Montana, where he later moved.

Judge Christensen wrote: "Montana's registration requirement has unsurprisingly had a negative impact on Menges' life." The decision describes how the registration requirement cost Menges employment opportunities and deprived him of beds at homeless shelters. In an article on the case published in the *New York Times*, Menges detailed his suicidality over the years because he had been shunned socially and economically due to the registration requirement.

Menges brought suit in December 2020 against Montana's Attorney General, the Bureau Chief of the Montana Crime Information Bureau, and the Head of Sexual and Violent Offenders Program for the Missoula County Sheriff's Office. Menges interposed three claims: (1) Montana's registration requirement unconstitutionally violates his substantive Due Process rights under the Fourteenth Amendment; (2) Montana's registration requirement as applied to him is a violation of his Equal Protection rights, also under the Fourteenth Amendment; and, (3) the registration requirement is a violation of Menges' right to privacy under the Montana Constitution.

The court held a trial on the merits on March 30, 2021, during which it also heard argument on defendants' various pre-trial motions attacking Menges' standing and alleged failure to state a claim on *Heck* grounds. (The rule in *Heck v. Humphrey*, 512 U.S. 477 [1994]: A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under 42 U.S.C.S. § 1983.) The court also *sua sponte* examined the Eleventh Amendment's prohibition of suits by individuals against states in federal court. All three sections of the opinion are outside of the scope of this article but, suffice to say, the court held none were a bar against Menges proceeding on his claims.

The primary relief Menges sought was injunctive. As such, his claims were analyzed through the well-known, five-part rubric—i.e. (1) he was required to demonstrate actual success on the merits; (2) irreparable injury; (3) no adequate remedy at law; (4) the balance of hardships justified a remedy in equity; (5) the public interest not be harmed by a permanent injunction. The majority of the court's analysis in this respect focused on the merits of each claim.

The Due Process claim was a substantive rather than procedural one. Citing *Obergefell v. Hodges*, 576 U.S. at 663 (2015), the court wrote that substantive due process protects liberties such as "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs." First, the court had to assess whether Montana was depriving Menges of a "liberty interest" protected by the Due Process Clause; if so, the second question was what level of scrutiny to apply.

On the inquiry's first prong, the court answered in the affirmative that Montana deprived Menges of a constitutionally protected liberty interest. The liberty interest at stake was the right of same-sex couples to enjoy intimate association in the same manner as different sex couples. Wrote the court: "it becomes clear that Montana requires Menges to register as a sexual offender because in 1993 he was convicted of a crime under Idaho's Crimes Against Nature statute. Going one step further, it is apparent that Montana requires Menges to register as a sexual offender because he had intimate sexual contact with a person of the same sex. This is where the deprivation of a liberty interest arises, because this is precisely the sort of conduct found to be constitutionally protected in *Lawrence*." The court observed a different result might obtain if the underlying statute at issue had concerned itself with the age of Menges' sexual partners given that both were minors.

Turning to the standard of review, Judge Christensen applied "heightened scrutiny" as mandated by the Ninth Circuit in a case implicating *Lawrence*; the court pointed out the standard of review applied by the Supreme Court in *Lawrence* itself is unclear. In the Ninth Circuit, this heightened scrutiny requires assessment of three factors: (1) whether an important government interest is at stake; (2) whether the government's intrusion into the lives of gay individuals significantly furthers that interest; and (3) whether intrusion is necessary to further that interest.

The court held that Montana's registration requirement purportedly

serves several important governmental interests, *e.g.* reducing recidivism among sexual offenders, prevention of victimization and prompt resolution of sexual or violent offenses, and protection of vulnerable groups and the public. The court found, however, that the government failed to carry its burden with factors (2) and (3) of the standard of review.

"As to the second factor," wrote the court, "none of the important government interests at stake in this matter are significantly furthered by forcing Menges to register as a sexual offender [. . .] [T]he conduct forming the basis of Menges' registration requirement is constitutionally protected by the substantive component of the Due Process Clause. The Court rejects any notion that engaging in consensual intimate sexual activity with a person of the same sex renders an individual a threat to the public or more likely to commit a sex crime. That is, Montana's important governmental interest in keeping track of sexual offenders is not substantially furthered by including Menges on that list."

As to the third and final factor, the court wrote in pertinent part "[i]n this case, Montana could advance its interests in protecting the public from sexual offenders without intruding on Menges' rights—simply and specifically, by not requiring him to register [. . .] Menges cannot fairly be characterized as the sort of 'sexual offender' Montana's registry is concerned with [. . .]"

Turning to the Equal Protection claim, the court was first required to identify the classifications drawn by the challenged statute and determine whether they are similarly situated, select and then apply the appropriate level of scrutiny.

In drawing the classification, the court looked to Idaho law. The classification and "control group" governing the Equal Protection claim was, on the one hand, "18-year old males convicted under Idaho's Crimes Against Nature statute in 1994 for engaging in oral or anal sex with a 16-year old male;" and, on the other hand, 18-year old males "convicted under Idaho's statutory rape provision in 1994 for engaging in vaginal sex with a 16-year-old female." The former group, the court observed, were required to register as sex offenders under Montana's registration requirement if they lived in Montana, while the latter group was not. Wrote the court, "[t]he only measurable difference is that the classification group engaged in oral or anal sex with a male and the control group engaged in vaginal sex with a female."

The court applied a rational basis standard of review, although not without reservations. "[T]he Ninth Circuit has been clear that when *Lawrence* is implicated, rational basis review is inappropriate." This was true, wrote the court, in Due Process Clause and Equal Protection Clauses alike and the conclusion was further supported by the fact that rational basis review is inappropriate when a statute implicates gender-based classifications. However, despite this, the court declared it " . . . need not resolve this issue, because [. . .] it finds that the classifications drawn by operation of Montana law in this case cannot survive even rational basis review."

The defendants argued the disparate treatment of the classification group and the control group was attributable to "'public health, safety, and welfare concerns' and to 'further the State's interest in administrative convenience.'" The court held "[n]either is rationally related to a legitimate state interest [. . .] To put it simply, Menges' 1994 Idaho conviction for engaging in anal or oral sex with another man in no way indicates he poses a threat to the public health, safety, or welfare."

Montana had argued the "presence of a 16-year old makes the difference[.]" The trouble with this argument, of course, was that Montana does not require anyone who engaged in sexual contact with a 16-year old female to register as a sexual offender. "In other words, if Montana's registration statutes, as applied to Menges, were actually worried about protecting minors, they would not let persons in the control group be free from the registration requirement."

The court found support for its conclusion in the Supreme Court's Equal Protection jurisprudence. Here, the court compared the "equal protection problem" in Menges' case to first, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942), which struck down an Oklahoma law on equal protection grounds that subjected persons committing larceny to sterilization while exempting those committing embezzlement; and, second, to *Eisenstadt v. Baird*, 405 U.S. 438, 453-55 (1979), which held there was an equal protection violation when a state forbids unmarried couples from obtaining contraception while permitting contraception for married couples. The court also looked to Louisiana and Kansas district court decisions finding equal protection violations for imposing harsher punishments or sex-offender registry requirements on gay individuals when no such punishment or registry requirement was imposed on heterosexuals for similar conduct.

The crux of Menges' privacy claim was simply that the Montana Constitution—which the court observed has one of the most stringent privacy protections in the country—protects his right to engage in the conduct that led to his conviction in Idaho and, therefore, the registration requirement is illegal as applied to him. The court engaged in a thorough review of several Montana decisions on the right to privacy, ultimately concluding that "[u]nder Montana's constitutional scheme, having consensual intimate sexual contact with a person of the same-sex does not render someone a public safety threat to the community. It does not increase the risk that our State's children or other vulnerable groups will be victimized, and law enforcement has no valid interest in keeping track of such persons whereabouts."

Having found Menges to enjoy success on the merits of all of his claims, the court finally turned to prongs two through five of the five-part rubric for granting an injunction. This portion of the decision is relatively short and the court found easily for Menges on all four elements.

Defendants had also urged Judge Christensen to impose a stay because Menges is plaintiff in a similar federal

lawsuit in Idaho. The trial court declined, broadly on the basis that the Idaho and Montana suits were substantially dissimilar and imposing such a stay on Menges's request to be purged from the Montana registry could "occasion serious injury on Menges while proceeding would not impact Defendants in any meaningful way."

However, defendants immediately filed a notice of appeal and, a few days after entry of judgment, the parties stipulated to a stay pending resolution of the appeal by the Ninth Circuit which the court permitted.

Judge Christensen was appointed to the federal bench by President Obama in 2011.

Menges was represented in his case by Elisabeth K. Ehret, Esq. of Missoula, Montana. ■

Matthew Goodwin is an associate at Brady Klein Weissman LLP in New York City, specializing in matrimonial and family law.

Federal District Judge Rules Private Prison Contractor Is Not State Actor and May Deny Gay Inmate Food Services Employment Based on Sexual Orientation

By William J. Rold

The decision is a small package, but it has large implications. Senior U.S. District Judge James S. Gwin ruled in *Upshur v. Coombs,* 2021 U.S. Dist. LEXIS 85772 (N.D. Ohio, May 5, 2021), that an Aramark Food Services supervisor did not act "under color of state law" when she denied gay *pro se* prisoner Rommel Upshur a job in the inmate-staffed kitchen.

Earlier, Judge Gwin *sua sponte* dismissed discrimination claims against Aramark, a private corporation under contract to provide food services at the prison where Upshur was incarcerated, because there were no allegations of a corporate custom or practice of discrimination. The case proceeded against supervisor Tammy Coombs, who moved to dismiss. Upshur did not file responsive papers.

Judge Gwin wrote that any Title VII claim was barred by failure to make an administrative complaint and obtain a "right to sue" letter. He does not address whether Title VII would apply to a prisoner job – or whether the EEOC would entertain such a complaint.

Most of the discussion relates to Equal Protection and § 1983, which requires "state action." Judge Gwin recognized that private vendors can act under color of state law under *West v. Atkins*, 487 U.S. 42, 47 (1988) (orthopedic surgeon under contract with state prison is state actor). He uses what he calls a "functional" test – saying that Aramark would act "under color of state law" in providing meals (since eating is an essential Eighth Amendment right), but not in hiring staff (since there is no inmate right to employment). He cites no authority directly on point, and this writer is not aware of any. In essence, Judge Gwin is adding an element to equal protection claims: that the discriminatory act itself must invoke some other constitutional violation for there to be state action.

The Sixth Circuit found a claim for denial of equal protection in a prison vendor's denial of services to an inmate because he was bisexual in *Lucas v. Chalk,* 2019 U.S. App. LEXIS 24561 (6th Cir., August 19, 2019). It cited *Davis v. Prison Health Servs.*, 679 F.3d 433, 438 (6th Cir. 2012), which Judge Gwin also cited here. But, the discriminatory claim is independent of any Eighth Amendment violation.

This is clear from *Davis,* which involved a denial of a work release job to a diabetic who was gay, not the withholding of needed medical services – and there is no constitutional right to work release. It was a personnel decision by a private medical vendor defendant – just like the personnel decision here, by a private food vendor supervisor.

Other cases cited by Judge Gwin also miss the mark. In *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019), the Supreme Court found a cable operator not to be a state actor, for purposes of First Amendment editorial issues, despite governmental regulation and licensing of its operations. *Neuens v. City of Columb*us, 303 F.3d 667, 670 (6th Cir. 2002), involved a cop who became engaged in a brawl while off duty, out-of-uniform, and without showing his badge. Similarly, *Lindsey v. Detroit Entertainment*, LLC, 484 F.3d 824, 827 (6th Cir. 2007), involved a private guard at a casino. *See also, Tahfs v. Proctor*, 316 F.3d 584, 591 (6th Cir. 2003) (no state action by private party who used state apparatus to obtain protective orders in domestic relations dispute).

Carl v. Muskegon County, 763 F.3d 592, 595-96 (6th Cir. 2014), also cited by Judge Gwin, is indistinguishable from the private orthopedist who was a state actor when seeing prisoner patients in *West,* except in *Carl* the doctor was a psychiatrist and she saw fewer patients. The priest who operated a charitable shelter in *Howell v. Father Maloney's Boys' Haven, Inc.,* 976 F.3d 750, 754 (6th Cir. 2020), was not a state actor. Judge Gwin seizes upon *dicta* in *Howell* to inject fear that charitable work in prisons will be chilled if any prison involvement "would portend" a public function.

A closer case to these facts is probably *Wolotsky v. Huhn,* 960 F.2d 133, 1333-35 (6th Cir. `992), which Judge Gwin does not mention. In *Wolotsky,* an employee sought to sue a private mental health agency for firing him, alleging state action because the agency did contractual work for the county. The court found no state action, in large part because the challenged actions "did not occur in a custodial setting."

Judge Gwin almost completely ignores the custodial setting here. He holds that the "symbiotic relationship" test for state action is "irrelevant," since "employing an inmate to work in a kitchen is discretionary and is not a power possessed by virtue of state law and made possible only because Aramark is clothed with the authority of state law." In fact, the opposite is true. Where else can Aramark get kitchen labor at a few cents an hour, subject to its total control, with actual discipline at the ready for any misbehavior? Prisoners are classic involuntary laborers who are under the "absolute dominion" of the state and the state's contractors who employ them. *Carl,* 763 F.3d at 597.

In a procedural posture where the alleged homophobic animus must be presumed, there is no excuse for finding employment discrimination under the Equal Protection Clause to be beyond the reach of the courts when conducted by prison contractors on prison grounds. One could easily substitute race or gender. Title VI (federal funding) may provide some safe harbor for such victims, but – since it does not include "sex," Title VI does not reach prisoners under *Bostock*. This case should not stand. ■

Invoking Sexual Orientation Discrimination As an Afterthought Results in Case Dismissal For Fired Gay Married Behavioral Health Nursing Director

By Wendy C. Bicovny

William Fry, a gay married man, sued his former employer, Ascension Health Ministry Services, d/b/a Columbia St. Mary's (Columbia), for discrimination based on sexual orientation in violation of Title VII. Columbia moved for summary judgment dismissing Fry's complaint. On May 3, 2021, U. S. District Judge Nancy Joseph granted Columbia's motion and dismissed Fry's complaint. *Fry v. Acension Health Ministry Servs.*, 2021 WL 173397 (E.D. Wisc.).

Fry was promoted to Director of Patient Services for Behavioral Health in 2011. As Director, Fry was responsible for inpatient and outpatient Behavioral Health services at Columbia. Fry selected Pamela Elgin to be the manager of Outpatient Behavioral Health and Susan Leuck to be the manager of Inpatient Behavioral Health. In February 2017, Katherine McEwen became Fry's direct supervisor. Fry disliked reporting to McEwen because he believed she performed poorly in her role. Fry requested that a new position be created in his department for him that would have Fry reporting to his then-subordinate, Elgin. The new position of clinical nurse was created, and Elgin hired Fry to fill it effective June 3, 2017.

The Joint Commission on Accreditation of Healthcare Organizations (Joint Commission) is an independent organization that accredits healthcare facilities throughout the country and conducts unannounced surveys of all facilities. A healthcare facility can lose its accreditation and funding if a Joint Commission survey identifies a serious threat to public or patient safety and it is not mitigated within 72 hours. The Joint Commission conducted an unannounced survey at Columbia beginning on May 2, 2017. During the survey, the Joint Commission asked Columbia to produce a report regarding safety events by 7:30 a.m. the next morning. The next morning, while Fry was working on the report, a surveyor identified a ligature risk (i.e., an item that can be used for self-strangulation) on an unattended medical cart in the Inpatient Behavioral Health Unit, and a staff member called Fry to come to the floor where the cart and surveyor were. The surveyor heard Fry's statement that he "can't be in two places at once" after being called about the cart and suggested to McEwen that it was demonstrative of the cultural problem he observed in Behavioral Health. The surveyor also told McEwen that certain problems he observed were due to the department's leadership, and the lead surveyor asked to meet privately with Kelly Elkins (the hospital's president) and McEwen to express concerns about how Fry was interacting with the surveyors. The Joint Commission issued an Immediate Threat to Life citation and determined that Columbia met the criteria of a preliminary denial of accreditation. The surveyor's comments regarding leadership in Behavioral Health and the preliminary survey findings they shared as the survey was in progress prompted discussion among McEwen, Elkins, and Human Resources representative Eric Andersen about Fry's leadership and engagement in the survey. Elkins was prepared to terminate Fry's employment, but McEwen suggested that instead the hospital accelerate by a few weeks Fry's transition to the clinical nursing position that he had created for himself. In its report, the Joint Commission specifically noted that a previously planned change in leadership was being

accelerated to be effective on the final day of the survey as a mitigation step being taken. Fry believed that McEwen was "scapegoating him" and "getting rid" of him to look good to the Joint Commission.

On Sunday, May 14, 2017, Elgin texted Fry and McEwen to inform them that she would not be at work the next morning. Fry inadvertently sent the following response to both Elgin and McEwen that stated " . . . I don't give a shit if any surveyor shows up tomorrow . . . " The next morning, McEwen emailed Andersen and Elkins explaining that there had been a new development showing that Fry's commitment to Behavioral Health was not where it needed to be, and quoted Fry's text message. That same morning Fry was fired. Fry testified that McEwen fired him "in a moment of pique" because he "insulted her." On May 16, 2017, Fry wrote a letter to McEwen, Elkins, and Eric Andersen appealing his termination. In his appeal, Fry admitted his text was inappropriate, but said he apologized to McEwen and could not see how any harm had been done to the hospital, McEwen, or Elkins. Fry expressed his belief that his "demotion" was to appease the Joint Commission and that his termination was prompted by his "inappropriate text," but never claimed that he had been discriminated against by anyone on any basis. Fry admitted that neither Travis Andersen nor Elkins were aware of his sexual orientation until after his employment ended. However, Fry believed McEwen terminated him because he insulted her in a text and could "get away with it" due, in part, to his sexual orientation. Fry asserted that he was unlawfully terminated by Columbia on the basis of his sexual orientation, in violation of Title VII. Columbia argued that it showed a legitimate, non-discriminatory reason for terminating his employment that had nothing to do with sexual orientation. Fry contended that the evidence demonstrates that he was meeting Columbia's legitimate expectations and relied on the fact that he worked for Columbia in various positions over approximately twelve years and "went above and beyond to be a model employee," had "spotless performance reviews" and was "well-respected by his peers, managers, and supervisors, and successfully completed eleven Joint Commission surveys during his professional career."

To the extent Fry relied on his job performance over his twelve years of employment with Ascension Health, for purposes of Title VII's question of whether an employee is meeting his employer's legitimate expectations, the relevant time period is at the time of the adverse employment action, Judge Joseph first noted. The Seventh Circuit clearly stated that if an employee previously had very positive job performance reviews, but his job responsibilities and supervision substantially changed in the intervening period, then the prior positive job performance was of little probative value in assessing the employee's current job performance because they are essentially different positions. Thus, if, as Fry claimed, McEwen had substantially altered his responsibilities during the 2017 Joint Commission survey, then his previous positive performances were irrelevant as to whether he met his employer's legitimate expectations at the time of his termination.

Fry argued that during the time immediately preceding the 2017 Joint Commission survey, he "spent six to nine months preparing many areas of clinical quality, documentation review, and safety review, and provided general advice to his team on how to excel during the survey." That may be the case, but it did not negate the fact that the Joint Commission identified multiple safety issues during the survey, issued an Immediate Threat to Life citation, and determined that Columbia met the criteria of a preliminary denial of accreditation and the surveyor articulated to Columbia, that certain problems he observed were due to Fry's leadership of the department. Yet, even after this disastrous survey, McEwen still suggested that Fry be allowed to transition to the clinical nursing position that Fry created for himself, albeit a few weeks early, instead of terminating his employment. It was only after Fry sent a text stating that he did not "give a shit if any surveyor shows up tomorrow" that finally solidified to Columbia that Fry was not taking the survey results seriously and terminated his employment. Given this evidence, no rational trier of fact could find that Fry was meeting his employer's legitimate expectations at the time of termination.

Importantly, it is worth noting that beyond the fact that Fry was not meeting his employer's legitimate expectations, he presented absolutely no evidence whatsoever that his termination had anything to do with his sexual orientation. It is undisputed that McEwen, Elkins, Travis Andersen, and Eric Andersen all participated in the decision to terminate Fry's employment. However, Fry acknowledges that two of the decision-makers—Elkins and Travis Andersen—were not even aware of his sexual orientation until after his employment ended. Fry only accuses McEwen of discriminatory animus; however, the evidence he presents to support that accusation consists of two instances of McEwen calling Fry's husband his "partner," a term Fry undisputedly used in the past to refer to his husband prior to their marriage. Fry also admitted that when he told McEwen that he would prefer it if she used the term "husband," she never used the term "partner" again. "On the record evidence before me," wrote the judge, "Fry's lawsuit borders on frivolous. Summary judgment is granted in favor of the defendant. And this case is dismissed." William Fry is represented by Nathaniel Cade, Jar, Cade Law Group LLC, Milwaukee, WI. ■

Wendy Bicovny is an ERISA and LGBT Rights Attorney in New York City.

Federal District Judge Orders Trial Against Warden and Private Health Care Vendor for HIV-Positive Plaintiff in West Virginia Jail Case; Horrific Conditions

By William J. Rold

In 2018, West Virginia put its county jails, which had consolidated into regions, under the aegis of the state Department of Corrections. The state contracts with Prime Care Medical of West Virginia, Inc. [PrimeCare], for its health care delivery. PrimeCare is one of several subsidiaries of Prime Care Medical, Inc., of Harrisburg, Pennsylvania, which has activities in multiple states.

A quick search of "Prime Care" and "Western Regional Jail and Correctional Facility" (involved in this case) shows nearly 200 cases, many before U.S. District Judge Robert C. Chambers, who denied summary judgment to Kim Wolfe, the jail's superintendent, in *Hammonds v. Wolfe,* 2021 U.S. Dist. LEXIS 86167 (S.D. W. Va., May 5, 2021). PrimeCare and its employee defendants did not move for summary judgment.

Ronnie Lee Hammonds has many serious medical problems. He is HIV-positive, and his virus has been unevenly controlled, resulting in an AIDS diagnosis at times. He also has a genetic heart condition, requiring a pacemaker; infective endocarditis; deep vein thrombosis; pulmonary embolism; seizure disorder; Hepatitis C; Methicillin-Resistant Staphylococcus Aureus ("MRSA"); and anxiety and depression. PrimeCare classified him as a "Special Needs Patient."

During the litigation, Hammonds was transferred from the jail, mooting his injunctive claims. He dropped Wolfe's successor and the jail as defendants – presumably on mootness grounds (as to an injunction) and on sovereign immunity grounds (once only damages remained in the case, and the jail became a state agency). [Note: Of interest to lawyers, at one point the jail cross-claimed against PrimeCare, but this was dropped when the jail was dismissed. Hammonds also dropped his claim of intentional infliction of emotional distress against Wolfe. It is unclear why this was done – his brief says without elaboration that it was "voluntary." Wolfe had argued in summary judgment that Hammond failed to raise a jury question on the specific intent required for this West Virginia tort. It is unclear if the IIED claim remains against the PrimeCare defendants.]

Hammonds was held in the jail for two months in 2017. He claims that PrimeCare failed to provide needed heart medication, resulting in several episodes of tachycardia (abnormally fast heart rate). During his fourth episode, he had what Judge Chambers calls a "verbal altercation" with PrimeCare employees, resulting in Hammonds' making a comment about "staying in his cell and dying the next time." PrimeCare promptly responded by placing Hammonds on "suicide watch."

This resulted in Hammonds' placement in "Pod-A-5" – a notorious multi-tiered unit where suicidal patients were mixed with other mentally ill inmates, as well as those under disciplinary segregation. The stripped cells, designed for one inmate, were concrete, with only a single raised slab for sleeping. Nevertheless, the jail placed three inmates in these cells, which resulted in two inmates sleeping on the concrete floor. It gets much worse.

Some of the mentally ill and out-of-control inmates threw feces, urine, and blood. They also caused their toilets to overflow and their plumbing to leak. Those on the upper tier caused flooding that leaked down to the lower tier where Hammond was confined. For days, he was required to "sleep" in standing water fouled by excrement and blood, clad only in a smock, which became saturated. The unheated cell was moldy and infested with insects and vermin. Inmates in "Pod-A-5" were not allowed cleaning supplies or rags to mitigate the filth.

Hammonds was denied medical treatment during his "suicide watch." Hammonds was bitten, and the wound became infected. He was given a single dose of antibiotics, which conflicted with his MRSA, without necessary follow-up. Eventually he was hospitalized. He was found to have sepsis (systemic infection, very dangerous to immune compromised patients). He required two surgeries. He has permanent disability to his leg from the wound.

It is apparent to this writer that Hammonds, already medically fragile, has a constitutional claim for his placement in these conditions. *See Taylor v. Riojas*, 141 S. Ct. 52, 54 (Nov. 2, 2020) (*per curiam*) (summarily reversing Fifth Circuit's decision granting qualified immunity where inmate was confined in shockingly unsanitary conditions with "'massive amounts' of feces" and a "frigidly cold cell" in which the plaintiff was without a bed and slept naked in sewage). It also seems clear that a jury question is presented on whether PrimeCare set all of this in motion – including the confinement in horrific conditions without medical support – because Hammonds complained too aggressively about his heart treatment.

Only the superintendent (Wolfe) had the audacity to try to get summary judgment – PrimeCare did not. Wolfe failed. There is enough here to satisfy both the serious risk and the deliberate indifference to that risk because the conditions were obvious to even a lay warden. It is not credible for the warden to try to deny knowing about the existence of these "noxious" conditions in an entire pod of his jail that mixed suicidal, out-of-control mentally ill, and punitive segregation inmates in a virtual cesspool.

There is a circuit split on whether the subjective intent element of deliberate indifference to serious medical needs applies to detainees like Hammond – or

if, under *Kingsley v. Hendrickson*, 576 U.S. 389, 396-7 (2015), an objective test applies a "reasonable" person standard to jail administrators. The Fourth Circuit has not decided. *Mays v. Sprinkle*, 992 F.3d 295 (4th Cir. 2021).

Judge Chambers rules that he need not decide here, either. There is a jury question under the subjective test based on the obviousness of the conditions under *Farmer v. Brennan,* 511 U.S. 825, 828 (1994). A jury question on subjective standards necessarily satisfies any "objective" test that would be applied under *Kingsley*. The same applies to qualified immunity, since *Brennan* and its progeny were clearly established when these events happened. *See Makdessi v. Fields*, 789 F.3d 126, 129 (4th Cir. 2015) ("Prison officials may not simply bury their heads in the sand and thereby skirt liability"). "Plaintiff argues his evidence shows there was widespread knowledge of the problems at the facility and, if Defendant Wolfe did not know about the conditions, it only could be explained by willful ignorance on his part," writes the judge.

Wolfe argues, finally, that any physical injuries to Hammond were not caused by him. Judge Chambers reserves ruling on this question. Presumably, it will be addressed at trial. Hammonds is ably represented by Mountain State Justice (Morgantown) and Stoebel & Johnson (Charleston). ■

Utah Supreme Court Establishes Rule That Transgender Individuals Can Change Their Sex on Their Birth Certificates, While the Dissent Resorts to "Biological Sex" Argument

By David Escoto

On May 6, 2021, the Supreme Court of Utah, in a 4-1 decision, announced the standard by which courts are to review petitions for sex-change on birth certificates in the future. The decision makes clear that transgender individuals in Utah can amend their birth certificates and other documents to reflect their gender identity. However, the decision presents quite a conversation between the majority and the dissent. The majority provides a scathing rebuke of the dissent, especially when the dissent attempts to rely on the "biological sex" argument to deny transgender individuals the ability to amend their sex on their birth certificate. *In re Sex Change of Childers-Gray*, 2021 UT 13; 2021 Utah LEXIS 40, 2021 WL 1804322 (Utah, May 6, 2021). Even though this is a win for transgender individuals in Utah, the decision notes that the state legislature could come in and override the standard announced in the decision.

Sean Childers-Gray is a transgender man who identifies as male and holds himself out as male to his friends, family, and the public. Childers-Gray was diagnosed with gender identity disorder and received hormone therapy to change his physical appearance to reflect how he self-identifies. When he petitioned to change his name and sex on his birth certificate, Childer-Gray had been undergoing hormone treatment for three years.

Angie Rice is a transgender woman living in Utah. Rice identifies as female and holds herself out as female in all aspects of her life. Rice was diagnosed with gender dysphoria and sought out hormone therapy. Similar to Childers-Gray, she filed a petition to change her name and sex on her birth certificate. At the time that she filed the petition, Rice had been undergoing hormone therapy for five years.

Both Childers-Gray and Rice filed their petitions with the district court. They complied with the Utah statute that governed name-change petitions because Utah does not have a statute that governs sex-change petitions. Both petitions gave reasons for their requests and included documentation from their doctors that they were "receiving appropriate clinical treatment for gender transition." They also indicated they were not listed on any sex offender registry or involved in any proceeding to give the indicia of seeking these changes for a fraudulent purpose. Rice also included documentation of emotional distress she endures because her documentation does not reflect how she holds herself out in her life.

District Judge Noel S. Hyde granted both name-change petitions but denied the sex-change petitions. First, the court noted that no Utah statute set forth a standard or procedure in which they could consider the sex-change petition. The court concluded that absent a statute from the Utah legislature, the sex-change petition was a nonjusticiable political question. Second, Judge Hyde concluded that in applying the name-change standard, the petition should be denied because it affects third parties' legal rights and duties. The district court provided several hypotheticals of situations in which a sex change could affect the duties of individuals and entities the petitioners interact with. Childers-Gray and Rice appealed the district court's orders to the Utah Supreme Court.

Writing for the majority, Justice Constandinos Himonas found the court had jurisdiction to hear this case, even though this was a non-adversarial

proceeding typically not heard by the judiciary. Justice Himonas noted that the framers of the Utah constitution intended to grant the judiciary substantive power to adjudicate name-change petitions. Utah courts have historically been able to adjudicate name-change petitions because they involve changes to legal status or identification. Then, reasoning by analogy, Justice Himonas examined whether a petition for a sex change is within the ambit contemplated by the framers of the Utah constitution. He concluded that sex-change petitions resemble name-change petitions and should fall within the category of "changes to legal status or identification," allowing state courts to adjudicate them.

Justice Himonas then looked to the plain language of the Utah statute to determine that the court had common law authority to adjudicate sex-change petitions. The Utah statute states that when a person born in Utah has a name change or sex change approved by order of a Utah district court, or other court in a competent jurisdiction, they can file such order with the state registrar with an application to change their birth certificate.

Justice Himonas made several observations of how the text of the statute is written. First and foremost, the way the statute is written does not give the court a new power but rather presupposes that the court has preexisting jurisdiction to hear a sex-change petition. Further, the legislature chose to address both name and sex-change petitions together. Justice Himonas pointed out that the original 1975 iteration of the statute also addressed them together.

Name change petitions in Utah are historically supported by common law authority to adjudicate them. Even though no standard has been set by the legislature or courts until now to address sex-change petitions, Justice Himonas reasoned that reading the two types of petitions together, a common law authority to adjudicate both exists and was contemplated by the drafters of the statute. Justice Himonas also noted many other areas, like marital status and declaratory judgments, that apply common law principles to give statutory tests meaning. Despite sex changes not having a common law standard to rely upon, Justice Himonas argued that this did not preclude the court from establishing one, and if the legislature disagreed, they could enact a statute to address sex-change petitions.

Having never articulated a test for sex-change petitions, Justice Himonas articulated one here, borrowing from how Utah common law adjudicates name-change petitions. As a general rule, sex-change petitions should be granted "if (1) they are not sought for a wrongful or fraudulent purpose and (2) they are supported by objective evidence of a sex change, which includes, at minimum, evidence of appropriate clinical care or treatment for gender transitioning or change by a licensed medical professional."

Applying this test to Childers-Gray and Rice, Justice Himonas determined that they satisfied both prongs of the test and that the district court's decision to deny their petitions was based on the legal mistake that the standard of review needed to be set by the legislature. Justice Himonas disavowed the district court's engagement in a "slippery slope" analysis of hypotheticals with no factual basis to avoid adhering to the plain language of the statute. Therefore, Justice Himonas concluded that the sex-change petitions should be granted.

Undoubtedly, this decision by Justice Himonas should be lauded because it allows transgender individuals a sense of relief that there are clear guidelines to follow when they seek to have their official documents accurately reflect their gender expression. However, the dissent by Associate Chief Justice Thomas Lee seems less of a dog whistle and more of a foghorn to transphobic Utah state legislators.

Much of Justice Lee's dissent is spent discussing how the decision will have lasting implications on third-party interests to which Lee claims that Justice Himonas did not properly give weight. In his discussion, Justice Lee repeats many of the talking points used to rationalize discriminating against transgender individuals. For example, Justice Lee talks about how the majority decision will affect spaces that are traditionally reserved for "biological girls and women," such as sports leagues, locker rooms, and domestic abuse shelters.

One of Justice Lee's biggest critiques of the majority decision is that the term "sex" in relation to "sex-change" should refer only to biological sex. Lee contended that granting these sex-change petitions would transform the sex designation on a birth certificate, which is based on biology, into a designation based on gender identity. To support this contention, Justice Lee relies on definitions of sex from 1975 that focus on biological identifiers such as genitalia observed at birth and chromosomes.

Justice Himonas pointed out that Justice Lee's position is nonsensical. First, Justice Himonas noted that Justice Lee's conception of biological sex still can include the adopted sex of transgender individuals. For example, genitalia could be observed at birth, but other secondary sex characteristics develop later in life that could be altered by hormone therapy. This means that according to Justice Lee's use of "biological sex," transgender individuals would still fall within his definition.

Further, Justice Himonas noted that Justice Lee wanting to use chromosomal indicators to define biological sex also makes no sense. Justice Himonas contended that there is no way that the drafters of the statute contemplated considering chromosomal indicators because a birth attendant never uses those types of determinations to determine sex when someone is born.

There should be some feeling of ease after this decision but, given the political composition of the Utah state legislature, we should watch what happens next with bated breath. As noted by Justice Himonas, the state legislature could step in and supersede the test announced with this decision.

Sean Childers-Gray and Angie Rice are represented by Christopher Wharton and Eric Kyler O'Brien of Wharton O'Brien, PLLC in Salt Lake City, Utah, Bethany M. Jennings, an Assistant Librarian and Adjunct Assistant Professor at the University of Utah, S.J. Quinney College of Law, and Troy L. Booher, Beth E. Kennedy, and Alexandra Mareschal of Zimmerman Booher in Salt Lake City, Utah. ■

David Escoto is a law student at New York Law School (class of 2021).

Pro Se Immigration Detainee Wins *Habeas* Relief on Prolonged Detention without Hearing

By William J. Rold

ICE detainee Elvis Jose Rosales Rosales is a citizen of Costa Rica, but a lawful permanent resident of the United States. His husband of five years is an American citizen. Rosales has been in detention for fourteen months. In *Rosales v. Searls*, 2021 WL 1966774 (W.D.N.Y., May 17, 2021), U.S. District Judge Lawrence J. Vilardo ordered Rosales' release unless: (1) he is given a hearing within thirty days; and (2) the hearing officer finds by clear and convincing evidence that Rosales' "continued detention is necessary to serve a compelling regulatory purpose, such as minimizing risk of flight or danger to the community [, and that no] less-restrictive alternative to detention would also address the government's interests."

Rosales was convicted of assisting aliens entering the United States from Canada, but he has served his sentence for that. He remains in custody because the Department of Homeland Security wants to deport him to Costa Rica for conviction of an "aggravated felony relating to alien smuggling," under 8 U.S.C. §§ 1101(a)(43)(N) and 1227(a)(2)(A)(iii). He lost his hearing before an Immigration Judge, and his case remains on appeal to the Board of Immigration Appeals.

Rosales tried to rely on the Supreme Court's decision in *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001, holding that six months is a benchmark beyond which holding a detainee with a final order of deportation per 8 U.S.C. § 1231 raises due process concerns. Here, Rosales does not have a final order of deportation, and his confinement is "pending" such final determination under 8 U.S.C. § 1226(c). As such, *Zadvydas* does not apply. *See Hechavarria v. Sessions*, 891 F. 3d 49, 57 (2nd Cir. 2018) (§ 1226 governs the "removal period" for "the detention of immigrants who are not immediately deportable").

Rosales' detention of fourteen months does not itself implicate substantive due process. The Second Circuit has approved longer detention against substantive due process challenges. *Sanusi v. I.N.S.*, 100 F. Aplp'x 49, 51 (2nd Cir. 2004) (six-year detention).

Procedural due process is another matter. These safeguards are "not offended" by a "brief period necessary for . . . removal proceedings." *Demore v. Kim*, 538 U.S. 510, 521, *citing Matthews v. Diaz*, 426 U.S. 67, 79-80 (1976). "[A] lawful permanent resident . . . could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention bec[omes] unreasonable or unjustified." Id. at 532 (Kennedy, J. concurring); see also, *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) ("the constitutional sufficiency of procedures provided in any situation, of course, varies with the circumstances").

In the mix of "what process is due," Judge Vilardo considers: "(1) the total length of detention to date; (2) the conditions of detention; (3) delays in the removal proceedings caused by the parties; and (4) the likelihood that the removal proceedings will result in a final order of removal." He relies generally on the procedural protections of *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976); *see also Wolff v. McDonnell*, 418 U.S. 539, 557-8 (1974) ("some kind of hearing" incident to prisoner discipline).

Rosales has ties to the community, and his husband lives in Buffalo. "Rosales's husband lives not in Costa Rica, where the government wishes to send him, but in the United States, where Rosales has lived for the last six years." Rosales is subject to 18/hour/day confinement and "faces ridicule and harassment because of his sexual orientation."

Courts have found confinement pending removal proceedings "even shorter than a year" to implicate procedural due process. *See Muse v. Sessions*, 2018 WL 4466052, at *4 (D. Minn. Sept. 18, 2018) (collecting cases). The Supreme Court upheld the constitutionality of § 1226 with the understanding that such detention would persist for a "very limited time." *Demore*, 538 U.S. at 529 & n.12. Judge Villardo notes that "Rosales's fourteen-month detention is more than triple the four-month average cited in *Demore* . . . . Rosales's detention therefore supports his argument that his detention without an individualized bond hearing has been unreasonably prolonged." [Note: lengthy annotated string citations omitted.]

Judge Vilardo finds that the first three factors tilt in Rosales' favor. On the last consideration (likelihood of a removal order being issued), Judge Vilardo declines to weigh in, because the matter is before the Board of Immigration Appeals.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333. "Here, that analysis leads to the conclusion that Rosales's continued detention without an individualized hearing, at which the government must justify his continued detention by clear and convincing evidence, fails to 'comport with the fundamental fairness demanded by the Due Process Clause.'" *Schall v. Martin*, 467 U.S. 253, 263 (1984) (internal quotations omitted).

"The private interest here is not liberty in the abstract, but liberty in the *United States*," *Parra v. Perryman*, 172 F. 3d 954, 958 (7th Cir. 1999). "Rosales has not conceded his deportability, and the resolution of that issue remains pending before the BIA. In fact, his interest in liberty in the United States must indeed be strong for him to subject himself to unreasonably-

prolonged detention while contesting his deportability. *Fremont v. Barr*, 2019 WL 1471006, at *6 n. 7 (W.D.N.Y. Apr. 3, 2019). If Rosales "chose not to challenge his removal, he would 'lose the right to rejoin [his] immediate family, a right that ranks high among the interests of the individual.'" Landon, 459 U.S. at 34.

Rosales's interest in his freedom pending the conclusion of his removal proceedings deserves great "weight and gravity." *Addington v. Texas*, 441 U.S. 418, 427 (1979). Rosales has an obvious interest in his "[f]reedom from imprisonment — from government custody, detention, or other forms of physical restraint," as the plaintiff did in *Zadvydas*, 533 U.S. at 690.

Judge Vilardo also recognizes the Government's interest in administering the immigration laws and assuring that people return for hearings. These interests are not incompatible with the right to a hearing – and they can be addressed there.

"The hearing to which Rosales is entitled is a 'full-blown adversary hearing,' to convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person," *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992), *quoting U.S. v. Salerno*, 481 U.S. 739, 751 (1987), or ensure that the noncitizen will appear for any future proceeding. This requires consideration of less-restrictive alternatives to detention. *Id.*; *cf., U.S. v. Playboy Entm't Grp, Inc.*, 529 U.S. 803, 816 (2000) ("When a plausible, less restrictive alternative is offered" to a regulation burdening a constitutional right, "it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals."). This is the "minimum" necessary for fundamental fairness, citing *Addington*, 441 U.S. at 432-33; *see also Santosky v. Kramer*, 455 U.S. 745, 756 (1982).

Rosales' continued detention violates the Due Process Clause, and he is entitled to a writ of *habeas corpus*. It is wonderful to see so many golden oldies dusted off. And in a *pro se* case! ■

Zero for Five in Prisoner Compassionate Release Cases

By William J. Rold

Here are five cases in which prisoners failed in petitions for compassionate release from federal custody in this month's reporting. One of them, in Ohio, did not involve COVID. Rather, a transgender inmate tried to use compassionate release under the First Step Act to present a protection from harm claim that justified her release. In the other four, only a New York decision wrote at any length on COVID risks (ultimately denying relief to a prisoner who had contracted COVID). The other cases, from Louisiana and Puerto Rico, did not find justification either medically or by Bureau of Prison [BOP] risk. Finally, the Third Circuit affirmed denial so perfunctorily that it dispensed with requiring the Government to file a brief.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT – This *per curiam* affirmance of a denial of compassionate release says it is not for "precedent," but it sends a message: "we don't want to be bothered." In *United States v. Coleman*, 2021 U.S. App. LEXIS 15356, 2021 WL 2069960 (3d Cir., May 24, 2021), 3rd Circuit Judges Theodore A. McKee (Clinton), Joseph A. Greenaway, Jr. (Clinton), and Stephanos Bibas (Trump) granted the Government's motion for "summary affirmance" and to "be relieved of its obligation to file a brief." *Pro se* prisoner Nathaniel Coleman is serving 155 months for robbery and firearms offenses. The opinion does not say how much time he has served or how old he is, but the criminal docket on his case is dated 2012. U.S. District Judge Gene E. K. Pratter (E.D. Pa.) denied Coleman's petition for compassionate release due to fears of COVID and of cancer. Coleman claimed likelihood of contracting COVID due to a "weak heart, asthma, hypertension and HIV." The court found no evidence to support Coleman's fear of cancer or allegation of a "weak heart." The district judge's finding that Coleman's asthma, hypertension, and HIV were well-controlled were not an "abuse of discretion." This standard of review apparently replaces the usual "clearly erroneous" standard of review of factual finding on compassionate release cases per *United States v. Pawlowski*, 967 F.3d 327, 329-30 (3d Cir. 2020). Without a sufficient medical condition to support compassionate release, Coleman's efforts at rehabilitation are irrelevant to compassionate release.

LOUISIANA – U.S. District Judge Jane Triche Milazzo denies compassionate release to Michael Leveridge in *United States v. Leveridge*, 2021 WL 1925571 (E.D. La., May 13, 2021). He served 27 of 84 months for distribution of methamphetamine. He has HIV and asthma. Leveridge has had COVID-19 and he recovered, and he has received both doses of the Pfizer vaccine. Judge Milazzo notes a dispute about what compassionate release standards apply after the First Step Act, noting the Fifth Circuit's last word pre-dated the Act in *United States v. Garcia*, 606 F.3d 209, 212 (5th Cir. 2010). This is incorrect (but barely), since the Fifth Circuit reversed a district court judge who similarly limited its discretion in *United States v. Shkambi*, 2021 WL 1291609 (5th Cir., Apr. 7, 2021). The error is probably harmless, because the broadened discretion under the First Step Act and the Sentencing Commission's failure to engage in rule-making would allow for the same result here – and Judge Milazzo says as much. Leveridge's HIV and asthma are controlled. The Government opposed his release. [Note: The Government argued that Leveridge referred only to his asthma

when asking the warden for release and should not be able to "add" HIV to his court petition. Judge Milazzo does not adopt a "name all ailments" standard of exhaustion – she simply finds no medical basis for compassionate release.] The decision relies heavily on the fact that Leveridge has had COVID and is vaccinated, citing *United States v. Perdigao*, 2020 WL 1672322, at *2 (E.D. La., Apr. 2, 2020) (marshalling cases), and thus presumably enjoys immunity from reinfection in prison.

NEW YORK – *United States v. Darling*, 2021 U.S. Dist. LEXIS 98006; 2021 WL 2070146 (S.D.N.Y., May 24, 2021). Darling, now 52 years old, was sentenced to 200 months for conviction of firearms charges and violation of the Hobbs Act (robbery or extortion affecting interstate commerce). He contracted COVID "due to the BOP's negligence" while at FCI Bennettsville (South Carolina). He has a § 2255 motion pending (federal *habeas corpus*). He asks for "home detention" while the § 2255 motion is pending, which U.S. District Judge Paul A. Crotty construes as a petition for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i). In the Second Circuit, "[d]istrict courts are free to consider the full slate of extraordinary and compelling reasons that an imprisoned person might bring before them in motions for compassionate release." *United States v. Brooker*, 976 F.3d 228, 237 (2d Cir. 2020). The only constraint is that courts may not consider rehabilitation alone to be an extraordinary and compelling reason. Id. at 237-38. Judge Crotty finds that Darling has "recovered" from "measurable" effects of COVID, with inadequate evidence of risk of recurrence, citing *United States v. Lewis*, 2021 U.S. Dist. LEXIS 88702, 2021 WL 1873154, at *1 (S.D.N.Y. May 10, 2021) ("Reinfection, while not impossible, is rare, according to the CDC.") "Darling has no underlying health conditions that put him at an increased risk of harm from his COVID-19 infection . . . . [H]e has not shown a risk of harm from COVID-19 that is specific to him as opposed to all African-Americans and all people in their 50's." Darling has not shown why "his fears about the long-term effects of his infection" would be lessened if he were at home in Staten Island. [Really?] Even if Darling met the standard for compassionate release, Judge Crotty finds the discretionary factor, particularly deterrence, would tip against his release under 18 U.S.C. § 3553. While Darling has been in prison for eleven years, he has not used that time "to demonstrably rehabilitate himself or improve the situation of his fellow prisoners." Judge Crotty also does not want to create a "disparity" between Darling and his co-defendants. Judge Crotty denied Darling's § 2255 motion on the same day (except to correct a scrivener's error.) He denied compassionate release without prejudice to its renewal should Darling's health or conditions at his detention facility materially change. Darling is represented by the Federal Defender (New York City).

OHIO – Transgender prisoner Darnell Nash does not rely on COVID risks in attempting compassionate release in *United States v. Nash*, 2021 U.S. Dist. LEXIS 98394 (N.D. Ohio, May 25, 2021). Instead, she relies on the First Step Act, 18 U.S.C. § 3582(c)(1)(A), and the alleged inability to protect her from harm in federal institutions. She 37 years old, serving 175 months for convictions arising from "sophisticated" conspiracy involving wire and mail fraud, identity theft, and fraud of some fifty welfare recipient victims in multiple states amounting to hundreds of thousands of dollars. Senior U.S. District Judge Donald C. Nugent was the sentencing judge in 2014 and had the petition for compassionate release now. With about two-years credit for time served awaiting trial, Nash may have by now served about half her sentence. She is still transitioning, having had some surgery but still living in a men's prison, the Federal Penitentiary in Yazoo City, Michigan. "Because her reassignment is not complete, she has some female features but also retains some biologically male features." Many of the submissions are under seal, but it seems undisputed that she has been a frequent victim of assault from other inmates and from staff. "[A] guard was involved in one of the most egregious assaults against her. That guard has since been convicted and is awaiting sentencing." She has gender dysphoria and PTSD. The problem is that Judge Nugent considered all of this in the context of her travails in jail prior to sentencing. His decision to deny a downward departure from sentencing guidelines at the time was affirmed by the 6th Circuit. While the Sixth Circuit rules permit the judge to reconsider under the First Step Act – see *United States v. Jones*, 980 F.3d 1098, 1107 (6th Cir., 2020) – he finds no reason to do so, given that Nash present no new mental or physical health problems and BOP has taken steps to try to protect her through segregation and transfer. He writes: "She feels that these measures are punitive rather than protective, but they are both means by which the BOP attempts to ensure the safety of inmates with special security issues." He further observes: "There is no dispute that Ms. Nash's life has been negatively affected by the combination of her incarceration, her gender dysphoria, the state of her gender reassignment process, and other mental health issues. Unfortunately, however, this does not make her case so exceptional in the context of prison life that it compels a reduction in her sentence . . . . Compassionate Release is not the appropriate means by which to address any alleged failure in the BOP's execution of its GID policy." Nash is represented by the Federal Defender (Cleveland). The Transgender Law Center also filed a Letter in support.

PUERTO RICO – This is the first compassionate release case this

writer has seen involving a defendant sentenced to life imprisonment. Life was just one of multiple sentences involved in a car-jacking/firearms case in the 1990's. Defendant Antonio Cruz-Arboleda is incarcerated at the Federal Penitentiary in Terre Haute, Indiana. U.S. District Judge Silvia Carreño-Coll denied his petition without prejudice in *United States v. Antonio Cruz-Arboleda*, 2021 U.S. Dist. LEXIS 92711 (D.P.R., May 14, 2021). Cruz-Arboleda has HIV and asthma. Judge Carreño-Coll finds that thirty days had not elapsed between Cruz-Arboleda's request of the warden and his filing of an action in federal court. He is thus time-barred. Judge Carreño-Coll proceeds to the merits anyway, assuming arguendo that Cruz-Arboleda had exhausted. The defendant failed to include any medical records in support of his petition. The court looks at the Government's submission and concludes that the ailments are under control. Judge Carreño-Coll proceeds to discuss them in some detail, including diagnoses and medications. Nevertheless, they are sealed and unavailable on PACER. Judge Carreño-Coll then discusses COVID-19 conditions at Terre Haute (submissions also sealed), noting that there are zero inmates and zero staff listed as positive on the Bureau of Prison's website and writing: "[I]t appears that the spread of COVID-19 at the aforementioned penitentiary is currently under control." The court does not mention the six inmates who have died of COVID at Terre Haute – or the 1,105 who have "recovered" (of a population of 1,182) – or the 146 staff who have "recovered." In reviewing an appeal of denial of compassionate release to one of Cruz-Arboleda's co-defendants, the 1st Circuit affirmed, noting that it need not decide in that appeal what discretion, if any, district courts in the 1st Circuit have to depart from the Guidelines of the Sentencing Commission in light of its failure to amend the Guidelines to conform to the First Step Act. *United States v. Diaz-Pabon*, No. 20-1472 (1st Cir., May 3, 2021). ■

CIVIL LITIGATION *notes*

CIVIL LITIGATION NOTES

By Wendy Bicovny and Arthur S. Leonard

Wendy Bicovny is an ERISA and LGBT Rights Attorney in New York City. Arthur S. Leonard is the Robert F. Wagner Professor of Labor and Employment Law at New York Law School.

U.S. COURT OF APPEALS, 2ND CIRCUIT – A 2nd Circuit panel denied a petition for review of the Board of Immigration Appeals (BIA) decision denying the Petitioner, an HIV positive, transgender native and citizen of Cameroon, either asylum, withholding of removal, or protection under the Convention against Torture (CAT). *Mbendeke v. Garland*, 2021 WL 2026082, 2021 U.S. App. LEXIS 15134 (May 21, 2021). The panel first noted that a person who has been convicted of a "particularly serious crime" was ineligible for asylum or withholding of removal. The panel initially found the BIA did not abuse its discretion in finding that the individual facts and circumstances of Petitioner's conspiracy offense rendered it a particularly serious crime. BIA properly considered (1) the scope of the conspiracy, which included at least eight fraudulent marriages and four fraudulent visa petitions over the course of three years and involved fraudulent efforts to obtain benefits for people who were not family members; (2) Petitioner's leadership role in the scheme; (3) her cooperation and sentence; and (4) the potential risk the offense posed to national security by undermining immigration procedures. Next, the panel stated that even though a particularly serious crime is not a bar to deferral of removal under the CAT, Petitioner failed to qualify for relief. First, Petitioner asserted that the agency mischaracterized the testimony of her expert witness, when the Immigration Judge (IJ) stated that the expert witness testified that "it was not more likely than not that respondent would be tortured if returned to Cameroon." The panel detected no error here because the IJ did not purport to quote the expert witness in drawing this conclusion from the testimony, and substantial evidence supported the conclusion itself. Petitioner, who now identifies as transgender, asserted throughout her application that she would be subject to torture in Cameroon on account of her status as a gay and HIV-positive man. Given the absence of any specific threats against Petitioner, her petition relied on population-level risks. In particular, the expert witness testified that over the prior seven or eight years, 35 to 45 individuals had been "detained and arrested" for being homosexual in Cameroon. When asked whether it was more likely than not that Petitioner would be tortured if removed to Cameroon, the expert witness refused to answer "yes" and instead asserted that there was "a likelihood, a strong likelihood" of torture. When pressed further on the question, she responded, "I cannot say with certainty, no." A reasonable adjudicator could glean from this reticence on the part of Petitioner's expert that the chance of Petitioner being tortured in Cameroon—while non-trivial—was not more likely than not. Second, Petitioner asserted that BIA failed to take account of several facts suggesting individualized risks of torture by her family and community. But BIA considered these facts and simply found that Petitioner had not overcome her evidentiary burden. For example, the IJ acknowledged that Petitioner had been tortured by her (now-deceased) stepfather as an adolescent when he tied her up and poured boiling water on her, but reasonably concluded that this did not show a risk of future torture because these events occurred when Petitioner was young, and she is now an adult. Petitioner did not meet her burden of showing that possibility was a probability, given the IJ's finding that she had "four or five homosexual relationships while living in Cameroon, and [her] wife and pastor were aware of them at the time, but [she] was never arrested, detained, or otherwise harmed for [those] relationships." Likewise, Petitioner pointed to allegedly coercive efforts to change her sexual orientation through conversion therapy as evidence that the IJ incorrectly stated that she "lived unharmed in Cameroon" from 1994 to 2012, but she did not argue that conversion therapy rose to the level of torture. Finally, contrary to Petitioner's argument, the BIA acknowledged that her status as an "outed" homosexual increased her individual risk of being tortured. Although she had been outed, the BIA concluded that "the possibility of the respondent facing harm that rises to the level of torture is still speculative." As the Petitioner failed to offer evidence showing that torture of homosexuals is widespread in Cameroon, substantial evidence supported the conclusion that Petitioner's elevated risk of torture did not rise to the level sufficient to confer Convention Against Torture relief. Petitioner is represented by Britt R. Devaney, Katten Muchin Rosenman LLP, Chicago, IL (Peter G. Wilson, Katten Muchin Rosenman LLP; Charles Roth, Tania Linares Garcia, National Immigrant Justice Center, Chicago, IL, on the brief). – *Wendy C. Bicovny*

U.S. COURT OF APPEALS, 2ND CIRCUIT – A 2nd Circuit panel denied a petition for review of the Board of Immigration Appeals (BIA) decision denying the Petitioner, an HIV positive, gay native and citizen of Haiti, either withholding of removal, or protection under the Convention against Torture (CAT). *Pamphile v. Garland*, 2021 WL 1904352, 2021 U.S. App. LEXIS 13981 (May 12, 2021). There were two issues before the panel, 1) Withholding of Removal and 2) Deferral of Removal under CAT. First, the panel found no error in BIA's conclusion that Petitioner

was ineligible for withholding of removal. An applicant is ineligible for withholding of removal if he has been convicted of a "particularly serious crime." The Immigration Judge (IJ) applied the proper factors and reasonably determined that Petitioner's conviction for attempted assault in the first degree in violation of New York law was particularly serious under the circumstances. Petitioner pleaded guilty to attempted assault under this provision, which requires "intent to cause serious physical injury" and causing such injury "by means of a deadly weapon or dangerous instrument," for which he received a 42-month sentence of imprisonment. To the extent that Petitioner argued the agency should have placed greater weight on an assessment that he posed a low risk of violence and suffers from post-traumatic stress disorder, the weight afforded to the evidence was within the agency's discretion, the panel pointed out. There was also no evidence in the record, contrary to Petitioner's assertion, that the IJ improperly considered Petitioner's history of anger management treatment in determining that Petitioner had committed a "particularly serious crime." For these reasons, the panel found no error and affirmed the decision of the BIA to deny Petitioner's petition for withholding of removal. As to the CAT issue, the agency concluded that Petitioner failed to establish that he would more likely than not be tortured on account of his status as a gay, HIV-positive, criminal deportee. The record did not compel a contrary conclusion. The evidence before the agency reflected that criminal deportees are generally not subject to mandatory detention upon arrival in Haiti. And the absence of medical care or different medical care did not, without more, reflect an intent to torture. Although there was evidence that LGBTI individuals in Haiti suffer discrimination and sometimes physical violence, the State Department Report considered by the agency indicated there were no reports of Haitian officials actively perpetrating or condoning violence against members of the LGBTI community. The panel deferred to the BIA's weighing of evidence. Because Petitioner had the burden to show that he would more likely than not suffer intentional harm rising to the level of torture, the panel state that the BIA did not err in denying his CAT claim on this record. Accordingly, the petition for review was denied. The panel also denied all pending motions and applications and vacated stays. Petitioner is represented by Gary J. Mennitt, and Deborah Kemi Martin, Dechert LLP, New York, NY. – *Wendy C. Bicovny*

U.S. COURT OF APPEALS, 4TH CIRCUIT – In *Roberts v. Glenn Industrial Group, Inc.*, 2021 WL 2021812, 2021 U.S. App. LEXIS 15224 (4th Cir., May 21, 2021), a 4th Circuit panel explained in an opinion by Chief Circuit Judge Roger L. Gregory that, especially in light of the Supreme Court's ruling in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), plaintiffs in same-sex harassment cases under Title VII are not limited to the three methods of proof described by Justice Antonin Scalia in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998). Plaintiff Chazz Roberts was discharged by the CEO of Glenn Industrial Group after his involvement in two serious safety incidents at work. Prior to these incidents, his supervisor repeatedly called him "gay" (he isn't) and subjected him to nasty comments, some of a sexual nature, and verbal and physical abuse. However, the supervisor was not gay and did not seek sexual favors from Roberts. Roberts complained to his supervisor's supervisor, who told Roberts to "suck it up," and he complained to another supervisor, as well as to the Human Resources manager (the CEO's wife), but nobody took any action against his supervisor and the harassment continued. Roberts never complained directly to the CEO. After CEO discharged him, Roberts asserted two claims under Title VII: hostile environment sexual harassment and retaliatory discharge. The district court granted summary judgement to the company, finding that Roberts' factual allegations did not state a claim under the three hypothetical methods of proving that same-sex harassment is "because of sex" under *Oncale*, and that the CEO, who discharged Roberts, had no personal knowledge about Roberts' prior harassment complaints concerning his supervisor. While agreeing that the retaliation claim was without merit, the 4th Circuit panel concluded that the district judge had misconstrued *Oncale* as describing the exclusive method of proving that same-sex harassment was "because of" the victim's sex. Judge Gregory noted that even prior to *Bostock*, the precedent of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), could be invoked in a same-sex harassment case if the plaintiff showed that abuse was directed to him because of his failure to conform to gender stereotypes. *Bostock* adds the further route of showing that the plaintiff was victimized because he was perceived by his supervisor to be gay, i.e., because of his perceived sexual orientation. Thus, there are at least five routes to proving that same-sex harassment is "because of sex," not just the three hypothesized by Justice Scalia in *Oncale*. The case was remanded to the district court for reconsideration of the summary judgment motion, in light of the 4th Circuit's analysis. Roberts is represented by Geraldine Sumter, of Ferguson Chamber & Sumter, P.A., Charlotte, NC. Jeremy Horowitz appeared as *amicus curiae* on behalf of the Equal Employment Opportunity Commission. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 9TH CIRCUIT – During the first week of May, a 9th Circuit panel heard oral arguments

in *Hecox v. Little*, a case in which the district court enjoined the enforcement of Idaho's law barring transgender girls and women from participating in scholastic competition against cisgender girls and women. As Hecox is no longer attending the University of Idaho, having withdrawn from the school, the court issued an order on May 6: "Within 14 days of the date of this order, all parties are requested to file a supplemental letter brief not exceeding 10 pages, double-spaced, addressing the following questions: 1) Is Lindsay Hecox's claim moot because she is not enrolled at Boise State University? 2) Does Jane Doe have standing based on the risk of having her sex disputed?" Our understanding from press reports is that Ms. Hecox might return to the university and seek to compete again. The second Jane Doe plaintiff's possible denial of participation in the future could be the alternative basis for finding that the case presents a live controversy based on her standing. The issue of whether the court should find the case moot and vacate the lower court's ruling was discussed during oral argument. The case is particularly important in light of the enactment of several similar laws by other states in recent months. The court's order is quoted in full above; see 2021 U.S. App. LEXIS 13568. The ACLU represents Hecox and Doe in their challenge to the Idaho statute. – *Arthur S. Leonard*

U.S. COURT OF APPEALS, 9TH CIRCUIT – A 9th Circuit panel denied a petition for review of applications for removal or protection under the Convention against Torture (CAT) by a gay Mexican man in *Cruz v. Garland*, 2021 U.S. App. LEXIS 14736 (May 18, 2021). As is typical of such a brief summary ruling, the court's memorandum opinion does not go into the facts. The petitioner was found to have been convicted of a "particularly serious crime" but the court does not say what his crime was. This disqualifies him for withholding of removal. As to the CAT claim, the court said, "the record does not compel the conclusion that [petitioner] would more likely than note be tortured with government acquiescence if returned to Mexico," citing a 9th Circuit case from 2013, *Vitug v. Holder*, 723 F.3d 1056. The petition is represented by Genna Ellis Beier and Francisco Miguel Ugarte of the San Francisco Public Defender's Office. – *Arthur S. Leonard*

HAWAII – A transgender plaintiff, suing *pro se*, has survived a motion to dismiss her discrimination claim under the Fair Housing Act (FHA) and Title VI of the Civil Rights Act of 1964, but U.S. District Judge Jill A. Otake found it unnecessary to take up the question whether the FHA bans gender identity discrimination because Jason Scutt's complaint also alleges race discrimination, which is expressly covered by the FHA and Title VI. *Scutt v. Maui Family Life Center*, 2021 U.S. Dist. LEXIS 85707 (D. Hawaii, May 5, 2021). Facing eviction, Scutt sought financial assistance from the defendant, which she alleges "acts as a public agency in charge of federal monetary assistance for individuals experiencing housing crises such as homelessness and eviction." Scutt submitted required documentation, and alleges that on August 16, 2020, one day before her scheduled interview, an employee of the defendant telephoned her and "asked prohibited questions regarding Plaintiff's medical and financial status, though which Plaintiff revealed her ethnicity, social status, and sexual orientation." Scutt alleges that the employee "called her 'haole'; referenced Christian funders, suggesting that only Christian, non-haole individuals would be considered for funding; and denied benefits for ineligibility due to lack of homelessness." (Haole refers to individuals who are not Native Hawaiians.) The complaint alleges bias in favor of Christian applicants and against the trans/LGBTQIA+ community. In addition to filing this suit, Scutt filed charges with the U.S. Department of Housing and Urban Development (HUD) and the Hawaii Civil Rights Commission (HRCR). Judge Otake allowed Scutt to amend her complaint to correct the legal name of the defendant organization, and she rejected the defendant's argument that the court should either dismiss for failure to exhaust administrative remedies or delay the case pending rulings by HUD or the HRCR on Scutt's charges. The court found that neither the FHA nor Title VI requires administrative exhaustion before filing suit. Scutt alleged a violation of Title VI of the Civil Rights Act of 1964, which bans discrimination because of race, color or national origin by programs receiving federal financial assistance. Judge Otake found that Scutt's sexual orientation or gender identity claim should be dismissed under Title VI, which does not cover sex as a forbidden ground of discrimination, but the Title VI claim continues as a race discrimination claim. In a footnote, the judge referenced the *Bostock* decision, and clearly has it in mind for a later determination about the FHA coverage. Notably, President Biden's January 20 Executive Order would support applying *Bostock* to the FHA, and HUD has consistently taken that position in light of the Executive Order. – *Arthur S. Leonard*

MARYLAND – Deluxe Corporation is bound by a consent decree incorporated as a final judgment in a discrimination case brought against the company by a transgender former employee. Under the terms of the consent decree, it was required to make various policy changes and, among other things, provide annual training to all of its employees so that they understand the legal requirements

of non-discrimination regarding transgender employees. Fred Brennan, a Deluxe employee who identifies as a born-again Christian, balked at completing the training, which required him to answer multiple-choice questions derived from hypothetical scenarios involving transgender workers. The training was designed to require employees to respond to the multiple-choice questions in a manner that indicates knowledge of their legal non-discrimination requirements. Brennan refused to do so, claiming that the test required him to select statements that violated his religious beliefs in order to complete the test, and the company imposed a 1% salary reduction as a penalty. He was subsequently discharged for reasons that the company credibly maintained had nothing to do with his failure to complete the non-discrimination training. He sued under Title VII for religious discrimination, claiming that the company made no effort to accommodate his religious beliefs. He also claimed that his refusal to complete the training was a reason for his discharge. *Brennan v. Deluxe Corp.*, 2021 U.S. Dist. LEXIS 100006, 2021 WL 2155004 (D. Md., May 27, 2021). U.S. District Judge Ellen L. Hollander granted summary judgment to the employer on two of Brennan's causes of action (discrimination on the basis of Plaintiff's Christian religion, and failure to engage in an interactive process to arrive at an accommodation), but she denied summary judgment on the claim of failure to accommodate Plaintiff's Christian religious belief. After much verbal agonizing, the judge concluded that there is a question for a factfinder after trial as to whether accommodating Brennan's religious beliefs would impose an undue hardship on the employer. Brennan argued that Deluxe did not have to require that an employee provide responses contradictory to his religious beliefs in order to comply with the Consent Decree, which left the manner of training up to the discretion of the employer. Deluxe argued that designing a different training vehicle for Brennan (and presumably any other religious objectors, although none are mentioned in the opinion) would present an undue burden because it would require Deluxe to incur more than a *de minimis* expense. Under the Supreme Court's leading precedent on accommodation of employee religious beliefs, *TWA v. Hardison*, 432 U.S. 63 (1977), employers are not obligated under Title VII to incur more than a *de minimis* expense to accommodate employee's religious beliefs and practices, and Title VII does not expressly require employers to enter into a negotiation with employees over accommodation (unlike the accommodation requirement under the Americans with Disabilities Act). Judge Hollander concluded that it is up to a factfinder, rather than being purely a question of law that the judge can decide, to determine whether providing some alternative training method would impose an undue burden on the employer in this case. [It is worth noting that several of the religious conservatives on the Supreme Court have suggested that the Court should reconsider the Hardison case, and perhaps this case will end up being a vehicle for that.] Brennan is represented by John B. Stolarz of Baltimore. Deluxe is represented by John Byron Flood, of Ogletree Deakins Nash Smoak and Steward PC, Washington, D.C. Judge Hollander was appointed by President Barack Obama. – *Arthur S. Leonard*

MASSACHUSETTS – A three-judge panel of the Appeals Court of Massachusetts ruled on May 6 that Molecular Health, Inc., a German corporation which used to have two branch offices in the U.S., in Boston and in Texas, had not violated Massachusetts' anti-discrimination law when it discharged its Boston-based IT director, Justin Nealis, an out gay man in February 2018, affirming a ruling by the Superior Court on summary judgment. *Nealis v. Molecular Health, Inc.*, 2021 Mass. App. Unpub. LEXIS 341, 2021 WL 1811730 (May 6, 2021). The court found that Nealis filed to provide evidence giving rise to any inference that his sexual orientation had anything to do with his discharge, or that the discharge was in retaliation for his filing a sexual orientation discrimination complaint with the company three weeks earlier. When Nealis was hired, Molecular's U.S. operation employed more than 100 people between the two offices, but the company was not financially successful, throughout Nealis's employment people were being laid off, and by the time he was let go, the Boston office was down to five employees and the other office had been closed. The Court found credible the company's non-discriminatory reason for the discharge: given the circumstances, they had no need for an IT director anymore. The company conceded it had no complaints about the quality of Nealis's work, and it offered him severance pay that was not required by any contract, as he was an at-will employee. He had many differences over the course of his employment with one co-worker, the Vice-President of Business Development, who was the subject of Nealis's sexual orientation discrimination claim, but who asserted that until he was notified that Nealis had filed this claim, he was unaware that Nealis was gay. Nealis claimed that he was "out" at the office and his sexuality was well known to the staff, but the court found uncontested evidence that it the VP's disclaimer was credible, including a concession by Nealis that he was uncertain whether this man knew Nealis was gay. The court's opinion reflected its conclusion that this was a case of an economically failing company gradually shedding almost all of its American staff until eventually there was no need for an IT director, so Nealis was let go. The court's unpublished opinion does not list counsel for Justin Nealis. – *Arthur S. Leonard*

CIVIL LITIGATION *notes*

MASSACHUSETTS – U.S. District Judge Allison D. Burroughs denied a motion to add a co-plaintiff to an existing Title VII suit, where the individual did not file a sexual orientation discrimination charge with the Equal Employment Opportunity Commission (EEOC) within the 300-day time limit specified in Title VII because the Supreme Court had not yet ruled on the question whether sexual orientation claims could be brought under Title VII. *Welch v. People's United Bank, National Association*, 2021 WL 2018935, 2021 U.S. Dist. LEXIS 96786 (D. Mass., May 20, 2021). Jason DeMello was listed as a co-plaintiff when the original complaint was filed, but the court dismissed his claim then without prejudice to give him a chance to present it to the EEOC, so that the EEOC could "address whether DeMello's claim, which concerns alleged misconduct in 2016 and 2017, is time-barred and/or whether cause exists to excuse this untimeliness." DeMello then filed a charge with the EEOC and requested a right-to-sue letter, which was provided to him. But the letter did not address the issue of timeliness, so it was up to Judge Burroughs to decide whether to excuse the untimeliness. "DeMello's primary argument is that he had no reason to file an EEOC complaint before the Supreme Court's June 2020 ruling in *Bostock*. This argument is just as unconvincing now as it was relative to PUB's motion to dismiss," wrote Judge Burroughs. "First, Plaintiffs have not cited any cases where, following *Bostock*, a court permitted a plaintiff to bring a sexual orientation-based Title VII claim despite failing to timely file an EEOC complaint. Second, the Court does not understand *Bostock* as opening the floodgates for all individuals who were allegedly discriminated against based on their sexual orientation to seek redress under Title VII regardless of when the alleged misconduct occurred . . . PUB should not be required to defend a late-filed suit concerning conduct that occurred in 2016 and 2017 merely because the Supreme Court issued a decision in June 1020 that, in DeMello's view, created a new cause of action. Finally, even if DeMello was diligently monitoring the Supreme Court's Title VII jurisprudence in hopes of an invitation to pursue a federal claim, he has not explained why he (1) never filed a complaint with the Massachusetts Commission Against Discrimination and (2) elected to file this suit instead of filing an EEOC complaint after *Bostock* was decided." Plaintiffs are represented by Travis Pregent, Pregent Law, Boston, MA. – *Arthur S. Leonard*

NEVADA – Bridget Ward is suing the City of Henderson, Nevada, in U.S. District Court claiming discrimination in violation of Title VII as well as negligent hiring, training and supervision and intentional and/or negligent infliction of emotional distress. On May 21, U.S. District Judge Jennifer A. Dorsey rejected the City's motion to dismiss the Title VII claim but granted the motion to dismiss the negligent supervision and emotional distress claims. *Ward v. City of Henderson*, 2021 U.S. Dist. LEXIS 96834, 2021 WL 2043937 (D. Nev.). According to Judge Dorsey's summary of the complaint, Ward is "an agnostic, transgender police officer" who worked for the city for many years. "Despite being well regarded by her peers," wrote Dorsey, "Ward faced serious discrimination at work, suffering the jibes and improper conduct of those unacquainted with, or dismissive of, her gender identity and religion." This "came to a head in June 2018" when she was passed over for a promotion in favor of a less-qualified junior candidate, even though Ward had been "recommended for the role and endorsed by the selection committee, and another transgender officer (with less experience than Ward) was also not promoted." Ward then accepted a role in a different unit, "where she was shot in the line of duty," and, disgusted with the way she was being treated, filed an intake form with the EEOC in November 2018, subsequently signing a formal charge of discrimination with EEOC on March 27, 2019, after which she continued to encounter discrimination at work. She sent a follow-up letter to EEOC, detailing the Police Departments' continued "discriminatory and retaliatory conduct," and received a right to sue letter. Judge Dorsey rejected defendant's argument that many of the claims were time-barred, finding that defendants apparently misunderstood how the Title VII statute of limitations works. The judge determined that Dorsey's completion of the intake form tolled the statute, and because Nevada is a deferral jurisdiction (i.e., has a state agency whose statute covers the same claims), her charge can cover all incidents occurring up to 300 days prior to the intake form, rather than the shorter period of 180 days which would apply in a non-deferral state. She filed only with the EEOC, but filing with the state agency is not necessary to trigger the 300 day rule. Furthermore, she was not required to file an amended charge to add the defendant's actions following the signing of her formal EEOC charge. The city did not dispute that Ward's claim satisfied substantive pleading requirements for her Title VII charge. However, the court found that under Nevada law the city enjoyed broad immunity from the negligent supervision and hiring claim unless Ward could allege facts showing "bad faith" by the city. Here, wrote Dorsey, "While Ward extensively describes the discriminatory acts of her colleagues and department, she fails entirely to attribute any bad-faith conduct to the City itself, much less explain how its hiring and supervision of its employees was performed in bad faith." Thus, that negligence claim had to be dismissed. Similarly, the negligent infliction of emotional distress claim had to be

dismissed, since Ward had not alleged emotional distress that was so serious that it "results in physical symptoms." She had relied on her gunshot wound as a physical symptom, but Judge Dorsey observed that the wound was not the result of emotional distress, even though it may have caused it (and Ward may have been experiencing emotional distress about her reassignment). The judge dismissed this claim "without prejudice" so Ward can replead it if she can make the necessary factual allegations. Ward is represented by Colleen E McCarty and Deanna L Forbush, of Fox Rothschild LLP, Las Vegas, NV. Judge Dorsey was appointed by President Barack Obama. — *Arthur S. Leonard*

NEW YORK – The New York Appellate Division, First Department, affirmed a decision by New York County Supreme Court Justice Nancy M. Bannon to grant summary judgment to the landlord on a gay tenant's claim that the landlord violated the federal Fair Housing Act (FHA) and the New York State Human Rights Law (NYSHRL) by failing to respond to reports of sexual orientation and race-based harassment by a fellow tenant. *Edstrom v. St. Nicks Alliance Corp.*, 2021 N.Y. App. Div. LEXIS 3186, 2021 NY Slip Op 03112 (May 13, 2021). The court relied on *Francis v. Kings Park Manor*, 992 F.3d 67 (2nd Cir. 2021), a recent decision in which the 2nd Circuit "acknowledged that deliberate indifference may be used to ground an FHA claim against a landlord when 'a plaintiff plausibly alleges that a [landlord] exercised [the requisite] substantial control over the context in which the harassment occurs and over the harasser," but that "the typical powers of a landlord over a tenant – such as the power to evict – do not establish the substantial control necessary to state a deliberate indifference claim under the FHA." The court observed that the complaint provided "no factual basis to infer that defendant had substantial control over the alleged harasser, where it simply alleges the typically arms-length relationship between landlord and tenant." The court also ruled that under its practice of interpreting the NYSHRL "under the same framework as the FHA," it would also uphold summary judgment for the landlord under the state law. However, on a separate claim, the court reversed Judge Bannon's dismissal of a warranty of habitability claim, finding that there were contested facts to be resolved about that issue, which arose from a "rodent infestation in the apartment," and remanded for the trial court to determine the "duration of uninhabitable conditions and the appropriate rental abatement." The plaintiff is represented by John F. McHugh. – *Arthur S. Leonard*

NEW YORK – Now and then we read an opinion that raises the question whether the complaint filed in a case had any input from a lawyer, since the court concluded that the complaint lacked some the basic elements necessary to invoke the jurisdiction of the court. Such is the situation in *Aponte v. Clinton Street Pizza, Inc.*, 2021 WL 1961646, 2021 U.S. Dist. LEXIS 94372 (S.D.N.Y., May 17, 2021), in which two former employees of Clinton Street Pizza who left their jobs in February 2019 asserted claims under the Fair Labor Standards Act and New York's wage and hours law, Title VII of the Civil Rights Act of 1964, and the New York City Human Rights Ordinance. Plaintiffs sought unpaid wages and overtime, and damages for discrimination and harassment because of sex (Nancy Aponte) and sexual orientation (Angelo Gabriel Alves Marques). They filed suit on March 6, 2020. The sexual orientation claim was asserted only under the New York City law, even though a sexual orientation claim could have been asserted under Title VII due to the 2nd Circuit's ruling in *Zarda v. Altitude Express*, which was ultimately affirmed by the Supreme Court as part of the *Bostock* ruling on June 15, 2020, several months after the complaint was filed. Whoever framed the complaint omitted crucial elements relating to the federal question jurisdiction of the court over the FLSA and Title VII claims. The complaint fails to include the necessary interstate commerce allegations for purposes of FLSA and fails to allege that Clinton Street Pizza has 15 or more employees, as required to come under Title VII. The complaint also says that the plaintiffs filed Title VII charges with the EEOC and have requested a right-to-sue letter but does not indicate that a right-to-sue letter has been received. The complaint named the business and three individuals as defendants, but service had not been completed on all parties. One of the individual defendants is *pro se* and has responded to the complaint, but no response was received from the business or the other two individuals, and plaintiffs moved for a default judgment against the non-responsive defendants. District Judge Kimba M. Wood declined to award a default judgment, because it is not clear on the face of the complaint that the federal district court has jurisdiction over the federal statutory claims, and following 2nd Circuit precedent, the court would not assert jurisdiction over the state and local law claims in the absence of a viable federal claim. Actually, this case could most likely have been brought in state court and avoided all these complications, since the same wage and hour claims could be asserted under the NY Labor Law and the harassment and discrimination claims under the City's Human Rights Law, which has expressly covered sexual orientation claims since 1986. In the third part of her opinion, Judge Wood instructs plaintiffs what to do if they want to continue this case in federal court by way of an amended complaint containing the necessary jurisdictional allegations. According

to the Westlaw and Lexis reports of the decision, plaintiffs are represented by Jesse Curtis Rose, The Rose Law Group, PLLC, Astoria, NY. – *Arthur S. Leonard*

TEXAS – End of the line for the quixotic quest by Republican activists Jack Pidgeon and Larry Hicks to get the Texas courts to declare that then-Major Annise Parker of Houston violated the law in 2013 when she reacted to the Supreme Court's ruling in *U.S. v. Windsor* (striking down Section 3 of the Defense of Marriage Act) by extending health insurance benefits to the same-sex spouses of Houston city employees who had gone out of state to marry? Well, maybe. In *Pidgeon v. Turner*, 2021 WL 1686746, 2021 Tex. App. LEXIS 3286 (April 29, 2021), a three-judge panel of the Court of Appeals of Texas, Houston (14th District), affirmed a decision by the 310th District Court in Harris County to grant defendants' plea to the jurisdiction, dismissing the case. The opinion by Justice Margaret Poissant went beyond agreeing with the district court that it lacked jurisdiction to issue the relief sought by the plaintiffs on immunity and other jurisdictional grounds, and expressed a view, in *dicta*, that pursuant to *Obergefell v. Hodges*, *Pavan v. Smith*, and *Bostock v. Clayton County*, the case was substantively without merit as well. That is, although it would take later U.S. Supreme Court decisions to pin down the point, the City Attorney of Houston was correct in 2013 in opining to Mayor Parker that failing to extend the benefits would violate the equal protection rights of the employees in question. The court pointed out that *Bostock* was relevant because under Title VII, as construed in *Bostock*, city employees' whose same-sex spouses were denied the same benefits that were provided to different-sex spouses would have a valid sexual orientation discrimination claim as well as a constitutional equal protection claim. In a partial dissent, Justice Randy Wilson objected to the portion of the opinion dealing with the merits, observing that once the court had decided to affirm the trial judge's jurisdictional ruling, it was without jurisdiction to opine on the merits of the case and should refrain from issuing extensive *dicta*. Pidgeon and Hicks are represented by Jared R. Woodfill. Of course, they are likely to file an appeal to the Texas Supreme Court and, if they strike out there, to petition the U.S. Supreme Court. Unless, exhausted by their efforts, they finally desist! – *Arthur S. Leonard*

TEXAS – There were news reports during May about *U.S. Pastor Council v. E.E.O.C.*, No. 4:18-cv-00824, pending before U.S. District Judge Reed O'Connor of the Northern District of Texas. This suit, filed several years ago by a group of non-profits and businesses claiming religious objections to employing or providing services to LGBT people, has gone through a series of amended complaints as the background legal framework has evolved, especially with the U.S. Supreme Court's decision last June in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). As originally filed, the plaintiffs sought to build on Judge O'Connor's prior rulings that Title IX and the Affordable Care Act, both of which forbid sex discrimination, do not forbid discrimination because of gender identity. O'Connor famously issued a nationwide injunction barring the Education Department from enforcing Title IX in gender identity discrimination cases, which the U.S. Department of Education Department then relied upon in refusing to process gender identity discrimination claims by students. Judge O'Connor has also enjoined the Affordable Care Act, and is generally known as one of the most conservative federal district judges with a particular tendency to reject the Obama Administration's interpretation of federal civil rights laws. The plaintiffs in this case were looking for declaratory and injunctive relief to protect them against any enforcement actions by federal agencies on sexual orientation or gender identity discrimination claims, based on their religious objections, relying on the arguments that such claims were not viable under federal sex discrimination laws and that enforcement against the plaintiffs would violate the Religious Freedom Restoration Act (RFRA). Their case became more complicated after the Supreme Court ruled in *Bostock* that Title VII prohibits discrimination on these grounds as a form of sex discrimination. The focus of the case has consequently shifted to emphasize the claim that federal enforcement action of such claims against plaintiffs would violate the RFRA and the 1st Amendment Free Exercise Clause. The most recent news reports concerned briefs filed on plaintiffs' motions for class certification and summary judgment. One of the reasons this case has been taking so long is that the court stayed ruling on prior motions pending the Supreme Court's decision in *Bostock*. The *Bostock* ruling caused the plaintiffs to amend their complaint, since it knocked the props out of one of their arguments. But with a ruling expected shortly from the Supreme Court in *Fulton v. City of Philadelphia*, the plaintiffs' Free Exercise Claims are now front and center. The "conventional wisdom" is that the Court's super-charged Free Exercise majority is like to find that Philadelphia violated the 1st Amendment rights of Catholic Social Services by shutting CSS out from the city's foster care program because CSS will not provide services to married same-sex couples. If the Court overturns *Employment Division v. Smith*, its key precedent requiring religious objectors to comply with neutral state laws of general application, Judge O'Connor may have a clear path to granting summary judgment to the plaintiffs. Stay tuned.

CRIMINAL/PRISONER LITIGATION *notes*

CRIMINAL LITIGATION NOTES

By Arthur S. Leonard

U.S. ARMY COURT OF CRIMINAL APPEALS – In *United States v. Council*, 2021 CCA LEXIS 255, 2021 WL 2035138 (May 21, 2021), the U.S. Army Court of Criminal Appeals affirmed the conviction of an HIV-positive male service member who had oral and vaginal intercourse with a female service member without using a condom or disclosing his HIV-status to her. At the trial, the female service member testified that she would not have had sex with the defendant had he disclosed his HIV status to her. The opinion for the appeals court panel by Senior Judge Paulette Vance Burton does not state that the female service member was infected as a result of the sexual encounter. The court martial jury was charged under a 2019 precedent of the U.S. Court of Appeals for the Armed Forces, *United States v. Forbes*, 78 M.J. 279 (C.A.A.F. 2019), a precedent binding on all lower military courts, that an HIV-positive service member who has been counseled that he must use a condom and disclose his HIV-positive status before having sex with somebody is guilty of disobeying orders and of sexual assault if he does not conform to the counseling. During the court martial proceedings, the defendant sought appointment of an expert witness to present a defense based on his undetectable viral load and the latest scientific evidence that an HIV-positive individual with an undetectable viral load does not transmit HIV through sexual intercourse, but the trial judge refused to make such an appointment, observing that defendant's viral load was irrelevant under *Forbes*. The Court of Criminal Appeals affirmed this ruling as well, pointing out that as a matter of precedent neither the trial judge nor the U.S. Army Court of Criminal Appeals had the authority to ignore the binding precedent of *Forbes*. The court also rejected defendant's argument that because he could not transmit HIV under the circumstances, there was no military purpose for requiring him to disclose his HIV status. The court explained: "Assuming, arguendo, appellant had an undetectable viral load at one point does not necessarily mean he could maintain that undetectable viral load at all times. This conclusion is not conjecture; instead, it is supported by the medical articles appellant submitted to the trial court in support of his request for an expert. These articles were subsequently attached to the record as appellate exhibits. These articles state, inter alia, that '[t] o maintain an undetectable viral load, it is very important for a person living with HIV to stay on treatment and have regular viral load tests.' Accordingly, while a person with a low viral load may not be able to transmit HIV to a sexual partner, there is no guarantee that person will maintain a low viral load (and the corresponding inability to transmit HIV to sexual partners) in perpetuity, particularly if their medical treatment for HIV changes in some manner. With this in mind, we conclude this order is much the same as a 'safe sex' order and has the valid military purpose of protecting both other service members and civilians from the potential of HIV infection."

PRISONER LITIGATION NOTES

By William J. Rold

William J. Rold is a civil rights attorney in New York City and a former judge. He previously represented the American Bar Association on the National Commission for Correctional Health Care.

U.S. COURT OF APPEALS – FIFTH CIRCUIT – In April, a *Law Notes* article headlined: "In Rare Transgender Victory, Fifth Circuit Reverses Dismissal of Lawsuit Challenging Booking of Transgender Inmates at Dallas County Jail," reporting the not for publication *per curiam* decision in *Jackson v. Valdez,* 2021 WL 1183020 (5th Cir., Mar. 29, 2021). Part of the decision dealt with an unsuccessful motion to recuse U.S. District Judge Brantley David Starr (N.D. Tex.), who was appointed by President Trump in 2019. The recusal was based on Judge Starr's alleged bias against the LGBT community and transgender people in particular. Judge Starr's denial of the motion was affirmed, with the admonishment that he should not have written a detailed rebuttal in his decision on recusal. One of the allegations of bias, not mentioned in *Law Notes* but appearing in the March 29th Fifth Circuit decision, was Judge Starr's support of Jeffrey Carl Mateer, who was Judge Starr's former boss in the Texas Attorney General's Office and was nominated to the N.D. Texas by President Trump in 2017. The March 29th opinion quoted remarks by Mateer that transgender children were part of "Satan's plan." These remarks were widely reported at the time, as well as comments disparaging suits against religious schools that fired teachers who were in same-sex marriages. The outcry caused Senator Cornyn to withdraw his support (but Senator Cruz continued his); Trump withdrew the nomination. Mateer is now affiliated with the First Liberty Institute, which brings or defends much of the anti-LGBT litigation nationwide. Incensed that the Fifth Circuit quoted him in the decision and represented by the First Liberty Institute, Mateer filed a "third party" motion to "correct" the opinion to delete the "Satan's Plan" language as "false and salacious." The transgender appellant (Jackson) objected, saying that Mateer had no standing and that, in any event, the statements were not false. She filed excerpts from stores in *The Washington Post, Newsweek,* and *The Dallas Morning News,* and on NBC, as well a video of Mateer's actual speech. Mateer replied that the video had been

edited out-of-context. It was not – in fact, it is still on-line if one looks for "Mateer" AND "Satan's Plan." As to "salacious," Mateer is the one who brought up sex, for those who have the "audacity" to refuse to marry outside their gender. The Fifth Circuit gave Mateer a nod, however. It withdrew its March 29th opinion, substituting a new one on May 18, 2019, 2021 U.S. App. LEXIS 14778. It changes one line to read, as part of the discussion of the recusal, that Judge Starr was challenged because he supported the judicial nomination of Jeffrey Mateer, who, according to Jackson, allegedly said that "transgender children were part of "'Satan's plan.'" So, what Mateer sought to delete remains, now with double sets of quotation marks.

U.S. COURT OF APPEALS – NINTH CIRCUIT – The Ninth Circuit rules that the "discretionary function" exception to federal liability under the Federal Tort Claims Act [FTCA] requires dismissal of transgender inmate Edward Jorodge Gladney's case about failure to protect her from assault by another inmate in *Gladney v. United States,* 2021 U.S. App. LEXIS 13068; 2021 WL 1739934 (9th Cir., May 3, 2021). The unpublished and unsigned memorandum opinion of less than 750 words was before a panel composed of Circuit Judge Consuelo M. Callahan, Senior Circuit Judge Susan P. Graber (Clinton), and C.D. Calif. U.S. District Judge James V. Selna (George W. Bush, by designation). They affirmed the dismissal by Senior U.S. District Judge David C. Bury (D. Ariz.) (George W. Bush), after appointing counsel for Gladney (who was *pro se* below) and hearing oral argument. While the Bureau of Prisons [BOP] has a duty to protect prisoners, its discretion as to how to do that is sufficiently broad to invoke the "discretionary function" exception under the FTCA. Neither the Prison Rape Elimination Act, nor BOP policies, sufficiently circumscribe discretion to take the case outside the exception. The panel relies on *Alfrey v. United States*, 276 F.3d 557, 561 (9th Cir. 2002). A "negligent guard" theory – *see Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475-76 (2d Cir. 2006) (*per curiam*) (holding that the discretionary function doctrine does not shield a "BOP employee's failure to perform a diligent inspection out of laziness, hastiness, or inattentiveness") – even if applied in the Ninth Circuit, does not save Gladney's claim for negligence under the FTCA, because "the record lacks evidence of a similar abdication of duty here." This is remarkable, since Gladney moved to compel discovery about the incident, her assailant's record of prior assaults, and deployment of officers on the day of the incident – and Judge Bury ordered them produced *in camera*. After this, Gladney moved for summary judgment herself, and it is unclear what became of this evidence. [Note: Judge Bury initially sealed his entire decision. After the Ninth Circuit appointed counsel, the opinion dismissing the case was unsealed – with the assailant's name redacted – but the rest of the record seems to have remained sealed. One can hope appointed counsel could see it, but there is no mention of same in the Circuit court's decision, except to say the record is "inadequate."] The same problem exists as to the Eighth Amendment portion of the decision. The Circuit said that Judge Bury "erred" in not reaching the Eighth Amendment claim, even if not pleaded; but it found the error "harmless," because "the record lacks evidence of any individualized risk to Plaintiff of which guards were aware." Judge Bury denied Gladney's repeated requests for counsel in the District Court.

CALIFORNIA – Transgender male inmate Paul Catano Murray, Sr., sues for violation of his civil rights in *Murray v. Holmes,* 2021 WL 2188132 (E.D. Calif., May 28, 2021). Murray alleged that California: (1) housed him at severe risk of contracting COVID; (2) denied his constitutional rights by addressing him with female pronouns in a grievance; and (3) failed to correct the pronoun problem in his grievance appeal. U.S. Magistrate Judge Kendall J. Newman finds that Murray has a "potentially cognizable" claim of an Eighth Amendment violation for deliberate indifference to COVID risk. He can proceed on this claim. Judge Newman finds that a single incidence of misgendering by pronouns in one grievance is not sufficiently serious to implicate the Eighth Amendment. Moreover, Murray's named defendant in the failure to cure the misgendering claim (the appeals office in Sacramento) is not a suable entity or person. Murray is given two choices: proceed on Claim I, dismissing Claims II and III without prejudice; OR filing an amended complaint and delaying service of process. He is not told that he risks another screening of everything if he refiles or that he could appeal his limitation of choices to a district judge. In fact, the Eastern District of California does not even assign a district judge to cases at this stage. This delegation of what seems to be Article III power to Magistrate Judges in the Eastern District of California has been the subject of numerous critical reporting in *Law Notes*. This seems not to be a good case on which to press the point, however, since Judge Newman is probably correct about the single pronoun incident.

CALIFORNIA – The *Murray* case (*see directly above*) reports the choices inmates are given in the E.D. Calif. when Magistrate Judges tell them to proceed on the "cognizable" claims or to amend and face a delay in service. Murray's decision is unknown, but he was promised electing to proceed on a limited complaint would accelerate service of process on defendants. U.S.

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Magistrate Judge Barbara A. McAuliffe made no such promise in *Evans v. Martin,* 2021 U.S. Dist. LEXIS 95408, 2021 WL 2002578 (E.D. Calif., May 19, 2021). Evans elected to proceed on a fraction of his claims, and Judge McAuliffe sent the case to the Clerk of Court, to be assigned to a district judge (something that is not done automatically in the E.D. Calif.) to rule on her Report and Recommendation to dismiss most of the case and to proceed with two claims. Service is not ordered, as of this writing. Judge McAulliffe found two claims to be "cognizable": excessive force; and sexual assault by an officer. She could hardly have done otherwise on these facts. Briefly, per the complaint, the events began when Evans, gay and perhaps trans, was "outed" to his wife; and she broke contact with him and refused to let him see his daughter. Evans became suicidal and threatened to swallow pills. A psych nurse had security search his cell. When a group of three officers "escorted" Evans back to his cell, they threw him to the ground, uttered homophobic slurs, and beat him severely, saying "you like it rough." He was slammed onto the floor and into a wall, and one officer "placed his state issue baton in Plaintiff's anus forcibly through the outside of Plaintiff's pants." ["Placed" seems a willfully obtuse choice of words; one cannot "place" a baton in an inmate's anus though state-issued durable pants without shoving it with significant force.] Evans was stripped (to see if he had breasts), placed in a holding cell, and beaten again. Evan was placed in psych segregation, where he banged his head on the wall and swallowed razor blades. [Judge McAuliffe does not say how Evans got razor blades in a psych holding cell after a strip search – can we imagine who would have left them there?] Evans was pepper-sprayed and beaten again until he was unconscious. After a couple of days, he was diagnosed with "distress" and sent to an emergency room. He was returned and put on suicide watch. He was charged with "assaulting an officer," found guilty, and sent to disciplinary segregation for 39 months, where he was forced to drink contaminated water from faulty plumbing for over thirty days. Evans sues some twenty defendants. A complete recitation of all his claims is beyond the scope of this report. Judge McAuliffe allows Evans to proceed only on the claims against the officers who beat him in the initial cell movement – under *Hudson v. McMillian*, 503 U.S. 1, 5 (1992) – and against the officer who assaulted him with the baton – under search and seizure standards, citing *Bearchild v. Cobban*, 947 F.3d 1130, 1144 (9th Cir. 2020). The baton use was part of a legitimate strip search gone bad (as in *Bearchild*) – it was not incident to a search at all; it was rape. Citing F.R.C.P. 18 and 20 (misjoinder), Judge McAuliffe does not allow Evans to proceed on any of the following claims: excessive force on any days other than the day of cell extraction/rape; denial of medical care, conditions in segregation, verbal harassment, retaliation, or disciplinary due process. It will probably be months before what is allowed to proceed winds its way through the labyrinth of the sluggish E.D. California.

DISTRICT OF COLUMBIA – Jeannette Driever, *pro se,* a cisgender woman and former federal prisoner, sues for damages for being housing with transgender women in federal prisons. Her case, raising various theories under the Constitution, the Religious Freedom Restoration Act [RFRA], and the Federal Tort Claims Act, was dismissed last year in *Driever v. United States,* 2020 U.S. Dist. LEXIS 192695, 2020 WL 6135036 (D.D.C., Oct. 19, 2020), reported in *Law Notes* (November 2020 at page 26). Now, in *Driever v. United States,* 2021 U.S. Dist. LEXIS 91932 (D.D.C., May 14, 2021), she seeks to reopen the case under F.R.C.P. 60 – or, in the alternative, to extend her time to appeal. U.S. District Judge Timothy J. Kelly denies both motions. He had earlier ruled: that Driever could not represent other inmates or litigate about institutions where she had not been confined; that her injunctive claims were mooted by her release, leaving only damages to be considered; and that she was not entitled to damages because none of her constitutional or statutory rights had been violated. Driever's primary point now is that the Supreme Court decision in *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020), justifies re-opening because it allows damages against federal defendants in their individual capacities ("in appropriate circumstances") under RFRA. Judge Kelly discusses Rule 60 at length as to when a change in law justifies relief in a case that has not been appealed – here, in particular, that had not been appealed prior to the change of law (and still has not been appealed). For those with a knotty Rule 60 problem and change of law, this is interesting reading; for the rest of us, we will skip ahead to the main story. Driever loses because *Tanzin* did not abrogate qualified immunity for federal defendants. Here, there was no clearly established law that housing cisgender women with transgender women was prohibited – in fact, what little law there is, says it is legal. Judge Kelly notes that Driever had time left to file an appeal within sixty days of his decision (the federal government being a party), and she still had time after the Supreme Court decided *Tanzin*. Instead, she let another month pass. There is no further authority to extend her time to appeal now. The motion is denied "in its entirety," but the denial can be appealed.

LOUISIANA – Transgender inmate Robert Clark won a TRO and injunction early in her civil rights case from U.S. District Judge Brian A. Jackson to keep Louisiana officials from cutting her hair while her case was pending. She has not achieved any preliminary relief since

that time. In *Clark v. Leblanc,* 2021 WL 2104633, 2021 U.S. Dist. LEXIS 160385 (M.D. La., May 25, 2021), Judge Jackson denied a preliminary injunction requiring defendants to permit her to style her hair and to provide her with access to an endocrinologist. Judge Jackson finds that Clark is not likely to prevail on her hair styling claim, even though women are permitted braids and buns. [Note: it is unclear if Clark is permitted a removable headband or, having won a restraining order, must now present as "Cousin It."] As to the endocrinologist, Louisiana officials sent Clark to one in March (after suspension of such "non-emergency" visits due to COVID was lifted), so this point is moot as to a preliminary injunction. Judge Jackson notes that Clerk's medical needs are "serious," citing to his own prior decision and to the Department of Justice's Statement of Interest on April 22, 2021, in the M.D. Georgia case of *Diamond v. Ward,* 5:20-cv-00453-MTT (Doc. 65), which was discussed in last month's *Law Notes*. Judge Clark finds that affirmative injunctive relief requires a more exacting standard than just preserving the status quo. [In this writer's view, the restraining versus affirmative dichotomy can be illusory: The first order could be considered affirmatively, as permitting Clark to grow her hair, rather than restraining Corrections from cutting it. This emphasis on individualized application of rules is the thrust of the DoJ Statement of Interest.]

NEW JERSEY – For once, the consensus that the Prison Rape Elimination Act [PREA] does not create a private cause of action actually works to a transgender inmate's benefit. Marina Voltz, *pro se,* filed suit in New Jersey Superior Court against officials at the Somerset County Jail for civil rights violations, including cross-gender searches and general lack of accommodations for female transgender inmates. She relied solely on state law, including the New Jersey Civil Rights Act, N.J.S.A. § 10:6–1, *et seq*., and the New Jersey Law Against Discrimination, N.J.S.A. §§ 10:5-1 to -49. She also alleged the Jail violated PREA and subjected her to "cruel and unusual" punishment. The defendants removed on federal question jurisdiction, 28 U.S.C. § 1441(a). Chief U.S. District Judge Freda L. Wolfson remanded the case back to state court in *Voltz v. Somerset County Jail,* 2021 WL 1986459 (D. N.J., May 18, 2021). Judge Wolfson found that the plaintiff, generally speaking, is the "master" of her forum, and Voltz stated that her claims "arise under state law." She mentioned "cruel and unusual" punishment only in passing, and this is not a sufficient justification for federal jurisdiction. [Note: Although Judge Wolfson does not mention it, the New Jersey Constitution, Article ¶ 12, uses the same words to protect prisoners.] As to PREA, it confers no jurisdiction. The removal statute is strictly construed against removal and all doubts are to be resolved in favor of remand. *Batoff v. State Farm Ins. Co*., 977 F.2d 848, 851 (3d Cir. 1992); *Steel Valley Auth. v. Union Switch & Signal Div*., 809 F.2d 1006, 1010 (3d Cir. 1987). "[A] defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10 (1983). A "well-pleaded complaint . . . is ordinarily entitled to remain in state court so long as its complaint does not, on its face, affirmatively allege a federal claim." *Compare Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg*., 545 U.S. 308, 314-5 (2005), where the Supreme Court rejected an attempt to "bury" federal jurisdiction in a state quiet title action, when the essential sticking point was a federal tax lien. It is gratifying in these days of "packed" federal courts that defendants cannot easily remove civil rights cases that eschew reliance on federal law.

NEW YORK – U.S. District Judge Philip M. Halpern dismissed the civil rights claim of *pro se* gay federal inmate Jones Tyler Martin with prejudice in *Martin v. Mihalik,* 2021 U.S. Dist. LEXIS 84338, 2021 WL 1738458 (S.D.N.Y., May 3, 2021). Martin brought an action under *Bivens* [*v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388 (1971)], alleging sexual orientation discrimination under the Fifth Amendment, and deliberate indifference to his serious health needs under the Eighth Amendment. U.S. District Judge Colleen McMahon had the case originally; it was reassigned to U.S. District Judge Nelson Stephen Roman (who allowed it to proceed past screening), and it is now before Judge Halpern. Martin has amended his complaint once previously. The events began with homophobic epithets from an officer arising from an "incident about a potted plant." [Warning to *pro se* plaintiffs: DO NOT begin your recitation of a civil rights claim by saying it arose from an "incident about a potted plant."] Things escalated, Martin's cell was searched, his medicine for seizure disorder was destroyed, and he lost his job. There is discussion about exhaustion of administrative remedies for federal prisoners under the Prison Litigation Reform Act (which is detailed enough to mention), but Judge Halpern ultimately decides that he cannot rule on this on the face of the Amended Complaint and that he need not reach the issue because of his dismissal on the merits. On sexual orientation discrimination, he finds that application of *Bivens* theory would be a "new" use of the doctrine barred by *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017); and *Doe v. Hagenbeck*, 870 F.3d 36, 43 (2d Cir. 2017). While *Davis v. Passman,* 442 U.S. 228, 234 (1979), allowed a Congressional employee to sue directly under the Fifth Amendment for an alleged violation of equal protection in employment, it is a "new" context when the case is brought by a prisoner. Imprisonment raises "special factors that counsel hesitation" about extending

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Bivens. He relies on *Alexander v. Ortiz*, 2018 U.S. Dist. LEXIS 45329, 2018 WL 1399302, at *4 (D.N.J. Mar. 20, 2018), aff'd, 807 F. App'x 198 (3d Cir. 2020); *Oneil v. Rodriguez*, 2020 U.S. Dist. LEXIS 181275, 2020 WL 5820548, at *3 (E.D.N.Y. Sept. 30, 2020); *Brown v. Cooper*, 2018 U.S. Dist. LEXIS 218544, 2018 WL 6977594, at *12 (D. Minn. Dec. 11, 2018). Judge Halpern does not stop there, however. He rules that *Davis* was a sex discrimination case, and Martin alleges sexual orientation discrimination. This presents a new circumstance. Judge Martin does not mention *Bostock v. Clayton County,* 140 S. Ct. 1731 (2020), in which the Supreme Court held that sexual orientation discrimination is necessarily sex discrimination. He also finds that *habeas corpus* could provide a potentially superior means of relief to a *Bivens* action for damages, citing *Jiminian v. Nash*, 245 F.3d 144, 146 (2d Cir. 2001); and *Gonzalez v. Hasty*, 269 F. Supp. 3d 45, 63 (E.D.N.Y. 2017), aff'd, 755 F. App'x 67 (2d Cir. 2018). These citations seem ridiculous. *Jiminian* involved successive writs to a challenge to a conviction and the difference between §§ 2241 and 2255 for these purposes. *Gonzalez* involved an inmate's potential use of *habeas* to escape extended punitive segregation and return to general population. Neither applies here, and in this writer's view no federal court would grant a writ under Martin's circumstances. Judge Halpern then turns to the seizure medication destruction and the Eighth Amendment. He finds that there are no allegations that Martin had seizures as a result (or any other injury from the loss of the medication – or even that he missed a dose). Moreover, there is no evidence that defendants knew about the destruction of the medicine or its potential importance in their "ransacking" of the cell – so they lacked subjective intent under the Eighth Amendment**.** Judge Halpern was appointed by President Trump in 2020. He sits in White Plains.

NEW YORK – *Pro se* bisexual prisoner Michael Jones is also Black and Jewish. He has numerous medical problems. He brings suit against defendants at New York's Great Meadow and Wende Correctional Facilities, alleging discrimination against him based on sexual orientation, race, and religion – and, as to Wende, political beliefs, since he was a vocal supporter of President Biden in 2020. He also alleges failure to provide medical care, unconstitutional conditions in Wende's Special Housing Unit [SHU], and retaliatory interference with his mail. U.S. District Judge Lawrence J. Valardo considers Jones' attachments to his complaint as part of the pleadings under *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991). In *Jones v. DOCCS,* 2021 WL 1910239 (W.D.N.Y., May 12, 2021), Judge Valardo severs the claims about Great Meadow and sends them to the Northern District of New York. He finds that the Wende claims can proceed in part but that some are insufficient without an amended complaint describing individual defendants' culpability in more detail. Jones has a First Amendment right to send and receive mail under *Johnson v. Goord*, 445 F.3d 532, 534 (2d Cir. 2006), which can proceed if he identifies the individuals responsible, even if only by description as "John Does" – and the defendants have a duty in their responsive pleadings to help Jones name them under *Valentin v. Dinkins*, 121 F.3d 72, 76 (2d Cir. 1997). Jones also states a "plausible" claim for denial of medical care, including treating his open bullet wound, withholding his leg braces, medical boots, and hearing aids, and forcing him into a cell where he had to clean the former occupant's feces. Jones' wound became infected, and Jones contracted COVID-19. [Judge Valardo recites the presence of an "open bullet wound" on a prisoner who has been imprisoned for years, without elaboration, as if it were just part of the regular *mise en scene* in such cases.] Again, Jones must name the individuals responsible in his amended complaint. Jones was placed in SHU without a mattress or medical attention. Judge Valardo finds that a month in SHU – while usually not enough time for the conditions to be atypical or significant under *Cruz v. Gomez*, 202 F.3d 593, 597 (2d Cir. 2000) – can be actionable for a prisoner with the kinds of special needs presented by Jones, if those needs are not met. Judge Valardo rules that Jones' discrimination claims, as presented, are too conclusory to proceed on the basis of sexual orientation, race, or religion. Jones has an opportunity to amend to allege specific animus. Jones states a claim for retaliation by an officer defendant who trashed Jones' cell while railing about Jones' support for President Biden. This officer was also allegedly responsible for forcing Jones to clean feces (knowing he had an open wound and saying "I hope you die"). This officer also allegedly wrote the ticket that placed Jones in SHU. Jones loses on his access to court claims by destruction of his legal papers in the trashing of his cell and his inability to go to the law library while in SHU. [In this writer's experience, prisoners who manage to get to court to make the claim rarely win an access to court argument.] Finally, Judge Lavardo denies Jones his request that a transfer be ordered to a protective unit, finding that Jones has not shown likelihood of prevailing on such a claim, and defendants have not yet been served or responded. The denial is without prejudice.

NEW YORK – U.S. Magistrate Judge Thérèse Wiley Dancks recommends denial of summary judgment to defendants in *pro se* transgender inmate Rashad Salaam's protection from harm case, *Salaam v. Stock,* 2021 U.S. Dist. LEXIS 90765 (N.D.N.Y., May 12, 2021). There were two significant incidents of brutal assault: one sexual, one physical – each involving different officers who

allegedly failed to protect Salaam. The case includes a good review of exhaustion standards under the Prison Litigation Reform Act [PLRA], which in New York (like many states) use different rules for exhaustion depending on whether the Prison Rape Elimination Act [PREA] is involved. In this writer's view, this evinces a fundamental misunderstanding of LGBT inmates' protection from targeting under PREA, which makes hate crime assaults "PREA-triggering" if the victim was identified (or identifiable) in advance. Put another way, PREA requires preventive measures, even if the assault that occurs is not overtly sexual, when LGBT inmates are beaten. *See, e.g.,* 28 C.F.R., Part 115, §§ 115.5 and 115.6 (definitions); 115.11 ("zero tolerance"); 115.22 ("responsive planning"); 115.41 (screening for victimization); 115.51 (mandatory reporting); and 115.71 (investigations). We have a long way to go with education on this point. Here, preserving the distinction in exhaustion between assaults and sexual assaults as justified by PREA, Judge Dancks nevertheless finds that neither officer defendant is entitled to summary judgment. Salaam was allegedly raped by another inmate on July 22, 2017, while officer Stock failed to protect her. Salaam was allegedly cut repeatedly with a weapon three days later, while defendant Vianese stood and watched. Salaam alleged that each officer was aware of prior incidents of transphobic harassment of Salaam. Defendants produced an affidavit of a grievance supervisor stating that there were no records of grievances. Salaam says her grievances were discarded and never logged and that the grievance system at Auburn Correctional Facility was "corrupted." Salaam says there are medical records, complaints to the PREA hotline, and to Safe Harbor of the Finger Lakes (an advocacy group), and that there was an Inspector General Investigation of the rape. Because Salaam did not comply with local rules on countering defendants' "Statement of Uncontested Facts," Judge Dancks finds that those facts supported by the record will be treated as established. But this only gets defendants so far. Judge Dancks finds that Salaam reported the sexual assault and that this satisfies exhaustion as to it. "[A]n inmate is not required to file a grievance concerning an alleged incident of sexual abuse or sexual harassment to satisfy [PLRA's] exhaustion requirement . . . before bringing a lawsuit regarding an allegation of sexual abuse as long as the matter was reported." 7 NYCRR § 701.3(i). As to the stabbing with the weapon, there is a factual dispute that cannot be resolved on the pleadings. "Since the Court is required to draw reasonable inferences in Plaintiff's favor, the Court must infer that the grievance was never filed because prison authorities did not file it, not because Plaintiff did not submit it." Quoting *McLean v. LaClair*, 2021 WL 671650, at *8 (N.D.N.Y. Feb. 22, 2021) (four more N.D.N.Y. cases omitted). Salaam's request for counsel is denied "at this time" without prejudice.

VIRGIN ISLANDS – Initially proceeding *pro se,* plaintiff Ruben Santana alleged that Corrections officials were deliberately indifferent to his serious foot infection, which became gangrenous, leading to the amputation of his leg. After he complained, he alleges that officials denied him treatment for his HIV infection as retaliation, which he described in an amended complaint. He died, and his Estate was substituted through yet another complaint, which the representative tried to amend twice: to add wrongful death and to add medical malpractice. The discussion is lengthy and worth the slog for practitioners in the Virgin Islands or advocates who have prisoner medical claims that escalate into wrongful death. In *Haysbert v. Government of the Virgin Islands,* 2021 WL 1950027 (D.V.I., May 14, 2021), U.S. District Judge Wilma A. Lewis cuts through it, allowing a final amended complaint. She permits the retaliation and wrongful death claims, but she disallows the medical malpractice claim, because Santana did not, while alive, file a notice of claim with the proper territorial authorities. This cannot be cured, so amendment on this basis is futile. The Section 1983 claims "survive" Santana's death, regardless of survivorship under Virgin Islands law, as the prisoner's death was allegedly connected to the constitutional allegations. *Carlson v. Green,* 446 U.S. 14, 25 (1980). Santana's Estate is represented by Mary Faith Carpenter (St. Croix).

VIRGINIA – *Pro se* prisoner Jack R. Vigue sues a "mishmash" of defendants ranging from the prosecutor who tried his case, his defense attorney, the judge, the Governor of Virginia, the prison grievance clerk, and a host of others – for various civil rights violation, some going back 40 years. Citing improper joinder under F.R.C.P. 20(a), U. S. District Judge M. Hannah Lauck only considers claims against "trial" defendants in *Vigue v. Clarke,* 2021 WL 1990893 E.D. Va., May 18, 2021). In sum, Vigue argues that the prosecutor, his defense attorney, and the state judge conspired to set him up "as example of to prevent 'other homosexuals' [from] com[ing] into their county and committing sex crimes or any other crimes, even though Plaintiff's crimes were not involved with any sex." Judge Lauck finds that the judge and the prosecutor have absolute immunity. The defense attorney is not a state actor under *Polk County v. Dodson*, 454 U.S. 312, 325 (1981). Judge Lauck finds the case frivolous and assesses a "strike" under 28 U.S.C. § 1915(g).

WASHINGTON – Several John and Jane Does, for themselves and all past and present transgender, gender non-conforming, and intersex inmates,

obtained a restraining order against the Washington Department of Corrections (DOC) in *Doe v. Wash. State Dep't of Corr.,* 2021 U.S. Dist. LEXIS 87161 (E.D. Wash., May 6, 2021). The dispute began after anti-transgender radio and publication "journalists" and one "individual" sought to obtain information under the Washington Freedom of Information Act about transgender women housed in women's prisons in the state. The requesters are named in the lawsuit as "interested parties." U.S. District Judge Thomas O. Rice initially entered a restraining order barring the disclosure, and he extends it in this decision. The State declined to agree to the TRO, but it did not oppose it. [Note: The state may have invited the TRO by their litigation posture, since the judge found that "Defendants have indicated they will release the requested records absent a court order preventing the disclosure."] Judge Rice set an expedited hearing on a preliminary injunction. The requesters sought information by name about inmates' gender identity, medical history, confinement, requests for surgery, transition status, completion of sex affirmation surgery, conviction history, and disciplinary history. The Doe plaintiffs allege that disclosure would violate their constitutionally protected privacy rights. They also argue that disclosure would chill inmates from seeking medical protection under the Eighth Amendment, and protection from harm under both the Eighth Amendment and the Prison Rape Elimination Act [PREA]. Judge Rice found a likelihood that Does would prevail on all these claims, including a substantive right to privacy under the Fourteenth Amendment, and that the injury would likely be irreparable. The balance of the equities "tips sharply" in Does' favor due to the "private nature of the records as well as apparent lack of prejudice to Defendants." While the public has an interest in public records, "the public has an interest in keeping confidential records confidential . . . . [and] any public interest in the records is vastly outweighed by the irreparable harm to Plaintiffs." The requesters here exhibit the hallmarks of engaging in a political witch-hunt. Oddly, the Doe plaintiffs do not seek class certification to represent future inmates. While their records do not yet exist, some of the information sought will be gathered immediately upon reception into Corrections under PREA, even as the case proceeds. Future inmates are typically included in injunctive cases. They also form a part of the numerosity and ineffective joinder arguments under F.R.C.P. 23(a). Does are represented by Antoinette M Davis Law, PLLC; Disability Rights Washington; American Civil Liberties Union of Washington Foundation; and MacDonald Hoague & Bayless (all of Seattle).

WISCONSIN – Transgender inmate Brittany Bradley, *pro se,* was transferred from a single cell in general population to a double cell. Her cellmate began to extort her sexually, and she complained. The cellmate was removed the same day authorities received the complaint. U.S. District Judge James D. Peterson grants summary judgment to defendants in *Bradley v. Price,* 2021 WL 1895062 (W.D. Wisc., May 11, 2021). Judge Peterson finds no triable issue on the key question of whether defendants were previously aware of a specific threat to Bradley under *Grieveson v. Anderson*, 538 F.3d 763, 776 (7th Cir. 2008). Judge Peterson characterizes the summary judgment proof this way: "The only evidence that Bradley identifies that could support her position is her contention that both defendants knew that she was transgender when they required her to share a cell with a male cellmate. In essence, Bradley's position is that the Eighth Amendment requires any self-identified transgender woman in a men's prison to be placed into a single cell." Judge Peterson found no case holding that transgender status alone is enough, without other proof – contrasting *Doe v. District of Columbia*, 215 F. Supp. 3d 62, 77-8 (D.D.C. 2016), where a transgender inmate placed in a double cell offered "ample evidence" other than cell placement that she was in danger. Prison administrators are entitled to a high degree of deference, and the court "cannot say that single-cell placement is the only constitutionally appropriate method of housing self-identified transgender women in male prisons." Judge Peterson notes that transgender inmates have sued for being defaulted to solitary confinement and that literature supports the view that single cells are not always the best choice, citing *Robison v. Hovis*, 2020 WL 1158125, at *3 (E.D. Mo. Mar. 10, 2020); *Hardeman v. Smith*, 2018 WL 1528160, at *2 (E.D. Okla. Mar. 28, 2018); Arkles, "Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention," 18 *Temp. Pol. & C.R.L.R.* 515, 537 (2009). Even if the court were to find a jury issue, defendants would be entitled to qualified immunity, since only damages remain, and the law was not clearly established on this point. Judge Peterson declines to assess a "strike" under the Prison Litigation Reform Act, as defendants requested, finding: "Bradley's claims were factually weak, but they were not frivolous or malicious."

LEGISLATIVE & ADMINISTRATIVE NOTES

By Arthur S. Leonard

U.S. CONGRESS – HOUSE OF REPRESENTATIVES – During May, the House passed H.R. 49, authorizing establishment of the National Pulse Memorial, to memorialize the victims of the Pulse Nightclub Massacre perpetrated on June 12, 2016, during which 49 people were killed and 58 more

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were wounded while present in a gay club in Orlando, Florida. The measure now goes to the Senate for consideration. *HRC News Release*, May 13.

U.S. DEPARTMENT OF STATE – On May 18, State Department Spokesperson Ned Price issued a Statement announcing that the Department was "updating" its interpretation of Section 301 of the Immigration and Nationality Act to resolve the problem highlighted by recent litigation by married same-sex couples seeking to secure U.S. passports for their children born outside the United States. Under its traditional interpretation, the Department was willing to recognize birthright citizenship and issue a passport only if the child was genetically related to a U.S. citizen parent. In the various lawsuits, transnational couples had conceived children through donor insemination and, in the case of male couples, surrogacy (i.e., assisted reproduction technology, or ART), and encountered difficulties when children did not have a U.S. citizen genetic parent. Under the new interpretation, the Department will now consider whether children born to married couples have "a genetic or gestational tie to at least one of their parents and meet the INA's other requirements." Price explained, "This updated interpretation and application of the INA takes into account the realities of modern families and advances in ART from when the Act was enacted in 1952." He also noted that the requirements for "children born to unmarried parents remain unchanged," and cautioned that the Department would "remain vigilant to the risks of citizenship fraud, exploitation, and abuse" and would "implement this policy in a manner that addresses these concerns." Transnational same-sex married couples should be sure to secure ample documentation to present to U.S. consulates and embassies when applying for passports for their children. Ned Price is one of the many out LGBT people placed in important positions by the Biden Administration.

ALABAMA – S.B. 10, a draconian bill that would have denied medically necessary care to transgender youth and required teachers to "out" them to their parents, failed to come to a vote before the legislative session ended. One assumes it will be back next session.

ARIZONA – The *Arizona Republic* (May 5) reported that a preliminary signature verification procedure concluded that opponents of the recently enacted anti-discrimination ordinance in Mesa may have submitted enough petition signatures to put a repeal referendum on the ballot. Mesa is the seventh Arizona municipality, soon followed by Scottsdale, to enact an anti-discrimination ordinance that includes sexual orientation and gender identity. Opponents claimed the measure will result in violations of privacy in public restrooms, with proponents pointing out that this has not emerged as a problem in other places that ban gender identity discrimination in public accommodations. However, the newspaper reported on May 7 that when a legal challenge to the sufficiency of signatures was challenged at the deadline for filing, the sponsors of the proposed referendum withdrew their measure, claiming they did not have the resources to battle over getting it onto the ballot, referring without particulars to a nationally-financed effort to keep the measure off the ballot.

ILLINOIS – On May 25, the Illinois Senate approved House Bill 1063 and sent it on to Governor Pritzker, who indicated that he would sign it. The bill repeals an Illinois law that made it a crime for a person who is HIV positive to have sex without using a condom. The law predates the advent of anti-viral drugs that can suppress the virus to the point of virtually eliminating sexual transmission.

KANSAS – The legislature failed to override Governor Laura Kelly's veto of a bill that would have banned transgender girls and women from competing in scholastic sports. The State Senate vote on May 3 fell one vote short of an override. *KansasCity.com*, May 3.

KENTUCKY – The Fairness Campaign announced on May 6 that the Lexington-Fayette Urban County Council unanimously voted to ban the performance of conversion therapy by licensed professionals on minors, becoming the third municipal government in Kentucky to do so. According to the press release, the three municipalities include about 20% of the state's population.

MONTANA – On May 7, Governor Greg Gianforte signed House Bill 112, which bans transgender girls and women from scholastic sports competition. This is in response to the flood of transgender girls who have been dominating women's high school track and gymnastics in Montana, to the outrage of state legislators and the sorrow of cisgender girls everywhere. (The preceding is a sarcastic fantasy sentence. There were not any transgender girls competing in Montana.) Showing how "politically correct" the legislature can be, they effectuate their policy goals by prohibiting students of the "male sex" from participating in athletic events that are designated for girls or women. * * * The governor also signed a bill that allows students to skip any classes in which human sexuality is to be discussed unless their parents have

given written consent. This is part of the sparsely populated state's desperate attempt to prevent teens from being converted to homosexuality, bisexuality, transgenderism or intersexuality, which threatens to depopulate the state even further. (Montana is unique in being a place where exposure to any mention of sexuality in high school classes has the irresistible effect of inspiring sexual deviance in the students and even – heavens! – their teachers!)

NEVADA – Both houses of the legislature have approved Senate Bill 725, which reforms the law governing sexually transmitted diseases. According to a report in by Advocate.com (May 27), "It repeals a law that made it a felony for an HIV-positive person 'to intentionally, knowingly or willfully engage in conduct that is intended or likely to transmit the disease,' according to a Silver State Equality press release. 'Repealing that statute means a person who has contracted HIV and who engaged in such behavior would instead be given a warning as their first offense and, after a second offense, would be guilty of a misdemeanor — a punishment that is consistent with the treatment of other communicable diseases.'"

OKLAHOMA – On May 10, Governor Kevin Stitt signed into law HB 1775 banning mandatory diversity training for public university students in the state regarding gender identity, sexual orientation, race stereotyping and sex stereotyping. After all, the state should not be promoting understanding and tolerance for women, people of color or LGBTQ folk, since that would undermine the Republican Party's devotion to promoting White Male Supremacy. Query: Were any public universities in Oklahoma actually talking about mandating that students participate in such training? Or is this just a "going on record" action by the Republican-controlled state government?

OREGON – Voting unanimously on May 13, the Oregon House of Representatives passed Senate Bill 704, which forbids the use of the so-called "gay panic defense" in criminal cases. Prompt signing by Governor Kate Brown of the measure which passed in the Senate in Aril was expected. *Los Angeles Blade*, May 13.

TENNESSEE – On May 4, Governor Bill Lee signed into law a measure that will require parental consent before students can be exposed to any information about LGBTQ people, issues or history in public school classes. *Daily Beast*, May 4. Because keeping the kids ignorant about sexual minorities is the best way to prevent the contagion of sexual deviancy from taking root in Tennessee? * * * On May 14, the governor signed into law HB 1233, which might be titled the "2nd Class Citizenship For Trans Students Act of 2021." Not only will transgender students be forbidden from using single-sex facilities (restrooms, locker rooms) consistent with their gender identity, but any cisgender student who ventures into one of those facilities and discovers a person of the opposite sex there (under this bill, transgender girls are considered to be boys, you see), they will have a right to sue; same deal if a cisgender student is housed with a person of the "opposite sex" on a school trip. The bill also mandates that schools "accommodate" transgender students by providing single-occupancy facilities for their use. Since the bill clearly violates Title IX of the federal Education Amendments Act as construed by the Biden Administration, expect litigation. * * * On May 17, he signed into law House Bill 1182 (SB 1224), requiring businesses with "formal or informal" policies of allowing transgender people to use restroom consistent with their gender identity to post what Human Rights Campaign labeled as "offensive and humiliating signage." The sign must state: "This facility has a policy of allowing the use of restrooms by either biological sex, regardless of the designation on the restroom." This, of course, channels the standard conservative Republican meme that transgender men are just women dressed as men and transgender women are just men dressed as women. The law goes into effect July 1. Nashville District Attorney Glenn Funk announced that his office would not enforce this statute, because, according to an AP Report published on-line on May 24, "I believe every person is welcome and valued in Nashville. Enforcement of transphobic or homophobic laws is contrary to those values. My office will not promote hate." * * * On May 18, Governor Lee signed SB 126, a bizarre bill that prohibits transitional health care for young people who have not started puberty. While critics contended that the measure is an unwarranted interference with the rights of children and parents, a statement from National Center for Lesbian Rights pointed out that the bill is likely to have little practical effect because its specific prohibition of prescribing puberty-blocking drugs to pre-pubescent youth targets a non-practice! Such drugs are not prescribed for pre-pubescent trans youth, but rather are prescribed at the first signs of puberty . . . Which suggests that the people who pushed this bill (which was originally thought to be dead in the water, but then was attached at the last minute as amendment to an unrelated regulatory measure) don't know what they are doing, or alternatively that this is just a measure intended to pander to transphobia rather than to have any substantive effect.

TEXAS – On May 26, out LGBTQ Texas state Representative Jessica González announced that "All anti-trans bills are dead this session!" The legislature

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was flooded with a variety of anti-transgender bills, affecting such issues as health care, sports participation, facilities access, and educational curriculum, but the handful of "out" legislators got to work lobbying their colleagues and managed to persuade enough of the other legislators (a majority of whom are Republicans) to avoid advancing the noxious measures – which would all have likely been signed into law by Governor Abbott had they passed. The other "out" legislators in Texas are Mary Gonzalez, Celia Israel, Ann Johnson, Julie Johnson and Erin Zwiener.

LAW & SOCIETY NOTES

By Arthur S. Leonard

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION – On May 16, NCAA announced that contrary to its non-discrimination policy, it will schedule competitions to be held in several states that have passed laws forbidding transgender women from competing in intercollegiate women's sports events. LGBTQ rights groups quickly denounced the NCAA's action, especially in light of some earlier indications that it would do what it had done several years ago when North Carolina passed an offensive bathroom bill and join the boycott of that state.

EVANGELICAL LUTHERAN CHURCH IN AMERICA – The Sierra Pacific Synod of the ELCA has elected Reverend Megan Rohrer, a transgender person who uses gender-neutral pronouns of they and them, to be its bishop. Rev. Rohrer was previously the first transgender person to be ordained by this Church and the first to serve as a pastor, when called to Grace Lutheran Church in San Francisco in 2014. Rev. Rohrer is a graduate of the Pacific School of Religion in Berkeley, and was ordained in 2006, with the National Church accepted their ordination in 2010. *Religionnews.com*, May 9.

INTERNATIONAL NOTES

By Arthur S. Leonard

ARMENIA – The International Lesbian and Gay Association reported a breakthrough in Armenia, where a court in Yerevan published a decision in March finding unlawful discrimination because of gender identity and sexual orientation when a sport club denied access to services to two transgender people and a gay person. In an apparent case of first impression, the court relied upon the Armenian Constitution, the European Convention on Human Rights, and case law of the European Court of Human Rights. The Armenian Constitution's prohibition on discrimination states, in addition to naming particular characteristics, "other characteristics," thus leaving it open to the courts to identify other forms of unlawful discrimination.

CAMEROON – *Human Rights Watch* reported on May 12 that a Cameroonian court sentenced two transgender women to five years in a men's prison and monetary fines under a penal law prohibiting same-sex relations. They were arrested for wearing typically female clothing, according to the HRW report, and had not been engaging in any illegal conduct. HRW asserts that placing transgender women in a male prison is subjecting them to continuous harassment and worse. The court's ruling is being appealed.

CROATIA – Zagreb's Administrative Court ruled on April 21 that a same-sex couple should not face discrimination in state adoption proceedings, according to a statement on its website by the Rainbow Families Association (RFA), an LGBT+ group, according to a May 6 report by *openlynews.com*. Mladen Kozic and Ivo Segota are seeking to adopt two children for whom they are acting as foster parents. The government may appeal the ruling.

CZECH REPUBLIC – We reported last month that President Zeman announced he would veto a marriage equality bill if it was approved by the Parliament. That veto threat was actually issued a long time ago, well before one house approved such a measure recently. As noted in our report last month, observers suggested that not enough time remained prior to the fall elections for this measure to be taken up in the other house of the Parliament. And it was noted that Parliament can override a veto by a simple majority vote in both houses.

GERMANY – The International Lesbian and Gay Association reported: "On 7 May, the German Bundesrat adopted the law "For the protection of children with variants of gender development" (19/24686) to protect intersex children from non-vital, non-emergency medical interventions." The law took effect as of May 24.

INDIA – The High Court in Delhi was supposed to hear arguments in marriage equality cases during May, but at the request of the government put off the argument until July 6. The position of the government is that the Indian Constitution does not require the government to allow same-sex marriages.

LITHUANIA – Reuters reported (May 25) that the parliament narrowly voted not to debate a bill that would have recognized civil partnerships for same-sex couples. The bill's sponsor, "out" legislator Tomas Raskevicius,

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indicated he would attempt to introduce the measure again in the fall. Public opinion polls in Lithuania show the public overwhelmingly opposed to legal recognition for same-sex relationships.

NAMIBIA – After hearing arguments in two cases concerning whether Namibia will recognize a same-sex marriage performed outside the country, the High Court in Windhoek announced that it would reserve judgement in the matter and would issue a judgement in January 2022, unless one is ready earlier, according to a May 24 press report. *Reuters* reported (May 18) that Namibia had issued emergency travel documents to the twin daughters of a gay male couple who were born to a South African surrogate. The twins had been refused entry documents on the ground that the father who is a Namibian national, Phillip Luhl, had not proved that the twins were genetically linked to him. A change in leadership at the Home Affairs Ministry in April led to a decision by the new minister, Albert Kawana, not to oppose the application. The couple's son had previously been issued an emergency passport, so the family can be reunited in Namibia. Lull's husband, Guillermo Delgado, is a Mexican national. Still pending is a court case that may determine whether the children are entitled to be considered Namibian citizens without proof of genetic ties to Lull.

PANAMA – The country's highest court has been sitting on marriage equality cases since 2016, even though an Inter-American Court of Human Rights ruling from 2017 makes clear that all countries that are party to the Inter-American Human Rights Convention on Human Rights (which includes Panama) is obligated to allow and recognize same-sex marriages. A recent poll shows that Panamanians are overwhelming opposed to same-sex marriages.

SERBIA – President of Serbia Aleksandar Vučić announced that if a bill allowing for same-sex unions is passed by the Parliament, he will veto it. The president asserted that the measure would be unconstitutional. Under Serbian law, presidential vetoes can be overridden by an absolute majority of the legislature, but an override is seen as unlikely since the president's party holds over half the legislative seats. *Easternwesternbalkans.com*, May 7.

TAIWAN – *France24.com* (May 6) reported that a Taiwanese court has ordered local authorities to register the same-sex marriage between a Taiwanese man and his spouse from Macau. The statute authorizing same-sex marriage allows Taiwanese nationals to marry foreigners, but only if the foreign citizen's country would recognize the marriage. The Taipei High Administrative Court overruled a government official's refusal to register this marriage. Activists hailed it as the first time a court had ordered local officials to register such a marriage. The victorious couple are Ting Tse-yen (Taiwan) and Leong Chin-fai (Macau).

UGANDA – On May 3, the Parliament approved a new Sexual Offences Bill, which Human Rights Watch described in detail on its website on May 6. The measure is a draconian expansion of the existing law against same-sex relations, authorizing, for example, the prosecution of any Ugandan who engages in such activity anywhere in the world, and expanding criminal law in such a way that victims of sexual assault will be discouraged from reporting the offense out of fear of prosecution.

UNITED KINGDOM – *Reuters* reported that the government has announced its intention to adopt legislation curtailing the practice of conversion therapy, but the announcement was rather general, and did not give details about what the legislation would cover and prohibit. Stand by. * * * A nonbinary person, Owen Hurcum, has been elected Mayor of Bangor, Wales, after having served as Deputy Mayor for the past year. They are believed to be the first acknowledged nonbinary person to hold such a post. *Outnews.com* (May 13). * * * The Guardian (May 16) reported that the U.K. government will hosts in first-even global conference on LGBT rights in 2022, consistent with a pledge to a an international 42-country Equal Rights Coalition. The event, titled "Safe to be me," will invite elected officials, activists and policymakers to a two-day conference in June, coinciding with the 50th anniversary of the first official London Pride marches, according to the *Guardian* report. Chair of the event will be Nick Herbert, a former Conservative Member of Parliament for Arundel and south Downs before being made a Lord last year.

PROFESSIONAL NOTES

By Arthur S. Leonard

On May 25, **NEW YORK GOVERNOR ANDREW CUOMO** nominated **ANTHONY CANNATARO**, an out gay man who is Administrative Judge of the New York City Civil Court, to the vacancy on the New York Court of Appeals created by the resignation and death of Judge **PAUL FEINMAN**. Judge Feinman, a past president of the LGBT Bar Association of Greater New York, was the first out member of the LGBT community to serve on New York's highest court. Judge Cannataro will be the second.

TRANSGENDER LEGAL DEFENSE FUND is hiring two new staff attorneys. For details, consult their website: transgenderlegal.org/careers.

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3. Bales, Rick, and Morgan Schweighoefer, Employment Protections for Sexual Orientation and Gender Identity in Ohio, Labor & Employmnet News (Ohio State Bar Association), Winter 2021.
4. Barzun, Charles L., and Michael D. Gilbert, Conflict Avoidance in Constitutional Law, 107 Va. L. Rev. 1 (March 2021).
5. Billhartz, Christina, The Condemnation of Socophilia: How the Federal Sentencing Guidelines Perpetuate Rather Than Discourage Child Pornography Offenses, 63 Ariz. L. Rev. 513 (Summer 2021).
6. Blake, Valarie K., Health Care Civil Rights Under Medicare for All, 72 Hastings L.J. 773 (March 2021).
7. Boso, Luke A., Anti-LGBT Free Speech and Group Subordination, 63 Ariz. L. Rev. 341 (Summer 2021).
8. Cerminara, Kathy L., Social Justice, Civil Rights, and Bioethics, 50 Stetson L. Rev. 265 (Winter 2021) (ethical issues of transgender health care considered).
9. Chavez, Margaret Smiley, Employing Smith to Prevent a Constitutional Right to Discriminate Based on Faith: Why the Supreme Court Should Affirm the Third Circuit in *Fulton v. City of Philadelphia*, 70 Am. U. L. Rev. 1165 (Feb. 2021).
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EDITOR'S NOTES

This proud, monthly publication is edited and chiefly written by Arthur S. Leonard, Robert F. Wagner Professor of Labor and Employment Law at New York Law School, with a staff of volunteer writers consisting of lawyers, law school graduates, current law students, and legal workers. All points of view expressed in *LGBT Law Notes* are those of identified writers, and are not official positions of the LGBT Bar Association of Greater New York or the LeGaL Foundation, Inc. Correspondence pertinent to issues covered in *LGBT Law Notes* is welcome and will be published subject to editing. Please address correspondence to the Editor via e-mail to info@le-gal.org.